HERBERT SMITH FREEHILLS

NEW FALSE ACCOUNTING OFFENCES COMMENCE OPERATION IN AUSTRALIA

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IN BRIEF

- Australia's new false accounting offences came into force from 1 March 2016.
- The new offences are broadly cast and designed to aid enforcement of anti-bribery and corruption as well as anti-money laundering laws.
- Companies should update their risk management plans, relevant policies and training to ensure compliance.

BACKGROUND

On 1 March 2016 Australia's new false accounting offences commenced operation, through the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016* (Cth) (**Crimes Amendment Act**).

The Crimes Amendment Act amends the *Criminal Code* (Cth)by inserting a new Part 10.9 - Accounting Records. These amendments create two new offences of intentional or reckless false dealing with accounting documents. If found guilty of an offence, both individuals and body corporates face substantial penalties.

The new offences implement Australia's obligation as a party to the Organisation for Economic Cooperation and Development (**OECD**) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the **Convention**). Article 8 of the Convention requires parties to create offences of false accounting for the purposes of concealing or enabling bribes to a foreign public official.[1]

These new Australian offences are similar in scope to the accounting provisions in the United States *Foreign Corrupt Practices Act* (**FCPA**), which are designed to complement their anti-bribery and corruption offences and require that 'issuers' in the US:

- keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer's transactions and dispositions of an issuer's assets, and
- devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the firm's assets.

Similarly, in Australia, the new false accounting offences will complement Australian offences for bribery of foreign officials as well as the Australian Anti-money laundering and counter-terrorism financing regime (**AML/CTF**). The new false accounting offences will work in tandem with the existing obligations under the *Corporations Act 2001* (Cth) to keep financial records (s 286) and not falsify books (s 1307).

Experience to date of the enforcement of the FCPA in the United States, is that arguably due to difficulties in proving anti-bribery and corruption offences, authorities have instead pursued companies and individuals under the FCPA accounting provisions noted above, which are easier to establish. The elements of the new Australian offences should also be easier to establish and capture similar conduct (particularly as funds involved in bribery and corruption are either disguised in corporate accounts or not included). A similar approach by Australian authorities to the US experience should be expected with these new offences.

OPERATION OF THE NEW FALSE ACCOUNTING OFFENCES

FALSE DEALING CONDUCT AND CRIMINALITY

The new false accounting offences apply to any account, record or document made or required for an accounting purpose, or any financial report, financial record or register required under the *Corporations Act 2001* (**accounting document**). The offences operate by criminalising any conduct by a body corporate or individual to either:

- make, alter, destroy or conceal an accounting document, or
- fail to make or alter an accounting document where there is a legal obligation to do so, (**false dealing conduct**).

However, such false dealing conduct is only criminal where the body corporate or individual acted with the intent of or was reckless as to the false dealing conduct concealing or disguising the receiving or giving of a benefit that was not legitimately due or a loss that was not legitimately incurred.[2]

While intention can be difficult to prove, the lesser criminal standard of recklessness is easier for prosecuting authorities to establish. Recklessness is established where it can be proven that the body corporate or individual is aware of a substantial risk that the conduct would facilitate, conceal or disguise the receiving or giving of a benefit that is not legitimately due or a loss that is not legitimately incurred.[3]

For either offence there is no requirement for the prosecuting authorities to prove:

- the actual receiving or giving of any benefit or the actual incurring of a loss by another person (it is merely the intention or recklessness that is relevant), or
- that the intention of the accused concerning the giving of a benefit or incurring of a loss related to a particular person.

CORPORATE LIABILITY

Corporations can be liable for criminal penalties under these offences for the acts of their employees, agents and officers where:

- the body corporate's board of directors intentionally or recklessly carried out the false dealing conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence,
- an employee, agent or officer of a body corporate with duties of such responsibility that their conduct may fairly be assumed to represent the body corporate's policy (high managerial agent) intentionally or recklessly engaged in false dealing conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence,
- a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the false dealing provisions, or
- the body corporate failed to create and maintain a corporate culture that required compliance with the false dealing provisions.

LIMITATIONS ON THE APPLICATION OF THE OFFENCES

Due to the constitutional limitations on the Australian Parliament's powers, the application of the new false accounting offences is limited to particular circumstances, however, they are very broad. Specifically, one or more of the below circumstances must apply:

1. the accused person is a person to which Commonwealth power applies, such as a constitutional corporation,4 a corporation incorporated in a Territory, an officer or employee of either of these types of corporation, a Commonwealth public official or someone providing such services,

2. the relevant conduct or omission occurred either in a Territory, outside Australia or concerns a matter or thing outside Australia, or

3. the relevant accounting document is in a Territory, outside Australia, kept under or for the purpose of a Commonwealth law or kept to record the receipt or use of Australian currency.

There is no requirement for the prosecution to prove that the accused knew or was reckless as to any of the above circumstances (i.e. absolute liability applies).[5]

The above definition and application means that the offences potentially have broad application, broad extra-territorial reach and require prosecutors to satisfy a relatively low threshold.

PENALTIES

For an individual found guilty of the offence of intentional false dealing with accounting documents, the penalty is imprisonment of up to 10 years, a fine of up to $1.8 million, or both. For a body corporate found guilty of the offence of intentional false dealing with accounting documents, the penalty is a fine of up to the greater of:

- $18 million,

- if the value of the benefit that the body corporate obtained directly or indirectly is reasonably attributable to the conduct constituting the offence, 3 times the value of that benefit, or

- if the value of the benefit cannot be determined, 10% of the annual turnover of the body

corporate during a 12 month period ending at the end of the month in which the conduct constituting the offence occurred.

Where the false dealing conduct has occurred recklessly, as this offence involves a lower level of criminality, the penalties are halved. Individuals face penalties of imprisonment of up to 5 years, a fine of up to $900,000, or both. A body corporate may receive a fine of up to the greater of $9 million, 1.5 times the value of the benefit or, if the value of the benefit cannot be determined, 5% of the body corporate's annual turnover.

WHAT SHOULD YOU DO?

While it is expected that all companies would require their accounts to be kept accurately (especially since failure to do so may already constitute an offence under State laws, the *Corporations Act 2001* and under similar laws in the United States where they apply), it is important that your company, if they have any connection to Australia, implements or reviews and, where necessary, updates its risk management plan and anti-bribery and corruption policies to ensure against breaches of these offences. This is particularly so because the company can be liable for the acts of their employees, the offences have broad reach and do not require proof of the primary false accounting activity. Further, the penalties for such offences are substantial and may result in significant reputational harm if breached.

In this regard, as noted above, the US Department of Justice and Securities & Exchange Commission make great use of their equivalent provisions under the FCPA where they have been unable to sufficiently establish primary bribery or corrupt conduct. We would expect a similar approach to be adopted by the Australian Federal Police.

Companies should make it clear to all employees that such acts or omissions will not be tolerated. This can be demonstrated through both reviewing the policies as well as regular training of employees to make sure they are aware of such policies and are acting in accordance with them at all times.

ENDNOTES

1. Under Article 8, parties are required to:

- prohibit persons from using irregular accounting methods, such as maintaining off-the-books accounts, for the purpose of bribing foreign public officials or hiding such bribery, and

- provide effective, proportionate and dissuasive civil, administrative or criminal penalties for the prohibited conduct.

2. Specific conduct constituting this element of the offences is set out in *Criminal Code* ss 490.1(1(b) and 490.2(1)(b).

3. *Criminal Code* s 5.4(1).

4. A 'constitutional corporation' is a corporation to which paragraph 51(xx) of the Australian Constitution applies. Constitutional corporations include:

- bodies incorporated under the Corporations Act 2001 that are either a trading or financial corporation,
- foreign corporations,
- bodies corporate that are incorporated in a territory, or
- bodies that are prescribed as bodies corporate under legislation.

Associations and other bodies that have been incorporated under state legislation are corporations; however, whether they are constitutional corporations will depend on whether they may be classified as either trading or financial corporations.

The following are not constitutional corporations:

- partnerships,
- unincorporated associations,
- sole traders, and
- local government.

5. *Criminal Code* ss 6.2, 490.1(3) and 490.2(2).

MORE INFORMATION

For information regarding possible implications for your business, contact a member of the Corporate crime and investigations team.