

Wednesday 9 August 2023

Attorney General's Department

Dear Attorney General's Department,

Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023

Thank you for allowing us to provide some additional information to you on the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (**Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 50,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises (**SMEs**) and the government sector.

The AICD has engaged with the Attorney-General's Department and Senate Legal and Constitutional Affairs Committee (**Committee**) on previous iterations of these proposed draft reforms and welcomes the re-introduction of the Bill to the Senate.¹

1. Executive Summary

Foreign bribery and corruption causes significant harm to the governance of societies and economies abroad, as well as distorting competition and the integrity of markets. The AICD strongly supports Government's efforts to enhance the effectiveness of Australia's foreign bribery laws.

This submission focuses on those aspects of the Bill that are particularly relevant to AICD members. In summary, the AICD:

- Supports the amendments proposed to the principal foreign bribery offence in section 70.2 of the *Criminal Code Act 1995* (**Criminal Code**);
- Supports the introduction of a new corporate offence of failing to prevent foreign bribery by an associate. However, we reiterate our concerns with certain aspects of the offence, in particular:
 - The proposed legal burden of proof for body corporates in relation to the 'adequate procedures' defence. We urge the Attorney General to consider that any burden of proof imposed on a defendant be an *evidentiary* burden rather than a *legal* burden; and

¹ AICD submission on *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (available [here](#)); AICD submission on *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (available [here](#)).

- The inclusion of 'subsidiaries' within the definition of 'associate'. We encourage the Attorney General to consider excluding 'subsidiaries' from the definition of 'associate' or alternatively, clarify that it is not the objective of the offence to impose liability on a body corporate simply on the basis of corporate ownership. Attributing liability to a body corporate for an associate's foreign bribery misconduct should be contingent on the substantive nature of the relationship between the corporation and the associate.
- Reiterates support for a 'Deferred Prosecution Agreement' (**DPA**) scheme, included in the previous iteration of the draft legislation, now omitted from this Bill, as a mechanism to incentivise self-reporting of foreign bribery misconduct detected by corporations. We encourage the Attorney General to re-consider its adoption as part of this package of reforms.

2. Failure to prevent foreign bribery offence

The AICD supports the introduction of a new offence for a failure to prevent foreign bribery of a foreign public official by an associate of a body corporate.

In our view, all companies should be held accountable for bribery of foreign public officials by their associates where they do not have adequate procedures in place, to detect, address and prevent such conduct from occurring. If introduced, the new offence will incentivise good governance practices and drive cultural change within corporations in order to promote compliance and prevent misconduct.

That said, we note that a failure to prevent model is still a relatively novel offence model in Australia and is yet to be tested by the courts. With this in mind, we strongly encourage the development of clear guidance on the steps corporations must take to meet their obligations in this context as discussed below.

Adequate procedures defence

We strongly endorse the availability of an 'adequate procedures' defence for body corporates. The Explanatory Memorandum to the Bill notes that the concept of 'adequate procedures' would be scalable and depend on circumstances such as the nature of the body corporate, its relevant sector and geographical operations.

We would however encourage the Minister to consider using the terminology 'reasonable steps' instead of 'adequate procedures' for the purposes of consistency across Commonwealth laws and the body of case law discussing the defence. We note that the terminology 'adequate procedures' has been criticised in the UK, in the context of the *Bribery Act 2010 (UK)*, as potentially depriving the defence of any substance. A post-legislative review by the House of Lords Select Committee considered that if the offence is proved, then in one sense any 'procedures' the corporate put into place were necessarily inadequate.² For this reason, the Select Committee preferred 'reasonable procedures'.

In any event, it is critical that guidance on what constitutes 'reasonable steps' or 'adequate procedures' by a body corporate in the specific context of the 'failure to prevent foreign bribery' offence is published, as would be required under the proposed new section 70.5B. We

² ALRC, Discussion Paper 87: Corporate Criminal Responsibility, November 2019, at p. 155 [7.43] (available [here](#)).

strongly encourage the development of this guidance to be subject to stakeholder consultation consistent with the public consultation process undertaken by the Attorney-General's Department in 2019.³

Burden of proof

While we support a failure to prevent foreign bribery offence, the AICD continues to have concerns with the proposed *legal* burden of proof in relation to the 'adequate procedures' defence.

That is, if a defendant corporation seeks to rely on the defence it must prove on the balance of probabilities that it implemented adequate procedures to prevent foreign bribery by its associates. Ordinarily when a defence is provided, the usual standard of proof under the Criminal Code is an *evidentiary* burden requiring the defendant to raise a real possibility that the defence may apply.⁴

Our concern with a legal burden of proof relates to the practical difficulties of proving an 'adequate procedures' defence in the context of court proceedings (where misconduct by an "associate" has already occurred). For example, when events are considered with the benefit of hindsight review, requiring a defendant to prove on the balance of probabilities that it implemented adequate procedures to prevent foreign bribery would provide the prosecution with an unfair advantage over a defendant in a court proceeding.

Given the proposal to apply 'strict or absolute liability' to the failure to prevent foreign bribery offence and the degree of potential penalties, the AICD urges the Attorney General to consider that any burden that is imposed on the defendant be evidentiary rather than legal. Doing so would still require a defendant corporation to:

- adduce or point to evidence that suggested a reasonable possibility it had adequate procedures in place to prevent an associate committing an offence;
- be proactive and accountable for the actions of their associates; and
- adopt adequate compliance measures to prevent bribery conduct from occurring.

Definition of 'associate'

As currently drafted, the definition of 'associate' for the purposes of the offence proposes to include all officers, employees, agents, contractors and subsidiaries who perform services for or on behalf of the corporation.

The AICD remains concerned with the inclusion of 'subsidiaries' within the definition on the basis that it purports to attribute liability to a parent entity for a subsidiary on the basis of simple corporate ownership. The fact that a company is a subsidiary to another company is not justification, of itself, to impose liability. For example, in some corporate groups a parent company can have a very limited degree of influence or control over the day-to-day management of a subsidiary, particularly in the case of a foreign subsidiary. Indeed such subsidiaries would usually have their own set of directors, distinct from parent entities, with attendant legal duties and statutory obligations.

³ Attorney-General's Department, Consultation Draft: [Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials](#) (November 2019).

⁴ Section 13.3, *Criminal Code Act 1995*.

We encourage the Attorney General to consider limiting the definition of 'associate' to those officers, employees, agents and contractors acting under delegation and/or within the actual or apparent scope of their authority, but exclude subsidiaries. This would be consistent with the current approach to corporate criminal liability in Part 2.5 of the Criminal Code.

However, if the Minister recommends retention of subsidiaries within the definition of 'associate', then we encourage the Bill to adopt an approach that is consistent with the equivalent UK failure to prevent offence. Although the *Bribery Act 2010 (UK)* definition of an 'associated person' extends to subsidiaries, the legislation takes a substance over form approach. In other words, focuses on the substantive nature of the relationship between the corporation and the associate, rather than any formal status.⁵

The Australian Law Reform Commission (**ALRC**) discussed the failure to prevent foreign bribery offence, as proposed in the 2019 iteration of the Bill, in its Final Report of the Corporate Criminal Responsibility Inquiry. The ALRC considered that, for the purposes of the offence, it was appropriate for the definition of 'associate' to include 'subsidiaries' in certain circumstances and agreed with stakeholders that the focus should be on the substance of the relationship, rather than the form.⁶

Relevantly, we note that the *Bribery Act 2010 (UK)* Guidance provides an important clarification around the requisite level of control:⁷

"The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe."

The AICD strongly recommends that similar clarification is provided in the Explanatory Memorandum to the Bill that it is not the intention of these reforms to expose Australian corporations to the serious risk of automatic prosecution for the conduct of persons who they are merely associated with through simple corporate ownership.

3. Deferred Prosecution Agreement scheme

We note that the DPA scheme, as proposed in the 2019 iteration of the draft legislation and endorsed by the majority of the Committee at the time, has been omitted from the Bill.

Under the model provided for in the 2019 iteration of the Bill, the Commonwealth Director of Public Prosecutions (**CDPP**) would agree not to commence proceedings in respect of the relevant offence, provided the corporation complies with the terms of the agreement. These agreements would not be filed with a court, but would require the approval of the agreement

⁵ Section 8, *Bribery Act 2010 (UK)*.

⁶ ALRC, Final Report 136: Corporate Criminal Responsibility, April 2020, at p. 312 [7.133] (available [here](#)).

⁷ Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (section 9 of the Bribery Act 2010), March 2011, at 42-43 (available [here](#)).

by an authorised person (such as a judge of the Federal Court of Australia, as recommended by the ALRC).⁸

If implemented, a DPA scheme would serve as an additional enforcement tool and not as a substitute for the investigation or prosecution of corporate crime, which would continue alongside the DPA scheme. For example, the CDPP could continue to undertake criminal prosecutions in circumstances where it is unconvinced that a DPA is in the public interest.

The availability of a DPA scheme would provide opportunities for corporations to self-report foreign bribery misconduct that is detected and cooperate with law enforcement authorities in respect of a range of specified conditions – including ongoing investigation, payment of financial penalties, admitting to agreed facts or implanting a program to improve future compliance.

In our view, this is particularly critical in the context of the failure to prevent foreign bribery offence where a corporation may become aware of bribery or corruption by one of its associates in a foreign jurisdiction.

Importantly, the implementation of a DPA scheme would also bring Australia into line with other jurisdictions such as the UK, US, Canada, France and Singapore.

We note that the Attorney-General's Department has previously consulted publicly on a proposed model for a deferred prosecution agreement in Australia and the ALRC have provided targeted recommendations on the need for judicial oversight of a DPA scheme in the context of the 2019 draft foreign bribery legislation.⁹

The AICD strongly supports the introduction of a DPA scheme for foreign bribery offences and encourages the Minister to re-consider its adoption as part of this package of reforms.

Next steps

We hope you find this information useful. If you would like to discuss any aspects further, please contact Laura Bacon, Senior Policy Adviser, at lbacon@aicd.com.au or Christian Gergis, Head of Policy, at cgergis@aicd.com.au.

Yours sincerely,

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GM Education & Policy Leadership

⁸ ALRC, Final Report 136, p. 502 at [11.35].

⁹ Attorney-General's Department Consultation: Proposed model for a deferred prosecution agreement scheme in Australia (accessible [here](#)); ALRC, Final Report 136, Ch. 11 at pp. 494-505.