



9 October 2015

Mr Anthony Coles
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Criminal Law and Law Enforcement
Criminal Justice Division
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By email: Anthony.Coles@ag.gov.au

Dear Anthony,

Request for comment: draft offence of false accounting

Thank you for the invitation to provide additional comment on the specific Terms of Reference concerning false accounting. Reiterating the observation made in our submission to the Senate Economics References Committee on 24 August 2015, there may be some value in drawing from legislative approaches adopted in the Corporations Act 2001, particularly those dealing with Falsification of Books – section 1307. It is in this context, and with reference to the specifics of the *Anti-Bribery and Books & Records Provisions* of the US Foreign Corrupt Practices Act (FCPA), that we have considered the Exposure Draft (ED) and make our further brief comments.

- The thrust of FCPA section 78 is set very much in the context of engendering a management aptitude and discipline towards the highest standards of recordkeeping and internal controls. Significantly, s 78m(b)(2)(ii) makes direct reference to generally accepted accounting principles and aligns the requirements closely with norms of accounting measurement and disclosure – both internal and external to the company. In contrast, we observe that the ED is drafted in too narrow a context and is expressed in highly prescriptive terms, where a principles-based approach would be far more appropriate, according better with the often firm and context specific nature of internal controls and other accounting type activities.
- A further significant difference between the FCPA provisions and the ED proposal is that a violation under the former can attract either civil or criminal liability based on the level of culpability. CPA Australia believes this level of flexibility as highly desirable contending for the types of errant behaviour ranging from the negligent through to the reckless or deliberately dishonest. In making this statement we acknowledge the constraints within a penalty regime under the umbrella of the Criminal Code.
- Similarly, we regard the draft penalties under clauses (5) and (6) of the ED as potentially excessive and we do not think that they should be so closely aligned with the primary wrongdoing under existing section 70.2 of the Criminal Code. As remarked above, misconduct in relation to books, records and other accounting documents can span a range of materials and level of intended obscuration. By way of comparison, penalties in relation to breach of Corporations Act s 1307 attract only 100 penalty units or imprisonment for 2 years, or both (refer Schedule 3 of the Corporations Act).

- Further, in relation to comparison with s 1307, the ED's proposed dictionary definition of **accounting document** is too narrow. In this respect the Corporations Act s 9 Dictionary definition of **Books** would be more appropriate.

Finally, we would like to draw your attention to a possibly useful resource examining US practice published in January 2012 by the ABA Criminal Justice Section Global Anti-Corruption Task Force titled *Complying with the Foreign Corrupt Practices Act: A Practical Primer* (authors Dean Zarfes, Michael Bloom and Sean Kramer from the University of Chicago Law School).

Thank you for the opportunity to provide comment. If you have any questions regarding this submission, please contact the undersigned on 03 9606 9826 or via email at john.purcell@cpaaustralia.com.au.

A handwritten signature in blue ink, appearing to read 'J. Purcell'.

Dr John A Purcell FCPA

Policy Adviser ESG
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