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A New Dawn for Corporate Australia's Foreign Bribery Prosecution Risk – A "Failure To Prevent" Offence and Absolute Liability Have Arrived

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Background

After years of parliamentary prevarication spanning three governments, on 29 February 2024, the *Crimes Legislation Amendment (Combatting Foreign Bribery) Bill* passed both houses of federal Parliament and will soon come into force.

As we explained in June 2023 when the bill was first tabled, the amending legislation will 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". That term is defined broadly to include employees, contractors, agents, subsidiaries and "a person that otherwise performs services on behalf of a corporation".

Australian federal law enforcement has suggested for years that the existing foreign bribery offence in the Commonwealth Criminal Code set evidentiary difficulties that were often insurmountable, not least proving that a benefit was "not legitimately due" in a foreign jurisdiction where accepted business customs and procedures may differ significantly from those in Australia or elsewhere. These difficulties go a long way to explaining the low prosecution rate for foreign bribery in Australia when compared to other jurisdictions like the UK and US.

No longer. In addition to streamlining the existing foreign bribery offence to (among other amendments) remove the "not legitimately due" element, replacing it with the concept of improperly influencing, the Commonwealth Criminal Code will now make corporations absolutely liable for the conduct of its associates, irrespective of the level of knowledge of the corporation.

The only way a corporation can protect itself from the new offence is by demonstrating that it had "adequate procedures" in place 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".

Lessons From the UK

The new absolute liability offence is based on an equivalent provision in the *Bribery Act 2010* (UK), which resulted in a significant increase in corporate prosecutions when the equivalent offence was introduced more than a decade ago. The UK offence marked a material shift in the law of corporate criminal responsibility, which has now arrived in Australia, with the introduction of a "failure to prevent" offence. Australian companies will now face the inherent difficulties of discharging the legal burden (on the balance of probabilities) that its procedures were adequate in circumstances in which the occurrence of bribery has rendered the procedures, by definition, inadequate at preventing the specified conduct.

Like their English counterparts, Australian courts will have to accept that the prosecution cannot simply assert a *res ipsa* position,[1] and that companies that have in place procedures that are reasonable in all the circumstances but still fail to prevent isolated incidents of foreign bribery by their associates can still rely on the defence. Interestingly, to address this very issue, law reform committees in the UK have recently shown an inclination to move away from "adequate" in favour of "reasonable" for the existing and anticipated failure to prevent offences.[2]

Adequate Procedures

It is unlikely to be long before some judicial guidance is provided in Australia on how the courts will approach the adequate procedures threshold.

What will constitute adequate procedures to prevent foreign bribery will 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.

Guidance on adequate procedures from an earlier iteration of the bill suggested that a company should be guided by two key principles when assessing and implementing its adequate procedures: the principles of proportionality of risk and effectiveness. 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.

We discuss all of these principles in more detail in our previous article.

1 *Res ipsa loquitor*: "the thing speaks for itself".

2 UK Law Commission, Corporate Criminal Liability – an Options Paper, 10 June 2022.

Absolute Liability

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).

Honeymoon Period

The amending legislation provides a six-month honeymoon period before the failure to prevent offence comes into force, no doubt in part designed to allow the attorney general's department to finalise its guidance on "adequate procedures" and for Australian companies, particularly those with operations in higher risk jurisdictions, to get their respective houses in order in line with the guidance.

Once the honeymoon period is over and the offence is off and running, Australian companies will face maximum penalties for a failure to prevent foreign bribery of the greater of AU$31.3 million, three times the benefit received, or (if the court cannot determine the benefit) 10% of the corporate group's annual turnover.

Still No DPAs

Despite seemingly bipartisan support amongst relevant stakeholders and the legal community, the federal Government has declined to introduce a deferred prosecution agreement (DPA) regime at the same time as the failure to prevent offence. DPA schemes have been introduced and utilised in both the UK and the US by incentivising companies to self-report incidents of foreign bribery discovered within their ranks. In circumstances in which foreign bribery is most likely to come to the attention of management but is otherwise extremely difficult for law enforcement agencies to detect, DPAs offer an alternative path to an otherwise inevitable prosecution before the courts.

Interestingly, the motion for the second reading of the bill was amended just prior to the bill's being passed by the Senate on 29 February 2024 with the annotation that the "the Senate is of the opinion that a DPA scheme in Australia is worthy of consideration but such a scheme should not function as a 'get out of jail free card' and should prioritise transparency so as to avoid the creation of a two-tiered justice system where corporate criminals are able to secretly negotiate agreements related to wrongdoing while private individuals are subject to the full force of a court of law".

If there was any doubt as to the federal Government's concerns in relation to a DPA regime despite the significant community support for its introduction, we need look no further than the content of this statement. Nevertheless, despite the reservations, the idea is clearly not off the table yet.

A Debarment Regime?

The Senate's annotation to the motion passing the second reading speech of the bill is also revelatory insofar as it indicates that the federal Government is considering further reform "to prevent companies convicted of foreign bribery from being awarded Australian government contracts, potentially through a whole of government debarment scheme".

Unlike the UK and US, where a conviction for corruption and bribery offences can result in complete debarment from government work – often a death sentence to companies working in industries like major projects and construction – in Australia, there is no formal federal debarment regime that exists only on a piecemeal scale at state and territory level. In many instances, the only real consequence of a corporate conviction for a corruption or bribery offence is a few awkward questions to navigate in a procurement questionnaire. In this context, noting the time it has taken for the current amendments to pass Parliament, both DPAs and a formal debarment regime remain areas to watch.

How We Can Help

Our Australian Litigation team has a breadth of white-collar criminal defence experience that very few firms in Australia can offer, including acting for defendants in foreign bribery prosecutions, both at trial and appellate level.

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