HERBERT SMITH FREEHILLS

Corporate crime & investigations in focus briefing

Getting ready for the Combatting Corporate Crime Bill

What does it mean for you?

November 2020

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Introduction

The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill* (the **Combatting Corporate Crime Bill**) will be the most significant shake up of Australia's anti-corruption landscape for companies since the foreign bribery offence was introduced in 1999. It introduces a new 'failure to prevent' foreign bribery offence, lays the groundwork for Australian regulatory guidance on anti-corruption compliance programs, and opens the way for a new enforcement model for corporate crime through a deferred prosecution agreement (**DPA**) scheme.

With the ALRC's Report on Corporate Criminal Responsibility broadly endorsing key elements of the Combatting Corporate Crime Bill, we expect it to continue moving through Parliament in future sittings.

In this briefing our team canvasses five questions to ask to help ensure you and your organisation are ready for these anticipated changes.

Five questions to help you prepare

1. Are your Board and executives aware of the proposed changes and what they mean?
2. Have you done or refreshed your bribery and corruption risk assessment?
3. Could you explain your compliance program to a regulator?
4. Have you connected your whistleblowing processes with your compliance program?
5. If a bribery allegation was made, how would you respond?

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About the Bill

The Combatting Corporate Crime Bill was first introduced into the Senate in 2017.[1] The bill lapsed upon the dissolution of Parliament at the last federal election, but was re-introduced in broadly similar form in December 2019. While progress on the bill has slowed following the COVID-19 pandemic, the proposal to introduce an offence of failing to prevent bribery continues to enjoy bipartisan support. The recent ALRC Report on Corporate Criminal Responsibility also endorsed the introduction of the offence and DPAs, with some suggested extensions.[2]

The Combatting Corporate Crime Bill is intended to address longstanding difficulties in prosecuting corruption occurring offshore by companies and individuals. The failing to prevent offence will specifically target foreign bribery by agents or third parties associated with the company. The introduction of the offence will require Boards and executives to revisit their anti-bribery risk assessments and ensure that their compliance framework is fit for purpose.

The Combatting Corporate Crime Bill is one of a series of reforms and developments relating to corporate governance and misconduct that have progressed in recent years, including following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

These reforms include:

- reforms to whistleblowing laws;[3]
- the introduction of laws requiring corporates to take steps to tackle modern slavery;[4]
- the introduction of increased criminal sanctions and civil penalties for corporate wrongdoing under the Corporations Act and other legislation;[5]
- the Federal Government's roadmap for implementing the recommendations from the Banking Royal Commission;[6] and
- updates to the Corporate Governance Principles and Recommendations by the ASX's Corporate Governance Council.[7]

These reforms have raised expectations of corporates and Boards in improving corporate governance and organisational culture and ensuring that individuals involved in wrongdoing are held accountable.

1. See our report here
2. See our report here
3. See our report here
4. See our report here
5. See our report here
6. Financial Services Royal Commission Implementation Roadmap; Update on the implementation of the Banking, Superannuation and Financial Services Royal Commission
7. See our report here

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1. Are your Board and executives aware of the proposed changes and what they mean?

The Combatting Corporate Crime Bill envisages the broadening of the offence of bribing a foreign public official, and the introduction of a new failing to prevent bribery offence and DPAs. A summary of the key changes is set out below.

Proposed change	What does it mean?
Broadening the offence of bribing a foreign public official	• Definition of foreign public official to also include a candidate for office. • Removing the requirement to prove that bribery was done with the intention of influencing a foreign public official in "the exercise of the official's duties". • Replacing the concept of "not legitimately due" with "improper influence" along with factors that may be considered for determining improper influence. • Broadening the offence to include bribery for the purposes of obtaining or retaining a personal advantage.
New offence of failing to prevent bribery	A company will be liable in the event that they fail to prevent bribery of a foreign public official by "associates" acting for the company's profit or gain, subject to a defence of adequate procedures.
Broad definition of "associate"	Associates of a company will include: • officers, employees, agents, contractors; • subsidiaries of the company and persons controlled by the company (as defined within the meaning of Division 6 of the Corporations Act 2001); • persons who perform services for or on behalf of the company.
New defence – adequate procedures	• A company will not be liable if the company can establish that they had in place at the time adequate procedures designed to prevent bribery of foreign public officials by associates. Draft guidance has been issued (see below).

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Proposed change	What does it mean?
Substantial penalties	If a company is found to have breached the offence of failing to prevent bribery, the Court may apply a penalty of not more than the greatest of the following: • $22.2 million fine (as at 1 July 2020); or • three times the value of the benefit obtained from the offence; or • where the value of the benefit cannot be determined, 10% of annual turnover at the applicable time.
Deferred Prosecution Agreements (DPA)	An agreement between a company and the Commonwealth Director of Public Prosecution (**CDPP**) which provides that the CDPP will not prosecute the company where the company agrees to comply with specified conditions. DPAs would be available in respect of a range of Commonwealth offences including bribery, money laundering and sanctions violations and market misconduct offences. You can read our briefing on DPAs and the potential implications for class action risk here.

The introduction of a failing to prevent offence would for the first time require all Australian companies to take steps to ensure that they have adequate procedures to prevent foreign bribery by associates. Draft guidance on “adequate procedures” has been issued by the Attorney-General’s Department (the **draft Guidance**). This follows changes to the ASX Corporate Governance Principles and Recommendations which became effective from 1 January 2020. Under the changes, all ASX listed entities must:

- have and disclose an anti-bribery and corruption policy and ensure that the Board or a committee of the Board is informed of any material breaches of the policy; and
- have and disclose a whistleblower policy and ensure that the Board or a committee of the Board is informed of any material incidents reported under the policy.

These recommendations are not mandatory, however, ASX Listing Rule 4.10.3 requires a corporation that elects not to follow these guidelines to explain why they did not follow these recommendations in its annual report or corporate governance statement.

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Lessons from the United Kingdom

The UK introduced a "failing to prevent bribery" offence from 1 July 2011 pursuant to Section 7 of the Bribery Act. While similar in nature to Australia's proposed offence, the UK offence also extends to private sector bribery. The Ministry of Justice published guidance on the procedures which commercial organisations can put in place to prevent bribery prior to the introduction of the legislation. This remains the main source of guidance for companies on how to comply with the legislation. Some insights can also be drawn from enforcement cases, such as the Statements of Facts supporting past DPAs, and the prosecution case in *R v Skansen*.

In January 2020, the Serious Fraud Office (SFO) published guidance on 'Evaluating a Corporate Compliance Programme' which makes clear that the state of a company's compliance programme is relevant not only to the question of whether it has a defence to the UK failure to prevent bribery offence, but also to whether a prosecutor should, in the public interest, prosecute or offer a DPA, and to sentencing in the event of a successful prosecution.[8]

While the SFO has emphasised the importance of an effective compliance programme, it has traditionally provided little by way of granular guidance as to what that programme should entail – on the basis that it is a prosecutor, not a regulator. Instead, it points businesses to the Ministry of Justice's statutory guidance on adequate procedures.

In October 2020, however, the SFO published new DPA guidance which includes some commentary on compliance. This notes that the SFO will carefully scrutinise a company's compliance programme at an early stage of the investigation "to assess its effectiveness" – ie with an apparent focus on substance rather than form – and that:

a) a compliance programme must be proportionate and risk-based;

b) it should be regularly reviewed and tested;

c) the company should be able to evidence (a) the above, (b) that the programme is adopted at board level, and (c) that it is sufficiently well-resourced.

8. You can view our report on the SFO's guidance on Evaluating a Corporate Compliance Programme here.

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2. Have you done or refreshed your bribery and corruption risk assessment?

Australian companies should be revisiting their bribery and corruption risk assessments to get ready for when the Combatting Corporate Crime Bill passes. Those companies which do not currently have an anti-bribery compliance programme in place will need to implement one in order to benefit from the adequate procedures defence.

A core element of the Attorney-General Department's draft Guidance is ensuring procedures address the bribery and corruption risks facing a business. Anti-bribery and corruption risk assessments should be carried out on a regular basis. This involves reviewing the specific risks faced by the business and its applicable policies and procedures to ensure they are fit for purpose.

There are a number of events which may trigger a need to refresh your policy and procedures:

Entering a new jurisdiction

Establishing a business in a new jurisdiction creates new opportunities and risks. Certain jurisdictions involve higher risk of corruption.[9]

Operating a new business line

Some business lines are more at risk for corruption owing to the nature of commercial relationships. For example, business which relies on contracts from government or state-owned enterprises involves higher risk for bribery of foreign public officials. When you enter a new business line, you should also consider the risks associated with modern slavery and potential implications for your modern slavery statement if you are a reporting entity.

New merger and acquisition

If undertaking an acquisition or merger, you should undertake risk-based due diligence to assess the target's anti-bribery and corruption compliance systems and the risks faced by the business. Failure to do so may expose the company to significant penalties and reputational damage in the event that wrongdoing is later uncovered.

New joint ventures

Joint ventures often involve a combination of the risks associated with entering a new jurisdiction, business line or an acquisition. Under the Combatting Corporate Crime Bill, joint venture entities can be treated as associates exposing companies to wrongdoing by the joint venture and, potentially, joint venture partners.

Dealing with new contractors or agents

All persons who perform services on behalf of a company will be treated as associates under the Combatting Corporate Crime Bill. The use of agents, particularly in the context of entering a new jurisdiction or business line, can pose increased risk for bribery and corruption.

9. Transparency International publishes an annual corruption perceptions index

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3. Could you explain your compliance program to a regulator?

An anti-bribery and corruption compliance program must be embedded in a company's culture. The draft Guidance published by the Attorney-General's Department emphasizes the importance of "pro-compliance" conduct by top level management and the board, and establishing a "robust culture of integrity within the corporation".

The draft Guidance indicates that companies of all sizes should put in place effective and proportionate procedures to prevent bribery, while recognising that there is no one size fits all approach. It outlines five main indicators of an effectively implemented compliance programme to prevent foreign bribery.[10] We have set out below some of the key factors which demonstrate those five indicators.

A robust culture of integrity within the corporation	• Regular and thorough assessments of whether anti-bribery and corruption policies and procedures are effective and up to date. • Senior leaders being aware of and actively examining foreign bribery risks and, together with middle management, taking specific actions that demonstrate a commitment to compliance. • Those responsible for anti-bribery policies and procedures being held accountable for misconduct that occurs under their supervision and being held accountable for supervisory oversight.
Demonstrated pro-compliance conduct by top level management and the Board of directors	• Holding meetings with and receiving detailed briefings from the compliance function. • Receiving reports of internal audit findings regarding foreign bribery risks and occurrences and engaging with those findings. • Ensuring the compliance team is adequately resourced to perform its functions to prevent foreign bribery.

10. Consultation Draft: Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials (November 2019), pg 15.

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A strong anti-bribery compliance function	• Operates autonomously and plays a role in strategic and operational decisions. • Reports directly and regulatory to senior management, and where applicable, the board of directors and subject to regular performance reviews. • Involved in training other employees.
Effective risk assessment and due diligence procedures	• Endorsed and overseen by senior management. • Appropriately resourced proportionate to the scale of the business. • Applied to the process of engaging third parties and in mergers and acquisitions, among other relevant situations.
Careful and proper use of third parties	• Appropriate oversight by top level management. • Subject to clear contractual terms that describe the services to be performed. • Subject to actual oversight of records and underlying documents.

Lessons from the United States

The US authorities, as a matter of course, will look at a corporate compliance program as part of their investigations. The US Department of Justice (DOJ) has published guidance concerning its evaluation of compliance programs, which states that whether a company's compliance program was "effective" under the guidelines at the time of an offense, and was effective at the time of a charging decision or resolution, are substantial considerations for DOJ prosecutors in deciding whether to charge a corporation for misconduct, and may also be relevant to whether employee misconduct will be attributed to the company in question.

The DOJ's published guidance, which was reiterated and revised in June 2020, makes it clear that in evaluating the "effectiveness" of a company's compliance program, US prosecutors are directed to ask three "fundamental questions": (1) Is the corporation's compliance program well designed?; (2) Is the program adequately resourced and empowered to function effectively?; and (3) Does the corporation's compliance program work in practice? As a practical matter, other US regulators (such as the SEC and the CFTC) will look at the same issues concerning corporate compliance programs in making their own charging decisions.

You can view our update on the DOJ's revised guidance issued in June 2020 here.

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4. Have you connected your whistleblowing processes with your compliance program?

An aspect of an effective anti-bribery and corruption framework is that concerns are escalated and dealt with. New Australian laws that came into effect in July 2019 created enhanced protections for whistleblowers. In addition, public and large proprietary companies are now required to have a whistleblower policy in place containing certain prescribed information (for further discussions on these reforms please see our summary here).

The draft Guidance published by the Attorney-General's Department identifies protections and secure channels for whistleblower reporting as a fundamental element of bribery prevention policy. In that context, companies should consider the following questions which are addressed by the draft Guidance.

Does your anti-bribery and corruption policy refer to your whistleblower policy?

An effective reporting mechanism will be visible, secure, confidential, accessible and provide adequate protections.

Do you have a robust framework for investigating whistleblower reports?

Any mechanism for reporting concerns regarding bribery and corruption should ensure that allegations are properly analysed, assessed and investigated.

How are your oversight and reporting mechanisms?

Corporations should properly consider the findings of investigation reports and ensure appropriate action is taken, including by amending existing policies, taking disciplinary action and putting in place new systems. The findings of investigation reports may be used to explore root causes, vulnerabilities and accountability lapses.

Are your staff aware of the company's whistleblower policy?

Through communication and training, employees and other associates whose functions expose them to greater bribery risk should be made aware of the consequences of engaging in foreign bribery, how they are expected to respond to bribe solicitation and where to report bribery concerns.

French Anti-Corruption Agency releases updated draft Guidance on anti-corruption prevention

On 16 October 2020, the French Anticorruption Agency published updated draft guidance to assist public and private entities to implement anti-corruption prevention and detection processes. Our report on the updated draft guidance can be found here.

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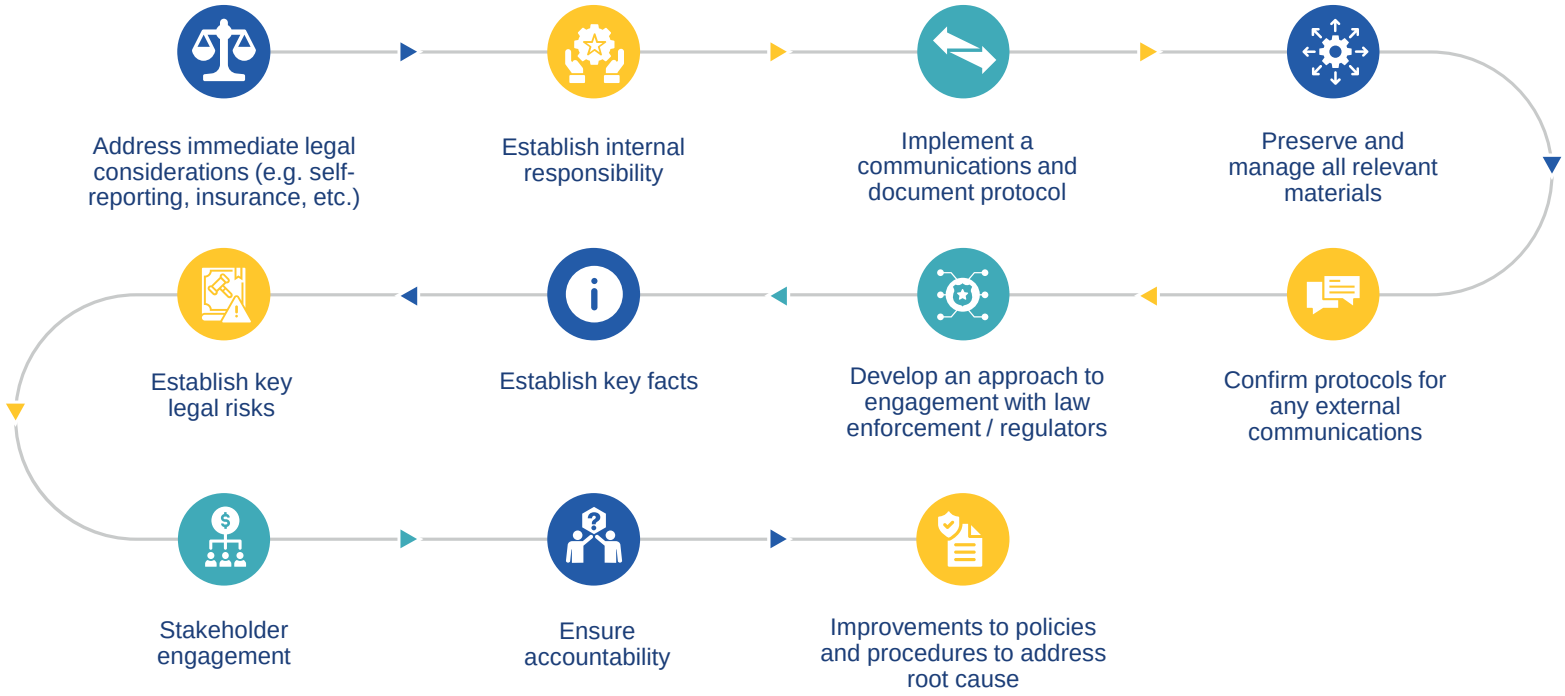
5. If a bribery allegation was made, how would you respond?

An allegation of bribery or corrupt conduct can have serious financial and reputational consequences. The factual issues are often complex and, in some cases, corrupt conduct can engage laws (and regulators) in multiple jurisdictions. The first few days after an allegation is made are often vital to ensure that the conduct is identified and that the trust of regulators and the public is maintained.

A summary of the core elements of a bribery investigation is below. Each element may not flow neatly from one to another, but good investigations will engage with a number of these issues in the early days of an investigation in order to understand what has happened and to prevent further damage to the business.



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The process of each bribery investigation will be fact dependent. If a public allegation of bribery or corrupt conduct has been made, early engagement with stakeholders may be necessary to ensure continued trust and confidence in management. It will also be necessary to consider reporting obligations (particularly where multiple jurisdictions are involved), and to keep this issue under review as the investigation progresses. While corporates often turn to root cause analysis after an investigation is well progressed, in some cases it may be appropriate to take swift action to address compliance risks and prevent further wrongdoing.

Key contacts

Jacqueline Wootton
Partner
Herbert Smith Freehills

+61 7 3258 6569
jacqueline.wootton@hsf.com

Steven Pettigrove
Senior Associate
Herbert Smith Freehills

+61 3 9288 1021
steven.pettigrove@hsf.com

Susannah Cogman
Partner
Herbert Smith Freehills

+44 20 7466 2580
susannah.cogman@hsf.com

John O'Donnell
Partner
Herbert Smith Freehills

+1 917 542 7809
john.odonnell@hsf.com

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