Pending anti-bribery developments in Australia

Global Anticorruption Newsletter

5 DEC 2018

A major overhaul of Australia's foreign bribery laws is currently under way, prompted by an Australian Senate Committee inquiry launched in 2015. The Senate Committee made a series of recommendations aimed at enhancing Australia's foreign bribery compliance and enforcement framework, and a number of those recommendations are reflected in bills currently before the Australian Parliament.

In summary, the inquiry highlighted the need for Australia to improve its anti-foreign bribery compliance and enforcement response to match international standards in other jurisdictions – such as the United Kingdom and United States – by strengthening its legal framework against foreign bribery and building a corporate culture of integrity and compliance. In the paragraphs that follow, we summarize the Senate Committee's key findings and recommendations, legislative changes pending before Parliament, and recommended action items for businesses operating in Australia.

Key Senate Committee recommendations and proposed changes to the law

1. Expansion of foreign bribery offenses

> The Senate Committee recommended that a new corporate offense of failing to prevent foreign bribery be introduced, bringing Australia in line with jurisdictions such as the United Kingdom. It also recommended development of principles-based guidance for companies on establishing and implementing "adequate procedures" that might serve as a defence to this new crime.

The evidence presented to the Senate Committee demonstrated that foreign bribery often occurs in situations where there is wilful blindness by senior management to problematic activities occurring within their organizations. The Committee expressed the view that when corporations fail to take steps to prevent foreign bribery, they should be held responsible for foreign bribery by their associates.

The recommendations have been taken up in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the CCC Bill), before the Senate at the time of writing. The CCC Bill introduces a new strict liability offense of failing to prevent bribery. When an associate (an officer, employee, agent, contractor or subsidiary) of a corporation commits the offense of foreign bribery for the benefit of the corporation, the corporation is deemed to have also committed the offense, unless it can show it had "adequate procedures" in place designed to prevent foreign bribery. Forthcoming ministerial guidance will assist companies as they plan and implement "adequate procedures" that might serve as a defense.

2. Introduction of deferred prosecution agreements

The Senate Committee's recommendations include the introduction of a deferred prosecution agreement (DPA) scheme to encourage self-reporting of foreign bribery offences. Such schemes already exist in other jurisdictions, including the United States and United Kingdom

A DPA scheme would enable corporations that have engaged in serious corporate crime to negotiate an agreement with the key Australian prosecutor, the Commonwealth Director of Public Prosecutions (CDPP). Provided that the corporation meets its obligations under the agreement, it would not subsequently be prosecuted for the offenses identified in the DPA.

The CCC Bill introduces a DPA scheme which provides that any DPA must contain admissions of facts relating to the misconduct at issue and require payment of a financial penalty to the Commonwealth and disgorgement of profits or other benefits gained from the misconduct. Additional terms may include implementation of compliance programs, compensation for victims, charitable donations, or agreements for ongoing cooperation with authorities. The CDPP must be satisfied that the DPA is in the public interest before agreeing to it and a former judicial officer must assess the agreement and approve it before it is given effect.

Partly in anticipation of the introduction of DPAs, the CDPP and Australian Federal Police (AFP) have already issued self-reporting guidelines to assist corporations that wish to self-report actual or suspected foreign bribery offenses. The guidelines seek to address significant uncertainties that had previously existed for corporations wanting to take such action. For example, the guidelines confirm that reports can be made about an associate's conduct without making admissions of corporate criminal responsibility and while preserving legal professional privilege. The guidelines specify that the fact of self-reporting (together with the degree of cooperation in fact provided) will be taken into account both in deciding whether to prosecute, and, if prosecution occurs, as a mitigating factor during sentencing. The guidelines also explain procedures for early guilty pleas by a company and how such pleas may result in significant discounts in sentencing.

3. Strengthening whistleblower protections

Given the significant harm generated by foreign bribery and corporate corruption and the key role insiders can play in exposing such conduct, the Senate Committee considered it essential that Australia take action to adequately protect whistleblowers.

Separate legislation – the Treasury Laws Amendment (Enhancing Whistleblower Protection) Bill 2017 – is currently pending that would implement significant reforms to Australia's whistleblower regime for the corporate, financial, and credit sectors. These reforms significantly expand the kinds of disclosures and categories of people able to receive protection, protect whistleblower anonymity, mandate internal whistleblower policies, and make it easier for victimized whistleblowers to receive compensation.

Other potential changes in the future

Other recommendations made by the Senate Committee, not currently the subject of proposed legislation, include abolishing the currently available "facilitation payment" defence; expanding requirements for companies and trusts to disclose beneficial ownership information to Australia's securities regulator; and enabling government agencies to

preclude companies found guilty of foreign bribery offences from being awarded federal government contracts. It remains to be seen whether these recommendations will be taken up in the future.

Preparing for these legislative changes

Given that amendments to the foreign bribery offence, the introduction of a DPA scheme, and enhanced whistleblower protections are currently before Parliament, organizations conducting business in Australia should begin preparing for these changes, including reviewing existing policies and procedures and ensuring that they are adequate to address the expanded requirements and protections. In addition, businesses operating in Australia should aim to:

- Understand the risks of bribery and corruption in their business and assess whether current policies, procedures, and internal controls are adequate to address those risks. Policies and procedures should contain:
  - a clear statement on the business's position on bribery and corruption (*ie*, that it is prohibited, or that it is prohibited generally but that facilitation payments may, in the limited circumstances permitted by law, be made)
  - avenues for confidential and easy reporting of suspected bribery and corruption, and
  - a clear process explaining how the business will respond to any allegations of bribery and corruption, including identifying who in senior management is ultimately responsible for responding to any reports.
- Ensure that the business's anti-bribery and corruption policies are clearly understood throughout the organization, including through regular inclusion in internal communications and appropriate training for company personnel. Visible senior management and board level articulation of the business's commitment to preventing bribery and corruption remains very important.
- Conduct proportionate and risk-based anti-bribery due diligence procedures for all third parties who work with the business.
- Regularly review anti-bribery and corruption policies to ensure they remain adequate, and report on those assessments to the board and senior management.
- Consider whether existing whistleblower policies are adequate to meet the requirements of the pending legislation. If the company does not have a whistleblower policy, ensure an appropriate policy is developed, implemented, and communicated throughout the organization.

Learn more about the implications of these developments by contacting any of the authors.