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Australia proposes robust new foreign bribery laws

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On Monday 2 December, the Australian Government introduced into the Senate the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (Cth) ("Foreign Bribery Bill"). This Bill proposes to fundamentally shift the criminal liability landscape for corporations with respect to foreign bribery

The Bill follows on from the Australian Government's introduction of the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) (the "2017 Bill") two years ago, which had been allowed to lapse at the end of the previous Parliamentary session, ahead of the 2019 Australian federal election.

Like the 2017 Bill, the Foreign Bribery Bill proposes the following fundamental changes:

1. creating a new criminal offence of bribery by an associate, for which a corporation may be convicted unless it has in place "adequate procedures" designed to prevent that conduct ("Failure to Prevent Bribery Offence"), which is punishable by a fine that is the greater of:
   a. AUD21 million;
   b. three times the value of the benefit provided; and
   c. 10% of the corporation's annual turnover;
2. amending the offence of foreign bribery; and
3. introducing a deferred prosecution agreement ("DPA") regime.

The Foreign Bribery Bill goes further than the 2017 Bill by:

1. amending the offence of foreign bribery to specify that it covers persons providing a benefit with the intention of obtaining a "business or personal advantage"; and
2. amending the definition of "dishonest" in the Criminal Code to remove the requirement that the prosecution prove the defendant knew that they were being dishonest.

The Government has also released new principles-based guidance in respect of what may constitute "adequate procedures" for the Failure to Prevent Bribery Offence.

The Government's strengthening of this Bill reflects the flurry of legislative activity and political commentary regarding corporate criminality in the aftermath of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. This includes the Government's implementation of stronger whistleblower protection laws and the Australian Law Reform Commission's ongoing review of the corporate criminal liability regime.

This article provides an overview of the Foreign Bribery Bill's impact on businesses in relation to:

- the proposed Failure to Prevent Bribery Offence;
- the "adequate procedures" defence to this new offence;
- the proposed amendments to the offence of foreign bribery;
- the amended definition of "dishonest" in the Criminal Code; and
- DPAs.

Businesses should pay close attention to the progress of this Bill and ensure that they have in place compliance policies that meet its "adequate procedures" test before its provisions come into effect, given the significant penalties that may apply. The Bill provides that its foreign bribery provisions would come into effect six months after it is passed by both Houses of Parliament and receives Royal Assent.

I. FAILURE TO PREVENT BRIBERY OFFENCE

As with the 2017 Bill, the Foreign Bribery Bill proposes a new strict liability corporate offence for failing to prevent foreign bribery. Under this proposal, corporations would be automatically liable for foreign bribery committed by an associate for the profit or gain of the corporation. The definition of "associate" includes any of a corporation's:

- officers;
- employees;
- agents;
- contractors;
- subsidiaries;
- controlled entities; and
- any persons that otherwise perform services on its behalf.

The only defence available to corporations is that they had "adequate procedures" in place to prevent the foreign bribery.

Currently, any successful prosecution requires proof that the corporation's "directing mind and will" (its senior management) caused it to engage in foreign bribery. However, by creating this strict liability offence, corporations can now be prosecuted even if a bribe was paid for their benefit but without their knowledge.

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Both the proposed offence and defence are modelled on section 7 of the United Kingdom's *Bribery Act 2010*, and have the aim of removing impediments to the successful prosecution of foreign bribery offences. This follows closely on the heels of the Australian Government providing an additional AUD41.6m in funding to the Commonwealth Director of Public Prosecutions over eight years to fund further prosecutions of criminal misconduct by corporations, in particular financial institutions.

II. THE "ADEQUATE PROCEDURES" DEFENCE

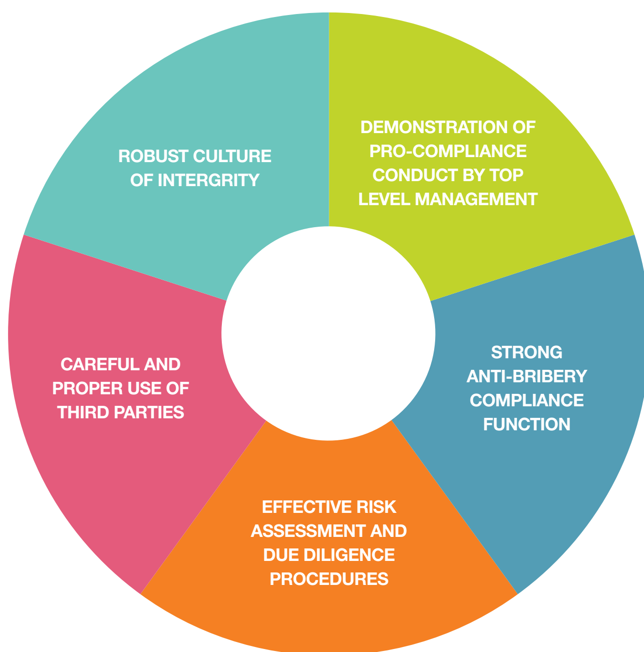
A consultation draft of the Government's Guidance on Adequate Procedures to Prevent the Commission of Foreign Bribery ("Guidance") has been published alongside this Bill. This is the first version of the Guidance that the Government has published, as no guidance was released in 2017.

Businesses should note that the Guidance is principles-based only, and is not a legislative instrument. As a result, the Guidance expressly states that failing to comply with it would not lead to the presumption that the corporation does not have "adequate procedures" in place. It nevertheless remains a helpful additional reference guide for corporations which should be taken into account.

The Guidance draws heavily from the United Kingdom Government's guidance accompanying its *Bribery Act 2010*, as well as guidance published by the Australian Trade Commission, United States Department of Justice, International Organization for Standardization, Organisation for Economic Co-operation and Development, United Nations Office on Drugs and Crime, World Bank, and Transparency International UK.

The main principles contained in the Guidance should therefore be familiar to most businesses. Its main emphasis is on corporations putting in place proportionate and effective compliance programs.

The Guidance outlines five main indicators of an effective compliance program:



The Guidance also specifies that corporations should have clear anti-bribery and corruption policies and procedures that articulate the corruption risks faced by the corporation, the processes designed to mitigate those risks, and the measures designed to prevent bribery by associates of the corporation. It sets out six fundamental elements of such policies:

1. risk assessment procedures;
2. board and managerial-level dedication to foreign bribery prevention;
3. the corporation's approach to mitigation of its bribery risk;
4. the corporation's implementation strategy for its bribery prevention policies, including communication and training;
5. reporting obligations and protections for whistleblower reporting; and
6. monitoring and reviewing compliance programs.

The Attorney-General's Department is accepting submissions in relation to the Guidance consultation draft by 28 February 2020.

III. AMENDMENTS TO THE OFFENCE OF FOREIGN BRIBERY

The Bill proposes a number of amendments to the offence of foreign bribery in order to lower the bar for successful prosecution. These include:

- removing the requirement that the benefit provided was not "legitimately due" (which has proved challenging for prosecutors to establish), and replacing it with the requirement that a defendant had the intention of "improperly influencing" a foreign public official;
- specifying that the bribery must be intended to obtain a "business or personal advantage", which clarifies that personal advantages, such as the bestowal of personal honours, the processing of visa requests, or reduction of personal tax liability, can be sufficient to establish the offence;
- clarifying that a defendant could have intended for the advantage to be obtained by someone else;
- clarifying that a defendant did not have to have a specific advantage in mind when providing the benefit;
- removing the requirement that a defendant had the intention of influencing the foreign public official "in the exercise of the official's duties as a foreign public official"; and
- expanding the definition of "public official" to include a candidate standing for office.

Corporations should ensure that their anti-bribery and corruption policies and procedures accommodate the conduct falling within this expanded offence.

IV. AMENDMENT TO THE DEFINITION OF "DISHONEST"

The Bill also proposes to streamline the definition of "dishonest" in the Criminal Code so that it:

- still requires the prosecution to prove that the defendant was dishonest according to the standards of ordinary people; but
- no longer requires the prosecution to prove that the defendant <u>knew</u> that he or she was being dishonest according to the standards of ordinary people.

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This change relates to the Criminal Code generally, and is not targeted at the foreign bribery offences. However, the Bill does propose that courts can have regard to dishonesty in considering whether the defendant attempted to "improperly influence" a foreign public official.

This change would align the Criminal Code with the High Court of Australia's ruling in *Peters v The Queen* (1998) 192 CLR 493 and the recent UK Supreme Court decision in *Ivey v Genting Casinos* [2017] UKSC 67, and is directed to offences such as dishonestly obtaining or dealing in personal financial information and the theft of trade secrets on behalf of a foreign government principal.

V. DEFERRED PROSECUTION AGREEMENTS

The Bill also introduces a DPA regime, which is designed to encourage corporations to self-report misconduct. Under this regime, the Commonwealth Director of Public Prosecutions would be able to invite corporations suspected of serious corporate crimes to negotiate a DPA. These serious corporate crimes include foreign bribery, fraud, false accounting, and money laundering. A DPA would require the corporation to agree to a statement of facts and comply with a range of conditions, including cooperating with the ongoing investigation of related misconduct.

Corporations would not be prosecuted in relation to matters that were the subject of a DPA. However, they could still be prosecuted if they materially breach a DPA or knew, or ought to have known, that they provided inaccurate, misleading or incomplete information in relation to a DPA or DPA negotiation.

In light of Australian regulators' recent "why not litigate?" approach, the Government was keen to ensure that DPAs were not seen to offer corporations a "free pass". As a result, the Bill proposes that DPAs cannot enter into force until they have been independently assessed by a former judicial officer as being both (i) in the interests of justice, and (ii) on terms that are fair, reasonable and proportionate.

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