Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA

Centre for Theology and Ministry
29 College Crescent
Parkville, Victoria, 3052

Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
E-mail: legcon.sen@aph.gov.au

Submission of the Synod of Victoria and Tasmania, Uniting Church in Australia to the Senate Legal and Constitutional Affairs Legislation Committee on the *Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023*

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The Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee on the *Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023.* The Synod requests that the Committee recommend the passage of the Bill through the Parliament. Ideally, the passage of the legislation would include the amendments recommended below.

The Synod is deeply disappointed that the current Government is opposed to introducing a Deferred Prosecution Agreement (DPA) scheme. Compared to other jurisdictions, Australia has low detection and prosecution of corporate bribery offences. The reality is that such crimes are extremely difficult for law enforcement agencies to detect. The reforms to private sector whistleblowing protection and compensation have been essential to increase the detection of such crimes. However, relying on whistleblowers is not the only detection mechanism needed. A DPA scheme would greatly assist with corporations self-reporting cases of bribery, money laundering and other severe corporate crimes where the crimes have been carried out without the approval of the corporation's board. A DPA scheme will not help detect corporate crimes that have been orchestrated at the top of the company by the current leadership of the corporation, as the individuals in question would face prosecution and therefore would not reveal the criminal activity.

The current Government's opposition to DPA schemes appears to rest on the mistaken belief that if DPAs are not offered, then all cases will proceed to prosecution. The reality is that in the absence of a DPA, many corporate crimes carried out by middle managers that would otherwise be self-reported to law enforcement agencies by the corporation itself will go undetected. Those responsible will never go to trial. The experience of other jurisdictions is that a DPA scheme increases the detection of corporate crimes and results in more prosecutions of the individuals inside the corporation that engaged in criminal conduct.

Data from the US shows that concerning offences under the US *Foreign Corrupt Practices Act* (FCPA), DPAs led to an increase in the number of individuals subsequently subjected to prosecution. From 2004-2014, after the introduction of DPAs increased the detection of crimes committed by corporate employees, there were 42 prosecutions of individuals involved in

corporate FCPA cases.[1] In the preceding decade, 1993 – 2003, before the introduction of DPAs, there were only seven prosecutions of individuals. From 1982 – 1992, there were 21 prosecutions of individuals for FCPA corporate offences.[2]

In 2019, US authorities brought charges against 30 individuals related to FCPA offences.[3] The US Department of Justice FCPA Unit also brought charges against an additional 19 people for offences not covered by the FCPA but related to FCPA investigations.[4] Such offences included money laundering.

For example, Alstom entered into a DPA with the US Department of Justice in 2014, agreeing to pay penalties of US$772 million related to violations of the FCPA spanning a decade.[5] Since then, US authorities have been able to bring prosecutions against eight of the individuals involved in the crimes securing the conviction of Lawrence Hoskins, a former senior vice-president in Alstom, to 15 months in prison in 2019.[6]

There had been over 300 DPAs entered into in the US from when they were made available as an option to prosecutors to 2019.[7] In 2018 US authorities recovered US$8.1 billion through penalties associated with DPAs and Non-Prosecution Agreements, and in 2019 US$7.8 billion was recovered.[8]

Regarding prosecutions for crimes involving cross-border corruption, the use of DPAs in the US has not reduced the number of prosecutions brought to the courts. In 2019, US authorities took four cases to trial related to the FCPA, the highest ever in a year.[9] The number of US prosecutions compares very favourably to the paltry amount of cases that have ever been brought to court by Australian authorities for cross-border corruption activities by Australian companies.

France introduced a DPA scheme in 2016 due to its poor record of addressing corruption cases by its corporations. As of September 2019, French authorities had entered into six DPAs which had imposed US$1.3 billion on companies.[10]

Research from the A.B. Freeman School of Business at Tulane University and the Rotman School of Management at the University of Toronto published in 2019 found that the negative impact on share prices and sales of a corporation was more significant for corporations that

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[1] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement', *University of California Davis Law Review* Vol 49 (2015), 531-538, http://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf
[2] Ibid., 539-541.
[3] Gibson Dunn, '2019 Year-End FCPA Update', 6 January 2020, 12.
[4] Ibid., 12.
[5] https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery
[6] Gibson Dunn, '2019 Year-End FCPA Update', 6 January 2020; and https://www.wsj.com/articles/former-alstom-executive-sentenced-to-15-months-in-prison-11583542058
[7] Gus De Franco, Christopher Small and Aida Sijamic Wahid, 'The Effect of Deferred Prosecution Agreements on Firm Performance', 19 August 2019, 2.
[8] Gibson Dunn, '2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements', 8 January 2020.
[9] Gibson Dunn, '2019 Year-End FCPA Update', 6 January 2020.
[10] Guy Pinsonnault, Jamieson Virgin and Eleanor Rock, 'Deferred Prosecution Agreements: A French Approach to Considering the Public Interest', McMillan Litigation Bulletin, September 2019, 2-3.

entered into a DPA compared to those that were prosecuted in the courts.[11] Their findings refute the claim that DPAs are a light penalty for corporations.

A corporation that decides to fight a case in the courts often has a reasonable chance of escaping any penalty. An unrepentant corporation that gets away with criminal activity after an attempted prosecution is sent a strong signal by the courts that they do not need to change their behaviour substantially. Further, DPAs are different from enforceable undertakings in that they require the corporation to admit its wrongdoing. In contrast, an enforceable undertaking may be imposed on a corporation that still refuses to genuinely admit its guilt.

Recommendations

The Synod makes the following recommendations:

- Include the fault element of recklessness in Section 70.2 of the *Criminal Code* to reduce the difficulty of law enforcement agencies being able to mount prosecutions for foreign bribery offences.
- Ensure the Bill makes it a criminal act to pay bribes to third parties to win government contracts in foreign jurisdictions, such as bribing a competitor to put in an uncompetitive bid for the contract.

Uniting Church concern regarding bribery

Combating corruption is a factor in efforts to eradicate poverty globally. The Uniting Church in Australia, at its Inaugural Assembly in 1977, stated that in response to the Christian gospel:

> *We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism in our society and beyond.*

The 2007 annual meeting of approximately 400 representatives of the Synod of Victoria and Tasmania passed a resolution acknowledging "there is a need to address corruption within developing countries to work towards the eradication of poverty" and "some wealthy countries continue to maintain laws and practices that foster, reward and allow them to benefit from corruption in developing countries". The resolution commended the Australian Government for its steps to combat corruption globally and urged several further measures to be taken.

Comments on Schedule 1 of the Bill

The Synod welcomes the measures in Schedule 1 of the Bill to amend Sections 70.1 and 70.2 of the *Criminal Code* with changes to the existing offence so that:

- the definition of a foreign public official is extended to include a candidate for office;
- the requirement that the foreign official must be influenced in the exercise of the official's duties is removed;
- the requirement that a benefit and business advantage must be 'not legitimately due' is removed and replaced with the concept of 'improperly influencing' a foreign public official;
- the offence to cover bribery to obtain a personal (i.e. non-business) advantage is extended so that the bribery offence applies to where the bribe was paid to obtain or retain an advantage of any kind; and,
- it is clear that the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind and that the business, or business or personal advantage, can be obtained for someone else.

The Synod strongly urges that the Bill be amended to include a fault element of recklessness in the payment of bribes. Including the fault element of recklessness would lower the bar on the level of evidence needed to prosecute a case involving foreign bribery successfully. The current

[11] Gus De Franco, Christopher Small and Aida Sijamic Wahid, 'The Effect of Deferred Prosecution Agreements on Firm Performance', 19 August 2019.

bar of proof required to prosecute a case of bribery of a foreign official is one of the reasons there have been next to no successful prosecutions in Australia.

The Synod supports that in determining whether the influence is improper, subsection 70.2A(2) provides that the following factors are to be disregarded:

- the fact that the benefit, or the offer or promise to provide the benefit, may be, or be perceived to be, customary, necessary or required in the situation;
- any official tolerance of the benefit; and
- if the particular business or a particular advantage is relevant to proving the matters referred to in paragraph 70.2(1)(b):
  - the fact that the value of the business or advantage is insignificant;
  - any official tolerance of the advantage;
  - the fact that the advantage may be customary, or perceived to be customary, in the situation.

An example of a case where there have been allegations that an Australian company made bribes to opposition parliamentarians to influence their behaviour when they formed government is the case of the Australian phosphate company Getax. *The Sunday Age* named it in January 2013 as one of the 28 companies that the OECD had identified as having allegations of foreign bribery made against it.[12] *The Sunday Age* reported that the AFP had interviewed two complainants on claims that Getax had bribed parliamentarians in Nauru to obtain a phosphate mining permit. However, the investigation could not continue due to lack of jurisdiction.[13] Leaked e-mails to the Australian Broadcasting Corporation (ABC) alleged to show hundreds of thousands of dollars being paid to Nauruan politicians whilst they were in opposition. The payments were alleged to help install a government amenable to allowing Getax to buy phosphate at prices below market value.[14]

In September 2016, the ABC made a further report about e-mails from 2009 and 2010, which suggested Getax was sending money to several Nauru politicians, including Baron Waqa and David Adeang.[15] From 2008 amounts of $10,000 were transferred on several occasions from Getax's Westpac account into the ANZ bank account of Madelyn Adeang, the late wife of David Adeang.[16] The payments were described as "Consultancy fees" or "Fees for Adeang". The transactions included:
$20,000 in April 2008
$10,001 in June 2008
$10,000 in July 2008
$10,000 in September 2008
$10,000 in October 2008.

The case also highlights an alleged attempt to disguise payments as a legitimate business expense.

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[12] Maris Beck and Ben Butler, 'Police reopen OZ, Cochlear bribery cases', *The Sunday Age,* 13 January 2013, http://www.smh.com.au/business/police-reopen-oz-cochlear-bribery-cases-20130112-2cmrt.html
[13] Maris Beck and Ben Butler, 'Bribery Cases Reopened', *The Sunday Age,* 13 January 2013.
[14] Hayden Cooper and Alex McDonald, 'Narua President and Justice Minister face bribery allegations involving Australian company', 7:30 Report, ABC, 8 June 2015, http://www.abc.net.au/7.30/content/2015/s4251115.htm
[15] Hayden Cooper, 'Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang', 7:30 ABC, 14 September 2016, http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170
[16] Ibid.

The Synod supports removing the requirement from the bribing of a foreign public official of having to prove the payments were not legitimately due for the reasons outlined in the Explanatory Memorandum (paragraph 54).

The Synod requests that the Bill ensure that it is a criminal act to pay bribes to third parties to win government contracts in foreign jurisdictions. Rolls Royce used intermediaries to pay bribes to competitors to ensure they submitted an uncompetitive bid.[17] In 2007 Rolls Royce employees engaged an intermediary to act concerning an open competitive tender for an energy-related Long Term Service Agreement on Samarinda Island. Through the intermediary, a commission was paid to a member of a competitor consortium to ensure that it submitted an uncompetitive bid.[18] In addition, the intermediary was used to pay bribes to employees working for the state-owned customer.[19] Rolls Royce won the contract.

Between 2009 and 2013, Rolls Royce also made corrupt payments to a Nigerian partner company to receive confidential information (including competitor pricing) about the bidding processes and influence over the requirements of the customer in the tendering process.[20]

The Synod welcomes the introduction of a new offence of failure of a body corporate to prevent foreign bribery by an associate. The Synod welcomes that the definition of an associate is broad to capture any person who provides services for or on behalf of another person, not limiting the definition to an officer, employee, agent, contractor, subsidiary or controlled entity.

The Synod believes it is imperative that subsection 70.5A(3) be included so that a body corporate may be convicted of an offence against this section even if the associate has not been convicted of an offence against section 70.2. The provision is critical as it is common for the associate paying the bribe not to be prosecuted through lack of cooperation of the jurisdiction in which the bribe was paid or due to the very high threshold of proof often required in a bribery case where the only two parties that concretely know the bribe was paid is the person paying the bribe and the person receiving the bribe.

The Synod supports the level and range of possible maximum penalty options set out in subsection 70.5A(6) for the new offence of failing to prevent foreign bribery to ensure the available penalties will act as a deterrent for the offence.

The Synod supports subsection 70.5A(7) so that the offence against subsection 70.5A(1) will apply even if the offence occurs wholly overseas, provided the offender is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

The legislative change to make it an offence for a body corporate to fail to prevent foreign bribery by an associate is vital to prevent Australian corporations from being able to pay bribes through intermediaries. These provisions of the Bill will help deter those businesses that set up intermediaries to make business arrangements through which bribes are paid. Under the current law, it is challenging to gain a prosecution in such a case as the company can always argue that it did not know what its intermediary was doing.

A relevant case of a company using intermediaries to pay bribes is that of Rolls Royce, which used a network of intermediaries and agents to pay bribes, with apparent knowledge by some employees inside Rolls Royce that an intermediary was acting corruptly on behalf of the

[17] EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, 16.
[18] Ibid., 17.
[19] Ibid., 17.
[20] Ibid., 17.

company.[21] An intermediary was classified as a customer to allow it to earn substantial mark-ups, far in excess of the commissions allowed under Rolls Royce's policy on intermediaries.[22] In Indonesia, Rolls Royce used an intermediary to bribe Garuda International employees regarding contracts for engines and maintenance.[23]

A relevant case of a company being forced to enter into a settlement based on its failure to maintain internal controls to prevent bribery is that involving Alcoa. Alcoa and a joint venture it controlled agreed to pay US$384 million to resolve charges around the bribing officials of a Bahraini state-controlled aluminium smelter, marking one of the largest US anti-corruption settlements of its kind.[24] It was alleged that officials were bribed for years so Alcoa could supply raw materials to Aluminium Bahrain, or Alba.[25] Alcoa's mining operations in Australia were the source of the alumina that Alcoa supplied to Alba.[26]

Alcoa failed to maintain adequate internal controls to prevent or detect more than US$110 million in improper payments funnelled to Alba through a consultant between 1989 and 2009, according to the US Securities and Exchange Commission (SEC), which brought civil charges under the *Foreign Corrupt Practices Act*. In the words of the SEC:[27]

> *An SEC investigation found that more than $110 million in corrupt payments were made to Bahraini officials with influence over contract negotiations between Alcoa and a major government-operated aluminium plant. Alcoa's subsidiaries used a London-based consultant with connections to Bahrain's royal family as an intermediary to negotiate with government officials and funnel the illicit payments to retain Alcoa's business as a supplier to the plant. Alcoa lacked sufficient internal controls to prevent and detect the bribes, which were improperly recorded in Alcoa's books and records as legitimate commissions or sales to a distributor.*

The Department of Justice brought criminal charges under the same law.[28]

The US SEC said Alcoa's subsidiaries used a London-based consultant to funnel the payments to officials. The subsidiaries cited by the US SEC were Alcoa World Alumina and Alcoa of Australia, both of which were parts of the joint venture.[29] The SEC stated:[30]

> *According to the SEC's order, Alcoa's Australian subsidiary retained a consultant to assist in negotiations for long-term alumina supply agreements with Alba and Bahraini government officials. A manager at the subsidiary described the consultant as "well versed in the normal ways of Middle East business" and one who "will keep the various stakeholders in the Alba smelter happy…" Despite the red flags inherent in this arrangement, Alcoa's subsidiary inserted the intermediary into the Alba sales supply chain, and the consultant generated the funds needed to pay bribes to Bahraini officials. Money used for the bribes came from the commissions that Alcoa's subsidiary paid to*

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[21] Ibid., 15.
[22] Ibid., 15.
[23] Ibid., 17.
[24] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109
[25] Ibid.
[26] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936
[27] Ibid.
[28] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109
[29] Ibid.
[30] US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936

the consultant as well as price mark-ups the consultant made between the purchase price of the product from Alcoa and the sale price to Alba.

The Department of Justice's settlement was with Alcoa World Alumina LLC, a joint venture with Australia's Alumina Ltd. The venture, 60 per cent-owned by Alcoa, agreed to plead guilty to a single count of violating the *Foreign Corrupt Practices Act* and pay US$223 million in five instalments over four years.[31] There was no legal action against Alcoa in Australia for the conduct under the existing anti-bribery provisions of the *Criminal Code.*

The Synod supports the Minister's ability to publish guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials under section 70.5B.

The Synod also welcomes the consequential amendments to the *Income Tax Assessment Act 1997* to ensure the continuation of the existing policy of prohibiting a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to a foreign public official.

Dr Mark Zirnsak
Senior Social Justice Advocate
Justice and International Mission Cluster
Synod of Victoria and Tasmania
Uniting Church in Australia

[31] Allison Martell, 'Alcoa to pay $384 million to settle Bahrain bribery charges', *Reuters Business News,* 9 January 2014, http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109