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CORPORATE GOVERNANCE UPDATE

THE CORPORATIONS AMENDMENT (PUBLISH WHAT YOU PAY) BILL 2014 (CTH)

SUMMARY

The *Corporations Amendment (Publish What You Pay) Bill 2014* (Cth) (Bill) is currently before the Senate. If passed, it will amend the *Corporations Act 2001* (Cth) to require:

- Australian companies involved in extractive industries to disclose all "reportable payments" to "government entities" over $100 000 on a country-by-country and project-by-project basis; and
- the Australian Securities and Investments Commission (**ASIC**) to publish the 'Publish What You Pay' reports on the ASIC website within 28 days of receipt.

Penalties will apply for producing misleading or false reports, and ASIC will have limited powers to exempt reporting.

As at the date of this update, it is not clear whether the Coalition, Labor or the Palmer United Party will support the Bill.

INTRODUCTION

The *Corporations Amendment (Publish What You Pay) Bill 2014* (Cth) (**Bill**) was introduced into Federal Parliament by Greens leader Christine Milne on 28 October 2014. The Bill marks the arrival of 'Publish What You Pay' legislation in Australia - similar legislation already exists in several other developed countries.

In this corporate governance update we outline:

- the international context of the Bill;
- which companies will be subject to the Bill;
- what payments, and in what form, affected companies will be required to report to ASIC; and
- other legal issues raised by the Bill.

BACKGROUND

The Bill has its roots in the demands of the 'Publish What You Pay' movement[1]. Its focus is on domestic and international payments by private companies, and if passed in its present form, it will:

- bring Australia into line with the reporting regimes in jurisdictions including the United States[2], European Union[3], United Kingdom[4] and Canada[5]; and
- affect reporting by public and large proprietary companies (and their respective holding companies) involved in any stage of the extraction process for minerals, oil, natural gas and logging of primary forests.

REQUIREMENTS - WHAT WILL HAVE TO BE REPORTED?

The Bill requires the reporting of all "reportable payments" over $100,000 to "government entities".

A "reportable payment" is defined broadly to include direct and indirect payment by a project proponent, including taxes, levies, royalties and licence fees, 'infrastructure improvements'[6], 'social payments'[7] and 'security services'[8]. A "government entity" is also broadly defined, and includes:

- the federal and state governments of Australia and foreign countries;
- government authorities, such as environmental or mining bodies; and
- companies owned by federal or state governments or government authorities.

The level of detail to be reported is extensive. For each extractive project, the proponent will need to report:

- the total amount of each reportable payment (i.e tax, levy, royalty, etc) made in connection with that project;
- the aggregate of those reportable payments; and
- for each government entity, the total amount of each kind of reportable payment paid to that entity, and the aggregate of those reportable payments,

with the report to be submitted annually as a part of a reporting company's annual financial report. The failure to submit a report (or filing of a misleading or false report) will be subject to the current penalties applicable to financial reports generally.

ASIC will be required to publish the report 28 days after receiving it, and will have limited powers to relieve a company from the requirement to report - in essence the only grounds for grant of a waiver will be where obtaining the information would cause disproportionate expense or undue delay for the reporting entity.

ISSUES FOR MINING COMPANIES

Many Australian companies are already submitting details of reportable payments to foreign governments or the Commonwealth. For companies in this category, the additional compliance cost imposed by the Bill (if passed) may not be high - certainly the Bill was drafted to be similar to other regimes to ensure consistency and help reduce compliance costs.

However, companies not currently reporting will need to ensure their internal reporting procedures are updated to properly record each reportable payment. It has been estimated that the initial cost of complying with the equivalent EU legislation was approximately 0.05% of a company's annual revenue.

[1] The Publish What You Pay movement is a global network of civil society organisations, including Oxfam Australia and the Australia Council for International Development, that campaign for greater transparency and accountability for payments to governments by companies in the oil, gas and mining sectors. Publish What You Pay's efforts culminated in the creation of the Extractive Industries Transparency Initiative (**EITI**), an international organisation that maintains a voluntary standard for transparency and accountability in government payments from the extractive industries. 48 countries have committed to the EITI. Australia is in the final stage of running an EITI pilot as a preliminary step to possibly joining the EITI. Under the pilot, Commonwealth, State and Territory governments report all revenue received from the extractive industries. Selected companies also report their revenue. The focus of the pilot was on domestic revenue received by the Commonwealth and States.

[2] Section 1504 *Dodd-Frank Act*

[3] European Union Directive 2013/34/EU

[4] *Reports on Payments to Governments Regulations 2014*

[5] *Extractive Sector Transparency Measures Act 2014*

[6] This is intended to capture payments relating to the physical environment, such as building roads, bridges and dams.

[7] This is intended to capture payments relating to community projects and social welfare, such as building hospitals or schools.

[8] This is intended to capture payments relating to the security of the project, including payments to government defence or police.

In addition to compliance costs, the Bill raises confidentiality issues for reporting companies. For example, agreements to exploit natural resources between a government and a reporting company giving rise to reportable payment obligations will also commonly include confidentiality restrictions, meaning a carve out for information required to be disclosed pursuant to government reporting requirements will be important.

CONCLUSION

As at the date of this update, it is not clear whether the Coalition, Labor or the Palmer United Party support the Bill. If enacted in its present form, it will:

- bring Australia into line with international best practice regarding the reporting of payments to governments by resource companies;
- result in additional compliance costs for affected companies; and
- require affected companies to carefully consider applicable confidentiality restrictions in the context of the reporting obligation.

Putting the existence of a formal reporting obligation to one side, from the perspective of good corporate governance and corruption avoidance, the existence of company policies dealing with payments to foreign governments or officials, the continued education of company officers, employees and agents regarding risk, acceptable practice and procedure in this area, and the proper documenting of any payments ultimately made to governments and government officials:

- enables the risks associated with investments in developing countries to be properly assessed by management and the board; and
- reflects international best practice.

Accordingly, even if the Bill is not ultimately enacted, companies in the extractive industries should have in place policies and systems to accurately record payments to governments and government officials.

MORE INFORMATION

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