Global Compact Network Australia

2018 Australian Dialogue on Bribery & Corruption

3 May 2018, Melbourne

Summary and Outcomes Document

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1 Overview

On 3 May 2018, the Global Compact Network Australia (***GCNA***) convened over 50 representatives from business, government and civil society at the annual Australian Dialogue on Bribery & Corruption (***Dialogue***). The event was held at Allens' office in Melbourne.

The Dialogue provides a platform for engagement between Australian businesses, government and civil society on anti-bribery and corruption. From Government, the event was attended by representatives from the Attorney General's Department, the Commonwealth Director of Public Prosecutions (***CDPP***), the Australian Securities and Investments Commission and the Australian Federal Police (***AFP***). From business, several sectors were represented, including extractives and industrials, banking/finance, professional services, and communications. Representatives also attended from universities and civil society.

This Summary Report outlines the highlights from the Dialogue.

2 Background to the Dialogue

The Dialogue was convened against the background of what is a watershed year for bribery and corruption regulation and enforcement in Australia. The key events of note are as set out below.

- The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) (***Bill***) proposes a number of amendments to the existing foreign bribery offence, and the introduction of a new 'failure to prevent bribery' offence (pursuant to which an Australian company will commit an offence if an 'associate' of the company commits bribery for the 'profit or gain' of the company). Corporations can rely on an exception if they prove on the balance of probabilities that they had adequate procedures in place that were designed to prevent associates from committing foreign bribery. The Minister will publish principles-based guidance on the steps that a body corporate can take to have 'adequate procedures' in place to prevent an associate from bribing foreign public officials.
- The Bill proposes amendments to the DPP Act to introduce a DPA scheme. Instead of prosecuting a corporation, the proposed scheme would enable the CDPP to enter into a DPA with a corporation that is alleged to have engaged in specified corporate crimes (including the bribery of a foreign public official offence and the new offence of failing to prevent bribery).
- The AFP and CDPP published the Best Practice Guidelines on Self-Reporting of Foreign Bribery and Related Offending by Corporations (***Best Practice Guidelines***) on 8 December 2017.
- The OECD released its Phase 4 Report in December 2017, which examined Australia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related OECD anti-bribery instruments. The OECD noted that Australia's enforcement of its foreign bribery offence had 'increased markedly' since Phase 3 (October 2012).

3 Perspectives from the UK and US

In light of the Bill before Parliament and the proposed introduction of DPAs and a UK-style failure to prevent offence, the Dialogue heard from a keynote speaker from the UK and the US. These

speakers were able to provide practical experience and perspectives on the implementation and negotiation of DPAs and strategies to incentivise self-reporting.

A focus of the keynote speakers comments was on the utility of DPAs. It was noted that DPAs are an important component of corporate liability because, in their absence, authorities are faced with a stark choice between indictment and declining to prosecute. DPAs provide companies and government with a middle ground. The criticism or perception of DPAs as being overly beneficial to corporates was discussed, contrasted to the view that companies that are a party to a DPA may still be subject to significant penalties (equivalent to those that would apply if they pleaded guilty), as well as having additional obligations imposed (e.g. the appointment of a monitor to oversee the company's compliance program). The 'win-win' nature of DPAs was discussed – where the government is able to get everything it wants through pecuniary penalties (and commitments to improved compliance), and the company benefits as it avoids the reputational damage of a guilty plea and some of the financial costs associated with lengthy trial processes. A number of practical examples of DPAs from the UK were discussed.

The role of self-reporting and cooperation in determining the applicable penalty in the US was discussed. The context of this discussion was that previously, self-reporting and cooperation were one factor to be considered in assessing liability in the US, which meant a company had to cooperate *and* self-report in order to get credit. However, self-reporting and cooperation have since been split – such that a company can now get credit for self-reporting if it does not cooperate, and vice versa. The system in the US where companies are incentivised to self-report and fully cooperate was noted, where in return for self-report and cooperation there is a potential reduction in financial penalties of up to 50% for companies that cooperate *and* self-report (for companies that cooperate but do not self-report, the maximum reduction is 25%). Importantly, there is a presumed declination to prosecute if the company self-discloses, cooperates and remediates, although this does not apply if there are aggravating circumstances. Companies are also now required to disclose individual wrongdoing in order to receive full credit for self-reporting.

4 Session 1: The Australian reforms – amendments to foreign bribery laws and DPAs

The first session considered the amendments to the existing foreign bribery offence, the introduction of the failure to prevent bribery offence and the DPA scheme. The panel of representatives from the Attorney General's Department, Australia Federal Police, and the Commonwealth Director of Public Prosecutions provided an overview of the amendments and their likely impact on enforcement.

4.1 Foreign bribery offences

It was noted that the changes to the existing foreign bribery offence respond to law enforcement experience and the OECD's recommendations, and are expected to simplify investigations and prosecutions.

The failure to prevent bribery offence is expected to lead to an increase in enforcement activity. It is anticipated that this offence will be particularly useful against larger entities, as attributing liability to smaller/medium size businesses via the existing provisions does not face the same challenges.

4.2 Introduction of the DPA scheme

The Dialogue considered the nature of the proposed DPA scheme. A code of practice will be established which will set out the expectations at each stage of the process, from self-reporting

through to compliance with the executed DPA. This will be developed in consultation with stakeholders.

It was noted that the steps a company can take to demonstrate cooperation will depend on the facts of the case at hand, and might include:

(a) engaging with regulatory authorities in good faith;

(b) assisting in expediting the process;

(c) providing access to documents;

(d) disclosing information which the investigating authorities would not otherwise discover; and

(e) signing an Investigation Cooperation Agreement.

5 Session 2: Self-Reporting, Cooperation and DPAs – perspectives from enforcement authorities and business

The second session considered self-reporting, cooperation and DPAs. Participants discussed the timing of self-reports, whether a company should conduct an internal investigation prior to any self-report and what is meant by 'cooperation'.

Participants noted that certainty will incentivise self-reporting. The clearer and bigger the 'sticks' and 'carrots' are, the more likely it is that companies will self-report and be willing to negotiate DPAs. It was noted that the first DPAs will provide useful examples that other companies can use as a guide.

6 Session 3: What will make guidance on 'adequate procedures' effective?

Participants broke into five tables to discuss the key components of the forthcoming guidance on adequate procedures. The five tables considered:

(a) the indicators of adequate procedures, concluding that these indicators should be consistent with existing guidance from other jurisdictions, as well as building on the six principles contained in the UK guidance;

(b) adequate procedures in the context of large companies with global footprints, and the need for greater context and case-based examples;

(c) risk assessments, concluding that the guidance should include a number of practical examples, and could cross refer to the best practice guidelines that apply to particular jurisdictions and industries;

(d) the meaning of 'tone from the top', emphasising the importance of culture and having the business 'own' compliance, noting the impact of senior executives engaging in conversations with affected individuals; and

(e) due diligence, noting the need for due diligence to be risk-based and industry specific, with frequent monitoring and review.

In keeping with the Chatham House rule, this summary document does not attribute comments to any speakers or participants. This document does not represent the view of Allens, the GCNA, or any speaker or participant.