Anti-Corruption and Bribery: the Regulatory Noose Tightens

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Authors: Murray Deakin, Apara Tayal

In brief

In the last six months, there have been a number of developments aimed at strengthening the anti-corruption and bribery regime in Australia. It is anticipated that further law reforms will be enacted to implement Australia's obligations under the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and the United Nations Convention against Corruption (UNCAC).

The recent developments are:

- New offences for false accounting records have been introduced in the Criminal Code 1995 (Cth)[1] which carry severe penalties
- Clarification that proof of "an intention to influence a particular foreign public official" is not required to establish the offence of bribery of a foreign public official in the Criminal Code 1995 (Cth)
- A public consultation paper was issued in March 2016 to consider the introduction of "Deferred Prosecution Agreements" in Australia
- A report is due to be issued by the Senate Standing Committee on Economics on 1 July 2016, which will examine the effectiveness of and any improvements to existing Commonwealth legislation, in particular, in relation to investigation and prosecution of foreign bribery and white-collar crime

Given these recent and anticipated future measures to strengthen Australia's anti-corruption and foreign bribery offences in Australia, companies need to review their anti-corruption and bribery policies and procedures to ensure they are compliant with the new laws, and be aware of further potential change with a view to updating their risk management systems, policies and training to ensure ongoing compliance.

[1] This came into effect on 1 March 2016.

In detail

It has been clarified that the primary offence of bribing a foreign public official set out in the Criminal Code 1995 (Cth) does not require proof of an "intention to influence a particular public official"[2] . A prosecutor does not need to prove that the defendant had an intention to influence or bribe any official in particular. Persons or corporations may be caught if they provide or cause to provide a benefit that is not legitimately due to another person with the intention of influencing a foreign public official in order to obtain or retain business or a business advantage (which does not actually need to be obtained or retained). This law has an extra-territorial operation as it applies to bribes given to foreign officials by Australian citizens, residents, or companies.

Under the Criminal Code, companies can be held liable for offences committed by employees, agents or officers where a company expressly or impliedly authorised the commission of the offences or where the company failed to maintain a corporate culture of compliance. Corporate culture has been defined in the Criminal Code as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

False Accounting

The existing regime has been strengthened by adding two new offences of intentional or reckless false dealing with accounting documents. The offences are established where:

- a person makes, alters, destroys or conceals an accounting document, or
- a person fails to make or alter an accounting document which the person is under a duty to make or alter;

and

- with the *intention* that the person's 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; or
- where the person is *reckless* as to whether the benefit or loss would arise.

The new false accounting offences apply:

- to any Australian or foreign corporation as well as any employees or persons engaged to do work for the corporation, whether within Australia or outside Australia; or
- if the offence occurs inside or outside Australia, concerns matters or things outside Australia or facilitates or conceals the commission of an offence against a law of the Commonwealth; or
- if the accounting document is in or outside Australia, or is kept under a law of the Commonwealth or is kept to record the receipt or use of Australian currency.

It can be seen that these new offences have a broad reach and can be applied more readily than the primary offence of foreign bribery to attack a corporation's involvement in a foreign bribery transaction.

The penalties for the two new offences are very substantial for both individuals and companies. Depending upon the offence,

- individuals can be imprisoned for 5-10 years and fined between $900,000 - $1.8 million
- companies can be fined $9 million - $18 million or 1.5 or 3 times the value of the benefit the company has obtained from the offence or 5-10% of their annual turnover (whichever is greater)

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[2] This change was made through the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* which received royal assent on 26 November 2015 and came into effect 27 November 2015.

Sections 286 and 1307 of the Corporations Act 2001 (*Cth*), which impose a duty on corporations to keep correct financial records and penalize persons for falsifying books continue to apply in parallel to the new false accounting offences, but the penalties applicable under these traditional offences are lower.

Deferred Prosecution Agreements

The public consultation paper on "Deferred prosecution agreements" (DPA) has been issued with the objective of encouraging self-reporting by corporations of internal misconduct. A DPA is a voluntary, negotiated settlement between a prosecutor agency and a defendant. DPAs have been used in the United States (US) effectively for many years to resolve enforcement actions in relation to corruption and the United Kingdom (UK) entered into its first DPA in November 2015 against a bank in relation to an offence of failing to prevent bribery.

Under a DPA scheme, prosecutors have the option to invite the company to negotiate an agreement to comply with a range of specified conditions, in return for deferral of the prosecution. The terms of a DPA typically require the company to cooperate with any investigation, admit to agreed facts, pay a financial penalty, and implement a program to improve future compliance. Upon fulfilment of the terms of the DPA, the prosecution is discontinued. A breach of the terms may result in the prosecuting agency resuming the prosecution and seeking further penalties.

The US also uses non-prosecution agreements (NPAs) as an alternative to DPAs. Under an NPA, a prosecutor agrees not to prosecute a defendant at all if the defendant complies with the agreed conditions. DPAs are typically filed with a court whereas NPAs are not.

DPAs may offer advantages by allowing a company to avoid formal conviction, avoiding lengthy litigation and/or procuring reduced financial penalty based on co-operation. DPAs can also provide a general incentive for companies to proactively improve internal compliance if a company's internal controls are considered in determining the availability and terms of DPAs.

From the perspective of the prosecution, DPAs would help mitigate the current challenges faced in detecting and investigating serious corporate crime and would improve enforcement outcomes as evidence of corporate crime can be hard to identify and often depends on companies co-operating or whistleblowers coming forward. This would also save prosecution and judicial resources by avoiding lengthy and contested litigation.

However, there are uncertainties associated with DPAs, such as whether the prosecution would invite a company which has self-reported to negotiate a DPA or whether the prosecution agency may launch a case on the basis of the disclosed evidence, or whether the DPA would in fact enjoy reduced financial penalties and whether a DPA, if offered, would be approved by the court.

There are differences in the key features of DPAs as adopted in the US and UK, and the public consultation seeks views on whether a DPA scheme should be adopted in Australia. Some of the points raised for consultation are:

- whether a DPA scheme would be useful for Commonwealth agencies.
- the types of offences for which a Commonwealth DPA scheme should be available, i.e., for economic corporate crime such as bribery, fraud and money laundering or should include other corporate crimes such as environmental crimes.
- whether DPAs should be available to companies only, or be extended to individuals. In the US, DPAs are available to both, however in the UK they exclude individuals.
- the extent the courts should be involved in an Australian DPA scheme. In the US, even though DPAs are filed and approved by the court, they are often negotiated and conducted with

limited judicial involvement. In the UK, the DPA negotiations are considered during at least two (2) court hearings with involvement throughout. In UK, the courts must also be satisfied that the DPA is in the interests of justice and its terms are fair, reasonable and proportionate.

- measures to enhance certainty for companies invited to enter into a DPA such as guidance on when a company might be invited
- whether a DPA should be made public for instance in the interests of transparency. If so, whether there are any circumstances where a DPA should not be published, or its publication postponed.
- the structure of DPA negotiations
- whether material disclosed during negotiations should be available for criminal and/or civil proceedings
- the consequences of a breach of a DPA
- whether an Australian DPA scheme should make use of independent monitors or other non-judicial supervisory mechanisms.

The takeaway

The clarification of the anti-bribery offence and introduction of the new false accounting offences should act as an impetus for Australian companies to increase their levels of compliance by introducing upgraded and more comprehensive risk management and compliance procedures to combat the elevated risks involved.

Further, depending on the outcome of the public consultation, if DPAs are proposed to be introduced in Australia, it will have the potential to change the manner in which anti-bribery offences are investigated and enforced in Australia. Accordingly, you should carefully consider which features of DPAs you support for implementation or prefer were disregarded by government, once it moves to its implementation phase, and whether you wish to engage with the consultation process which concludes on 2 May 2016.

Let's talk

At PwC our cross-disciplinary legal and risk consulting team have the expertise to conduct a comprehensive review of your systems and practices not only in Australia, but also in other jurisdictions, particularly in Asia-Pacific to ensure your business is compliant with the current and any forthcoming requirements of the anti-bribery regime in Australia.

For a deeper discussion of how these issues might affect your business, please contact:

Tony O'Malley, Partner
+61 (2) 8266 3015
tony.omally@au.pwc.com

Murray Deakin, Partner
+61 (2) 8266 2448
murray.deakin@au.pwc.com

Malcolm Shackell, Partner
+61 (2) 8266 2993
malcolm.shackell@au.pwc.com

Sylvia Ng, Director
+61 (2) 8266 0338
Sylvia.ng@au.pwc.com

Mark Rigby, Director
+61 (2) 8266 1774
mark.rigby@au.pwc.com