HERBERT SMITH FREEHILLS

DOING BUSINESS IN AUSTRALIA

FREE TRADE AGREEMENTS, ANTI-CORRUPTION, SANCTIONS, EXPORT CONTROLS, WHISTLEBLOWING LAWS, FOREIGN INFLUENCE AND MODERN SLAVERY

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Chapter 24

Free Trade Agreements, Anti-Corruption, Sanctions, Export Controls, Whistleblowing Laws, Foreign Influence and Modern Slavery

There are a range of internationally focused regulations that companies and individuals should take into account when doing business in, or trading with, Australia. This chapter looks at some of those key international considerations, including:

- the impact of anti-corruption and bribery laws (including false accounting offences);
- the effects of the free trade agreements that Australia has entered with other countries or groups of countries;
- the restrictions on dealings flowing from import/export controls and sanctions regimes; and
- the effect of laws aimed at providing transparency of foreign influence in Australia.

Anti-corruption

There are four primary categories of anti-corruption laws which companies and individuals should be aware of when conducting business in Australia:

- prohibitions on bribing Australian officials;
- prohibitions on Australian companies, or persons in Australia, bribing foreign public officials;
- prohibitions on false dealings with accounting documents; and
- prohibitions on 'private' bribery.

Prohibition on bribing Australian officials

Australia’s Criminal Code prohibits a person or company from dishonestly providing, offering or promising a benefit to another person (or causing this to occur), with the intention of influencing a federal public official in the exercise of the official’s duties as a public official.

Key points to note in respect of these provisions are:

- the definition of bribe or corrupting benefit is broad – it extends to any benefit or advantage, including hospitality, gifts, travel and preferential treatment;
- an 'offer' or 'promise' to provide a benefit is sufficient – no benefit needs to actually be provided; nor does the bribe need to actually influence the public official – an intention to influence is sufficient;
- the bribe or corrupting benefit can be offered, promised or provided through an intermediary, rather than directly;
- there is no 'facilitation payment' defence; and
- relevant public officials include parliamentarians, judicial officers, members of the public service, members of the defence force, members of the Federal Police, officers of federal authorities, and officers and employees of contracted service providers for federal contracts.

The consequences for breaching these provisions are severe, including:

- significant penalties:
    - for companies: up to the greatest of a A$21 million fine, three times the value of the benefit directly or indirectly obtained, or (if the court cannot determine the value of the benefit) 10% of the annual turnover of the company during the 12 months prior to the offence; and
    - for individuals: up to 10 years imprisonment and/or a A$2.1 million fine;
- potentially, an action under Proceeds of Crime legislation, for example to pay a penalty equivalent to the value of the benefits derived from the commission of the offence; and
- reputational damage, as well as the cost and strain of being subject to a criminal

investigation and prosecution.

Companies can be found liable for bribery where, for example, a senior manager of the company engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence – although there is a due diligence defence in this scenario. A company can also be found liable where it failed to create and maintain a corporate culture that required compliance with the relevant provisions.

Similarly, legislation in Australian states and territories prohibits conduct which seeks to influence a state or territory official to misuse their position.

Prohibition on bribing Foreign officials

Australia's Criminal Code also prohibits a person or company from providing or offering a benefit that is not legitimately due to the receiving person with the intention of influencing a foreign public official in order to obtain or retain a business or a business advantage that is not legitimately due.

The offence applies to conduct that occurs wholly or partly in Australia (which may include calling or sending correspondence to or from Australia), and to conduct that occurred wholly outside Australia if it was committed by an Australian citizen or resident, or an Australian company.

The same key points noted above for the Australian public official offence also apply to the foreign bribery offence, except that:

- there is a 'facilitation payment' defence; and
- the definition of foreign public official includes employees, contractors or officials of a foreign government department or agency, members of a foreign military or police force, or members of the executive, judiciary or legislative.

The Australian Government is currently considering significant reforms to the foreign bribery offence. Key changes under consideration include creating a new offence of recklessly bribing a foreign public official and creating a new corporate offence for failing to prevent foreign bribery. Should these changes be implemented, they will likely increase the compliance risks for companies operating in Australia.

Penalties for the foreign bribery offence mirror the Australian public official offence, including

the potential for actions under Proceeds of Crime legislation (as set out above).

False accounting offences

The Australian Criminal Code also includes offences that criminalise intentional or reckless false dealings with accounting documents for the purposes of concealing the giving or receiving of benefits that are not legitimately due.

These offences were introduced to primarily target foreign bribery, but the broad drafting means they may be invoked beyond this context. Because of the lower threshold of proof required, it may be easier to establish a false accounting offence than to establish the bribery offences discussed above.

The false accounting offences apply to conduct occurring both within and outside Australia. However, if the conduct occurred wholly outside Australia by a person who is not an Australian citizen or resident, or an Australian company, then the Attorney-General's consent is required to prosecute.

These offences also attract significant penalties. Where an offence was intentional, the penalties mirror the penalties for the Australian public official offence and foreign bribery offence. Where an offence was reckless, the penalties are half the maximum penalties for the intentional offence.

Prohibitions on private bribery

Each Australian state and territory has offences which, broadly speaking, prohibit:

- agents from corruptly accepting or soliciting a benefit as an inducement or reward for an act or omission in relation to the principal’s business; and
- persons from corruptly giving or offering a benefit to an agent with the intention of influencing the principal’s business.

The penalties for bribery and corruption offences under state and territory legislation vary. Some states and territories also have false accounting type offences that have been relied upon in the context of private bribery charges.

Herbert Smith Freehills' anti-corruption

practice

Herbert Smith Freehills has significant expertise advising clients on anti-corruption and bribery issues, including providing practical advice on how to mitigate such risks. We work with our clients in conducting internal investigations, and are representing clients in investigations and enforcement proceedings by both Australian and international regulators. We also understand the potential reputational and related risks. We work with our clients on managing public relations, shareholder communications, insurance issues, employment issues and the prospect of civil claims.

Free trade agreements

Free trade agreements (**FTAs**) are international treaties entered into between countries that seek to promote economic integration and facilitate greater trade and investment by reducing barriers to trade. FTAs can be entered into between two countries or between groups of countries covering multiple regions.

In recent years, Australia has strongly pursued FTAs. The Australian Government's stated policy aim is to maximise the economic benefits flowing to Australia from FTAs. According to the government, those benefits include:

- freer trade flows and stronger ties with Australia's trading partners;
- increased Australian productivity and higher GDP growth by allowing domestic businesses access to cheaper inputs, introducing new technologies, and fostering competition and innovation; and
- enhanced competitiveness of Australian exports in the partner market, and attractiveness of Australia as an investment destination.

Australia is party to 11 FTAs with either individual countries or groups of countries. Those are with New Zealand, Singapore, the Association of South East Asian Nations (**ASEAN**), the United States, Thailand, Chile, Malaysia, Korea, Japan and China, and most recently the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) between 11 Pacific nations.

The CPTPP came into force on 30 December 2018 and is a separate agreement that incorporates by reference the provisions of the Trans-Pacific Partnership (signed but not yet in force), notwithstanding a limited set of suspended provisions. The CPTPP was brokered after President Trump withdrew the United States from the TPP in early 2017 and the suspended provisions largely represent those provisions that the United States favoured but that other

Parties opposed. Significantly, the CPTPP maintains the original market access package of the TPP.

A number of FTAs are also under negotiation, including the Australia-Gulf Cooperation Council (**GCC**) FTA, Australia- India Comprehensive Economic Cooperation Agreement, Environmental Goods Negotiations, Pacific Alliance Free Trade Agreement, Regional Comprehensive Economic Partnership, Trade in Services Agreement and the Australia-European Union Free Trade Agreement.

Additionally, there are several FTAs that were recently signed in 2018 by Australia but are not yet in force, including the Indonesia-Australia Comprehensive Economic Partnership Agreement, the Peru-Australia Free Trade Agreement, the Australia-Hong Kong Free Trade Agreement and the Pacific Agreement on Closer Economic Relations (**PACER**) Plus which is between Australia, New Zealand and 8 Pacific Island nations.

As a member of the World Trade Organisation (**WTO**), Australia upholds legal trade disciplines in its FTAs to ensure they are supportive of the international trading system. Under WTO rules, FTAs must eliminate tariffs and other restrictions on 'substantially all the trade' in goods between its member countries and eliminate substantially all discrimination against service suppliers from member countries (helping to increase trade in services).

One area which has been the subject of much attention and controversy recently is the inclusion in FTAs of investor state dispute resolution mechanisms. Such mechanisms permit foreign investors to bring direct claims against governments where treaty protections are breached e.g. where investments are expropriated. The purpose of including such mechanisms is to increase investor confidence and consequently investment in the host country. However, critics claim that such protections place foreign investors in a more favourable position compared to domestic investors and can hamper legitimate government regulation.

Export regulation

General

There are fairly minimal limitations on exports from Australia. Most exported goods and services are not subject to Goods and Services Tax (**GST**) so long as they are exported within a prescribed time of an invoice being issued or payment being received.

Defence export controls

The Australian Government maintains export control policies for defence and strategic goods and technologies (including military items and ‘dual-use’ items that can be adapted for military

programs or weapons systems) to ensure they are exported in accordance with Australia's national interests and international obligations (including sanctions regimes). Export controls are implemented under a framework of relevant legislation, including the *Defence Trade Controls Act 2012* (Cth) and the *Customs Act 1901* (Cth).

Australia's export control systems are continually evolving to account for changes in Australia's strategic circumstances. Accordingly, foreign persons and entities doing business in Australia should regularly review Australia's defence export policies and procedures, and seek independent legal advice before commencing commercial activities that may involve the export of defence and strategic goods and technologies.

Import regulation

General

Importation is regulated by a number of statutes in Australia, including the *Customs Act 1901* (Cth). There is no general requirement for importers to hold an import licence to import goods into Australia. However, depending on the nature of the goods and regardless of value, importers may be required to obtain permits to clear certain imported goods from customs control.

The importation of certain goods may be prohibited or restricted under the *Customs (Prohibited Imports) Regulations 1956* (Cth). This includes the importation of firearms and weapons. For some of these goods, permits are required prior to importation.

Duties and taxes

In most cases, customs duties and Commonwealth taxes apply to the value of imported goods, including under the *Customs Tariff Act 1995* (Cth). The rate of duty payable depends on the tariff classification of the goods.

However, goods may be imported duty-free via free trade agreements or on the basis of duty concession schemes. One such scheme is the Tariff Concession Scheme (**TCS**) which was established in 1992. Concessions under the TCS apply to imported goods covered by a Tariff Concession Order (**TCO**). Typically, TCOs are only granted where substitutable goods are not made in Australia.

Anti-dumping

Dumping occurs where exporters sell goods to Australia at prices below the ‘normal value’ of goods, which is usually the domestic price of goods in the country of export. Subsidisation is

when imported goods benefit from government assistance in the country of export.

While dumping and subsidisation are not prohibited under Australian law, Australia's anti-dumping and countervailing (anti-subsidy) system, administered by the Anti-Dumping Commission, may result in the imposition of anti-dumping measures (including duties such as ad valorem duty, fixed duty, floor price or a combination of fixed and variable duties) or 'countervailing' duties that offset the amount of the relevant subsidy.

Members of Australian industry can apply to the Anti-Dumping Commission to investigate dumping or subsidy claims which have caused, or threaten to cause, material injury. The Minister decides whether special duties should be imposed based on the recommendation of the Anti-Dumping Commission.

Sanction regimes

Australian sanctions laws implement both United Nations Security Council (**UNSC**) sanctions and Australia's autonomous sanctions.

Article 41 of the *United Nations Charter* allows the UNSC to impose sanctions against nations which pose a threat to international peace and security. As a United Nations member state, Australia is obliged to implement UNSC sanctions domestically. Sanctions are implemented by promulgating new regulations under the *Charter of the United Nations Act 1945* (Cth). The Department of Foreign Affairs and Trade (**DFAT**) has responsibility for implementing legislation giving effect to sanctions-related decisions of the UNSC, including with respect to the freezing of terrorist assets.

Australia also imposes sanctions on some dealings with certain countries and individuals to support its foreign policy objectives. Autonomous sanctions are implemented under the *Autonomous Sanctions Act 2011* (Cth) and the *Australian Autonomous Sanctions Regulations 2011* and other related regulations. DFAT also administers these sanctions. Australian autonomous sanctions regimes may supplement UNSC sanctions regimes, or be separate from them. Sanctions measures vary for each sanctions regime and may include general prohibitions on:

- making a 'sanctioned supply' of 'export sanctioned goods';
- making a 'sanctioned import' of 'import sanctioned goods';
- providing a 'sanctioned service';
- engaging in a 'sanctioned commercial activity';

- dealing with a ‘designated person or entity’;
- using or dealing with a ‘controlled asset’; or
- the entry into or transit through Australia of a ‘designated person’ or a ‘declared person’.

Sanctions regimes imposed by foreign jurisdictions, such as the European Union and the United States (**US**), may also impact the dealings of foreign persons and entities doing business in Australia. Such regimes may be enlivened when nationals of those jurisdictions, or entities wholly owned by nationals of those jurisdictions, are involved in dealings in Australia.

Both International and Australian sanction regimes are regularly subject to change and need to be consulted for variances. Recently, in May 2018, the US withdrew from the Joint Comprehensive Plan of Action (**JCPOA**); an agreement endorsed by UNSC Resolution 2231 which promised Iran phased sanctions relief in exchange for nuclear reform. The US has since taken steps to re-impose US sanctions lifted or waived in accordance with the JCPOA. Whereas, DFAT has indicated that there is no intended change to Australia’s UNSC and autonomous sanctions regime. Australian businesses should seek legal advice as to the effect of these sanctions regimes on their business activities.

Information about the implementation of autonomous and UNSC sanctions in Australia, as well as additions to the register of ‘designated persons or entities’, is available on DFAT’s website.

Foreign persons and entities doing business in Australia should familiarise themselves with the operation of Australia’s sanctions regimes and seek independent legal advice before commencing commercial activities which may be affected by sanctions regimes.

Whistleblowing Laws

Australia has recently updated its laws relating to private whistleblowing. The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (**Whistleblower Bill**) will:

- consolidate the existing laws on private whistleblowing into the *Corporations Act 2001* (Cth);
- enhance the existing protections for whistleblowers; and
- introduce a requirement for public and large proprietary companies to have a whistleblower policy.

The new laws will commence on 1 July 2019. The existing laws will continue to apply until that date.

Both the existing and new laws contain protections for whistleblowers prohibiting victimising or disclosing confidential information about whistleblowers. There are significant penalties under the new laws for failing to comply with these protections. Both will be civil penalty provisions under the *Corporations Act 2001* (Cth), and could therefore lead to civil penalties. Both will also be criminal offences, potentially resulting in fines or imprisonment. Whistleblowers will also able to seek compensation where they have been victimised.

From 1 July 2019, these protections will apply to 'protected disclosures' being whistleblower reports:

- which are made by an eligible whistleblower (including officers, employees, suppliers, and associates of the company, or a relative or dependent of any of those people);
- which are made to an eligible recipient (including ASIC, APRA or, in relation to a company, officers, senior managers, auditors, actuaries of the company, or a person authorised by the company to receive disclosures); and
- where the report relates to specified offences or the whistleblower has reasonable grounds to suspect that the information concerns misconduct or an improper state of affairs or circumstances in relation to the company (excepting certain personal work-related grievances).

Companies need to have processes and procedures in place to ensure that protected disclosures are identified, escalated, assessed, investigated, actioned and reported on consistently with the confidentiality and non-victimisation protections.

From 1 January 2020, public and large proprietary companies will also be required to have a whistleblower policy that sets out certain matters, such as to whom protected disclosures may be made. It will be a criminal offence to fail to comply with this requirement. Similarly, the 4th edition of the *Corporate Governance Principles and Recommendations* recommends that listed companies have a whistleblower policy and suggests it covers certain (different) subject matters. This edition will take effect for a listed entity's first full financial year commencing on or after 1 January 2020.

Foreign Influence Transparency Scheme

Australia has recently implemented a suite of measures aimed at countering the threat of

espionage, foreign interference and covert influence in Australia. One of those measures is the *Foreign Influence Transparency Scheme Act 2018* (Cth) (**Scheme**), which commenced on 10 December 2018.

The Scheme is aimed at increasing visibility of the extent of foreign influence over Australia's political and government processes. The Scheme imposes registration and other obligations on persons who undertake or agree to undertake certain, mostly political, activities on behalf of foreign principals.

The activities covered by the scheme include parliamentary and general political lobbying in Australia, communications and disbursement activities, and activities by former Australian Cabinet Ministers and certain other high-level officials. Whether an activity is registrable will depend on what type of foreign principal is involved, what activity is undertaken and, in some cases, whether the purpose of that activity is political or government influence.

There are a number of exemptions available, including for diplomatic activities, industry representative bodies, registered charities and trade unions. Limited exemptions apply for commercial or business pursuits.

Notably:

- the definition of foreign principal is broad, covering not only foreign governments and foreign political organisations, but also entities related to foreign governments or foreign political organisations in certain prescribed ways;
- if required to register, a person must provide certain information to the Australian Government, which may be published on a public, transparency register; and
- registrants are subject to a number of ongoing reporting, disclosure and record keeping requirements. There are also heightened reporting requirements during Australian voting periods.

The Scheme creates criminal offences for failing to register under the Scheme, failing to fulfil obligations under the Scheme, providing false or misleading information to the Department and destroying records with the intent of avoiding or defeating the object of the Scheme.

Before undertaking any of the activities covered by the Scheme, businesses, especially those with any element of foreign-government ownership, should familiarise themselves with the Scheme and seek independent legal advice as to its application and requirements.

Modern slavery

Australian entities and entities carrying on business in Australia with a consolidated revenue of $100 million or more will now be required to report on the actions taken by the reporting entity to address modern slavery risks within their operations and supply chains. The purpose of the regime is to reduce the likelihood of modern slavery practices taking place in the provision of goods or services in the Australian market.

'Modern slavery' means conduct which would constitute:

- certain slavery-related offences under Australia's existing criminal law, including slavery, servitude, forced labour and forced marriage; or
- child labour or trafficking in persons as defined by particular international conventions.

Under the *Modern Slavery Act 2018* (Cth) reporting entities will have to publish a modern slavery statement annually. The first statement must be published within 6 months of the completion of the entity's 2019/2020 financial year.

The modern slavery statement must describe:

- the structure, operations and supply chains of the reporting entity;
- the risks of modern slavery practices in the operations and supply chains of the reporting entity;
- the actions taken by the reporting entity, to assess and address those risks, including due diligence and remediation processes; and
- how the reporting entity assesses the effectiveness of such actions.

At the time of publishing, there is no penalty for failing to make a modern slavery statement. However, a reporting entity can be asked by the Minister to explain why it did not comply with its reporting requirements and/or be required to take remedial steps. If the reporting entity does not provide an explanation or it fails to take remedial steps, the Minister may publish the identity of the entity and details concerning the entity's failure to comply with its reporting obligations.

NSW has also introduced modern slavery legislation, with reporting obligations. It is intended

that companies reporting under the Commonwealth regime would satisfy the requirements of the NSW law (although the interaction between the laws is still to be formalised). Entities should consider whether they have obligations under either the Commonwealth and/or NSW law.

Last updated: 01/03/2019

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