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AFP
AUSTRALIAN FEDERAL POLICE

20 January 2020

Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs
Legislation Committee

Via email: legcon.sen@aph.gov.au

Dear Ms Dunstone,

Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.

The AFP notes the Attorney-General's Department (AGD) is making a submission to the inquiry, on which the AFP was consulted and contributed. We also offer the information below to assist the Committee's consideration of the Bill from a law enforcement perspective.

Economic and corporate crime, including foreign bribery is opaque and sophisticated in nature which requires investigation of large amounts of complicated data. This is hampered by mechanisms that allow individuals to conceal their identity and are complicated by a lack of accessible documentary evidence, particularly when evidence is held overseas. Finally, if matters progress to court, the proceedings are generally long and complex, against well-resourced defendants.

The AFP supports measures in the Bill which expand the scope of foreign bribery offences, place proactive obligations on corporations to prevent foreign bribery, encourage self-reporting and cooperation with law enforcement, and assist the AFP and other agencies to more effectively and efficiently investigate and disrupt economic crime. The AFP considers the amendments will enhance protection of Australian businesses from corruption, and support corporate cultures of integrity.

Schedule 1 – Amendments relating to Foreign Bribery

Proposed Amendments

The AFP supports the proposed amendments to expand the section 70.2 'bribery of a foreign public official' offence to capture bribery of candidates for public office and an intention to obtain or retain a personal advantage. The amendments also remove the requirement to prove that both the benefit and advantage were 'not legitimately due' and that the influence not be limited only to the foreign public official's 'exercise of official duties'. The Bill also creates a new section 70.5A 'failure of a body corporate to prevent foreign bribery by an associate' offence which places an obligation on corporations to be proactive in preventing foreign bribery, which the AFP also supports.

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AFP Experience

These measures strengthen the existing provisions and remove some of the impediments to foreign bribery investigations and prosecution. The failure to prevent offence also creates incentives for corporations to implement measures to prevent foreign bribery. In the AFP's experience, it is often difficult to prove that the 'benefits' provided (ie the bribes) were not legitimately due because they can be disguised as contractual obligations, paid through intermediaries, or take non-monetary forms such as scholarships for children, employment opportunities and entertainment and marketing expenses. In addition, the complex corporate structures of international corporations can make it difficult to establish the liability of corporations, particularly where there has been wilful blindness to the activities of employees or agents.

Attributing Liability

Under the existing provisions, it is difficult to attribute liability to an Australian parent company for the acts of its overseas subsidiary. Even if technically the subsidiary company has committed the physical and fault elements required by section 70.2 the difficulty for law enforcement is that we cannot assert jurisdiction over the subsidiary, thus no criminal liability can be established. For example, because they are registered overseas and operate entirely outside the jurisdiction. The new 'failure to prevent' offence would make the Australian parent company liable for the acts of its overseas subsidiary, thereby ensuring that criminal conduct undertaken for the benefit of the Australian parent can be properly addressed. The new 'failure to prevent' offence will be likely to increase the incentives for companies to proactively undertake due diligence to prevent foreign bribery from occurring in the first place.

By way of example:

- Under existing provisions, it would not be an offence for an Australian corporation to pay a bribe to an individual running for office in a foreign country even if the bribe was paid on the assumption that the individual would act in a corporation's business interests once elected. That deficiency in legislative coverage for the relevant conduct is corrected by amendments in the Bill.
- Under the existing provisions, it is also unlikely to be an offence for an Australian citizen to pay a bribe to a foreign public official to receive a visa or foreign citizenship. This is because the visa or citizenship is likely to be considered a *personal* advantage rather than a business advantage. Similarly, paying a bribe to release an individual from custody or obtain a favourable court verdict is more likely to be a personal advantage rather than a business advantage. The AFP has previously assessed referrals which have not progressed to investigation due to the above investigative challenges and low prospects of a successful prosecution.

AFP experience has been that some elected foreign officials often have influence in government well beyond their official duties. The existing provisions are imperfect in their application to the above scenario because they are limited to an intention to influence the foreign public official "in the exercise of their official duties". The amendments in the Bill would remove this limitation.

The "not legitimately due" requirement in the existing provisions is often the hardest element of the offence to satisfy, because the bribes are often built into legitimate contractual arrangements. For example, a subcontractor on an infrastructure project may agree to forward part of their subcontract payments to foreign public officials. However, the progress payments and invoices issued by the subcontractor are unlikely to distinguish between the legitimate component and the

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illegitimate component. When much of the evidence is based overseas, it can be extremely difficult, if not impossible, to establish that any part of these payments for services were not legitimately due.

In the context of obtaining or retaining business advantages, a similar issue can arise when trying to prove not legitimately due. For example, a payment to bribe a foreign taxation official to minimise the amount of tax owed by a company would require proof that the advantage gained was not legitimately due, i.e. that the ultimate tax calculation was incorrect. This would involve an extensive evidence gathering process involving international tax law.

Recklessness Offence

As is set out in the AGD submission, the AFP supports the significant inclusion of a recklessness offence, as was set out in the original exposure draft of the Bill. Foreign bribery investigations often involve senior managers turning a blind eye, creating structures that allow plausible deniability or failing to inquire about red flag issues. These cases often fall short of meeting the high evidentiary standard required to prove intention, but they have a higher probability of being captured by a fault element of recklessness. A recklessness offence would more precisely reflect instances of overseas corruption, therefore leading to greater enforcement outcomes and lead to change in corporate culture.

Commonwealth Deferred Prosecution Agreement Scheme (Schedule 2)

Proposed Amendments

The AFP supports amendments to establish a Deferred Prosecution Agreement (DPA) Scheme in Australia that allows the Commonwealth Director of Public Prosecutions (CDPP) to invite a corporation that has engaged in serious corporate crime to negotiate an agreement and comply with a range of mandatory and optional conditions.

The sophisticated, and organised nature of corporate crime makes it difficult to detect, investigate and prosecute corporate criminal offending, due to mechanisms that conceal conduct. There is a lack of incentive for corporations to cooperate particularly as it relates to obtaining evidentiary material held by the corporation, out of reach from law enforcement. Establishing a DPA scheme will enhance the prospects of cooperation with law enforcement and is expected to lead to greater opportunities to self-report together with providing an additional method for Commonwealth agencies to remediate criminal conduct as it relates to corporate entities or legal persons in Australia. This has the potential to free up investigative resources for other serious offending and provide a mechanism for corporations to address criminal conduct orchestrated by employees without damage to reputation and financial activities that may result from protracted and costly formal court proceedings and conviction.

The AFP is working with the CDPP and AGD to develop accompanying governance and a Code of Practice, to support the proposed DPA Scheme.

AFP Experience

This DPA scheme aims to enhance the accountability of Australian businesses and supports improved corporate culture and integrity and encourages reporting of misconduct. From an operational perspective, the scheme addresses some of the challenges faced by law enforcement when detecting and investigating serious corporate crime. It provides an additional law enforcement tool and incentives, coupled with encouraging self-reporting and improved cooperation with law enforcement to uncover the full nature and scope of offending.

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Access and identification of critical evidence

The AFP's experience is that when companies genuinely cooperate in an investigation, evidence is obtained that would otherwise not be available to the AFP (primarily when it is located overseas, but is within the control of the Company), and/or critical evidence is identified in a more efficient manner.

In addition, many of the AFP's foreign bribery investigations overlap with other international counterparts, who have DPA regimes in place. Where a company has a corporate presence in Australia as well as a country with a DPA scheme, such as the US or UK, our experience is that the company is more likely to cooperate with those law enforcement agencies. Cooperation with Australian law enforcement agencies would be reduced, as companies have less incentive to cooperate with agencies unable to recommend to prosecutors the option of a DPA. In cases spanning several jurisdictions, this lack of cooperation could mean Australian law enforcement is unable to achieve effective global resolutions with our international partners.

Proceeds of Crime

The ability to include a term in the DPA, consenting to any relevant orders under the *Proceeds of Crime Act 2002* will also ensure the scheme addresses criminal benefits derived by the corporation as a result of their offending. This will ensure that corporations are held accountable for all aspects of their offending and that DPAs are not seen as a way of avoiding or frustrating proceeds of crime proceedings. Funds paid pursuant to proceeds of crime orders go to the Confiscated Assets Account, which allows these funds to be reinvested in the community through programs to support law enforcement, crime prevention, drug treatment and drug diversion.

Amendments relating to 'dishonesty' definition in the Criminal Code (Schedule 3)

Proposed Amendments

The AFP supports amendments to how the *dishonesty* test is established, to align with modern jurisprudence and consistency with other Commonwealth legislation which reflects the test endorsed by the High Court in *Peters v The Queen* (1998) 192 CLR 493. We note that the recently passed *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*, also amended the Corporations Act so that the *Peters* test now applies to all Corporations Act dishonesty offences.

Under the *Peters* test, *dishonesty* will be a matter for the trier of fact, based on a single-step ordinary, decent person test of whether the defendant's knowledge, belief or intent was dishonest, without the requirement to prove awareness or knowledge that it was dishonest in that sense. The Criminal Code currently contains approximately thirty different offences involving *dishonesty* and from an investigative perspective, it can be difficult to obtain sufficient admissible evidence to establish that the defendant was aware or knew that they were dishonest in that sense.

AFP Experience

Noting that the current definitions of *dishonesty* apply to approximately thirty offences in the Criminal Code, the current test can be difficult to establish in the sophisticated and complex reality of corporate crime. Amending the test to be a single-step will enable the AFP to dedicate resourcing otherwise occupied in this space to other serious offending.

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Final matters

Thank you for the opportunity to provide a submission to this inquiry. Please do not hesitate to contact _____ if you require any further information from the AFP. The AFP would also be happy to make senior officers available to attend a hearing if it would assist the Committee's inquiry.

Yours sincerely

Ian McCartney
Deputy Commissioner

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