

ALLEN & OVERY

The Advent of Stronger Foreign Bribery Laws in Australia

On December 6, 2017, the Australian Government introduced the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 (Bill)* into the Senate. The Bill provides for a number of key amendments to the Australian Criminal Code to strengthen Australia's foreign bribery laws and increase the range of tools available for investigators and prosecutors to deal with serious corporate crime. The changes are significant and include the creation of a new "absolute" liability corporate offence of failing to prevent foreign bribery and a new deferred prosecution agreement (DPA) regime.

The Bill comes after a lengthy consultation process, and signals a shift in the Government's push to tackle serious corporate crime in Australia and overseas. It also comes hand-in-hand with further regulatory proposals to reform Australian whistleblower laws and bring together key law enforcement agencies under an umbrella Home Affairs portfolio that will be overseen by the Attorney-General.

Key Reforms

The following reforms are proposed by the Bill:

1. New corporate offence of failing to prevent foreign bribery.

The most noteworthy proposal in the Bill is the introduction of a new strict liability corporate offence of "failure to prevent bribery of foreign public officials". Under this "failure to prevent" offence, the Bill imposes criminal liability on a company when a person "associated" with the company pays a bribe intending to obtain or retain business or a business advantage for the entity. The Bill defines associated person broadly to include any person who performs services for or on behalf of the entity, and includes employees, agents (as well as those operating overseas), and subsidiaries. The offence applies to Australian body corporates that are "constitutional corporations", "incorporated in Territory", or "taken to be registered in a Territory under section 119A of the *Corporations Act 2001*". This means that the offence applies to trading or financial corporations incorporated under the Corporations law of a State or Territory, foreign corporations in Australia, or a corporation incorporated or registered in a Territory of Australia.

The proposed changes in the Bill provide for a defence to this broad strict liability offence if an entity can demonstrate that it has implemented "adequate procedures" to prevent bribery by associated persons. No guidance has yet been published to explain what "adequate procedures" a company must implement to establish this defence, but we expect such guidance to be released when the proposed changes are enacted. The Bill also provides for high corporate fines for the offence, including a maximum penalty of AUD21 million, three times the value of any benefit obtained by the company from the bribery or a fine of 10% of the annual turnover of the company during the relevant period, whichever is greater.

2. Introduction of a Deferred Prosecution Agreement (DPA) scheme

As a means of encouraging greater self-reporting by companies, the Bill also introduces a DPA regime in Australia. DPAs have radically transformed the corporate crime landscape overseas, particularly in the U.S. and the UK, by offering an alternative to the prosecution of corporate misconduct. DPAs are a voluntary, negotiated settlement between a prosecutor (in this case, the Commonwealth Director of Public Prosecutions) and a defendant. Importantly, a company will not be prosecuted in relation to matters that were the subject of a DPA where it fulfills its obligations under the agreement. The DPA scheme is designed to encourage companies to self-report misconduct by offering greater certainty of outcome, compared to lengthy criminal investigation and prosecution. DPAs may also allow companies to avoid some of the reputational and financial costs associated with litigation.

In the current iteration of the Bill, DPAs will only be available to companies (not individuals). DPAs will be available for the offence of foreign bribery and other corporate criminal conduct, such as money laundering, false accounting, dishonest conduct in the financial sector and sanctions violations.

3. Broadening of the existing foreign bribery offence

Finally, the Bill also broadens the current existing foreign bribery offence and lowers the bar that must be established for the commission of the offence. It does so by:

- introducing a concept of "improperly influencing" a foreign public official to obtain or retain business or a business advantage, and removing the former requirement that the business advantage not be "legitimately due". The accused need not have a specific business or advantage in mind when paying or offering the bribe, and the business advantage is not limited to an advantage that the briber will take for himself /their company, but extends to advantages obtained for other persons

- extending the scope of the offence of foreign bribery to include bribery to obtain a personal advantage
- removing the requirement that the foreign official be influenced in the exercise of their official duties; and

- extending the definition of “foreign public official” to include a candidate for office

Importantly, there is no proposal at this stage to remove or amend the facilitation payment defence, which allows payments of minor value to expedite routine government actions.

How do these reforms affect you?

If implemented in their current form, the changes proposed by the Bill will have a significant impact on Australian businesses. At a minimum, the reforms mean that companies operating in Australia must ensure they have adequate compliance policies in place to fight corruption both in their local and foreign operations.

To prepare, corporates should assess the risks they face in overseas markets and review their existing compliance procedures. Australian businesses should be asking themselves whether they have a strong compliance program in place and what changes need to be made to bring it in line with best practice. This can be done by conducting a thorough risk assessment across the company’s organisation and ensuring financial and commercial controls are in place, including adequate bookkeeping, auditing and approvals of expenditure. Employee compliance training should also be reviewed and re-invigorated. Companies wanting to get ahead of the regulatory curve should be preparing for the changes now before the revised legislation comes into force.

Note, an article discussing the Australian Government’s consultation on the proposed changes to foreign bribery laws and the lessons learned from the UK Bribery Act 2010 can be found [here](#).

