

Ms Kathryn Gordon
OECD
Via email: Kathryn.gordon@oecd.org

Mr Brooks Hickman
OECD
Via email: brooks.hickman@oecd.org

21 October 2016

Dear Ms Gordon and Mr Hickman,

OECD Public Consultation on Liability of Legal Persons

The Foreign Corrupt Practices Working Party of the Business Law Section of the Law Council of Australia (**BLS Working Party**) is pleased to contribute a submission to the OECD Working Group on Bribery (**WGB**) in response to its public consultation on liability of legal persons.

The Law Council of Australia is Australia's peak professional body representing the interests of lawyers in Australia. The Law Council of Australia is concerned to ensure that Australian laws relating to corrupt practices involving foreign public officials are effective, proportionate and dissuasive.

This submission is primarily approached from the perspective of the lessons available from the operation of the Australian regulatory regime in the international context. As noted in the Phase 3 Report concerning Australia (2012) and the Phase 3 Follow Up Report (April 2015), the Australian enforcement record has been poor to date, although substantial progress has been made in recent years to improve enforcement outcomes.

The BLS Working Party has the following submissions on the issues for discussion raised in the consultation paper. In the interests of brevity, a degree of familiarity with the Australian regime is assumed. The Phase 3 Report contains an accurate summary of the Australian regime. We can elaborate on any point we make below if that would assist.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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1 General

The BLS Working Party considers that the most important components of an effective system for the imposition of liability on legal persons are:

- a regime that is designed to ensure that legal persons adopt measures that mitigate the risk of foreign corrupt practices occurring within their organisation and that, conversely, rewards organisations that do effectively adopt measures reasonably designed to mitigate that risk;
- equally as important is an enforcement regime that is properly designed to investigate and root out foreign corrupt practices when they occur.

The BLS Working Party briefly expands on each of these components as follows.

In terms of the regulatory framework, the BLS Working Party supports the regulatory approach that imposes fault on legal persons reflected in the United Kingdom Bribery Act (section 7(2), adequate procedures). We do not support an identification principle of legal person liability (culpability only if directing mind of the legal person is responsible for the conduct) as that imposes too high a prosecutorial burden in the context of bribery and does not encourage mitigation of risk. We do not support the US style approach of respondeat superior liability for legal persons because there is no express relief in circumstances where appropriate mitigation steps have been adopted. There are issues with the effectiveness of the Australian culpability regime for legal persons as discussed in point 10 below.

As to the second component, from an enforcement perspective further work needs to be done in Australia around making the regulatory infrastructure more effective and dissuasive. Areas for particular ongoing focus are:

- effective encouragement to drive self-reporting as a logical outcome where bribery is uncovered in an organisation (including as part of a deferred prosecution agreement scheme);
- effective corporate whistleblowing protections in the private sector;

- improving the expertise of investigating authorities, particularly with regard to understanding corporate governance in the context of legal persons.

2 Nature of liability

The foreign bribery offence in Australia (Division 70 of the Criminal Code Act 1995 (Cth) (**Criminal Code**)) is currently restricted to a statutory criminal liability regime. The BLS Working Party is of the opinion that the main reason the Australian regime has not been effective in achieving effective and dissuasive penalties is because of a lack of enforcement outcomes rather than the essential nature of the criminal sanction itself.

The consultation paper raises the question of whether other forms of sanction such as non-criminal penalties may be more effective. An interesting area of Australian enforcement activity that has exhibited positive enforcement outcomes in recent years is the differently structured civil penalty regimes that exist under Australia's Corporations law and Competition law for some offences (Part 9.4B of the Corporations law and Part VII of the Competition law). These regimes impose a lower prosecutorial burden of proof (balance of probabilities rather than proof beyond reasonable doubt) but with commensurately lower penalties than for criminal culpability (maximum AU\$1 million for Corporations law and AU\$10 million for Competition law for legal persons as the measure of pecuniary liability). For clarity, civil penalty liability is not applicable to Australia's foreign bribery or false accounting offences. There has been no debate as yet in Australia to extend a civil penalty regime to foreign bribery offences. The BLS Working Party considers that the emphasis should be on improving enforcement outcomes in criminal prosecutions.

3 Legal basis of liability

Having regard to Australia's English sourced common law background, the BLS Working Party considers that statutory criminal law is the proper basis for imposing legal person liability. This is to overcome the lack of clarity as to the common law position, to impose appropriate culpability standards on legal persons, as well as an appropriate definition of the territorial scope of the legislative provisions.

The Anti-Bribery Convention¹ and the WGB monitoring of its provisions has contributed to debate on strengthening Australia's legal person liability system for foreign bribery. Similarly, the WGB's work on legal person liability has resulted in the adoption of other laws covering offences that sit beside the foreign bribery offence. For example, an additional books and records offence with substantially increased penalties for legal persons was inserted in Australia's Criminal Code from 1 March 2016, partly in response to comments made by the WGB in the Phase 3 Report.

4 Types of entities covered

Australia's regime applies to individuals as well as corporations that have distinct legal personality. There is no express recognition of entities that lack legal personality.

In the opinion of the BLS Working Party, this is not a significant issue in the context of the Australian business environment. The vast majority of Australian business organisations are conducted through legal entities with legal personality. To the extent that some business is undertaken through organisations lacking legal personality (the primary examples under Australian law would be a partnership or an unincorporated joint venture) liability would be sufficiently attributable through the individuals and legal persons constituting the unincorporated venture.

5 Standard of liability - Whose acts?

The physical standard for legal person culpability in Australia is the act of an employee or agent acting in accordance with their actual or apparent authority.

As noted in point 1 above, the BLS Working Party supports a failure to properly supervise as the culpability standard for holding a legal person liability for bribery. We do not consider that a strict respondeat superior approach provides an appropriate incentive for the adoption of appropriate compliance measures.

¹ The OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, ratified by Australia on 18 October 1999.

6 Standard of liability - What conditions?

The conditions adopted when determining whether a legal person should be held liable for bribery in Australia (Division 70 of the Criminal Code) involves a degree of complexity and ambiguity. Those conditions are:

- the conferring of a benefit on a person;
- the benefit not being legitimately due;
- influence of a foreign public official;
- the obtaining or retaining of a business advantage being not legitimately due.

The Australian regime is also complicated by the application of “default fault” culpability elements as part of Australia’s federal criminal law system. Under Australian law, principles of *mens rea* as they apply to potentially criminal acts have default culpability requirements when a specific culpability requirement is not expressed for a physical element. This is a feature of the Australian foreign bribery offence (in section 70.2 of the Criminal Code) in relation to some of the conditions noted above. Default fault and culpability for a legal person can be established through poor culture as noted in point 10 below.

Again, the UK Bribery Act simplification of the conditions to legal person liability provides a better model of regulation than the Australian conditions. For example, the UK Bribery Act explicitly rejected a proposal that a benefit be “undue” because that would be an unnecessary and complex requirement in circumstances where the model of the regulation should instead focus on the impropriety of the benefit (see discussion in Law Comm 313)².

7 Intermediaries

The Australian regime imposes liability on legal persons conduct undertaken through “agents” but is not otherwise explicit in its approach to imposing liability for the risk of conduct engaged in through agents. The Australian regime involves

² Law Commission Law Comm 313 “*Reforming Bribery*” 19 November 2008 (UK) at paragraphs 3.47, 5.91-5.98.

uncertainty if the agent does not have specific or apparent authority to undertake illegal activities or where the agent is not directly engaged by the legal person (or is engaged by non-Australian subsidiaries of an Australian legal person).

The UK Bribery Act approach to imposing acts of associates as directly attributable to a legal person irrespective of authority and the separate limb in the United States of prohibiting payments to third parties knowing that any part of the payment will be offered to a foreign public official (which includes deliberate ignorance where high risk) are better forms of regulation in relation to imposing responsibility on legal persons for the conduct of intermediaries.

8 Successor liability

The BLS Working Party does not consider the issue of successor liability is a significant matter in the Australian context.

In Australia, change of control transactions typically involve the acquired corporation remaining a distinct legal entity rather than becoming merged into an acquiring entity. To the extent an entity is dissolved (winding up on the grounds of insolvency), if subsequent legal liability were to be established there are processes to revive the legal entity.

9 Jurisdiction

Australian law does not restrict liability to legal persons for foreign bribery that occur entirely outside Australia only if it could assert jurisdiction over the natural person who committed the offence. The BLS Working Party would not support the adoption of such a restriction as it would significantly and needlessly reduce the potential territorial reach of the offence as it applies to Australian legal persons.

The Australian offence has territorial operation where the conduct occurs wholly or partly in Australia or in an Australian aircraft or ship or relates to conduct wholly outside Australia engaged in by Australian citizens, Australian residents or companies incorporated in Australia.

Australian territorial scope does not extend to foreign incorporated subsidiaries of an Australian legal person. To extend liability to an Australian legal person for

such subsidiaries, it would be necessary to establish that an Australian incorporated parent company was an accomplice to the conduct engaged in by the foreign subsidiary. The BLS Working Party does not support this limitation in the territorial scope of the offence as it can be expected that many Australian legal persons act through foreign incorporated subsidiaries where those foreign incorporated subsidiaries are the alter ego of the Australian legal person for practical purposes.

10 Compliance systems as means of precluding liability

The Australian regime of attributing fault to legal persons (Part 12.3 of the Criminal Code) has some merits over regimes that are based on identification principles of corporate culpability (see point 1 above), in that issues of poor corporate culture and absence of compliance systems are explicitly recognised as relevant to the imposition of corporate culpability. However, ultimately, the Australian mechanism seems to have failed because of complexity of drafting and obscurity of meaning. This is demonstrated by the lack of reliance by Australian prosecuting authorities on the Australian provisions (both in the context of foreign bribery offences and more generally as a matter of criminal law) in proceedings to date. Indeed, there have been no cases brought in Australia to the knowledge of the BLS Working Party where any liability for an offence against a Commonwealth law concerning corporate liability and compliance systems has been considered.

The BLS Working Party would instead have a preference to establish an effective compliance system as a defence where the burden of proof is on the legal person to establish that the compliance system is effective in a manner analogous to the UK Bribery Act.

The adequate design and implementation of a compliance system should most appropriately be determined by an Australian Court based upon the circumstances of a particular case rather than being prescriptively set out in legislation as determination of the adequacy of the system is specific to the circumstances of the relevant organisation.

There has been a recent broader debate in Australia concerning the desirability that good “culture” be exhibited by corporations and, for example, raising the

question whether the Australian securities regulator should endeavour to pursue enforcement activities when it considers that poor culture exists.³ The BLS Working Party does not believe this debate is particularly significant to the issue raised in the consultation paper as we prefer (as noted above) an approach where a culture of compliance is a defence with the burden of proof imposed on the legal person.

11 Sanctions and mitigating factors

In Australia, the prescribed criminal penalty for a contravention of the foreign bribery offence by a legal person is a fine that is currently an amount up to but not exceeding AU\$1.8 million or 3 times the value of the benefit or 10% of the annual consolidated revenue of the legal person.

Gains received through bribery can be confiscated under Australian law by forfeiture order (Proceeds of Crime Act 2002 (Cth)). Disbarment from public contracts is likely to be a potential penalty available within Australia although the current Commonwealth Procurement Rules July 2014 do not currently specifically provide for any debarment sanction and the degree of rigour that is currently applied is open to some question.⁴ Court supervised corporate monitoring might also be a tool used in an Australian settlement process but this will require some legislative intervention as currently, there is no means by which a monitor may be imposed by Court order on a company.

The BLS Working Party believes that an effective sanctions regime should also explicitly allow for recognition of mitigating circumstances that are transparent and predictable to enhance the effectiveness of sanctions. As noted in point 0 above, further work is required in Australia to encourage self-reporting and to protect corporate whistleblowing in the private sector.

³ To an extent the Australian debate tracks similar discussion currently occurring in other countries- see for example the summary of the debate outlined in Financial Reporting Council "*Corporate Culture and the Role of Boards*" Report of Observations July 2016 (UK).

⁴ See Rule 10.31, *Commonwealth Procurement Rules*, July 2014. The Australian Government appears to rely on what it claims to be the integrity procedures under existing procurement rules to ensure "corrupt" companies are not awarded Australian procurement contracts. Yet, the Rules are silent on anything to do about debarment; rather, they allow for vague notions of "public interest" to permit an agency to decline to award a contract to a company. Where the Australian media reports companies being awarded contracts by the Australian Government when the same company has been debarred by the World Bank, there are good grounds to suspect the current system concerning debarment as an effective sanction in Australia is inadequate.

The sanctions for legal persons that are the least effective are where there is no clear framework to encourage self-reporting as the logical response when bribery is discovered within an organisation. In this environment, having regard to the significant sanctions that may be involved, regulatory investigations become more difficult and outcomes more arbitrary.

12 Settlements

The BLS Working Party supports the development of additional mechanisms in Australia to facilitate settlements, including by the adoption of a deferred prosecution agreement scheme for Commonwealth financial crimes (including foreign bribery and other serious financial offences).

Experience in Australia to date has been an absence of successful enforcement outcomes. As such the lack of enforcement precedent does not advance and reinforce a strong community expectation of compliance.

For Australia, a better outcome would be to have a record of settlements as is beginning to be the case in the United Kingdom.

The disadvantages of a settlement system are clear (an attitude that the merits might not matter). However, for Australia, it would be better to risk that potential disadvantage in order to reinforce the importance of a culture of compliance in the business community.

If you have any questions in relation to this submission, in the first instance please contact the Chair of the Working Party, Greg Golding on 02-9296 2164 or via email: greg.golding@au.kwm.com

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Teresa Dyson', written in a cursive style.

Teresa Dyson, Chair
Business Law Section