

11 June 2024

Ms Susan McKeag  
Assistant Secretary  
Criminal Law Policy Branch  
Attorney- General's Department  
Barton ACT 2060

By email: [foreignbriberyAPGs@ag.gov.au](mailto:foreignbriberyAPGs@ag.gov.au)

Dear Ms McKeag,

**Draft guidance on adequate procedures to prevent the commission of foreign bribery**

1. This submission concerning *Draft guidance on adequate procedures to prevent the commission of foreign bribery (Draft Guidance)* is made by the Foreign Corrupt Practices Committee (the **Committee**) of the Business Law Section of the Law Council of Australia.
2. The Committee welcomes the release of the Draft Guidance. The Committee endorses the content and scope of the Draft Guidance. In particular:
  - The Committee considers that the Draft Guidance strikes an appropriate balance of the advantage of relative succinctness in analysis in guidance for business, while clearly specifying the key principles that should underpin adequate procedures.
  - The Committee agrees with the specification of an overriding key principle of proportionality and with the five main indicators of an effective program as outlined in the Draft Guidance, noting that these key principles are consistent with the “six principles” in the UK Guidance<sup>1</sup> and the “hallmarks of an effective compliance program” in the US Guidance.<sup>2</sup>
  - In that context the Committee does not consider it would be particularly helpful to go further and try to resynthesise, in the Draft Guidance or related materials, the huge body of resources available to entities that are properly alerted to the relevant principles and can easily access the

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<sup>1</sup> Ministry of Justice, “*The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*”, March 2011 (UK Guidance).

<sup>2</sup> “*FCPA: A resource guide to the US Foreign Corrupt Practices Act*”, second edition by the Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, July 2020 (US Guidance).

materials that are available from overseas government agencies and NGOs.<sup>3</sup>

- The Committee encourages the Attorney-General's Department to engage with the Commonwealth Director of Public Prosecutions and the Australian Federal Police so that the principles in the Draft Guidance are reflected in the various guidances that each of these agencies publish on the topic.

3. The Committee provides the following constructive feedback on the Draft Guidance:

- It would be highly desirable to more prominently recognise that no bribery prevention regime will be capable of preventing bribery at all times, and that perfection is not required by adequate procedures.<sup>4</sup> In that regard it is important that the Draft Guidance expressly acknowledges that adequate procedures is equivalent to procedures that are reasonable in all the circumstances.<sup>5</sup> It should also be made clear that whether or not adequate procedures exist is a fact-specific inquiry depending on the circumstances of each case.
- A case study on the issues in operating through local agents in section 4.3.1 of the Draft Guidance would be a helpful addition.<sup>6</sup> The use of agents and intermediaries in engaging in corrupt conduct is a notorious way in which historic offending conduct has been engaged in, and clear examples of what is expected of business would be particularly helpful in this area for small to medium-sized businesses.<sup>7</sup>
- Express commentary on the issues surrounding excessive hospitality and facilitation payment would be helpful additions to the Draft Guidance.<sup>8</sup> The difficulties in this area and the limits of the facilitation defence suggest specific discussion in the body of the Draft Guidance would be of assistance.<sup>9</sup>

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<sup>3</sup> Including Transparency International, and also noting the important role that is and should continue to be played by Austrade in the Australian context.

<sup>4</sup> Noting the comment at the last paragraph of section 2.0 of the Draft Guidance. Compare the UK Guidance at [11] (page 8) and US Guidance at page 57. The explanatory memorandum to the amending legislation noted the importance of the guidance in framing understanding of the legal definition of adequate procedures (paragraph 101 of Explanatory Memorandum to *Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023*).

<sup>5</sup> For further consideration of this important policy consideration see the analysis in the UK Law Commission paper "*Corporate Criminal Liability: an options paper*" 10 June 2022 at 8.68-8.72. The UK has subsequently moved to a more express recognition of reasonable procedures in subsequent "failure to prevent" offences (failure to prevent tax evasion and failure to prevent fraud): for discussion of these developments see L Campbell "*Corporate liability and criminalisation of failure*" (2018) 12 Law and Fin Mkts Rev 57.

<sup>6</sup> See UK Guidance case study 6 and US Guidance "*Hypothetical: Third party vetting*" at page 63-71.

<sup>7</sup> Noting this is an issue referenced in the section 2.1.1 case study of the Draft Guidance. However, the Committee thinks it merits specific illustration as a discrete topic.

<sup>8</sup> See UK Guidance at [26]–[27], [45]–[46] and US Guidance at pages 14-6, 25-8.

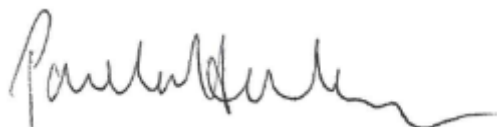
<sup>9</sup> The Committee notes the description of the facilitation defence in Appendix A to the Draft Guidance.

- The section 3 discussion of responsibilities of top-level management could further reinforce the importance of following proper procedures in relation to internal recruitment decisions.<sup>10</sup>
- The section 6.1 reference in the Draft Guidance to whistleblowing issues relevant to smaller corporations might more accurately state “Smaller corporations that are not subject to Corporations Act requirements to ***implement compliant whistleblower policies***, should ensure an appropriate reporting mechanism is in place proportionate to the corporations risk”.<sup>11</sup>
- The discussion in section 6.3 of the Draft Guidance of self-reporting is not technically relevant to establishing adequate procedures, and that position could more clearly be acknowledged.<sup>12</sup>

### Conclusion and further contact

4. The Committee would be pleased to discuss any aspect of this submission.
5. Please contact the chair of the Committee Greg Golding at [Greg.Golding@ashurst.com](mailto:Greg.Golding@ashurst.com), if you would like to do so.

Yours faithfully



**Pamela Hanrahan**  
**Chair**  
**Business Law Section**

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<sup>10</sup> For example, where retired government officials or relatives of government officials are employed within commercial organisations.

<sup>11</sup> It is an obligation to implement policies rather than the application of whistleblowing protections that is the distinction applicable to different entities.

<sup>12</sup> That is referenced at the end of the discussion but could be more prominently noted if it remains in this section, perhaps by moving the commentary up to the commencement of the discussion.