Hogan Lovells

The Australian Government introduces the Crimes Legislation Amendment (Combatting Corporate Crimes) Bill 2019 (Cth) targeting corporate misconduct and foreign bribery

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Recently, three of Australia's four largest banks have self-reported breaches of anti-money laundering and counter-terrorism financing laws. Commonwealth Bank of Australia in 2018 admitted fault and agreed to pay a civil penalty of AU$700 million for 53,506 breaches of Australia's money laundering laws. The penalty imposed at the time was the largest in Australian corporate history.

Against a backdrop of widely reported corporate misconduct with high penalties attached, the Commonwealth Government intends to legislate to provide for a more efficient and effective self-reporting mechanism for companies. The first objective of the Government's policy initiative and legislative scheme is that if a company voluntarily admits certain facts associated with corporate misconduct (not guilt), they may receive the benefit of the ability to negotiate an out of court civil penalty and receive no substantial criminal sanction. A second objective is to introduce the new offence of failing to prevent foreign bribery.

The need for an alternate system has arisen due to the opaque and complex nature of modern corporate crime that has made it difficult for regulators to achieve convictions. Corporate crime including foreign bribery is often difficult to identify and easy to conceal in complicated structures and transactions. Associated investigations into corporate misconduct can be complex, difficult and time consuming.

To enhance the tools available to regulators to combat corporate crime, on 2 December 2019, the Commonwealth Government introduced the Crimes Legislation Amendment (Combatting Corporate Crimes) Bill 2019 (Cth) ("**Bill**") into the Commonwealth Parliament. The Bill will amend the *Criminal Code 1995* (Cth) ("**Criminal Code**") and *Director of Public Prosecutions Act 1983* (Cth). The Bill will strengthen Australia's corporate crime framework and bring Australia into line with the regimes in the United States and the United Kingdom who have already taken significant steps to combat foreign bribery. The Bill is designed to improve authorities' track record in combatting corporate misconduct.

The Bill replicates an earlier bill (lapsed) whereby the Commonwealth Government went through a detailed consultation process in 2017, which resulted in the Crimes Legislation Amendment

(Combatting Corporate Crime) Bill 2017 (Cth) ("**2017 Bill**"). The 2017 Bill lapsed after the Parliament failed to debate it in the 18 months before the dissolution of Parliament ahead of the May 2019 Australian federal election.

Notable provisions introduced by the bill

The Bill introduces two notable provisions:

- the proposal of a Deferred Prosecution Agreement ("**DPA**") regime to encourage companies to self-report serious misconduct; and
- the introduction of a new strict liability offence for companies "failing to prevent" a foreign bribery. Companies will face absolute liability for bribery by "associates", including subsidiaries, if they do not have adequate procedures in place designed to prevent bribery of foreign public officials by their associates.

Deferred prosecution agreement regime

The 2017 Bill considered the introduction of a new DPA regime to encourage companies to come forward and self-report misconduct to Australian authorities. This DPA is a well-established regime used in the United States and has also been introduced to the United Kingdom, France, Canada, Singapore and Japan.

The current Bill has kept the DPA regime which was proposed in the 2017 Bill, however, it has eliminated the admission of guilt as a pre-requisite for the Commonwealth Director of Public Prosecutions ("**CDPP**") being able to offer a DPA to companies accused of serious wrongdoing. Keeping the pre-requisite of admission of guilt could potentially result in an increased exposure to civil actions and class actions. This DPA regime will empower the CDPP to invite companies suspected of serious corporate misconduct including foreign bribery, fraud, false accounting, money laundering, breaches of sanctions laws and various criminal breaches of the *Corporations Act 2001* (Cth) to negotiate a DPA.

The Bill proposes that a DPA cannot become enforceable unless the CDPP is satisfied that it is in the public interest to enter into the DPA. A DPA will not enter into force unless it has been independently assessed by a former judicial officer as being reasonable, appropriate and in the interests of justice.

What is a DPA?

A DPA requires a company to agree to a certain statement of facts and comply with a range of conditions. Companies will not be prosecuted in relation to matters that are the subject of the DPA. The DPA only extends to companies and not individuals. The conditions that a DPA must contain, at a minimum, include the following:

- a statement of facts relating to each offence specified in the DPA (aside from the admission of guilt);
- the period the DPA will be in force;
- the requirements / conditions to be fulfilled under the DPA e.g. cooperating with the CDPP and Australian authorities with the ongoing investigation of related misconduct;
- the amount of financial penalty to be paid by the company;

- the circumstances constituting a material contravention of the DPA; and
- confirmation that the company consents to the CDPP instituting prosecution of the company for contravention of the DPA without being trialled or examined.

Benefits and risks associated with DPAs

If a company enters into a DPA with the CDPP, it will provide certainty for companies that an investigation has come to an end, and that its exposure to a regulator is known. Another benefit for companies entering into a DPA is that if it is complied with, there will be no judicial findings that the company has contravened the law, however, the company may still be required to pay a financial penalty or comply with certain conditions set out in the DPA.

There are, however, also risks associated with the company entering into a DPA. The CDPP may not be willing to offer a DPA to a company even if the company self-reports misconduct. There is also potential for civil claims or class actions associated from the facts "agreed" under the terms of the DPA.

New failure to prevent bribery offence

The Bill introduces a new liability offence in section 70.5B of the Criminal Code for companies "failing to prevent" a foreign bribery. Under this new offence, companies will automatically be liable for foreign bribery activities committed by an "associate" for the profit or gain of the company. The term "associate" includes officers, employees, agents, contractors, subsidiaries, controlled entities and any persons that otherwise perform services on its behalf.

If a company can demonstrate that it had "adequate procedures" in place to minimise risks, this will constitute an adequate defence. This new "failing to prevent" offence carries a maximum penalty of either AU$21 million fine, 10 percent of annual turnover of the company in the 12 months before the conduct occurred, or three times the benefit gained.

Draft Guidance

On 3 December 2019, as required by the Bill, the Attorney-General published guidance on the types of measures that are likely to constitute "adequate procedures" ("**Draft Guidance**") and therefore a defence to the "failure to prevent" offence. The Draft Guidance is principles-based only, and serves as a helpful additional reference guide for companies without being a legislative instrument. The Draft Guidance is modelled on the guidance published by the United Kingdom Government that accompanies the "failure to prevent" offence under section 7 of the *Bribery Act 2010* (UK).

The Draft Guidance outlines steps a company can take to prevent an associate from bribing foreign public officials. The Draft Guidance specifies that "companies should place effective and proportionate procedures to prevent bribery from occurring within their business". These "effective" procedures that can be incorporated into a company's compliance program include:

- a robust culture of integrity;
- a clear pro-compliance conduct by top management level;
- a strong anti-bribery compliance function;
- effective risk assessment and due diligence procedures; and
- careful and proper use of third parties.

The Draft Guidance also specifies that procedures should be "proportionate" to the company's circumstances. This brings into consideration such matters as the company's size, the risks associated with its activities and exposure to foreign bribery.

The Draft Guidance sets out six fundamental elements that are necessary to be included in a company's bribery prevention policy. These are known as "adequate procedures" which include:

- more extensive risk assessment and due diligence procedures;
- whistle-blower reporting mechanisms;
- monitoring and reviewing compliance programs;
- board and managerial-level dedication to foreign bribery prevention;
- mitigating the company's bribery risks; and
- staff training.

As the Draft Guidance is principles-based only, failing to comply with the Draft Guidance will not lead to the presumption that company does not have "adequate procedures" in place. Companies should however endeavour to follow the Draft Guidance in order to demonstrate that they have adequate procedures in place. By following the Draft Guidance, companies are more likely to establish a defence to the new "failure to prevent" offence.

Other notable provisions

Introducing a new definition of "dishonesty"

The Bill will repeal the current definition of "dishonesty" in the Criminal Code and propose a new definition of dishonesty as "dishonest according to the standards of ordinary people". The new definition will eliminate the requirement for proof that the defendant knew that it was being dishonest according to the standards of ordinary people. This new definition is in accordance with the Australian High Court test in *Peters v The Queen* (1998) 192 CLR 493.

Broadening the scope of the foreign bribery offence

The Bill broadens the scope of the foreign bribery offence to capture bribery conducted to obtain a personal advantage, and not just business or a business advantage. The addition of the word "personal" into the offence ensures that the provision captures a wide scope of personal advantages. These include (but are not limited to) granting of visas or other residency benefits and the bestowing of scholarships, personal titles or other honours. This prohibition also applies to:

- benefits provided or offered not only to current office holders, but also to candidates for office; and
- obtaining a business advantage for a third party.

Conclusion

The Bill has currently been adjourned for debate in the Senate until 4 February 2020. The Commonwealth Government is calling for submissions on the Draft Guidance by 28 February 2020. The Bill demonstrates that the Commonwealth Government is committed to confronting and dealing with corporate misconduct and protecting Australia from the consequences of

corporate crime. In recent years, the Commonwealth Government has taken significant steps to fortify how Australian authorities respond to detecting, prosecuting and preventing foreign bribery and corporate misconduct.

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