

Background

On 22 June 2023, the federal government tabled the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, which signals an impending, fundamental shift in the way that corporations may be prosecuted for foreign bribery in Australia and the way that Australian companies (or companies doing business in Australia) should seek to protect themselves from prosecution.

In addition to streamlining the existing foreign bribery offence, the amending legislation seeks to introduce a new "absolute liability" offence into the Commonwealth Criminal Code for a failure to prevent bribery of foreign public officials by a company's "associates", which is defined to include employees, contractors, agents and subsidiaries.

"Absolute liability" means that there is no requirement for a fault element (i.e. intention, knowledge, recklessness or negligence) to be established for the company to be criminally liable for the conduct of its associates. As with the existing offence, if passed, the new absolute liability offence will result in fines based on the greater of AU\$27.5 million, three times the benefit received or (if the court cannot determine the benefit) 10% of the corporate group's annual turnover.

The only way a company could avoid absolute liability for the conduct of its associates is to establish that it had in place "adequate procedures" to prevent the commission of the offence, which the company bears the legal onus of establishing. The new legislation requires the Attorney-General to publish guidance on the types of measures that are likely to constitute "adequate procedures".

If passed by both houses of Parliament, the offence will come into force six months after royal assent, to allow sufficient time for government to publish finalised guidance, providing a "honeymoon period" for corporations to implement these procedures. The proposed new offence is modelled on section 7 of the Bribery Act 2010 (UK), the introduction of which has seen a significant uptick in successful prosecutions in the United Kingdom.

The Time Is Nigh

This new absolute liability offence has been lurking in the shadows for corporate Australia for at least five years. It is substantially the same as the offence proposed in the Turnbull Government's Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 and subsequently in the Morrison Government's Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019. On both occasions, despite bipartisan support, the bills were allowed to lapse and the amendments never came into force.

Nevertheless, this bill appears to have momentum as the new government seeks to demonstrate its commitment to cracking down on corporate foreign bribery offending. Given its similarity to the offence previously proposed by the opposition government, Australian companies and companies doing business in Australia are unlikely to be granted another reprieve and will need to get their respective houses in order.

Absolute Liability

The introduction of an absolute liability offence is significant in circumstances in which the Attorney-General's Department's own guide to framing Commonwealth offences provides that the application of absolute liability should only be used in limited circumstances that justify creating criminal liability for persons or companies which lack any "fault" for the offending.¹

Absolute liability is more severe than the more common "strict liability", which also requires no fault element to be established, but does make available a defence of mistake of fact – which is not available for absolute liability offences. The justification, according to the explanatory memorandum, is that this offence will incentivise corporations to actively ensure they have adequate procedures in place to prevent foreign bribery occurring and is appropriate to capture the distinct nature of corporate misconduct where it is a form of omission (i.e. a failure to prevent).

Adequate Procedures

What constitutes "adequate procedures" to prevent foreign bribery would be determined by the courts on a case-by-case basis. As the explanatory memorandum indicates, it is envisaged that this concept would be scalable, i.e. its requirements would depend on the circumstances, including the nature of the body corporate concerned and the relevant sector and geographical locations in which it operates.

As noted, if the offence is passed into law, the Attorney-General's Department is required to publish guidance for corporations on the types of measures a company could implement and steps it could take to prevent an associate from bribing a foreign public official. While no draft guidance has been published for this latest bill, much can be extrapolated from the draft guidance published in respect of the proposed introduction of this offence in 2019. Like the offence itself, the earlier guidance is broadly consistent with the material provided by the UK Ministry of Justice for the equivalent offence under the Bribery Act 2010 (UK).

The earlier guidance suggested that a company should be guided by two key principles when assessing and implementing its adequate procedures.

¹ See the Attorney-General's Department's [Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#)

Principle of Proportionality to Risk

Each corporation should make an assessment of the nature and extent of the foreign bribery risks it faces. Bribery mitigation policies and procedures should be proportionate to the bribery risk identified through the risk assessment.

In a small corporation, senior management may be highly engaged with the company's compliance framework by working closely with the compliance function on a routine basis or by carrying out the compliance function. By comparison, in a large corporation with multiple business units, tiered management structures and many reporting channels, more complex processes would be required to connect the compliance function with senior management and the board of directors. The guidance suggests that a proportionate approach for a large multinational corporation could be for the board of directors and top-level management to set bribery prevention policies and to task lower-level management to design, implement and monitor anti-bribery measures on a day-to-day basis.

Principle of Effectiveness

The previous guidance indicates that steps a body corporate takes to prevent an associate from bribing foreign public officials must result, in practice, in an effective anti-bribery compliance programme. Robust written policies that are clear and accessible are a key element of corporate compliance programmes but are of no value unless operationalised effectively.

Indicators of effectiveness include:

- A robust culture of integrity within the corporation
- Demonstrated pro-compliance conduct by top level management and the board of directors (where applicable)
- A strong anti-bribery compliance function
- Effective risk assessment and due diligence procedures
- Careful and proper use of third parties

A consistent theme in the previous guidance is the "top down" requirement for adequate procedures, i.e. senior leaders in the company must be aware of and proactive in examining foreign bribery risks and implementing appropriate procedures. However, policies and procedures alone are clearly not sufficient. If the offence passes into law, gone will be the days when producing a glossy anti-bribery and corruption manual from the filing cabinet will suffice. A company will need to demonstrate significant pro-compliance conduct, from the board of directors down. This might include engaging external compliance expertise, constantly examining foreign bribery risks as they arise, receiving and acting on reports from internal audits and ensuring the compliance function is adequately resourced and can operate effectively and autonomously.

Another critical component the courts are likely to examine when determining if adequate procedures have been established is the level of communication and training to ensure that a company's "associates" (including agents and subsidiaries) are sufficiently on notice of the company's managerial level commitment to preventing foreign bribery.

Key Takeaways

- After some years of delay, it now seems very likely that:
 - Australian corporations will soon be subject to a punitive, absolute liability offence when employees, contractors, agents or subsidiaries engage in foreign bribery.
 - The only defence to a charge will be to establish that the company had in place "adequate procedures" to prevent the commission of the offence.
 - Based on previous Australian guidance and the material published by the UK Ministry of Justice, discharging that onus will be no easy feat. Companies doing business in Australia must now take extensive steps – utilising external expertise if necessary – to ensure that their anti-bribery policies and procedures reflect the principles of proportionality and effectiveness.
- With the bill likely to pass both houses of Parliament imminently, Australian companies and foreign companies doing business in Australia look to have a six-month "honeymoon period" to ensure that their procedures are sufficient to give the company a fighting chance of establishing the defence should an employee, agent or other associate decide to engage in foreign bribery anyway.
- While the Attorney-General's Department will provide the guidance, if the offence is passed into law, it will ultimately be for the courts to determine whether the policies and procedures a particular company has in place are adequate by reference to the risks to which it is exposed and the steps it has taken to mitigate those risks.

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