



ASIC

Australian Securities & Investments Commission

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Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Dunstone

Inquiry into the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

Thank you for the invitation contained in your email of 8 December 2015 to provide a submission addressing the abovenamed Bill.

Having reviewed the Bill, the Australian Securities and Investments Commission (ASIC) notes that the amendments to the *Criminal Code* effected by Schedule 2 are of particular significance to ASIC's work as a law enforcement agency. ASIC supports these amendments.

As you are aware, the amendments to the *Criminal Code* create two new offences (sections 490.1 and 490.2) proscribing intentional and reckless false dealings with accounting documents. As the Explanatory Memorandum and Second Reading speeches have noted, enacting these offences will satisfy Australia's obligations in respect of false accounting offences under Article 8 of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

In addition to fulfilling this important obligation in the area of foreign bribery, the two new offences will have a broader field of application. The offences are deliberately cast in a form that will assist more generally in addressing "false accounting" as a significant and serious form of corporate crime - one that is encountered by ASIC in the course of its enforcement activities.

ASIC's investigations in a variety of contexts have uncovered conduct involving the making of entries in the accounting records of companies that facilitate, disguise or conceal illegitimate benefits. For example, in the investigations following the collapse of Sonray Capital Markets Pty Ltd ASIC discovered that false entries had

been made in trading accounts that purported to show that funds had been deposited when they had not. Offences of this nature can and do cause significant harm to Australian financial consumers and compromise the integrity of our markets.

While in some circumstances it will be possible and appropriate to charge the existing offence of falsifying books contained in section 1307(1) of the *Corporations Act 2001*, limitations on the scope of that offence and the applicable maximum penalty of just two years imprisonment (and/or a fine of 100 penalty units) mean that it has often been necessary for ASIC (on advice from the Commonwealth Director of Public Prosecutions) to utilise State or Territory offences. Again using the Sonray Capital Markets Pty Ltd case as an example, Scott Murray (the Chief Executive Officer) and Russell Johnson (Director) were charged with (and pleaded guilty to) offences including the Victorian false accounting offence in section 83, *Crimes Act 1958*.

In ASIC's submission it is important for a variety of reasons for there to be an effective Commonwealth offence available that carries a maximum penalty that reflects the very serious criminality involved in falsifying accounting records. These reasons include:

- the more straightforward nexus between Commonwealth investigative powers (such as those contained in the *Australian Securities and Investments Commission Act 2001* and the search warrant provisions of the *Crimes Act 1914*) and Commonwealth offences;
- the additional legal and administrative requirements imposed when a Commonwealth agency commences a prosecution involving State or Territory offences; and
- the complexities of law that are introduced when a combination of Commonwealth and State or Territory offences are jointly tried and/or sentenced.

Finally, ASIC notes that it supports the introduction of both an intention-based and recklessness-based form of the offence, with the latter carrying a lesser maximum penalty. In ASIC's view this "tiered" approach is appropriate in light of the likelihood that fault will often need to be inferred from the available circumstantial evidence and that a combination of purposes may be served by falsely dealing with a particular accounting record. In cases where the evidence does not support prosecution of an intention-based offence it will be important that an alternative means is available to deal with those who have nevertheless engaged in the proscribed conduct with an awareness of the substantial risk that their dealing with an accounting document would, for instance, facilitate an illegitimate payment.

ASIC would be happy to provide further information in relation to these matters if the Committee would be assisted.

Yours sincerely,

Michael Kingston
Chief Legal Officer