Implications of the proposed amendments to Australia's foreign bribery laws

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- The reforms are intended to create an incentive for companies to implement more effective measures to prevent bribery and promote a culture of integrity.
- Two new separate foreign bribery offences are proposed — the first which introduces the fault element of recklessness and the second a new corporate offence of failing to prevent foreign bribery of a foreign public official.
- The proposed changes are expected to remove possible impediments to successful prosecutions and improve the effectiveness in regulating foreign bribery.

Australia has taken recent steps to strengthen its anti-bribery and corruption regime by proposing amendments to the foreign bribery offence in the *Criminal Code Act 1995* and proposing to introduce a deferred prosecution agreement (DPA) scheme. The business community has welcomed these proposed changes.

Closer alignment with international anti-bribery and corruption standards has already been achieved by many Australian businesses, a large number of which are operating across borders and in multiple jurisdictions.

We discuss the proposed legislative changes below and these should be considered along with the proactive approach that the Federal Government agencies are taking to combat bribery and corruption.

Turning the corner towards effective regulation

Since the introduction of the OECD *Convention on Combating Bribery of Foreign Officials* in 1999 and Australia's subsequent criminalisation of bribing foreign public officials, much criticism has been heaped on the country's lack in number of convictions in the 18 years that the legislation has been in place.

Sensitive to such criticism surrounding Australia's fractured enforcement, the Federal Government has timed these proposed amendments ahead of 12 December 2017 when Australia will be subjected to Phase 4 of the OECD Working Group on Bribery's rigorous peer-review monitoring system. Phase 4 focuses on enforcement and covers unresolved issues from prior reports, as well as in-depth exploration of horizontal issues such as detection, company liability and co-operation and mutual legal assistance among law enforcement officials.[1]

As outlined in the Public Consultation Paper, one of the government's objectives is to 'to ensure the law reflects community expectations and does not present unnecessary barriers to effective prosecution.'[2] These barriers include ambiguities in the current law which are intended to be removed.

The proposed amendments

The government has outlined the following proposed amendments to the foreign bribery offence:

- extending the definition of 'foreign public official' to include 'candidates for office'
- removing the requirements that the benefit/business advantage must be 'not legitimately due' and replacing it with the concept of 'improperly influence' a foreign public official
- extending the offence to cover bribery to obtain a personal advantage

- creating a new foreign bribery offence based on the fault element of recklessness
- creating a new corporate offence of failing to prevent foreign bribery
- removing the requirement of influencing a foreign public official in the exercise of their official capacity
- clarifying that the offence does not require the accused to have a specific business or advantage in mind, and that business or an advantage can be obtained for someone else.[3]

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Candidates for office

Similar to the US's Foreign Corrupt Practices Act (FCPA), which includes 'candidate for foreign political office,'[4] the proposal to expand Australia's current definition of 'foreign public official' intends to capture the conduct of companies bribing candidates for public office with the intent of obtaining business advantages once the candidate takes office.

In the absence of any published guidance, it remains unclear whether a 'candidate for office' may include a person intending to seek nomination or intending to apply for a public job. What has been made clear however is that this amendment will not prevent individuals or companies from making legitimate donations to candidates for office, as the amended offence will still require the prosecution to show that the benefit was provided, offered or promised to improperly influence the candidate to obtain/retain an advantage.

Improperly influencing a foreign public official

It is proposed to remove the requirements that the benefit/business advantage must be 'not legitimately due' and replacing it with the concept of 'improperly influencing' a foreign public official. The Public Consultation Paper outlines various factors that may be considered in determining 'improper influence':

- the recipient or intended recipient of the benefit
- the nature of the benefit
- how the benefit was provided
- whether the value of the benefit is disproportionate to the value of consideration or purported consideration (if any) for the benefit
- whether the benefit, or the offer or promise to provide the benefit, was provided in the absence of any legal obligation to do so
- whether, and to what extent, the benefit, offer or promise is recorded or documented.

Bribes are often disguised as legitimate business transactions. For these reasons, many offshore corruption investigations pivot on the following question: was the value of the benefit disproportionate to the value of any goods or services provided? An example may include disproportionately large 'consultancy fees' paid to a third party. Circumstances will vary thus the court will have an opportunity to consider other factors when determining 'improper influence'.

Obtaining a personal advantage

The proposed amendments seek to extend the offence of bribing a foreign public official to include obtaining a personal advantage. Examples may include non-monetary advantages such as:

- personal titles/honours
- processing of visa/immigration requests
- employing relatives of foreign officials or
- providing educational support such as scholarships.

New offences

Two new separate foreign bribery offences are proposed. The first offence aims to overcome difficulties in establishing intention by introducing the fault element of recklessness. This would still require intention as to the conduct of providing, promising or offering the benefit, however, unlike the current foreign bribery offence, this new offence would apply where a person is reckless as to whether that conduct would improperly influence a foreign public official in relation to the obtaining or retaining business or an advantage.[5]

This amendment may capture situations where a person is aware of a substantial risk that the circumstance exists (or will exist), and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.[6]

The second new offence (and one of the more significant proposals) is the creation of a new corporate offence of failing to prevent foreign bribery of a foreign public official. Much commentary (including the Public Consultation Paper itself) has drawn similarities with section 7 of the UK Bribery Act 2010. This is somewhat misleading. Though section 7 of the UK Bribery Act provides that a company would be automatically liable for bribery by employees, contractors and agents, except where it can show it had adequate procedures in place, it also does not distinguish between public and private bribery.

Commercial or 'business-to-business' bribery is not an offence under the Commonwealth legislation. The fact that the UK legislation captures both public and private bribery is one

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of the reasons why is it represents global best practice in anti-corruption regulation by prohibiting all bribery.

Acting outside of official duties

Situations may arise where foreign public officials are bribed to act outside of their official duties to secure business or an advantage. For example, an official influencing decisions within other government departments such as a Minister influencing the award of a mining licence. It is proposed to remove the requirement of influencing a foreign public official in the exercise of their official capacity.

In order to determine whether a foreign public official was acting beyond the official scope of their work, the prosecution must establish the scope of their duties most likely in the form of a statement from the foreign jurisdiction. The government has acknowledged this will require mutual assistance which may be difficult and time consuming.

Clarifications

Finally, the government is consulting on amendments to the offence to clarify that business can be obtained for someone else and to provide that the accused does not need to have a specific business or advantage in mind.

This may capture situations where a person who obtains the business is not the same person who provides/offers the benefit. Similarly, those with the intent of 'currying favour' with no specific business or advantage in mind but rather an unspecified undue advantage may be provided in the future may also be captured.

Rejecting corruption means rejecting all corruption

Despite best efforts to remove existing ambiguities, the proposed amendments stop short of eradicating all uncertainty and confusion that has pervaded Australian organisations since the foreign bribery laws were introduced.

The 'facilitation payments' defence[7] will remain intact despite requests from some organisations to have it removed.[8] One leading ASX company contended 'the permissibility of facilitation payments under Australian law not only helps to maintain an environment in which bribery can take root and flourish, but often does so in the face of local laws which seek to prohibit these payments.'[9] For example, the UK Bribery Act does not distinguish between bribes and facilitation payments. Other countries which do not permit facilitation payments (or 'graft'), include Indonesia, India, Cambodia, Nigeria, Tanzania, Zambia, Uganda and Canada. This presents operational challenges for Australian organisations subject to the foreign extra-territorial provisions.

Companies who choose a 'country-by-country' approach, permitting facilitation payments in some countries but not others may lead to confusion among employees and a compliance burden for general counsel. There are also complexities associated with complying with Australian legislation. For example, the record keeping requirements and retaining details of the payment — such documentation which may be considered as evidence of bribery and used in prosecution in foreign jurisdictions.

Adopting a 'zero-tolerance' approach is recommended and in line with the global trend enabling organisations to consciously manage the risks that they face more effectively. As The Honourable Terence Cole AO RFD QC stated 'rejecting corruption means rejecting all corruption. One cannot allow just a little bit of ethically or morally wrong conduct because if one does it becomes impossible to draw the bright line which permissible conduct must not cross.'[10]

The reality is Australian companies engaging in international activities will still be subject to tougher foreign bribery laws and active enforcers such as the US Department of Justice and the UK Serious Fraud Office. Questions remain whether Australia will implement a stricter regime further aligning its obligations under the OECD Convention.

Implications for Australian organisations

If enacted, the proposed changes are expected to remove possible impediments to successful prosecutions and improve the effectiveness in regulating foreign bribery. To further enhance the existing regulatory regime, the

Federal Government is consulting on a DPA model[11] offering a voluntary alternative to prosecution in which a company undertakes specified actions in exchange for prosecution being suspended, pending successful completion of the agreement.[12] This would be a welcome addition to the current regulatory regime. It is likely to resolve much uncertainty that currently disincentivises companies from self-reporting potentially serious criminal offences.

An anti-bribery and corruption framework should represent a single element of an overall compliance and risk management framework. Though it is expected the Minister will publish guidance on the steps that organisations can take to prevent an associate from bribing foreign public officials,[13] in the meantime, companies may avail themselves of the six key Principles of what may constitute 'adequate procedures' as published by the UK Ministry of Justice.[14]

It is recommended organisations adopt a risk-based approach to managing bribery risks. This recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions and is based on the premise that you cannot entirely eliminate the risk of bribery. Procedures should be proportionate to the risks faced by an organisation and tailored to ensure greatest impact on areas deemed higher risk. ◪

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Notes

1 OECD, Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery, 2017, p 4.

2 Australian Government Attorney-General's Department, Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*, Public Consultation Paper, April 2017, p 3.

3 Australian Government Attorney-General's Department, Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*, Public Consultation Paper, April 2017, p 4.

4 15 USC § 78dd-1 Prohibited foreign trade practices by issuers, Foreign Corrupt Practices Act 1977.

5 Australian Government Attorney-General's Department, Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*, Public Consultation Paper, April 2017, p 7.

6 Definition of 'recklessness', s 5.4 C*riminal Code Act 1995*.

7 Section 70.4 of the *Criminal Code Act 1995*.

8 Smith A, Shell submission, Inquiry into foreign bribery, 24 August 2015; Abbott M, Woodside submission, Senate Economics References Committee — Inquiry into Foreign Bribery, 20 August 2015; bhpbilliton submission, Senate Economics References Committee Inquiry into Foreign Bribery, September 2015.

9 Abbott, M. Woodside submission, Senate Economics References Committee — Inquiry into Foreign Bribery, 20 August 2015.

10 The Hon TRH Cole AO RFD QC, an address on 'Corruption' to the 6th National Investigations Symposium, 2 November 2006.

11 Australian Government Attorney-General's Department, Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia, Public Consultation Paper, March 2017.

12 Mackinnon C and Fehon M, 'Deferred Prosecution Agreements — creating greater flexibility for Australian regulators', Positive Outcomes, December 2013.

13 Australian Government Attorney-General's Department, Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*, Public Consultation Paper, April 2017, p 16.

14 UK Ministry of Justice, The Bribery Act 2010: Guidance, March 2011.