HERBERT SMITH FREEHILLS

NEW AUSTRALIAN MEASURES TO COMBAT CORPORATE CRIME

11 December 2017 | Australia
Legal Briefings – By **Jacqui Wootton, Tania Gray and Christine Wong**

On 6 December 2017, the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* **(the Bill)** was introduced into the Senate.

The key measures contained in the Bill include the creation of a new strict liability offence for failing to prevent foreign bribery and a new deferred prosecution agreement (**DPA**) scheme. The introduction of the Bill follows the consultation process on these reforms that took place earlier this year. It is also timely as the OECD's next report on Australia's progress in implementing the OECD Anti-Bribery Convention is due shortly. The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee, with a report due by 20 April 2018.

The Government also introduced two further bills last week for related reforms concerning whistleblower laws and giving effect to the establishment of a new Home Affairs portfolio. The Home Affairs portfolio brings together a number of key law enforcement agencies responsible for security, law enforcement and criminal intelligence and strengthens the Attorney-General's oversight of these agencies. That includes agencies responsible for corporate crime matters, such as the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Federal Police.

WHAT ARE THE IMPLICATIONS?

These reforms are significant. Combined with the new corporate offence of failing to prevent bribery, DPAs have the potential to shift the dial in Australia's enforcement of foreign bribery laws. The Explanatory Memorandum to the Bill (**EM**) states that the measures seek to address current challenges associated with detecting and addressing serious corporate crime which tends to be opaque and sophisticated and therefore difficult to identify.

DPAs have been transformative overseas, particularly in the US and increasingly the UK, in the way authorities tackle corporate misconduct.

The DPA scheme reflected in the Bill aims to make it easier for authorities to detect corporate misconduct and encourage companies to come forward and report issues they detect internally. These new mechanisms give Australian prosecutors more flexibility in how they can resolve allegations and seek to hold companies to account.

WHAT ARE THE PROPOSED CHANGES TO FOREIGN BRIBERY OFFENCES?

A key difference between the Bill and the changes to the foreign bribery offences outlined in the consultation paper released by the Australian Government on 4 April 2017 is that the Bill no longer includes an offence of recklessly bribing a foreign public official. This is consistent with various submissions during the consultation process which advocated against such a development.

In other major respects, the Bill reflects the position in the consultation paper (which was outlined in our 12 April 2017 update here). That is, the Bill:

1. CREATES A NEW STRICT LIABILITY CORPORATE OFFENCE OF FAILING TO PREVENT FOREIGN BRIBERY.

This is similar to the corporate offence that exists in the UK. It would mean that a company is automatically liable for foreign bribery by 'associates' (ie officers, employees, contractors, agents, subsidiary or controlled companies or persons performing services for or on behalf of the company), unless the company can establish that it had adequate procedures in place to prevent bribery from occurring. A company can be convicted under this provision even if the relevant associate has not been successfully convicted of a foreign bribery offence.

The Minister is required to publish guidance on the steps that a company can take to prevent bribery of foreign public officials. That guidance has not yet been released. During the consultation process earlier this year, many submissions called for the government to consult on the form and scope of guidance that would be issued.

2. LOWERS AND CLARIFIES THE BAR FOR WHAT MUST BE ESTABLISHED IN THE CURRENT OFFENCE.

This includes by:

- introducing the concept of "improperly influencing" a foreign public official to obtain or retain business or an advantage. This replaces the former requirement that the benefit or business advantage be "not legitimately due". The Bill lists non-exhaustive factors that may be considered in determining the existence of "improper influence". That includes how the benefit was provided, whether the value of the benefit is disproportionate to the value of any consideration provided for the benefit, whether the benefit was provided dishonestly and whether there is evidence of due diligence. The Bill

specifies that certain matters are to be disregarded, including official tolerance of the benefit and the fact that the benefit is (or is perceived to be) customary, necessary or required.

- extending the definition of foreign public official to include candidates for office.
- extending the scope of the offence to cover bribery to obtain a personal advantage.
- removing the requirement that the foreign public official be influenced in the exercise of their duties as a foreign public official.
- clarifying the scope of the offence to make clear that the business or advantage can be obtained for another person, not only the person who provided or offered the benefit. Further, the accused does not need to have a specific business or advantage in mind when providing or offering the bribe.

Businesses will have a period to prepare for the new provisions, with these aspects of the legislation due to commence 6 months after the Act receives royal asset.

WHAT ARE THE ELEMENTS OF THE NEW DPA SCHEME?

The Bill also includes the introduction of a new DPA scheme, which was the subject of the Australian Government's consultation paper released on 31 March 2017 (see our earlier update on here).

The scheme in the Bill largely reflects the model in the consultation draft. The Commonwealth Director of Public Prosecutions (**CDPP**) retains a key role, and will determine whether entry into a DPA is appropriate.

A number of key developments in the Bill from the model outlined during the consultation process are that:

- in addition to foreign bribery and money-laundering offences, DPA's will be available for sanctions, domestic bribery and various other specified offences under the Commonwealth *Criminal Code*, as well as a number of now specified offences under the *Corporations Act* (relating for instance to market misconduct, insider trading and falsification of records). DPAs would not be available for other crimes types that were under assessment in the consultation process (such as tax, environmental crime, cartel offences and offences under workplace health and safety legislation).
- the mandatory elements of a DPA do not include the company's formal admission of

criminal liability. It is also now a discretionary (rather than mandatory) term that the company co-operate in any investigation. This may include aiding prosecutors to pursue individuals.

- the appointment of independent monitors to oversee compliance with DPAs is not specifically addressed, although that may be included as a term if considered appropriate by the prosecutor.

- there are no specific requirements in the legislation governing the process to negotiate a DPA (such as how negotiations would be commenced, confidentiality and the records that must be maintained).

WHAT WILL THE DPA INCLUDE?

A DPA must contain the following:

- a statement of facts relating to each offence specified in the DPA. The EM provides that this element seeks to enhance accountability under the scheme by requiring the party to a DPA to admit to agreed facts detailing the misconduct. There does not however seem to be any mandatory requirement to admit liability to the specified offences.

- requirements to be fulfilled by the person under the DPA. Although not specified in the Bill, this might include requirements to allow for oversight of a company by a monitor.

- the amount of the financial penalty payable. The severity of the penalty is to be assessed by the CDPP as appropriate having regard to all the circumstances relating to the DPA including cooperation in negotiations, the severity of the penalty that could be imposed on a conviction and the forfeit of any likely benefit. The EM notes a "measurably" lower penalty may be appropriate where a company demonstrates a high level of cooperation or will be required to expend a significant amount to comply with other terms of the DPA. The Bill also provides that no penalty may be imposed in exceptional circumstances and if in the interests of justice.

- the circumstances constituting a material breach of the DPA.

- that the person consents to the CDPP instituting a prosecution of the person if the CDPP is satisfied of a material breach of the DPA or that misleading information has been knowingly provided in negotiating the DPA.

There are also a non-exhaustive list of non-mandatory terms that a DPA may contain. That may include terms providing for:

- co-operation in any investigation or prosecution relating to a matter specified in the DPA.
- the implementation of a compliance program or policies.
- payment of reasonable costs incurred by a Commonwealth entity relating to DPA negotiations.
- the consequences of a failure by the person to comply with any DPA terms.
- compensation of victims, donation of money to charity or third parties or forfeiture of likely benefits.

The CDPP may also include any other term considered appropriate.

HOW WILL A DPA BE APPROVED?

The approval process for Australian DPAs differs from the process that applies in jurisdictions like the US and UK.

First, the CDPP must provide a written statement that it is satisfied that there are reasonable grounds to believe that an offence specified in the DPA has been committed and that entering into the DPA is in the public interest.

Second, an "approving officer" must then review the DPA and decide whether to approve it. Approving officers are former judicial officers appointed by the Minister for terms of not more than 5 years.

The approving officer must approve the DPA if he or she is satisfied that the terms are in the interests of justice and fair, reasonable and proportionate. Any agreed variations to a DPA must also be approved by the approving officer.

HOW WILL A DPA BE PUBLISHED?

Once the DPA is approved, it must be published on the CDPP's website within 10 business days.

The CDPP may however decide not to publish a DPA or to publish an abridged version if the CDPP considers it appropriate in the interests of justice to do so. Relevant factors may include whether full publication would be a threat to public safety, or prejudice an ongoing investigation or the fair trial of a person.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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