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OUR REF:

Submission on the proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*

Nyman Gibson Miralis submission

This submission is in response to the Attorney-General's Department public consultation paper outlining proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*.

1. Our Involvement

1.1 In preparing this submission Nyman Gibson Miralis draws on its experience:

- (a) Advising on foreign bribery matters that involve multiple jurisdictional investigations;
- (b) Providing legal advice to individuals who are being investigated by multiple agencies in multiple jurisdictions, including but not limited to China, Singapore, South Korea, the United Kingdom and the United States, where there has been a connection to Australia.

2. The impact of investigations into alleged bribery offences

2.1 In our experience, there are a range of adverse consequences that can result from being investigated for alleged bribery offences, regardless of the outcome of the investigation. We raise this concern in response to the proposed amendments to the foreign bribery offences because, in our view, some of the proposed amendments have the effect of reducing the standard of proof required to commence an investigation.

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2.2 Investigations into alleged bribery offences are lengthy and complex and there is no guarantee that an investigation will result in a person being charged for bribery offences. In circumstances where the alleged conduct has a transnational component, such as foreign bribery offences or transnational business deals, those being investigated are likely to be the target of multiple investigations in multiple jurisdictions. The negative impacts of being the target of an investigation are compounded when a person is being investigated in more than one jurisdiction.

2.3 In our view, those being investigated in a foreign jurisdiction are likely to be at a disadvantage because they are unfamiliar with the legal framework.

3. Reputational damage

3.1 A key concern for people who are being investigated for alleged bribery offences is the potential reputational damage. In our experience, the extent of the reputational damage that a person suffers as a result of being investigated can be catastrophic to their future employability and career longevity. Frequently, those being investigated are people who occupy senior or highly influential positions in their relevant industry. The impact of being investigated for a bribery-related offence can lead to job loss. The effects can also be long-lasting where a person's reputation in an industry or profession that they have built a career in has been ruined. This places significant emotional and financial stress on those being investigated which should not be overlooked.

3.2 The impact of lowering the standard of proof required to commence investigations into alleged bribery related offences should be considered in light of the extent of the risk of reputational damage.

4. Financial impact

4.1 In our experience, those being investigated are vulnerable to having their interests restrained pursuant to a court order. This causes obvious financial stress on those being investigated.

4.2 Factors that exacerbate the financial pressure placed on those being investigated include the likelihood of job loss, the increased risk of having related civil proceedings commenced against them and, where a person is being investigated in more than one jurisdiction, the corollary legal costs.

5. Exposure to civil proceedings

5.1 In our experience, people who are investigated for bribery-related offences are also the subject of related civil proceedings. This often occurs when the alleged offending conduct involves a commercial component such as a business deal.

5.2 This raises important issues about the different standards of proof and disclosure obligations that apply in civil and criminal jurisdictions. Whether a particular defence is available to a person may be influenced by evidence that they have provided in related legal proceedings. Consideration should be given to the legal issues that arise when a person is investigated for alleged bribery-related offences.

6. Contravention of legal rights

6.1 A major concern for people who are the target of multi-jurisdictional investigations is identifying the scope of the legal rights afforded to them under different jurisdictions and the mechanisms for defending their rights.

6.2 For example, we acted for a client who was issued a subpoena to give evidence in related proceedings against a co-accused in a foreign jurisdiction. A request for mutual legal assistance was made to the Australian courts to compel our client to give oral evidence on issues that were central to his own legal proceedings. This raised a number of legal issues for our client.

6.3 The paramount concern was our client's right against self-incrimination and the mechanisms available to him to assert this right. It was necessary to also consider the legal processes in both of the jurisdictions involved, whether our client could appear in a foreign court to oppose an order as a foreign non-party and which jurisdiction offered the most protection to our client. Consideration of these issues was complex and required a substantial amount of time and resources.

6.4 In our experience, those being investigated are also exposed to significant legal risks in regards to the sharing of information between investigative bodies in different countries. Each investigative body is regulated by its own governance model. There is an increased likelihood that information will be shared in a manner that contravenes the legal rights of the person under investigation.

7. The importance of culture, values and official tolerance

7.1 We do not support the legislative requirement to disregard the following issues when determining alleged bribery offences, namely:

- The fact that the benefit or advantage may be, or be perceived to be, customary, necessary or required in the situation
- The fact that the value of the business or advantage is insignificant, and
- Any official tolerance of the benefit or advantage.

7.2 In our view, culture, values and official tolerance are important factors that influence business practices across industries and jurisdictions. In that regard, when making a determination as to whether the alleged conduct amounts to a bribery offence, both cultural and industry specific norms should not be disregarded. Furthermore, from a compliance perspective, culturally-appropriate legal structures will carry greater legitimacy.

7.3 In our experience, investigations into alleged bribery offences frequently involve close business relationships that have developed over several years. We have found that in this context, the line between legitimate business practices and behaviour that the law deems to be “improper” is blurred. We do not support legislative provisions that do not recognise the business practices that are customary or commonplace depending on the industry or country.

Please contact Phillip Gibson or Dennis Miralis to discuss any of the issues outlined in this submission.



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