

# SENATE BACKS FURTHER FOREIGN BRIBERY REFORM: SENATE COMMITTEE HANDS DOWN REPORT ON AUSTRALIA'S ANTI-BRIBERY REGIME

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Legal Briefings - By **Elizabeth Macknay, Christopher Hicks and Timothy Goyder**

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The long-awaited Senate Economics References Committee report into foreign bribery was released on 27 March 2018. The report recommends ways in which Australia's foreign bribery framework can be strengthened.

## KEY TAKEAWAYS FOR AUSTRALIAN COMPANIES

1. The Senate Economics References Committee endorses proposed legislation currently before Parliament, which, if passed, will amend the existing foreign bribery offence and introduce a corporate bribery offence. The Committee also recommends reforms to Australia's whistleblower laws, including those currently being considered by Parliament.
2. The Committee supports efforts to encourage self-reporting through a deferred prosecution agreement scheme, and suggests that more practical guidance be published on how and where to self-report.
3. The Committee recommends significant additional reforms to Australia's foreign bribery laws, including:

- the abolition of the facilitation payments defence;
  - a beneficial ownership register; and
  - a debarment regime for companies involved in bribery.
2. The Committee's additional proposed reforms likely represent the next wave of changes to Australia's foreign bribery legal framework. They reflect measures already taken in jurisdictions such as the United Kingdom and the United States, and, if taken up by Parliament, would continue the trend of Australia strengthening its foreign bribery laws in line with international developments.

## SUMMARY OF REPORT

The long-awaited Senate Economics References Committee (**Committee**) report into foreign bribery (**report**) was released on 27 March 2018. The report recommends ways in which Australia's foreign bribery framework can be strengthened. The Senate first requested the Committee to look into Australia's foreign bribery laws in June 2015; however, the inquiry was delayed by the double dissolution of the Commonwealth Parliament in 2016.

The Committee makes 22 recommendations in the report. The report identifies reforms to bolster the effectiveness of Commonwealth legislation to combat foreign bribery, suggests changes to the investigation and prosecution of foreign bribery offences, and contains recommendations aimed at increasing self-reporting by companies and enhancing corporate awareness and compliance.

The Committee does not unanimously adopt all recommendations in the report, and the Coalition members of the Committee have released a supplemental report with additional comments responding to some of the criticisms made by the Committee about government inaction.

## ENDORSEMENT OF PROPOSED AMENDMENTS TO BRIBERY AND WHISTLEBLOWER LAWS

The Committee concludes that there continue to be deficiencies in Australia's anti-bribery framework. Legislation is currently before Parliament to address some of these deficiencies. The report endorses the proposed reforms designed to strengthen Australia's anti-bribery framework.

- The Committee endorses the reforms to the existing foreign bribery offence proposed in the *Crimes Legislation (Combatting Corporate Crime) Bill 2017 (Corporate Crime Bill)*. These amendments include expanding the definition of 'foreign public official' to include candidates for public office; introducing the concept of 'improperly influencing' a foreign public official (in place of a requirement to prove that a benefit was 'not legitimately due'); and extending the foreign bribery offence to capture bribery to obtain a personal advantage (as well as a business advantage).
- The Committee also endorses the introduction of a corporate offence of failing to prevent foreign bribery, as contemplated by the Corporate Crime Bill. The proposed offence will make a company automatically liable for foreign bribery committed for the benefit of the company by its associates (such as employees, agents or subsidiaries) anywhere in the world. It will be a defence if the company can prove that it had 'adequate procedures' to prevent and detect foreign bribery. The Minister will be required to issue guidance about what constitutes 'adequate procedures' for the purposes of the law. The Committee is supportive of the proposal to reverse the onus of proof in respect of the defence (meaning the company must prove that the defence applies). The Committee also favours principles-based guidance on what will constitute 'adequate procedures', rather than a 'tick-a-box' checklist approach. This approach, which is consistent with the UK approach, would support greater flexibility, but also result in greater uncertainty, for companies. The Committee recommends that an exposure draft of the guidelines be released, and that the guidelines be finalised in advance of the commencement of the new offence, to allow companies time to implement any appropriate changes.
- The Committee endorses the recommendations in the Whistleblower Protections Report (**Whistleblower Report**) handed down by the Committee on Corporations and Financial Services. The Whistleblower Report recommends establishing a Whistleblower Protection Authority and introducing a rewards scheme for whistleblowers. These recommendations, among others, are not reflected in the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Whistleblower Bill)*. While the Committee endorses the Whistleblower Bill, it expresses concern that the 'bulk of the recommendations made in the Whistleblower Report remain outstanding'.<sup>1</sup>

## GREATER FOCUS ON SELF-REPORTING AND COMPLIANCE

The report discusses the issues that law enforcement agencies face in identifying cases of foreign bribery, and investigating and successfully prosecuting these cases. The report identifies a need to develop a culture of corporate awareness and compliance, and to encourage companies to self-report.

With this in mind, the Committee endorses the introduction of a Commonwealth deferred prosecution agreement (**DPA**) scheme, as proposed in the Corporate Crime Bill. DPAs will typically require a company to cooperate with an investigation into any serious financial crimes (including foreign bribery), pay a financial penalty, and implement a program to improve compliance. In return, the prosecution of the company is deferred for a period. Provided the company complies with the terms of the DPA during that period, the prosecutor will then move to dismiss the charges.

The Committee considers that a DPA scheme would provide an incentive for companies to proactively report suspected foreign bribery. It is anticipated that the scheme would encourage companies to work *with* authorities, rather than against them. The Committee notes that, to be effective, the scheme would need to be supported by a robust legal framework that requires strict compliance. The Committee supports the publication of approved DPAs, as well as records of compliance with DPAs, other than in exceptional cases.

In addition to a DPA scheme, the report also contains the following recommendations to promote self-reporting and a corporate culture of compliance:

- publishing practical guidance on the offence of foreign bribery, to increase awareness of the problem of foreign bribery and provide practical advice for companies in high risk areas; and
- providing clear public information for individuals and small businesses about how and where to make a voluntary report of foreign bribery.

**“The Senate Economics References Committee has endorsed changes to strengthen Australia’s foreign bribery laws in line with international developments in the US and UK. Australian companies should prepare for an increased focus on anti-bribery compliance, as Australia continues to tighten the net.”**

## **FURTHER CHANGES RECOMMENDED**

The Committee recommends additional reforms to strengthen Australia’s response to foreign bribery. The proposed changes, if enacted, would bring Australia into line with other jurisdictions, such as the United Kingdom and the United States. This demonstrates the increasing internationalisation of bribery laws.

Of particular importance, the Committee recommends that the facilitation payments defence should be abolished. The defence allows companies to avoid liability for facilitation payments (or 'grease payments'), being small benefits provided to foreign officials to speed up routine government action. The defence is only available in limited circumstances, and is subject to strict record keeping requirements. However, critics of the defence argue that facilitation payments are bribes, and help maintain an environment in which bribery can flourish.

Many countries, including the United Kingdom and Canada, have abolished the facilitation payments defence. Additionally, while the OECD does not expressly prohibit the retention of the facilitation payments defence, it encourages countries to take steps to prevent the use of facilitation payments.

The Committee observes that, while the Australian Government has taken steps to discourage the use of facilitation payments, Australia is increasingly an outlier in its stance on facilitation payments. The Committee notes that the removal of the defence would clearly signal that bribery was never acceptable. It recommends that the defence be abolished with a transition period to allow time for businesses to implement policy changes and to develop a culture of compliance.<sup>2</sup>

The report also contains the following suggestions for reform:

- An alternative and lesser offence of recklessly bribing a foreign public official, picking up on a proposal raised in the 2017 consultation paper on amendments to the foreign bribery offence.<sup>3</sup>
- That ASIC maintain a beneficial ownership register, to increase transparency around company ownership and to deter a number of corporate crimes including foreign bribery. The development of a beneficial ownership register is currently the subject of a stalled inquiry by the Department of Treasury.<sup>4</sup> Such a register exists for companies registered in the United Kingdom.
- A Federal government 'debarment policy' barring companies convicted of domestic or foreign bribery from public procurement contracts. Debarment regimes operate in the UK, United States, European Union and Canada, and have driven companies in those markets to self-report and cooperate more with law enforcement agencies, to avoid the significant financial consequences of debarment.

## KEY DATES

By 20 April 2018, we expect to see a report from the Legal and Constitutional Affairs Legislation Committee on the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*.

# ENDNOTES

1. Coalition Senators disagree with this recommendation, noting the government's recent introduction of the Whistleblower Bill. The Senate Economics References Committee recently recommended that the Whistleblower Bill be passed in its current form.
2. Coalition Senators disagree with this recommendation, but accept that the facilitation payments defence should be the subject of further review.
3. For more on this see:  
<https://www.herbertsmithfreehills.com/latest-thinking/proposed-changes-t...>
4. For more on this see:  
<https://www.herbertsmithfreehills.com/latest-thinking/lifting-the-lid-on...>

# KEY CONTACTS

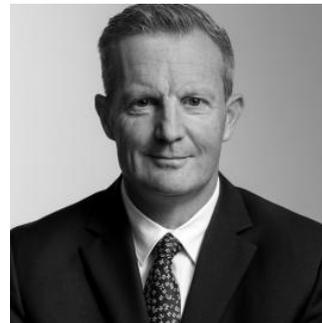
If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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