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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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

EXPLANATORY MEMORANDUM

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

# CRIMES LEGISLATION AMENDMENT (COMBATTING FOREIGN BRIBERY) BILL 2023

## GENERAL OUTLINE

1. Foreign bribery is a serious and insidious problem across the world. At a local level, it can harm communities by increasing the costs and/or reducing the quality of vital public goods and services for citizens, skewing competition and misallocating precious resources. At a macro level, it impedes economic development, corrodes good governance and undermines the rule of law. Further, bribery by Australians and Australian businesses damages our international standing and can shrink the global market for Australian exports.

2. Australia is a committed member of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Anti-Bribery Convention). The Anti-Bribery Convention obliges party States to criminalise the bribery of foreign public officials and to implement a range of related measures to make this criminalisation effective. In 1999, Australia gave effect to these obligations by enacting the current foreign bribery offence in Division 70 of the Criminal Code (Cth).<sup>1</sup>

3. This Bill will further strengthen Australia's implementation and enforcement of the Anti-Bribery Convention by strengthening the legal framework for investigating and prosecuting foreign bribery. Specifically, Schedule 1 of the Bill:

- (i) extends the foreign bribery offence to include the bribery of candidates for public office (not just current holders of public office);
- (ii) extends the foreign bribery offence to include bribery conducted to obtain a personal advantage (the current offence is restricted to bribery conducted to obtain or retain a business advantage);
- (iii) removes the existing requirement that the benefit or business advantage be 'not legitimately due' and replaces it with the concept of 'improperly influencing' a foreign public official;
- (iv) removes the existing requirement that the foreign public official be influenced in the exercise of their official duties; and
- (v) makes it clear that the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else.

4. These amendments seek to overcome the limitations of the current foreign bribery offence which has proven to be overly prescriptive and difficult to use. This is evidenced by the low number of foreign bribery prosecutions in Australia.<sup>2</sup> The OECD Working Group on Bribery has previously expressed concern about Australia's low level of enforcement given the high-risk regions and sectors in which Australian companies operate.

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<sup>1</sup> Inserted by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth)

<sup>2</sup> Since the introduction of the offence in 1999, only seven individuals and three corporations have been convicted of foreign bribery offences.

5. The targeted amendments in the Bill have been developed to capture typical cases of foreign bribery being encountered by law enforcement. In this way, the amendments will ensure the foreign bribery offence keeps pace with the evolving nature of foreign bribery offending.

6. The Bill will also introduce a new indictable corporate offence of failing to prevent foreign bribery. This offence will apply where an associate of a body corporate has committed bribery for the profit or gain of the body corporate. It will be a defence if the body corporate can establish that it had ‘adequate procedures’ in place to prevent the commission of foreign bribery by its associates.

7. The new corporate offence for foreign bribery is designed to overcome challenges in establishing criminal liability of businesses that engage in wilful blindness with respect to misconduct by their employees and other associates, and is intended to incentivise businesses to implement and maintain adequate procedures to prevent foreign bribery from occurring. The offence will be an incentive for companies to implement and maintain measures to prevent bribery. The introduction of an equivalent offence in the United Kingdom in 2010 led to increased adoption of corporate compliance programs.

8. In addition, the Bill makes consequential amendments to the *Income Tax Assessment Act 1997* to preserve the existing rule which prohibits a person from claiming as a deduction for a loss or outgoing a bribe to a foreign public official.

#### **FINANCIAL IMPACT**

9. The Bill is not expected to have a significant impact on consolidated revenue.

10. To the extent that Schedule 1 is designed to improve the legislative framework in Australia for prosecuting foreign bribery, the Bill may lead to more fines being imposed for the foreign bribery offence.

## ACRONYMS

AGD Framing Guide	<i>Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i>
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1989] ATS 21
Corporations Act	<i>Corporations Act 2001</i>
Crimes Act	<i>Crimes Act 1914</i>
ICCPR	International Covenant on Civil and Political Rights [1976] ATS 5
ITAA	<i>Income Tax Assessment Act 1997</i>

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023**

11. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

12. To the extent that the measures in the Bill may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of the Bill.

13. To the extent that the Bill strengthens the framework for prosecuting the offence of foreign bribery, the Bill actively promotes human rights by facilitating good governance and strengthening the rule of law.

14. Australia is a committed member of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Anti-Bribery Convention). The Bill strengthens Australia's implementation and enforcement of the Anti-Bribery Convention.

### **Human rights implications**

15. The Bill improves Australia's implementation and enforcement of the Anti-Bribery Convention by refining the elements of the existing foreign bribery offence in Division 70 of the Criminal Code. These amendments seek to overcome the limitations of the current foreign bribery offence which has proven to be overly prescriptive and difficult to use. In this way, the Bill ensures that the foreign bribery offence keeps pace with the evolving nature of foreign bribery offending.

16. The Bill will also introduce a new indictable corporate offence of failing to prevent foreign bribery. This offence will apply where an associate of a body corporate has committed bribery for the profit or gain of the body corporate. It will be a defence if the body corporate can establish that it had 'adequate procedures' in place to prevent the commission of foreign bribery by its associates.

17. The Bill engages the following rights:

- The right to freedom of person and freedom from arbitrary detention in Article 9 of the ICCPR.
- The prohibition on cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the CAT.
- The right to freedom of movement in Article 12 of the ICCPR.
- The right to be presumed innocent in Article 14 of the ICCPR.

***Articles 9, 7 and 12 - the right to freedom of person and freedom from arbitrary detention, the prohibition on cruel, inhuman or degrading treatment or punishment, and the right to freedom of movement***

18. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention, or deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. The UN Human Rights Committee has stated that ‘arbitrariness’ includes the elements of inappropriateness, injustice and a lack of predictability. An arrest or detention must be reasonable and necessary in all circumstances.

19. Article 7 of the ICCPR and the CAT prohibits conduct which may be regarded as cruel, inhuman or degrading treatment or punishment (‘ill treatment’) and can be either physical or mental. Examples of cruel, inhuman or degrading treatment include unduly prolonged detention that causes mental harm.

20. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. This right can be permissibly limited if the limitations are provided by law, are necessary to protect national security or the rights and freedoms of others and consistent with the other rights in the ICCPR.

21. The Bill amends the existing foreign bribery offence in Division 70 of the Criminal Code (Cth), for which a court may lawfully prescribe a period of imprisonment for a natural person found guilty of the offence.

22. There are strong, long-standing legal protections embedded in Australia’s criminal justice system which mean that the Bill does not interfere with the human rights set out in Articles 9, 7 and 12 of the ICCPR. These protections are expressed in Commonwealth, State and Territory legislation and at common law, and include the right to be informed promptly of a charge, the right to apply for bail, the right to silence (i.e. the right against self-incrimination), the right to a fair trial (including a right to seek legal representation and the requirement for the prosecution to prove an offence beyond reasonable doubt), the right to a trial by jury, the right to be given reasons for decisions, the right to appeal a decision of a court, and the right not to be tried or punished more than once for the same offence.

23. The Bill provides that, where a natural person is convicted of the offence of foreign bribery, the maximum penalty is 10 years’ imprisonment or a fine of not more than 10,000 penalty units, or both. This penalty is reasonable to achieve the legitimate objectives of deterring and punishing foreign bribery, and promoting the integrity of international business transactions.<sup>3</sup>

24. This penalty is also consistent with established principles of Commonwealth criminal law policy, as documented in the AGD Framing Guide. The AGD Framing Guide provides that a high maximum penalty is appropriate where the consequences of an offence are particularly dangerous or damaging. The significant impacts of foreign bribery on the integrity of Australian businesses and the potential impacts on local communities where the bribery occurs warrant a significant maximum penalty.

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<sup>3</sup> The Anti-Bribery Convention states the bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties.

### ***Article 14(2) – the right to be presumed innocent***

25. Article 14(2) of the ICCPR provides that ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

26. Item 7 of Schedule 1 of the Bill extends the existing defence of lawful conduct (which applies to the foreign bribery offence in section 70.2 of the Criminal Code) to situations where the conduct relates to bribing an individual standing or nominated as a candidate to be a foreign public official. The Bill places the evidentiary burden for establishing this defence on the defendant, consistent with the existing offence in Division 70 of the Criminal Code.

27. Consistent with the AGD Framing Guide, placing an evidential burden on the defendant is appropriate where the matters relevant to establishing the defence are readily within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove those matters. It is appropriate in the present circumstances because:

- The defendant would be in a better position to adduce evidence of any written foreign law he or she relied on when offering or providing the benefit. The defendant could readily provide evidence of the existence of the foreign law and their reliance on it to support their case.
- It would be difficult for the prosecution to prove the non-existence of a law in a foreign jurisdiction. For example, this would require the prosecution to seek evidence of any written law.
- The question of whether the benefit was required or permitted under a foreign country’s written law is not central to the question of culpability for the offence. The essential elements of the proposed foreign bribery offence are that the defendant provided, offered or caused to be provided or offered, a benefit to another person with the intention of improperly influencing a foreign public official in order to obtain an advantage.

28. Item 8 of Schedule 1 of the Bill also establishes a new corporate offence of failure to prevent bribery of a foreign public official by an associate. Item 8 provides that the new offence will not apply if the body corporate had in place adequate procedures designed to prevent an associate from committing foreign bribery. The defendant bears the legal burden in relation to this matter. The standard of proof the defendant will need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code). The justification for imposing this legal burden on the body corporate is that it will incentivise corporations to adopt measures to actively prevent foreign bribery.

29. The Bill requires the Minister to publish guidance on the steps that body corporates can take to prevent an associate from bribing foreign public officials.

### **Conclusion**

30. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

31. The Bill amends the elements of the existing foreign bribery offence in Division 70 of the Criminal Code and creates a new corporate offence of failure to prevent bribery of a foreign public official by an associate.

32. To the extent that the Bill limits certain human rights and freedoms, those limitations are reasonable, necessary and proportionate in order to adequately deter and punish foreign bribery.

33. Significantly, the Bill does not alter or in any way diminish the protections available to an accused in a criminal trial in Australia, including criminal procedure law and appeal rights.

34. The Bill strengthens Australia's implementation and enforcement of the Anti-Bribery Convention. In this way, the Bill contributes to good governance and the rule of law.

## NOTES ON CLAUSES

### Preliminary

#### Clause 1 – Short title

35. Clause 1 provides for the short title of the Bill to be the *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2023*.

#### Clause 2 – Commencement

36. Clause 2 provides for the commencement of each provision in the Bill, as set out in the table at clause 2(1).

37. Clause 2(2) specifies that information in column 3 of the table at clause 2(1) is not a part of the Bill, and information may be inserted in this column, or information in it may be edited, in any published version of the Bill.

#### Clause 3 – Schedules

38. Clause 3 provides that legislation that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Bill has effect according to its terms.

## **Schedule 1 – Amendments relating to foreign bribery**

### **Part 1 – Main amendments**

#### ***Criminal Code Act 1995***

##### **Item 1 – Before section 70.1 of the Criminal Code**

40. Item 1 inserts a new heading for Subdivision A — Definitions. This reflects the restructuring of Division 70.2 to include subdivisions.

##### **Item 2 — Section 70.1 of the Criminal Code**

41. Item 2 amends section 70.1 to include new definitions for relevant terms in the Division. The new definitions provide that: ‘advantage’ means an advantage of any kind and is not limited to property; ‘annual turnover’ has the meaning given by new section 70.5C; and a person is an ‘associate’ of another person if the first-mentioned person is an officer, employee, agent, contractor or subsidiary of the other person, is controlled by another person or performs services for or on behalf of another person.

42. These are definitions of key terms included in the new offences of bribing a foreign public official (new section 70.2) or failing to prevent bribery of a foreign public official (new section 70.5A).

43. The definition of ‘associate’ is intended to provide clarity by reference to the associate’s role or position relative to the body corporate, i.e. an officer, employee, agent, contractor, subsidiary or controlled entity of the person would be an associate. ‘Subsidiary’ is defined within the meaning of Division 6 of the Corporations Act, which provides that a body corporate is a subsidiary of another body corporate if, and only if:

- the other body controls the composition of the first body’s board (section 47 of the Corporations Act provides that, without limiting the circumstances, this control exists when the body corporate can appoint or remove all, or the majority, of the directors of the first-mentioned body, or
- the other body is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the first body, or
- the other body holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital), or
- the first body is a subsidiary of a subsidiary of the other body.

44. A ‘subsidiary’ within the meaning of the Corporations Act includes a body corporate that: (a) is incorporated outside of Australia; and (b) otherwise meets the definition of ‘subsidiary’ in section 46 of that Act.

45. ‘Control’ of a body corporate is also defined within the meaning of Division 6 of Part 1.2 the Corporations Act. Section 50AA of the Corporations Act provides that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.

46. The definition of ‘associate’ is also intended to have broad application to a person who provides services for or on behalf of another person. Such a person would not necessarily need to be an officer, employee, agent, contractor, subsidiary or controlled entity.

**Item 3 — Section 70.1 of the Criminal Code (definitions of ‘benefit’ and ‘business advantage’)**

47. Item 3 repeals the existing definitions of ‘benefit’ and ‘business advantage’ in section 70.1.

48. The existing definition of ‘benefit’ in section 70.1 is repealed. This definition is superfluous as an identical definition is already provided in the Dictionary at the end of the Criminal Code. As explained under item 6 below, the definition in the Dictionary, identical to the one being repealed, provides that a ‘benefit includes any advantage and is not limited to property’.

49. As explained under item 6 below, the new offence of bribing a foreign public official (new section 70.2) covers bribery to obtain or retain business or a business or personal advantage. In repealing the definition of ‘business advantage’ it is intended that both ‘business advantage’ and ‘personal advantage’ will take their ordinary meanings. Advantage is defined in section 70.1 as an advantage of any kind and is not limited to property.

**Item 4— Section 70.1 of the Criminal Code (at the end of the definition of ‘foreign public official’)**

50. Item 4 amends the definition of ‘foreign public official’ in section 70.1 to include a person standing, or nominated, (whether formally or informally) as a candidate to be a foreign public official covered by any of paragraphs (a) to (k) of the existing definition.

51. This amendment ensures that the foreign bribery offences extend to bribes made to candidates for public office. Law enforcement experience indicates that individuals or companies may seek to bribe candidates for public office, with the intent of obtaining an advantage once the candidate takes office. It is appropriate to criminalise this conduct given that it equally undermines good governance and free and fair markets.

**Item 5 — After section 70.1 of the Criminal Code**

52. Item 5 inserts new Subdivision B — Bribery of foreign public officials. This reflects the restructuring of Division 70.2 to include subdivisions.

**Item 6 — Section 70.2 of the Criminal Code**

Overview

53. Item 6 repeals the existing foreign bribery offence in section 70.2 and replaces it with a new offence of bribing a foreign public official. The reason for replacing the existing offence is to address challenges authorities currently face in investigating and prosecuting the offence, as articulated in the Government’s public consultation paper ‘Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*’, released in April 2017.

54. Challenges relating to the existing foreign bribery offence include the need to show that both the bribe and the business or personal advantage sought were not legitimately due. In some cases, the threshold of ‘not legitimately due’ can present challenges. For example, bribe payments can be concealed as agent fees, making it difficult to show, beyond a reasonable doubt, that the payments were not legitimately due. Further, proving the existing offence can also require reliance on international legal assistance processes. Reliance on such processes may be required, for example, to prove that a benefit or advantage was not legitimately due or that a foreign official was working within their official duties. International legal assistance processes may take time and/or prove unsuccessful, and the investigation/prosecution may be compromised as a result.

55. In summary, item 6 changes the existing foreign bribery offence in section 70.2 in the following ways:

- removes the requirement that the foreign official must be influenced in the exercise of the official’s duties
- removes the requirement that a benefit and business advantage must be ‘not legitimately due’ and replaces it with the concept of ‘improperly influencing’ a foreign public official, and
- extends the offence to cover bribery to obtain a personal (i.e. non-business) advantage.

#### New section 70.2 – Bribing a foreign public official

56. The foreign bribery offence in new section 70.2 provides that a person commits an offence if the person:

- provides, offers, or promises a benefit to another person, or causes the benefit to be provided, offered or promised to another person (new paragraph 70.2(1)(a)), and
- does so with the intention of improperly influencing a foreign public official in order to obtain or retain business or a business or personal advantage (new paragraph 70.2(1)(b)).

57. Providing, offering or promising a benefit to another person or causing the benefit to be provided, offered or promised to another person under new paragraphs 70.2(1)(a) is conduct that carries the fault element of intention as defined by new paragraph 70.2(1)(b).

58. New paragraph 70.2(1)(b) provides the relevant intention that applies to the physical element in new paragraph 70.2(1)(a). Subsection 5.1(2) of the Criminal Code allows for a specific fault element to be provided for a physical element of an offence. A person will have the necessary intention if, by providing the benefit etc, they mean to improperly influence a public official in order to obtain or retain business or a business or personal advantage. To avoid doubt, this does not require proof that a foreign public official actually has been or will be influenced, only that a person intended that this occur.

59. The existing foreign bribery offence applies only to bribery of foreign public officials to obtain or retain business or a business advantage. The new offence is not limited in this way. Instead, it applies where the bribe is to obtain or retain business or a business or personal advantage. It may also apply where a combination of business, a business advantage and/or personal advantage are obtained or retained.

60. Law enforcement experience has shown that foreign bribery can occur where the advantage sought is personal. These could include instances where a foreign official is improperly influenced in the bestowal of personal titles or honours or in relation to the processing of visa or immigration requests.

61. The term ‘personal’ is intended to capture a broad range of personal advantages, including (but not limited to) the granting of visas or other residency benefits, and the bestowing of scholarships, personal titles or other honours.

62. The term ‘business’ refers to trade and commercial transactions, and ensures that the offence covers the types of business transactions that Australia is required to criminalise as a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

63. Law enforcement experience has also shown that foreign bribery can occur where the advantage sought is both a business and personal advantage, for example, where a foreign official seeks a visa. The grant of a visa is personal insofar as the person may enter the country, while also providing a business advantage by allowing the person to more easily tender for contracts or undertake business in the jurisdiction.

64. Item 6 ensures that the foreign bribery offence operates as intended by specifying that the offence applies in the context of both personal and business advantages, or both. Given the seriousness of the foreign bribery offence and the high penalty it can attract, it is desirable that its scope is clearly articulated.

65. The amendment is consistent with Recommendation 6 of the Senate Economics References Committee’s 2018 report on Foreign Bribery that ‘the foreign bribery offence apply in circumstances where a bribe of a foreign public official was to obtain or retain a personal advantage’.

66. Paragraphs 70.2(2)(a) and (c) provide that a person does not need to intend to improperly influence a particular foreign public official, or actually obtain or retain business or a business or personal advantage. These paragraphs are consistent with existing subsection 70.2(1A). New paragraph 70.2(2)(b) further provides that a person does not need to intend to obtain or retain a particular business or a particular business or personal advantage. This means the prosecution would not need to prove the particular business or advantage that is related to the bribery.

67. Subsections 70.2(3) and (4) provide the maximum penalties applicable for the new offence for individuals (subsection 70.2(3)) and bodies corporate (subsection 70.2(4)). These penalties are the same as that for the existing foreign bribery offence under existing subsections 70.2(4) and (5).

68. With respect to the reference to “benefit” in paragraph 70.2(4)(b), ‘benefit’ is defined in the Dictionary of the Criminal Code. This provides that a ‘benefit includes any advantage and is not limited to property’.

69. New paragraph 70.2(4)(c), regarding the relevant period for assessing a body corporate’s annual turnover for the purpose of determining the maximum fine, replicates the existing approach under paragraph 70.2(5)(c), except for one clarification. The existing paragraph provides that the relevant period is 12 months ending at the end of the month in

which the body corporate committed the offence. The new paragraph clarifies that the period could also end at the end of the month in which the body corporate began committing the offence, which would apply where the offence was committed over a period greater than a month. This is consistent with similar provisions in the Corporations Act and provides greater clarity around the calculation of this amount.

#### New section 70.2A – Improper influence

70. The new offence of foreign bribery is based on the concept of improper influence of a foreign public official. This term would better characterise the conduct of foreign bribery than the current term ‘not legitimately due’.

71. New section 70.2A provides detail on the new concept of improper influence. Subsection 70.2A(1) provides that, in a prosecution for the foreign bribery offence, the determination of whether influence is improper is a matter for the trier of fact.

72. Subsection 70.2A(2) provides factors to be disregarded in determining whether influence is improper for the purposes of paragraph 70.2(1)(b). These factors are modelled on existing subsections 70.2(2) and (3) and include:

- the fact that the benefit, or the offer or promise to provide the benefit, may be, or be perceived to be, customary, necessary or required in the situation
- any official tolerance of the benefit, and
- if particular business or a particular business or personal advantage is relevant to proving the matters referred to in paragraph 70.2(1)(b):
  - the fact that the value of the business or advantage is insignificant
  - any official tolerance of the advantage
  - the fact that the advantage may be customary, or perceived to be customary, in the situation.

73. Subsection 70.2A(3) provides factors which may be considered in determining whether influence is improper. These factors include:

- the recipient or intended recipient of the benefit
- the nature of the benefit
- how the benefit was provided
- whether the value of the benefit is disproportionate to the value of consideration or purported consideration (if any) for the benefit
- whether the benefit, or the offer or promise to provide the benefit, was provided in the absence of any legal obligation to do so
- whether the benefit was provided, or the offer or promise to provide the benefit was made, dishonestly
- whether, and to what extent, the benefit, offer or promise is recorded or documented
- if the provision of the benefit, or the offer or promise to provide the benefit, is recorded or documented:

- the accuracy of the record or documentation, and
- whether the record or documentation is consistent with the ordinary practices of the person who made the record or documentation
- whether there is evidence that due diligence was exercised in relation to the benefit, or the offer or promise to provide the benefit
- whether any of the following conduct is contrary to a written law in the place where it occurs:
  - the provision of the benefit, or the offer or promise to provide the benefit
  - the acceptance of the benefit, or
  - any conduct directly connected with the provision, offer or promise to provide, or acceptance of the benefit, and
- in relation to particular business or a particular business or personal advantage:
  - whether the business or advantage was awarded on a competitive or non-commercial basis
  - whether there is any demonstrable conflict of interest in the provision of the business or advantage.

74. Subsection 70.2A(4) provides that the factors listed above do not limit the matters that can be considered in determining whether influence is improper.

75. The factors are intended to reflect, in a non-exhaustive manner, the conduct of bribery of a foreign public official. For example, the test of whether the value of the benefit is disproportionate to the value of consideration or purported consideration (if any) for the benefit (paragraph 70.2A(3)(d)) could be applied where a bribe is paid through an agent supported by an agency agreement. Under this example, in assessing improper influence, the trier of fact could compare the value of the agent's services with the amount paid for those purported services. Under this paragraph, the trier of fact could consider any disproportion, but it is intended that a lack of disproportion itself would not be determinative of whether the influence was improper.

76. As another example, if a benefit provided or offered to a foreign public official may be of low or insignificant value in Australian dollar terms and of higher value in the location of the official, the trier of fact could consider the value to the official in determining whether influence is improper. In this scenario, among other things, the trier of fact may have regard to the nature of the benefit (paragraph 70.2A(3)(b)) and whether the value of the benefit is disproportionate to the value of any consideration provided or purported to have been provided for the benefit (paragraph 70.2A(3)(d)).

77. There are two factors connected to the legality of the conduct: paragraph 70.2A(3)(e) concerns the absence of any legal obligation to provide a benefit, and paragraph 70.2A(3)(j) concerns conduct contrary to a written law in the place where it occurs. It is intended that the existence of either of these particular factors in a matter would likely carry significant weight in determining that influence is improper, depending on the broader circumstances.

78. The factor in paragraph 70.2A(3)(f) is whether the benefit was provided, or the offer or promise to provide the benefit was made, dishonestly.

79. The factors in paragraphs 70.2A(3)(g) and (h) refer to matters that are recorded or documented. It is intended that ‘recorded’ would cover something that is set down in writing or other form (whether or not in electronic form) and ‘documented’ would refer to there being documentation to support something.

#### **Item 7 – After subsection 70.3(2) of the Criminal Code**

80. Item 7 inserts new subsection 70.3(2A). This extends the existing defence of lawful conduct, which applies to the foreign bribery offence in section 70.2, to situations where the conduct relates to an individual standing or nominated as a candidate to be a foreign public official.

81. Existing section 70.3 sets out the terms of the defence of conduct lawful in the foreign public official’s country. The table in existing subsection 70.3(1) prescribes the source of the applicable law that will apply to the different classes of foreign public officials. The different classes are contained in the definition of ‘foreign public official’ in existing subsection 70.1, to which item 4 above adds a person standing, or nominated, (whether formally or informally) as a candidate to be a foreign public official in a position covered by any of the existing paragraphs under the definition.

82. New subsection 70.3(2A) provides, by reference to the conditions in the table in existing subsection 70.3(1), a defence where the conduct occurred in relation to a candidate for the position of foreign public official and a written law in force in the relevant place permits the provision of the benefit to the relevant foreign public official. For example, the defence would be available to a person who provides a benefit to a candidate for a political office or a public service position under a law of a foreign country, if the written law in force in the foreign country permits the provision of the benefit.

83. Item 7 provides that the defendant bears the burden of adducing evidence that suggests a reasonable possibility that the matters comprising the defence exist (section 13.3 of the Criminal Code). If the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt (section 13.1 of the Criminal Code).

84. This offence-specific defence is appropriate because:

- The defendant would be in a better position to adduce evidence of the written foreign law he or she relied on when offering or providing the benefit. The defendant could readily provide evidence of the existence of the foreign law and their reliance on it to support their case.
- It would be difficult for the prosecution to prove the non-existence of a law in a foreign jurisdiction. For example, this would require the prosecution to seek evidence of any written law.
- The question of whether the benefit was required or permitted under a foreign country’s written law is not central to the question of culpability for the offence. The essential elements of the proposed foreign bribery offence are that the defendant provided, offered or caused to be provided or offered, a benefit to another person with the intention of improperly influencing a foreign public official in order to obtain or retain business or a business or personal advantage.

85. Under the current offence, whether the conduct was lawful in the place it occurs is not an element of the offence. A defendant already bears an evidential burden when seeking to rely on the defence in section 70.3 for conduct lawful in the foreign public official's country. New subsection 70.3(2A) would extend the existing defence to also apply to conduct involving candidates for a foreign public office, ensuring consistency across all categories of foreign public official.

#### **Item 8 — After section 70.5 of the Criminal Code**

86. Item 8 inserts new Subdivision C — Failure to prevent bribery of foreign public officials.

#### New section 70.5A – Failing to prevent bribery of a foreign public official

87. New section 70.5A of this Subdivision inserts a new offence of failing to prevent bribery of a foreign public official that can only be committed by a body corporate.

88. Subsection 70.5A(1) provides that a person (the first person) will commit an offence if:

- The first person is a body corporate that is a constitutional corporation, incorporated in a Territory or taken to be registered in a Territory under the Corporations Act, and
- an associate of the first person:
  - commits the offence of foreign bribery against section 70.2, or
  - engages in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2 (the notional offence), and
- the associate does so for the profit or gain of the first person.

89. The term 'associate' is defined in the amendments to section 70.1 described above under item 2. A person is an 'associate' of another person if the first-mentioned person is an officer, employee, agent, contractor or subsidiary of the other person, is controlled by the other person, or otherwise performs services for or on behalf of another person.

90. The term 'associate' extends to persons who perform services for a corporation, which is particularly relevant to the challenges of prosecuting foreign bribery as companies may seek to distance themselves from payment of a bribe by engaging others to do so. The broad scope of the term 'associate' is justified because it incentivises parent companies to take more active steps to prevent their subsidiaries and associates from committing foreign bribery. It also encourages stronger due diligence regarding business partners and supply chains, including ongoing oversight of such relationships to ensure compliance with the parent company's anti-bribery policies and procedures.

91. Paragraph 70.5A(1)(b)(ii), covers the situation where an associate of the first person engages in conduct outside Australia that, if engaged in Australia, would constitute an offence against section 70.2. It is intended that this paragraph would cover situations where a subsidiary of a body corporate engages in conduct abroad that would constitute the foreign bribery offence.

92. Conduct that is done for the 'profit or gain' of the first person (paragraph 70.5A(1)(c)) is not defined in the legislation and would be interpreted by reference to the ordinary

meaning of the words. The ordinary meaning of these words, however, is very broad. ‘Gain’ would include any sort of benefit or advantage to the body corporate. The term would cover, for example, situations where an Australian company benefits merely because it is the beneficial owner of a subsidiary company that benefited from the commission of the foreign bribery offence.

93. Subsection 70.5A(2) provides that absolute liability applies to certain elements of the new corporate offence of ‘Failing to prevent bribery of a foreign public official’ in subsection 70.5A(1); namely, to paragraphs (1)(a) and (1)(c), and the circumstances contained in subparagraphs (1)(b)(i) and (1)(b)(ii).

94. The AGD Framing Guide provides that the application of absolute liability should only be used in limited circumstances and where there is adequate justification for doing so. The Guide provides that applying absolute liability to a particular physical element of an offence may be justified where requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking ‘fault’ in respect of that element. It may also be justified where the particular element of the offence is a jurisdictional element rather than one going to the essence of the offence.

95. In this case, applying absolute liability to the above elements of the offence in subsection 70.5A(1) is necessary to ensure the effectiveness of the new offence. In particular, it ensures that the prosecution does not need to establish any fault element in order to prove the offence. Accordingly, a corporation will not be able to avoid criminal liability committed by its associate for the profit or gain of the corporation because one or more fault elements could not be attributed to it. In this way, the offence incentivises corporations to actively ensure they have adequate procedures in place to prevent foreign bribery occurring. The defence of ‘adequate procedures’ is discussed further below. Applying absolute liability in this way is appropriate to capture the distinct nature of corporate misconduct where it is a form of omission.

96. The application of absolute liability to paragraph 70.5A(1)(a) is necessary as this aspect of the offence is a jurisdictional element. It is not appropriate for the defence of mistake of fact to apply to the offence elements in paragraph 70.5A(1)(b). It is sufficient that the fault elements of the underlying conduct by the associate described in those subparagraphs need to be established by the prosecution.

97. Subsection 70.5A(3) clarifies that the first person may be convicted of an offence against this section even if the associate has not been convicted of an offence against section 70.2. The prosecution would need to show that the associate committed a foreign bribery offence against section 70.2 or engaged in the conduct described in new subparagraph 70.5A(1)(b)(ii), but would not need to show that the associate has been successfully prosecuted.

98. Subsection 70.5A(4) provides that section 12.6 of the Criminal Code applies in relation to an offence against subsection (1) as if the reference in section 12.6 to an employee, agent or officer of a body corporate included any associate of the body corporate. This would mean that the general principle of ‘intervening conduct or event’ in section 10.1 of the Criminal Code would not apply. Section 12.6 provides that a body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the

body corporate. Subsection 70.5A(4) extends this to also include any associate of the body corporate (which could include a subsidiary or a controlled entity of the body corporate).

99. Subsection 70.5A(5) provides that the offence will not apply if the body corporate had in place adequate procedures designed to prevent:

- the commission of the foreign bribery offence against section 70.2 by any associate of the body corporate, and
- any associate of the first person engaging in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2.

100. The defendant bears a legal burden in relation to this matter. The justification for imposing this legal burden on the body corporate is that it would create a strong positive incentive for corporations to adopt measures to prevent foreign bribery. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code).

101. What constitutes ‘adequate procedures’ would be determined by the courts on a case by case basis. It is envisaged that this concept would be scalable – its requirements would depend on the circumstances, including the nature of the body corporate concerned and the relevant sector and geographical sector in which it operates. As noted below, proposed new section 70.5B also provides that the Minister must publish guidance on the steps that body corporates can take to prevent an associate from bribing foreign public officials.

102. Subsection 70.5A(6) provides that the maximum penalty for the new offence of failing to prevent foreign bribery in subsection 70.5A(1) is the greatest of the following:

- 100,000 penalty units;
- if the court can determine the value of the benefit obtained by the associate, 3 times that value;
- if the court cannot determine the value of that benefit, 10% of the annual turnover of the body corporate for the 12 month period ending at the end of the month in which the associate committed, or began committing, the offence.

103. The term ‘benefit’ is defined in the Dictionary of the Criminal Code. This provides that a ‘benefit includes any advantage and is not limited to property’.

104. Subsection 70.2(7) provides that extended geographical jurisdiction — category A applies to an offence against subsection 70.5A(1). This is defined in section 15.1 of the Criminal Code. It means the offence would apply where, among other situations, the conduct which constitutes the offence occurs wholly overseas where the offender is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

105. Subsection 70.5A(8) provides that the offence at subsection 70.5A(1) is an indictable offence. This provision ensures the offence can be dealt with as an indictable offence consistent with other serious offences that are indictable offences, including the substantive foreign bribery offence at section 70.2 of the Criminal Code.

106. Section 4G of the Crimes Act provides that indictable offences are offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months,

unless the contrary intention appears. As the new offence at subsection 70.5A(1) does not contain a penalty of imprisonment (as it only applies to bodies corporate) it must therefore be specified as an indictable offence in order for it to be considered as such.

107. Specifying the new offence as an indictable offence will allow prosecutions of the offence to be heard in superior courts and enables the Commissioner of the AFP and CDPP to seek certain orders under the *Proceeds of Crime Act 2002* in respect of the offence, including certain types of restraining orders, forfeiture orders and pecuniary penalty orders.

108. New section 70.5B provides that the Minister must publish guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials. This is intended to assist companies in implementing appropriate measures to prevent bribery.

109. The guidance will be designed to be of general application to corporations of all sizes and in all sectors. It will be principles-based rather than prescriptive.

110. A body corporate with limited exposure to foreign bribery risk would not be expected to take mitigation measures as extensive as another corporation that has a significantly greater risk profile.

111. This guidance would not be legislative in character, and as such, would not take the form of a legislative instrument.

112. Departure from the guidance's suggested procedures would not of itself give rise to a suggestion that a corporation does not have adequate procedures in place. However, businesses would need to implement robust and effective steps to prevent foreign bribery in their circumstances. Companies with effective and well-integrated compliance regimes that a court considers adequate would obtain the benefit of the defence set out at subsection 70.5A(5).

### **Item 9 — Before section 70.6 of the Criminal Code**

113. Item 9 inserts a new Subdivision D — Miscellaneous.

114. New section 70.5C includes the details for determining 'annual turnover' for the purpose of the maximum penalty for the new foreign bribery offence and the offence of failing to prevent bribery of a foreign public official. Section 70.5C remains unchanged from existing subsections 70.2(6) and (7), but is now included in a new section to reflect the introduction of these new offences.

115. New section 70.5D provides that the question of whether two bodies corporate are related to each other is to be determined for the purposes of Division 70 in the same way as for the purposes of the Corporations Act.

### **Item 10 — Application of amendments**

116. Item 10 provides that the amendments in Part 1 would apply in relation to conduct engaged in on or after the commencement of this item. The amendments would commence six months after the amending legislation receives Royal Assent to allow sufficient time for businesses to make any adjustments for the new provisions.

## ***Income Tax Assessment Act 1997***

### **Items 11, 12, 13, 14 – Subsections 26-52(2), 26-52 (2A), 26-52 (6) and (7)**

117. Items 11, 12, 13 and 14 amend the *Income Tax Assessment Act 1997* (the ITAA). The intention of these amendments is to prohibit a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to a foreign public official. This is a continuation of the current approach of section 26-52 of the ITAA. The amendments revise the relevant provisions of the ITAA so that the concept of bribery of a foreign public official in that Act is consistent with the concept that is contained in new section 70.2 of the Criminal Code, as described under item 6 above.

118. Item 11 repeals the existing definition of a ‘bribe to a foreign public official’ in subsection 26-52(2) and substitutes it with a new definition consistent with the concept of bribery of a foreign public official as set out in new subsection 70.2(2) of the Criminal Code. In particular, item 12 provides that an amount is a bribe to a foreign public official to the extent that a person incurs the amount in, or in connection with:

- providing, offering, or promising a benefit to another person, or causing the benefit to be provided, offered or promised to another person (new paragraph 26.52(2)(a)), and
- does so with the intention of improperly influencing a foreign public official in order to obtain or retain business or a business or personal advantage (new paragraph 26.52(2)(b)).

119. Item 11 provides that the benefit may be any advantage and is not limited to property. This is the same definition of benefit used in existing subsection 26-52(2).

120. Existing subsection 26-52(2A) provides that, for the purposes of subsection 26-52(2), when assessing whether an amount is a bribe a decision maker should disregard whether business, or a business advantage, was actually obtained or retained. Item 12 replaces the phrase ‘a business advantage’, with the phrase ‘a business or personal advantage’, picking up the language of new paragraph 26-52(2)(b).

121. Item 13 repeals existing subsections 26-52(6) and (7), and substitutes factors to be disregarded in determining whether influence is improper for the purposes of paragraph 26-52(2)(b). These factors are the same as in new subsection 70.2A(2) of the *Crimes Act 1914*:

- the fact that the benefit, or the offer or promise to provide the benefit, may be, or be perceived to be, customary, necessary or required in the situation
- any official tolerance of the benefit, and
- if particular business or a particular business or personal advantage is relevant to determining whether influence is improper:
  - the fact that the value of the business or advantage is insignificant
  - any official tolerance of the advantage

- the fact that the advantage may be customary, or perceived to be customary, in the situation.

#### **Item 14 – Application of amendments**

122. Item 14 provides that the above amendments to the ITAA would apply to a loss or outgoing incurred on or after the commencement of Part 1 of this Schedule, meaning the amendments commence at the same time the new foreign bribery offence in section 70.2 of the Criminal Code and the other main amendments commence. Although items 11 to 14 commence on the first 1 January, 1 April, 1 July or 1 October to occur after the end of the period of 6 months beginning on the day the Act receives the Royal Assent (which is the standard commencement for amendments to tax legislation), they would apply to a loss or outgoing incurred on or after commencement of Part 1.