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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CRIMES LEGISLATION AMENDMENT (COMBATTING FOREIGN BRIBERY)
BILL 2023**

ADDENDUM TO THE EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, the Hon Mark Dreyfus KC MP)

CRIMES LEGISLATION AMENDMENT (COMBATTING FOREIGN BRIBERY) BILL 2023

The purpose of this addendum is to provide additional clarifying material to the Explanatory Memorandum for the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (the Bill).

This addendum responds to Recommendation 1 of the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) in its report on the Bill published on 26 July 2023. The Committee recommended that the Government consider amending the Bill or the Bill's explanatory memorandum with respect to proposed section 70.5A to clarify that the fact that foreign bribery has occurred does not, in itself, mean that adequate procedures were not implemented by the relevant body corporate.

GENERAL OUTLINE

1. On page 3, insert the following new paragraph:
 - 6A. The defence is intended to encourage a body corporate to establish, implement and maintain adequate procedures designed to prevent foreign bribery. If a body corporate can demonstrate that it had adequate procedures to prevent foreign bribery in place, the body corporate would obtain the benefit of the defence set out at subsection 70.5A(5). The defence is intended to apply in circumstances where a body corporate can demonstrate that it had, in place, adequate procedures to prevent the commission of an offence against section 70.2 by any associate of the body corporate (or, where the associate was engaging in conduct outside of Australia that, if engaged in in Australia, would constitute an offence against section 70.2). In such circumstances, the mere fact that an associate of a body corporate has engaged in foreign bribery does not, of itself, mean that adequate procedures designed to prevent the commission of the offence were not implemented by the respective body corporate.
2. Consideration of whether a body corporate has 'adequate procedures designed to prevent' foreign bribery should be focused on processes undertaken by a body corporate to prevent foreign bribery, including whether they align with adequate procedures guidance, rather than solely on the actions by associates of the body corporate.

NOTES ON CLAUSES

Schedule 1 – Amendments relating to foreign bribery

Item 8 – After paragraph 112

1. After paragraph 112 of the Explanatory Memorandum, insert the following new paragraph:
 - 112A. If a body corporate can demonstrate that it had adequate procedures designed to prevent foreign bribery in place, the body corporate would obtain the benefit of the defence set out at subsection 70.5A(5), despite foreign bribery

occurring. In such circumstances, the mere fact that an associate of a body corporate has engaged in foreign bribery does not, in itself, mean that adequate procedures designed to prevent the commission of the offence were not implemented by the relevant body corporate. The adequate procedures guidance, which will be published by the Minister, will outline steps a body corporate can take to put in place adequate procedures designed to prevent foreign bribery. If a body corporate can demonstrate it had such procedures in place, having regard to the guidance, a court may find that it had adequate procedures designed to prevent foreign bribery. When considering ‘adequate procedures’, a body corporate should therefore focus on whether the policies and procedures it has in place are effective in preventing foreign bribery.

2. This additional material provides clarity on the intended purpose of the new subsection 70.5A(5), in that a body corporate would obtain the benefit of the defence if it can demonstrate it had in place adequate procedures designed to prevent the commission of the foreign bribery, as outlined in paragraph 99 of the Explanatory Memorandum.
3. The defence is intended to be read as a whole and, as outlined in paragraph 101 of the Explanatory Memorandum, what constitutes ‘adequate procedures’ would be determined by the courts on a case by case basis.
4. Further to the outline in paragraph 101 of the Explanatory Memorandum, the defendant can provide whatever evidence is appropriate in the circumstances to demonstrate to the court that it had in place adequate procedures to prevent the commission of foreign bribery. Whether procedures to prevent foreign bribery are adequate in the circumstances must be determined on a case by case basis and may depend on a range of factors, including the size of the relevant body corporate. As noted in the Explanatory Memorandum, imposing the legal burden on the body corporate creates a strong positive incentive for corporations to adopt measures to prevent foreign bribery.
5. Ensuring that a body corporate focus on whether policies and procedures in place are effective in influencing actions and behaviour, beyond their mere existence, addresses observations from the United Kingdom in recent foreign bribery prosecution. For example, a generic ethics policy may not demonstrate that a body corporate had adequate procedures designed to prevent foreign bribery. Likewise, where a body corporate implements adequate procedure following an offence by its associate, it may not retrospectively obtain the benefit of the defence in subsection 70.5(A)(5). A body corporate should therefore undertake due diligence in preparing its adequate procedures to prevent foreign bribery.