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The Attorney-General's Department
Via email

Dear Attorney-General

Statutory Review of the Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024

Thank you for the opportunity to provide a submission on the Attorney-General's Statutory Review of the Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024 (**Review**).

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 more than 54,000 includes directors and governance leaders of not-for-profits, large and small businesses and the public sector.

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

The AICD was an active participant in consultations on the *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* (**Act**), and welcomed its passage.[1] We supported amendments to the principal foreign bribery offence in section 70.2 of the *Criminal Code Act 1995* (**Criminal Code**) and the introduction of a 'failure to prevent bribery of a foreign public official by an associate' criminal offence in section 70.5A (**Amendments**), subject to suggested refinements to elements of the 'failure to prevent' offence.[2]

We note that the Review seeks views on whether the Amendments have achieved their intended deterrence and enforcement objectives, and whether further amendments or measures are necessary to improve the operation or enforcement of Australia's foreign bribery laws. In the 18 months since the Act was passed, we understand that there has been no enforcement action brought under, or judicial consideration of, the Amendments.

Our comments are therefore focused on section 5 of the Review paper and reiterate the AICD's support for the introduction of a Deferred Prosecution Agreement (**DPA**) scheme.

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[1] AICD submission on Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (available here); 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).

[2] See AICD submission on the *Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023* (available here). We raised concerns for example with the inclusion of 'subsidiaries' within the definition of 'associate' and suggested that 'subsidiaries' be removed. We also raised concerns with the imposition of a legal burden of proof on a defendant for the purposes of the 'failure to prevent' offence, and suggested this be an evidentiary burden of proof.

1. Executive Summary

The AICD recommends that the Government introduce a DPA scheme for foreign bribery offences. We have consistently advocated for the introduction of a DPA in each of the consultations on the Act, and strongly encourage its consideration as part of this Review.

In our view, DPAs would materially improve the effectiveness of the regime. Foreign bribery investigations can be highly complex and resource intensive. Overseas experience indicates a DPA scheme would incentivise self-reporting, cooperation and remediation, and therefore improve the efficiency of Australian foreign bribery enforcement. A DPA framework would also align Australia with comparable jurisdictions and Organisation for Economic Co-operation and Development (**OECD**) recommendations.

When the Amendments were passed in 2024, the Attorney-General at the time noted that a DPA scheme should only be considered once they had been given time to operate.[3] In our view, an appropriate time period has passed, and a DPA scheme should now be considered.

We also recommend that a DPA framework be considered in light of the Attorney-General's recent proposal for a 'failure to prevent modern slavery' criminal offence with an accompanying DPA scheme. Importantly, the AICD is firmly opposed to the introduction of a 'failure to prevent modern slavery' criminal offence for reasons that we will detail in our submission to that separate consultation. Our key concern is that there are significant distinctions between bribery by an 'associate' that is within an entity's control or influence, and modern slavery occurring within complex supply chains several tiers removed from an entity's direct operations.

However, should the Government nevertheless pursue the 'failure to prevent modern slavery' offence, we consider it is critical that it be accompanied by an effective DPA scheme. In these circumstances, the AICD would strongly urge consistency in Australia's enforcement approach for 'failure to prevent' criminal offences in both the modern slavery and foreign bribery contexts.

2. Introducing a DPA Scheme

This section responds to questions 17 – 18 of the Review paper.

Previous consideration of the DPA scheme

A DPA scheme was proposed in both the 2017 and 2019 iterations of the Act and was supported by the majority of responses in each of these consultations.[4] A DPA scheme was also endorsed by the majority of the Senate Legal and Constitutional Affairs Committee in 2019, which stated that it was comfortable that the scheme "would serve as an additional enforcement tool and not as a substitute for the robust investigation and prosecution of corporate crime."[5]

However, in the 2023 iteration of the Act a DPA scheme was omitted. At the time, the Senate Legal and Constitutional Affairs Committee's Deputy Chair provided additional comments in the Committee's report on the Act, noting the wide-ranging support of stakeholders for the inclusion of a DPA scheme and the benefits of alignment with comparable international regimes and OECD guidelines.[6] The Deputy Chair further stated that "A failure by the Government to amend the Bill and to provide for Deferred Prosecution Agreements would

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[3] The Hon Mark Dreyfus KC, MP, Attorney-General, House of Representatives Hansard, 22 June 2023, pages 6 – 7.
[4] The Senate Economics References Committee: Foreign Bribery, page 93 at paragraph 5.21.
[5] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, page 25.
[6] Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 [Provisions], page 17 at paragraph 1.1.

represent a missed opportunity for Australia to participate in the resolution of significant cross-border foreign bribery cases.”[7]

Foreign bribery is often difficult to detect and can be frequently concealed within large and complex global operations. As a result, voluntary self-reporting by corporations can play a critical role in identifying, investigating and addressing misconduct.

Benefits of a DPA scheme

The AICD considers that the availability of a court-approved DPA scheme would provide a strong incentive for corporations to self-report foreign bribery misconduct they detect, and cooperate with law enforcement authorities in respect of a range of specified remedies. This could include ongoing investigation, payment of financial penalties, admitting to agreed facts or implementing a program to improve future compliance.

A DPA scheme would also improve the efficiency and effectiveness of Australia's foreign bribery enforcement regime. Foreign bribery investigations are often highly complex, resource-intensive and protracted, placing significant demands on the Australian Federal Police and the Commonwealth Director of Public Prosecutions (**CDPP**). By encouraging entities to proactively disclose misconduct and cooperate with investigations, a DPA scheme could allow matters to be resolved faster, and free up enforcement resources for cases that cannot be expedited by comparable mechanisms.

Under the 2019 iteration of the Act, the DPA model that was proposed contemplated that the CDPP would agree not to commence proceedings in respect of the relevant offence, provided the entity complied with the terms of the DPA. These agreements would not be filed with a court, but would require approval by an authorised person (such as a judge of the Federal Court of Australia, as has also been recommended by the Australian Law Reform Commission in its Corporate Criminal Responsibility report).[8]

Importantly, if introduced, a DPA scheme should 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 should retain the ability to pursue criminal prosecution where it considers that a DPA would not be in the public interest.

We consider that a DPA scheme is particularly critical in the context of the ‘failure to prevent foreign bribery by an associate’ offence.[9] Under this offence, a corporation may be liable for bribery committed by an associate operating in a foreign jurisdiction, including circumstances where the conduct only comes to the corporation's attention after it has occurred. In these situations, a DPA scheme would provide a clear and credible mechanism to encourage self-reporting, cooperation and remediation, supporting both accountability and effective enforcement outcomes.

Alignment with comparable countries

The introduction of a DPA scheme would also bring Australia into line with other jurisdictions that utilise DPA schemes, such as the United Kingdom, USA, Canada, France and Singapore. As reflected in the Review paper the presence of a DPA scheme in these countries has been central to securing significant financial penalties.

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[7] Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 [Provisions], page 23 at paragraph 1.21.

[8] ALRC, Final Report 136: Corporate Criminal Responsibility, April 2020, at p. 502 [11.35] (available here).

[9] Criminal Code Act 1995, section 70.5A.

The OECD recommends that member countries of the Anti-Bribery Convention (**Convention**) (of which Australia is one) consider using a variety of resolutions for foreign bribery cases, including non-trial resolutions such as DPAs.[10] This is a recommendation that has been adopted by a majority of parties to the Convention.[11] Between 1999 and 2018, 695 of the 890 foreign bribery cases successfully concluded by parties to the Convention were by non-trial resolutions.[12] In total, sanctioned individuals and organisations have paid approximately USD 14.9 billion in penalties, with 95% of this amount arising from non-trial resolutions. DPAs or similar resolutions accounted for nearly 37% of this total.[13]

Intersection with proposed reforms to Australia's modern slavery regime

Finally, the AICD notes that the Attorney-General's Department is considering the introduction of a DPA scheme in its consultation on Strengthening Australia's legislative response to modern slavery in supply chains. This includes the proposed introduction of a 'failure to prevent modern slavery' criminal offence. The consultation paper notes that a DPA scheme is being considered with the aim of providing an additional enforcement tool to support the effective investigation and resolution of complex corporate offending while maintaining strong safeguards and oversight.

While it is not the focus of this Review, we highlight that the AICD is strongly opposed to the introduction of a 'failure to prevent modern slavery' criminal offence. We consider there are significant distinctions between bribery by an 'associate' (within an entity's control or influence) and modern slavery occurring within complex supply chains several tiers removed from an entity's direct operations. However, if Government nevertheless proceeds with a new 'failure to prevent modern slavery' criminal offence, we consider it is critical that a DPA scheme accompany this offence. In these circumstances, we would urge Government to be consistent in its enforcement approach and utilise DPA schemes in connection with 'failure to prevent' criminal offences under both the foreign bribery and modern slavery regimes.

3. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Elise Plunket, Policy Adviser at eplunket@aicd.com.au, Laura Bacon, Senior Policy Adviser at lbacon@aicd.com.au or Simon Mitchell, Acting Head of Policy at smitchell@aicd.com.au.

Yours sincerely,

Louise Petschler GAICD
GM, Education & Policy Leadership

[10] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, recommendation XVII.
[11] OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention, page 12.
[12] Ibid, page 13.
[13] Ibid, page 15.