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Anti-Bribery & Corruption in Australia

By Dennis Miralis

Australia has been a signatory to the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions since 1999. Australia has also been a signatory to the United Nations Convention against Corruption. These international agreements are complementary and mutually reinforcing since 2003,

While the OECD monitoring report acknowledges the substantial steps taken by Australian authorities in combatting foreign bribery and corruption, it also highlighted Australia's historically low number of foreign bribery prosecutions, when considered against other OECD members.

Key recommendations from the report emphasise the need for Australia to:

- Reduce the risk of the Australian real estate sector being used to launder the proceeds of foreign bribery;
- Ensure that Australian authorities have adequate resources to effectively enforce the offence of foreign bribery;
- Take a proactive approach to the investigation and prosecution of companies for foreign bribery offences; and
- Strengthen whistleblower protections in the private sector.

Transparency International's 2019 survey placed Australia as one of the top performers in the APAC region however the report highlighted the overall deficiencies in the APAC regions ability to effectively control corruption.

When considering these recommendations, it is also important to note that since the commission of the OECD report, a number of prominent foreign bribery prosecutions have now been brought to public attention.

In the lifting of longstanding Court suppression orders on 28 November 2018, information relating to the successful prosecution of companies Note Printing Australia Limited and Securency International Pty Ltd became publically available for the first time. Between 2012 and 2018, both companies – as well as executives, employees and agents of the companies – were convicted and sentenced for foreign bribery offences.

Foreign bribery and transnational corruption offences are by nature difficult to detect. These offences present significant obstacles for law enforcement bodies to overcome prior to completion of a successful prosecution.

Reasons for this include the fact that commonly neither the provider nor the recipient of a bribe is likely to disclose the offence. Both parties will often go to great measures to mask or conceal the corrupt activity which is often closely linked to non-corrupt, legitimate business activity. In an effort to obscure corrupt practices, illicit funds are often placed, layered and integrated into legitimate financial markets using money laundering typologies.

Unlike many other serious offences, there is rarely an easily identifiable victim of foreign bribery who is willing to come forward and report the crime. Witnesses to such offences often reside outside Australia's jurisdictional limits and may be reluctant to provide assistance in criminal proceedings conducted in Australia.

For these reasons it is not uncommon for a foreign bribery case, including investigation and prosecution phases, to take in excess of five years.

Recently, the Australian Federal Police ("the AFP") has received additional funding to assist dedicated foreign bribery investigative teams and an additional fraud and anti-corruption team.

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The Commonwealth Director of Public Prosecutions (CDPP), whose primary role is to prosecute offences against Commonwealth law such as foreign bribery, have also recently been consulted in relation to legislative reform in this area.

What are the key areas of anti-corruption compliance risk on which companies should focus?

Given the shifting legislative and investigative landscape highlighted above, there are a number of risks or 'red flags' which companies would be well advised to be aware of in regards to foreign bribery and corruption.

The reforms signal a shift in onus with an increased need for companies to adopt a proactive, risk-based approach to compliance. Failure to do so can expose companies to criminal charges in the event a company associate engages in foreign bribery, even in circumstances unknown to the corporation.

In a whitepaper recently published by TRACE international, specific examples of situations that may signal a heightened risk of foreign bribery are identified. Even after internal safeguards have been established, the need to conduct due diligence when dealing with third party intermediaries is stressed in the report.

Factors which will affect the level of risk include:

- Whether a company uses intermediaries;
- The control a company has over its subsidiaries, including foreign subsidiaries;
- Whether a company is operating in multiple jurisdictions; and
- The prevalence of corruption in jurisdictions that the company operates in.

Australian anti-bribery and corruption laws, including the proposed revisions, present a complex management challenge for Australian companies operating in multiple jurisdictions within the global marketplace. Foreign bribery offences apply extra-territorially and can result in serious penalties including imprisonment.

A number of common red flags for foreign bribery exist when dealing with third party intermediaries and companies would be best advised acknowledging and taking appropriate action in response to such warning signs. These indicators represent a variety of different risks across a range of severity levels and are situations which should raise heightened suspicion for companies and include:

- The intermediary having governments links or links with politically exposed persons (also known as PEP's);
- A history of criminal convictions or a criminal record held by employees of an intermediary;
- Evidence that the intermediary has inadequate controls or a lack of effective anti-bribery policies in place;
- Suspicious circumstances including a lack of clear expertise in the relevant industry or unusual payment or compensation practices;
- A lack of transparency relating to true ownership or complex structures which appear to obscure beneficial ownership; and
- Any other evidence of falsification or forgery on the part of the intermediate.

Anti-bribery risk assessments should be performed for all company associates. Risk assessment procedures and due diligence procedures should be documented to create a clear audit trail in the event of incident or investigation. In light of the proposed reforms, it is expected that future investigations will place an increased emphasis on examining whether companies have facilitated a 'culture of compliance' hostile to bribery or comparable corrupt practices.

Enforcement policies or priorities of anti-corruption will change in the near future

The Australian Government is considering options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by companies. A key component of in this area is the proposed introduction of a Deferred Prosecution Agreement (DPA) scheme.

Although it is presently unclear as to the exact form a DPA scheme would take on in Australia, a DPA is essentially an agreement negotiated between a prosecutor and a corporate defendant, similar to a 'plea deal'.

Offered at the discretion of the prosecution, a DPA would propose the deferral of a prosecution in exchange for compliance with a number of terms and conditions, which may include:

- Full cooperation with any ongoing investigation.
- The admission of agreed facts.
- The implementation of an internal program to promote and ensure future legal compliance.
- The payment of a fine or penalty.

In the UK, only corporate bodies can participate in DPA's. In the United States, both corporations and individuals can enter into such agreements. Adding extra complexity, the Australian constitution dictates that only Australian Courts can exercise judicial powers. Court's must make an independent determination as the appropriate course and cannot simply 'sign-off' on agreed penalties agreed between the parties. As such, Australian DPAs would need to be characterised more in the manner of interim settlement agreements as opposed to final orders.

The intended deterrent effect of a DPA scheme is best achieved by permitting individuals to participate. Disallowing individual participation would disincentivise people who may have some personal liability or involvement in illicit activities from reporting corporate misconduct. This would of course be contrary to the intention of the newly implemented whistleblower scheme discussed above.

There is also a risk that large companies, or the wider public, will view the introduction of a DPA scheme as a means for companies to 'buy their way out' of situations encompassing criminal wrongdoing. This again has the potential to undercut public confidence and the recent legislative changes intended to reinforce a greater level of corporate education in anti-corruption compliance.