Law Council
OF AUSTRALIA

Business Law Section

8 September 2026

Attorney-General's Department
Canberra ACT 2600

By email: Foreignbribery.statreview@ag.gov.au

Dear Sir/Madam,

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

1. This submission has been prepared by the Foreign Corrupt Practices Working Group of the Business Law Section of the Law Council of Australia (the **FCPWG**) to the Attorney-General's Department on the Statutory Review of the *Crimes Legislation Amendment (Combatting Foreign Bribery) Act* 2024 (the **2024 Amending Legislation**).

2. The FCPWG is a small group of members (private practitioners, academics, corporate counsel) with a specialist interest in the regulation of foreign bribery, and commercial crime more broadly.

3. Below we address the five areas identified for consideration, along with the questions asked.

4. Before doing so we make the following general observations as to our views about the current position relating to the regulation of foreign bribery in Australia.

General views on the effectiveness of this regime

5. An effective but proportionate Australian regulatory regime that sanctions supply-side foreign bribery by Australian persons is clearly appropriate from a policy perspective and is consistent with Australia's multilateral public law obligations.

6. The difficulty with the laws does not generally lie in the words or intent of the legislation, but in investigation and enforcement. Continuous refinement of the legislative language is largely pointless and a misallocation of resources in the absence of demonstrated drafting problems in actual prosecutions. In broad terms, we submit that the existing legislation is fit for purpose and reflects international best practice.

7. While improving investigation and enforcement mechanisms that address the unique challenges of this type of crime should continue to be actively assessed by the Attorney-General and the Australian Federal Police (**AFP**), any measures adopted must be proportionate and sit comfortably within Australia's established justice

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system. In that regard, we continue to support the introduction of an appropriate Deferred Prosecution Agreement (**DPA**) mechanism (see below).

8. In general terms, there has been a significant increase in business and public understanding of foreign bribery issues over the last decade. In our view, Australian businesses, large and small, take these laws seriously and seek to implement appropriate compliance policies and monitoring across their supply chain networks, notwithstanding the challenges that exist in many jurisdictions where Australian companies operate.

9. While it might be suggested that international focus on this type of crime has declined recently (particularly given the changed priorities of the US Department of Justice under the current US administration), we consider the long-term importance of the issue to be unchanged. Many of Australia's major trading partners continue to dedicate significant resources to tackling foreign bribery, irrespective of the approach taken by any one country. Australia should continue to allocate appropriate resources to this area, particularly in relation to investigation, enforcement and public education.

10. Our responses to the issues for consideration are informed by these general observations.

Section 70.2—Bribing a foreign public official

11. While the changes introduced by the 2024 Amending Legislation represent an improvement to the legislative framework, we do not consider that they have had a material impact on the effectiveness of the regime.

12. The difficulties with the regime sit with investigation and enforcement issues, not the words of the legislation.

Questions

1. How effective are the amendments made to section 70.2? You may wish to consider effectiveness from the perspective of both deterrence and enforcement.

13. The FCPWG does not consider that deterrence or enforcement is materially facilitated by the amendments, subject to what we say below.

14. The wording of the legislation is highly technical. In our view, changing the words has no impact on deterrence, as it does not alter the public understanding of the sanction.

15. Enforcement is not generally facilitated by the amendments, as we do not consider that they materially improve the ability of regulators to pursue investigations and prosecutions.

2. Are there any issues with the operation of section 70.2 as amended by the Act?

16. The offence is predicated upon the concept that a person (whether a company or an individual) must, relevantly, intend to "*improperly influence*" another for the proscribed purpose. This is a novel concept under Australian criminal law, not used in any other offence. While the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) sets out a range of non-exclusive factors that a trier of fact may take into account in determining whether improper influence has occurred, some judicial guidance will likely be required before the phrase becomes settled as a matter of law and practice. This may be contributing to the absence of any apparent prosecutions by the Commonwealth Director of Public Prosecutions (**CDPP**).

3. Are there any additional measures that are necessary or desirable to improve the operation or enforcement of section 70.2?

17. No.

Section 70.5A—Corporate offence: failure to prevent foreign bribery

18. The introduction of the failure to prevent offence was a significant development introduced by the 2024 Amending Legislation.

19. The adoption of the equivalent offence in the UK Bribery Act 2010 led, in a practical sense, to a step change in corporate compliance and enforcement in that jurisdiction. However, our members understand that, while the UK Serious Fraud Office has secured certain large resolutions of alleged bribery cases, it has also suffered some notable failures in prosecuting the very individuals alleged to have engaged in the offending conduct that certain companies had admitted. This illustrates the inherent complexity of these regimes.

20. There is a real debate to be had as to whether a strict liability standard of criminal culpability for companies, with a reversal of the onus of proof, strikes the appropriate balance between the rights of companies and the need for deterrence. However, in the context of the pre-existing Criminal Code regime, it is clear that the well-known uncertainties surrounding the corporate culture intention standard have created, in the experience of our members, real prosecution challenges. In that sense, prosecutors should feel no ongoing reluctance to pursue corporate enforcement action under the current framework.

21. The FCPWG does not advocate the expansion of this strict liability regime to other contexts. The justification for its adoption in the case of foreign bribery is specific to the investigation and enforcement difficulties inherent in this type of crime.

22. The question that must be asked is why, since the introduction of the corporate offence, there has been no discernible impact on enforcement of the kind experienced in the UK.

23. The FCPWG considers that two years is far too short a period in which to assess effectiveness, given the well-known long lead times required to properly investigate a defended allegation of unlawful conduct.

24. The FCPWG considers that a more significant reason for the relative success of the UK system was the introduction of a DPA regime, with a clear role played by the UK judiciary, which resulted in significant changes in corporate behaviour. We return to that issue below.

Questions

4. How effective is the failure to prevent foreign bribery offence? You may wish to consider effectiveness from the perspective of deterrence, enforcement and influence on corporate compliance practices.

25. While there have been few, if any, formal prosecutions to date, we consider it too early to assess effectiveness. It is likely that the AFP and the CDPP will have their own views on effectiveness from their regulatory perspective.

26. In our experience, the introduction of the new offence did achieve public exposure and resulted in increased focus by corporate boards. The FCPWG observed companies revising compliance policies and revisiting the monitoring of supply chain relationships as a result of the 2024 reforms. The FCPWG considers that Australian business takes this regime seriously, and that corporate attention to these issues increased following the 2024 Amending Legislation.

27. Of course, as time passes without evidence of an active enforcement program where it is warranted, the credibility of the regulatory regime will suffer. In the view of our members, the laws risk becoming merely another compliance obligation to be managed, rather than a genuine deterrent.

5. If you have used the adequate procedures guidance, how useful have you found it? Do you have any suggestions about how the guidance could be improved?

28. The adequate procedures guidance is useful as far as it goes. However, in our view the true success of a compliance policy depends on the tone set at the top of an organisation, on effective training, on meaningful internal enforcement and, where criminal conduct is detected, on a certain pathway to seek resolution while not avoiding responsibility where responsibility properly falls to be assessed.

29. The guidance is brief and principles-based, and is less prescriptive than the US and UK analogues. The FCPWG does not consider that a failing.

30. Best practice would be for the guidance to be revisited periodically and updated to address specific issues as they become topical.

6. Are there additional measures (legislative or non-legislative) that are necessary or desirable to improve the operation, implementation or enforcement of the failure to prevent offence?

31. There is an important role for government to perform in promoting and reinforcing the importance of compliance. The FCPWG considers that the use of government resources in these areas is a public benefit (including through Austrade, embassies and high commissions).

Other components of the legislative framework, including penalties

32. As the US enforcement record illustrates—and, indeed, as does the record in Australia (particularly the Reserve Bank *Securency* prosecutions)—the false accounting offence is equally important to effective enforcement of foreign bribery as the primary offence itself. The two offences need to work effectively together. Too frequently in the past, general state legislation not specific to this conduct has been relied upon for this purpose.

33. The penalties under the regime are substantial, as they should be. The FCPWG considers that the potential penalties create effective deterrence (provided of course that there is evidence of active enforcement).

Questions

8. Should the Division 490 offences be amended to replace the requirement for the benefit to be 'not legitimately due' with the concept of 'improper influence', to better align with section 70.2?

34. Yes. There is no policy basis for maintaining conflicting language between the two provisions, and alignment would promote consistency and reduce interpretive uncertainty.

9. Are current penalties proportionate and effective to deter foreign bribery and related offences? If not, what would a more appropriate penalty be?

35. Yes. The penalties are substantial and therefore appropriately encourage deterrence.

10. Are there additional measures (legislative or non-legislative) that are necessary or desirable to improve the operation or enforcement of offences related to foreign bribery?

36. Strategies to encourage self-reporting and the introduction of DPAs are the most significant issues for consideration.

Enforcement

37. The FCPWG agrees with the description of the complexities associated with investigation and enforcement referenced in the review paper. Improvements to aid investigations are welcomed, provided they incorporate appropriate safeguards, including protections for properly privileged communications between client and lawyer.

38. In general terms, we approach this question as practitioners who act for the targets of regulatory exercises of compulsory disclosure powers. Our members also act, from time to time, for individuals who are the subject of investigations or who become defendants in criminal prosecutions. The FCPWG accepts that those powers are generally necessary and appropriate, but they must remain proportionate and continue to recognise fundamental rights.

39. The FCPWG would not support the grant of notice to produce powers to policing bodies. The criminal justice system grants extraordinary powers to policing bodies but should continue to require a warrant process for the production of documents. The more direct compulsory powers of bodies such as ASIC, ACCC and AUSTRAC exist in aid of their civil and regulatory functions, with criminal prosecution powers properly residing with the CDPP (and state equivalents).

40. The FCPWG considers that Taskforce Solaris is a step in the right direction towards unifying and harmonising enforcement. However, we consider that the absence of a dedicated agency staffed by specialised personnel with long-term experience is a likely reason for Australia's relatively poor enforcement record.

Questions

11. What are the current challenges experienced when enforcing foreign bribery offences?

41. The challenges are well described in the review paper. We endorse that analysis and have addressed the most significant of those challenges throughout this submission.

12. How could existing enforcement powers and tools be improved to overcome challenges in obtaining evidence when investigating foreign bribery and related offences?

42. The FCPWG would welcome the opportunity to comment on specific enhancements that regulatory bodies consider may assist their investigative work.

13. Would you support or not support any alternative or additional approaches to improve enforcement outcomes?

43. The FCPWG would support alternative or additional approaches, provided they are accompanied by appropriate safeguards for the rights of individuals and companies under investigation.

Corporate liability: non-trial resolutions, including a Deferred Prosecution Agreement scheme

44. The FCPWG has previously supported the adoption of a DPA scheme tailored to Australia's circumstances. Copies of the detailed submissions we have made on this topic are attached.[1] Nothing has changed since the time of making those submissions that causes us to alter our position.

45. The FCPWG considers it likely that the relative improvement in the UK's enforcement record over the last decade is largely attributable to the availability of DPAs and the related regulatory encouragement of self-reporting. Historically, DPAs and NPAs (or non-prosecution agreements, as that concept has developed in the US) have been pivotal to the US enforcement regime.

46. From a policy perspective, it is important that a DPA regime not be perceived as a mechanism for large corporations to buy their way out of criminal liability. The FCPWG considers that such a characterisation fundamentally misunderstands the sound policy rationale, and the legal nature of corporate personality, that underpins the case for a DPA regime. The FCPWG is confident that these policy concerns can be navigated by a properly structured scheme.

47. In particular, agreed resolution pathways for companies must be seen to be open, transparent and supported by independent published reasons demonstrating the value to society of the resolution mechanism being in the public interest.

48. For a self-reporting and DPA regime to work, there must be predictability of outcome and a structure that reliably offers a result superior to the uncertainties of criminal litigation, so as to encourage a rational decision by companies (boards of directors and/or owners) to self-report.

49. The perception of our members is that the fundamental difficulty with the CDPP and AFP self-reporting guidelines, and the AFP's optimal investigation outcomes guidelines, is that they offer no such predictability or reliable outcome. The well-known public examples involving self-reporting have still resulted in protracted and complex prosecution actions. The FCPWG therefore finds it unsurprising that voluntary disclosure of potential criminal conduct by the business community has been lukewarm at best.

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[1] A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia, 3 May 2017 and Deferred prosecution agreement scheme code of practice, 12 July 2018

50. An increasingly important consideration is the implications for investigations and enforcement in jurisdictions outside Australia that may arise following self-reporting, which adds further complexity to the self-reporting decision. The FCPWG considers that this issue has tempered the self-reporting mindset in the UK in recent years, following an initial willingness to embrace self-reporting and seek a DPA. It follows that this becomes an international enforcement issue requiring greater cooperation between regulators. It does, however, weigh heavily on companies, which generally take considered, informed and experienced advice before deciding how to proceed.

51. As a guide, we offer the following factors our members would currently have regard to in assessing the merits and demerits of self-reporting when an internal investigation has uncovered potential wrongdoing:

    (a) What occurred and who was involved?

    (b) Where did the conduct occur?

    (c) What other laws, practices or enforcement attitude exist in relevant jurisdictions (that is, is there any proper connection with, say, the US, the UK or other Western country)?

    (d) For section 70.5A, is the predicate offence under section 70.2 satisfied and the associate engaged in foreign bribery?

    (e) If no, or if the facts and liability view are uncertain, why report anything?

    (f) If yes, what is in the interests of the company (assuming individuals are separately represented, noting any company is expected to offer up the individuals involved)?

Questions

14. In your view, how effective is the CDPP and AFP self-report guideline?

15. In your view, how effective is the AFP's optimal investigation outcomes guideline?

16. How could the existing non-trial resolution mechanisms be improved in order to better encourage corporations to self-report, self-disclose and cooperate in investigations?

52. As noted above, we consider that the effectiveness of existing non-trial resolution mechanisms is significantly diminished by the perceived lack of predictable outcomes and the absence of clear advantages over a defended criminal litigation path.

17. Should Australia introduce a DPA scheme for foreign bribery offences? Please provide details on any benefits, risks or concerns to support your response.

18. If Australia were to introduce a DPA scheme for foreign bribery offences:

a. How should it operate? What should be its key features?

b. What would be essential components or conditions of a DPA scheme to incentivise corporations to self-report, self-disclose and cooperate in investigations?

53. Yes. We refer to and rely upon the detailed submissions we have previously made on this topic, which set out the FCPWG's proposed model and key features for a DPA scheme in Australia.

54. The FCPWG would be pleased to discuss any aspect of this submission.

55. Please contact the chair of the working group Greg Golding [redacted] if you would like to do so.

Yours sincerely



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Chair, Business Law Section