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Australian Dialogue on Bribery and Corruption

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BRIEFING PACK

Introduction and contents

The Australian Dialogue on Bribery and Corruption (***Dialogue***) provides a platform for engagement between Australian businesses, government / regulators, academics and civil society, and an opportunity to explore the practical steps each stakeholder group can take to strengthen ethical business practices and reduce corruption and bribery in Australia and wherever Australian businesses operate.

The Dialogue will have three key focus areas:

1. The nature and rationale of the proposed foreign bribery reforms as set out in the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) (***Bill***) (including the introduction of the Deferred Prosecution Agreement (***DPA***) scheme);
2. The impact of self-reporting, cooperation and access to DPAs; and
3. Guidance on how to implement and maintain adequate procedures to prevent foreign bribery.

The objectives of the Dialogue include:

- identifying the challenges and opportunities in enforcement, including how to encourage more business-regulator engagement and collaboration;
- enhancing the capacity of Australian businesses to understand the importance of, and practical steps to, ensure ethical business practices – and the risks in not doing so;
- building a constructive Australian multi-stakeholder network on ethical business practice and anti-corruption; and
- identifying practical steps that each stakeholder group can take to move the anti-corruption agenda in Australia forward.

The role of business, government / regulators and civil society, and the levers each has at its disposal to drive change, will be explored. Lessons learnt to date will be shared, and key issues including corporate culture, cooperation and self-reporting will be discussed.

This Briefing Pack has been prepared to provide relevant background to underpin discussions throughout the Dialogue. It summarises the proposed amendments to Australian foreign bribery laws, the proposed DPA regime, the Best Practice Guidelines on Self-Reporting, and provides an overview of guidance on corporate culture and adequate procedures in other jurisdictions.

1 Overview of the Bill

The Bill proposes amendments to the *Criminal Code Act 1995* (Cth) (***Criminal Code***) and the *Director of Public Prosecutions Act 1983* (Cth) (***DPP Act***). The Bill was introduced to the Senate on 6 December 2017. Subsequently, the Bill was referred to the Senate's Legal and Constitutional Affairs Legislation Committee, which published its report on 20 April 2018. It was also considered by the Senate's Standing Committee for the Scrutiny of Bills, which published its Scrutiny Digest 3 on 21 March 2018.

2 Key amendments to the existing foreign bribery offence

The Bill proposes a number of amendments to the existing foreign bribery offence.

Importantly, proposed section 70.2A replaces the test of whether an advantage was 'not legitimately due' with a test of whether the foreign public official was 'improperly influenced'. In making this assessment, the factors that must be disregarded include, amongst others, the fact that the benefit may be (or perceived to be) customary, necessary or required in the situation, or that the benefit is officially tolerated. Factors to which regard may be had include (amongst others):

(a) the (intended) recipient of the benefit;

(b) the nature of the benefit;

(c) how the benefit was provided; and

(d) records of the benefit.

Other key amendments proposed under the Bill include:

(a) expanding the definition of foreign public official to include 'an individual standing, or nominated, (whether formally or informally) as a candidate to be a foreign public official';[1]

(b) removing the requirement that the foreign public official must be influenced 'in the exercise of the official's duties'; and

(c) expanding the scope of the bribery offence to include where a bribe was paid to obtain or retain an advantage of any kind (including a personal advantage), rather than being limited to retaining business or a particular business advantage.

We note that the Bill does not remove the 'facilitation payments' defence. The Attorney-General's Department has stated that the government will continue to review the operation of this defence.[2]

[1] Bill sch 1 item 4 (new section 70.1 of the Criminal Code).

[2] Attorney-General's Department, *Response to Questions on Notice regarding the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (***AG Answers***), [Question 19 and 20].

3 The introduction of the 'failure to prevent bribery' offence

3.1 The offence

Under the proposed amendments, an Australian company will commit an offence if an 'associate' of the company commits bribery for the 'profit or gain' of the company. The bribe by the associate may have been paid anywhere in the world.

The Bill sets out a broad definition of the term 'associate' so as to include all officers, employees, agents, contractors, and any other person that performs services for or on the company's behalf. The definition also includes subsidiaries and controlled entities, regardless of whether they are performing services for, or on behalf of, the company.

The proposed failure to prevent bribery offence is an 'absolute liability' offence. Unless a corporation can prove it had 'adequate procedures' in place to prevent foreign bribery by associates, it will be liable without the prosecution having to establish culpability on the part of the corporation. The 'absolute liability' nature of the offence has been justified as it:

- addresses difficulties that Australian enforcement agencies have previously experienced with the lack of written evidence to establish intention in foreign bribery cases;
- creates a strong positive incentive for corporations to adopt adequate procedures to prevent foreign bribery; and
- overcomes challenges in establishing liability of corporate entities for foreign bribery, and ensures that corporations are not able to avoid liability through wilful blindness.[3]

The prosecution will still bear the legal burden of proving the physical elements of the circumstances beyond reasonable doubt, including that the associate committed the primary offence (and its fault elements) under section 70.2 of the Criminal Code (or equivalent conduct outside Australia). The prosecution will not be required to show that the associate has been successfully prosecuted.

3.2 The 'adequate procedures' exception

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 the commission of the foreign bribery offence by the associate. The courts will determine the adequacy of procedures on a case by case basis.[4] The Attorney General's Department has advised that corporations that are able to point to the existence of effective and well-integrated compliance regimes would be able to establish the ‘adequate procedures defence’, but that the types of procedures that will be considered ‘adequate’ will differ substantially from corporation to corporation, depending on factors such as the size of the corporation and its risk profile.

[3] EM, [90-91]; AG Answers, [Questions 15 and 16].

[4] EM, [96].

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.[5] The Attorney-General's Department announced that such guidance will likely be informed by the UK guidance in relation to the *Bribery Act 2010* (UK), as well as other existing guidance (including that published by the Australian Trade Commission, US Department of Justice, International Organization for Standardization, the OECD, the United Nations Office on Drugs and Crime and the World Bank).[6] The Attorney-General's Department stated that 'consistency with international guidance will limit regulatory impact as many corporations (particularly multinationals) already take preventative action based on UK/US requirements'.[7]

[5] AG Answers, [Question 6 and 9] .

[6] AG Answers, [Question 11].

[7] AG Answers, [Question 22].

4 Existing guidance on 'adequate procedures'

4.1 US guidance

In 2017 the Department of Justice (***DOJ***) published guidance titled 'Evaluation of Corporate Compliance Programs'. The guidance refers to the factors that prosecutors should consider when conducting an investigation of a corporate entity and determining whether to bring charges or negotiate plea or other agreements. Such factors include:

> 'the existence and effectiveness of the corporation's pre-existing compliance program' and the corporation's remedial efforts 'to implement an effective corporate compliance program or to improve an existing one.'

The guidance notes that the DOJ's Fraud Section 'does not use any rigid formula' to assess the effectiveness of corporate compliance programs, but rather as each company's risk profile warrants 'particularized evaluation' the DOJ will make an 'individualized determination in each case'. However, there are 'common questions' that the Fraud Section may ask in making this determination. To that end, the guidance provides 'important topics and sample questions that the Fraud Section has frequently found relevant' when assessing compliance programs. The questions are split into 11 sample topics (as set out below) with corresponding questions that are relevant when assessing compliance programs:

(a) analysis and remediation of underlying misconduct;

(b) senior and middle management;

(c) autonomy and resources;

(d) policies and procedures;

(e) risk assessment;

(f) training and communications;

(g) confidential reporting and investigation;

(h) incentives and disciplinary measures;

(i) continuous improvement, periodic testing and review;

(j) third party management; and

(k) mergers & acquisitions.

The DOJ emphasised that the questions raised under these topics are not a checklist or formula – and other factors may be more important given the particular facts in issue.

4.2 UK guidance

The *Bribery Act 2010* (UK) requires the Secretary of State to publish guidance about procedures that commercial organisations can put in place to prevent persons associated with them from engaging in bribery. In response, the Ministry of Justice published guidance in March 2011 which explains the policy behind the failure to prevent bribery offence and is intended to help commercial organisations to understand the procedures they can put in place to prevent bribery. The guidance notes that departure from the suggested procedures in the guidance 'will not of itself give rise to a presumption that an organisation does not have adequate procedures'.

The guidance states that:'[t]he Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles'.

The guidance also notes that the principles are not prescriptive and are 'intended to be flexible', allowing for the 'huge variety of circumstances that commercial organisations find themselves in'. The six principles are:

(a) Proportionate procedures

Procedures must be proportionate to the bribery risks an organisation faces and to the nature, scale and complexity of the commercial organisation's activities. The procedures and policies must be clear, practical, accessible, effectively implemented and enforced.

(b) Top-level commitment

The top-level management of a commercial organisation (e.g. board of directors) must be committed to preventing bribery by persons associated with the company. This is likely to require communication of the company's anti-bribery stance, and an appropriate degree of involvement in developing bribery prevention procedures.

(c) Risk assessments

Organisations should conduct periodic, informed and well-documented assessments of the nature and extent of their exposure to external and internal risks of bribery committed on their behalf by associated persons. Risk assessments must be resourced appropriately and have proper oversight by top-level management.

(d) Due diligence on third parties

Organisations must apply due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation.

In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged 'associated' persons may also be required, if proportionate to the identified risks.

(e) Communication and training

Organisations need to ensure that their bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks the organisation faces.

An important aspect of internal communications is the establishment of a secure, confidential and accessible whistle-blowing program for internal or external parties to raise concerns about suspected bribery or to provide suggestions for improvement of bribery prevention procedures.

(f) Monitoring and review

Organisations should monitor and review anti-bribery policies and procedures and make improvements where necessary.

5 The Deferred Prosecution Agreement regime

The Bill proposes amendments to the DPP Act to introduce a DPA scheme. Instead of prosecuting a corporation, the proposed scheme would enable the Commonwealth Director of Public Prosecutions (***CDPP***) to enter into a DPA with a corporation that is alleged to have engaged in specified corporate crimes. No criminal proceedings may be commenced in relation to an offence specified in a DPA, subject to the exceptions discussed below.

The offences to which a DPA may relate include specific offences under the following acts:

(a) *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)*;*

(b) *Autonomous Sanctions Act 2011* (Cth)*;*

(c) *Charter of the United Nations Act 1945* (Cth)*;*

(d) *Corporations Act 2001* (Cth)*;* and

(e) *Criminal Code*.

Notably, the Criminal Code provisions include section 70.2 (the bribery of a foreign public official offence) and will apply to the new offence of failing to prevent bribery.

If a DPA is negotiated, the Director must give the DPA to an 'approving officer' for review and approval. The Director must include the negotiated DPA and a statement that the Director is satisfied that there are reasonable grounds to believe that an offence specified in the DPA has been committed and that entering into the DPA is in the public interest. An approving officer must be appointed for a maximum of five years by the Minister, who may only appoint a former judicial officer of an Australian court and must be satisfied that the person has the necessary knowledge or experience to perform the approving officer role.[8]

The approving officer must assume correctness and accuracy of the information set out in the DPA and approve the terms of the DPA if the approving officer is satisfied that the terms are in the interests of justice, fair, reasonable and proportionate.

A DPA must contain:

(a) a statement of facts relating to each offence specified in the DPA (we note that there is no requirement for the company to admit guilt - the Attorney-General's Department considers that this strikes an appropriate balance between the need to encourage corporations to self-report and the need to hold corporations accountable);[9]

(b) the last day for which the DPA will be in force;

(c) the requirements to be fulfilled by the person subject to the DPA;

(d) the amount of the financial penalty to be paid to the Commonwealth; and

[8] This model is in many ways a hybrid of the US and UK regimes. In the UK, a judge is involved in the supervision and approval of a DPA. In contrast, in the US, a judge only provides final approval of a DPA. Under the Australian regime, an approving officer has a narrow remit and only has the power to approve or not approve the DPA. The approving officer must assume that the information set out in the DPA is true and correct. To uphold the separation of powers under the Constitution and facilitate independent and expert scrutiny, no further judicial input, apart from having former Australian judges function as approving officers, was included in the proposed DPA scheme. See: AG Answers, [Question 29].

[9] AG Answers, [Question 25].

(e) the circumstances which constitute a material contravention of the DPA – and that the person consents to the Director instituting a prosecution on indictment (i.e. if there is a material contravention of the DPA, or if the person provided inaccurate, misleading or incomplete information to a Commonwealth entity and knew that the information was inaccurate, misleading or incomplete). In such circumstances, the statement of facts in the DPA is taken to constitute 'agreed facts' for the purposes of any criminal proceedings.

A DPA may also include other terms as listed in the Bill, including a requirement to donate money to a charity or other third party, implement a compliance program, or pay reasonable costs incurred by the Commonwealth in negotiating the DPA and any other terms the Director considers appropriate.

It is anticipated that a DPA Code of Practice will be provided, including guidance regarding:

- the level and steps of cooperation that will be expected from corporations seeking a DPA;
- details on the practical operation of the DPA scheme;
- information on how the CDPP will consult with other government agencies throughout the DPA process to ensure relevant matters are included in the DPA;
- an outline of the kinds of terms that might be included in a DPA; and
- information on the possible roles and appointment of independent monitors as it is anticipated that it will often be appropriate for DPAs to include terms requiring the engagement of an independent monitor to carry out particular functions in a manner appropriate to the circumstances.[10]

[10] AG Answers, [Questions 24, 32, 33, 36 and 37].

6 Summary of the Best Practice Guidelines on Self-Reporting

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 Best Practice Guidelines set out a framework for corporations (or officers, employees or agents) to report a suspected breach of Division 70 of the Criminal Code or a related offence[11] by the corporation prior to the AFP receiving a referral or commencing an investigation. It is noted in Guideline 3 of the Best Practice Guidelines that the AFP and CDPP will review the operation of the guidelines within two years or earlier in the event that a Deferred Prosecution Scheme commences.

6.1 Cooperation with the AFP investigation

Following a self-report, the AFP will conduct an independent investigation into the reported conduct. This will include an independent assessment of any internal investigation and report in respect of the conduct. The AFP may also investigate any criminal profits the corporation may have received that are associated with the conduct.

The AFP expects 'full and frank disclosure to the AFP about the relevant conduct and the corporation's role in it', including 'full access' to documents relating to the matter (e.g. investigation reports, including those commissioned by the corporation's lawyers) and potential witnesses. Such expectations may be documented in an Investigation Cooperation Agreement between the AFP and the corporation.[12]

6.2 Prosecution policy

In deciding whether to commence a prosecution, the CDPP must consider whether there are reasonable prospects of obtaining a conviction and whether a prosecution is in the public interest. Public interest factors that will be considered in addition to those set out in paragraph 2.10 of the Prosecution Policy are:

- the fact that the corporation has self-reported the conduct, as well as the quality and timeliness of the self-report;
- the extent of the corporation's cooperation;
- any history of similar misconduct within the corporation or its related bodies corporate;
- whether there is an appropriate governance framework in place (including specific anti-corruption policies and processes) and the extent to which there is a culture of compliance with that framework;
- whether the alleged offending involved, or was expressly, tacitly or impliedly authorised or permitted by any members of the board and/or other high managerial agents;
- whether the corporation has taken steps to prevent recurrence of the conduct;
- any steps taken to redress any harm caused (e.g. by compensating victims);

[11] E.g. money laundering offences under Division 400 of the Criminal Code.

[12] AFP and CDPP, *Self-Reporting of Foreign Bribery and Related Offending by Corporation* (8 December 2017) [9 and 10] (***AFP/CDPP Guidelines***).

- any self-reports by the corporation in another jurisdiction and the nature of and compliance with any penalties/orders imposed in those jurisdictions;
- whether the collateral consequences of any court-imposed penalties would be disproportionate to the offending conduct; and
- any other relevant factors.

The Director may issue a written undertaking under section 9 of the DPP Act to the effect that evidence given by the corporation as a witness will not be admissible in proceedings against the corporation or that the corporation will not be prosecuted for specified offences, acts or omissions.[13]

6.3 Procedure for early offers to plead guilty and the 'fast track' option

The corporation should notify the AFP or the CDPP of its willingness to enter plea negotiations and whether it will sign an undertaking to cooperate with law enforcement agencies in relation to future prosecutions and/or confiscation proceedings.[14] The corporation will then be advised that:[15]

(a) all communications by the AFP with the corporation are non-binding and without prejudice;

(b) views expressed by individual AFP officers do not bind the AFP;

(c) views expressed by the AFP do not bind the CDPP;

(d) neither the AFP nor the CDPP are committed to a course of action until full agreement on details of a proposed guilty plea are reached; and

(e) the AFP cannot make offers or give concessions regarding sentencing as the court will ultimately determine the sentence.

The CDPP will assess the appropriateness of a guilty plea proposal, considering all circumstances of the case, any other relevant considerations, the CDPP Victims of Crime Policy, as well as the views of the AFP. Once the CDPP has assessed the guilty plea offer, the CDPP and/or AFP and the corporation will attempt to settle an agreed statement of facts.[16]

The Best Practice Guidelines provide for 'fast track' prosecutions in circumstances where a corporation pleads guilty to criminal charges at the earliest opportunity. The corporation can then maximise the sentencing discount that will be available to it.[17]

6.4 Confidentiality

While the AFP and CDPP will treat self-disclosed information as confidential (if practicable), it may disclose information to other domestic and international regulators and enforcement agencies investigating foreign bribery allegations. The corporation will be notified of the proposed disclosure unless such notification would compromise another investigation.[18]

[13] AFP/CDPP Guidelines, [17–19].

[14] AFP/CDPP Guidelines, [21] and [30].

[15] AFP/CDPP Guidelines, [20-22].

[16] AFP/CDPP Guidelines, [23-27].

[17] AFP/CDPP Guidelines, [28-29].

[18] AFP/CDPP Guidelines, [12].