

# New anti-bribery laws place a "heavy burden" on companies to avoid criminal liability

## SENATE COMMITTEE REPORT ENDORSES

### CRIMES LEGISLATION AMENDMENT (COMBATTING CORPORATE CRIME) BILL 2017 (CTH)

24 April 2018

#### WHAT YOU NEED TO KNOW

- A Senate Committee has recommended that Parliament pass a Bill to introduce an offence of "failing to prevent" foreign bribery and a deferred prosecution agreement (**DPA**) scheme, along with other amendments to strengthen Australia's foreign bribery regime.
- It is the second Senate Committee in as many months to support reforms, released on the heels of the detailed Senate inquiry into foreign bribery which called for even stronger laws (see our Regulatory Update, ["The time has come" for major anti-bribery reforms](#), dated 29 March 2018).
- In addition to giving its green light to the proposed laws, the Committee recommended that the Government engage in public consultation about what "adequate procedures" to prevent foreign bribery should look like and the guidance that should be given in relation to when prosecutors will offer deferred prosecution agreements to corporate defendants.
- The new laws could be fully in force by late 2018 or early in 2019, and it is important that companies start thinking now about reviewing and strengthening their anti-bribery policies and practices.

## Major anti-bribery reforms proposed

In December 2017, the Australian Government introduced the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017* into Parliament in order to significantly strengthen Australia's anti-bribery and corporate misconduct laws.

The key features of the Bill are:

- a new offence of failing to prevent bribery of a foreign official, committed where a foreign public official is bribed by a company "associate" (broadly defined to include subsidiaries, officers, employees, contractors, agents and even "service providers"), unless the company can demonstrate that it had in place "adequate procedures" designed to prevent the offence;
- a DPA scheme, which allows a criminal prosecutor and a corporate defendant to agree that the prosecution will be discontinued on settlement terms to be approved by a retired judge; and
- various amendments to remove impediments to investigating and prosecuting the existing offence of bribing a foreign official, which will continue to operate in addition to the new "failing to prevent" offence.

For a detailed overview of the Bill, see our Regulatory Update, [Carrot and stick: Tough new bribery laws introduced, but DPAs will be coming](#), dated 7 December 2017.

Following its introduction into Parliament, the Bill was referred to the Senate's Legal and Constitutional Affairs Legislation Committee for consideration.

## Committee support for the Bill

On 20 April 2018, the Senate Committee report was released and recommended that Parliament pass the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) as currently drafted.

In endorsing the new offence of failing to prevent bribery, the Committee acknowledged concerns about the "absolute liability" imposed by the offence, the onus a defendant bears in demonstrating "adequate procedures" and the broad category of "associates" whose conduct could give rise to criminal liability. The Committee also recognised that the new offence "could become a broad 'catch all' offence for all cases of foreign bribery" and placed a "heavy burden of proof on corporations". However, the report concluded that the offence is an appropriate means to ensure companies implement effective anti-bribery measures.

## Guidance on "adequate procedures" and DPAs

If the Bill is passed in its current form, the Government will be required to publish guidance on the steps a company can take to prevent its associates from bribing a foreign public official, for the purposes of the adequate procedures defence. The Attorney-General's department has confirmed that it will publicly consult on the draft guidance, which will be informed by guidelines on the very similar defence under the UK *Bribery Act*.

The Committee also recommended that the Government's guidance specify that having internal whistle-blowing systems is one of the steps that should be taken to prevent bribery by associates. This recommendation coincides with significant proposed reforms concerning whistleblower protections and policies (see our Ashurst Update, [Stronger whistleblower protections are coming to Australia](#), dated 12 December 2017), and is yet another reminder that whistleblower procedures should be a high priority for compliance reviews in 2018.

At the same time, it is recognised that what constitutes adequate steps to prevent bribery may differ substantially from company to company. It is not reasonable to expect that a small company with limited profile of bribery risks will put in place the same compliance program as a large company with substantially greater risks.

In relation to the introduction of a DPA scheme, the Committee observed that the Attorney-General's Department is currently developing a "DPA Code of Practice" that will provide details on the operation of the scheme, such as the kind of matters that might be included in a DPA and the degree of co-operation that would be required by companies seeking a DPA.

The Committee recommended that the Government provide at least four weeks for stakeholders to comment on the DPA Code of Practice and the adequate procedures guidelines.

## What's next?

The Committee's report is another step on the path toward significant anti-bribery and corruption reform in Australia. Key reforms are now imminent – we expect that Parliament will vote on the Bill by mid-2018 and companies will not have long to adjust to the new laws. The Bill currently provides that the DPA scheme will commence the day after assent, while the other foreign bribery amendments (including the new offence) will commence 6 months after assent. That is not long at all for any company that is yet to examine and reinforce its anti-bribery culture and systems in anticipation of the laws.

It is currently unclear when the Government will release its draft guidance on the adequate procedures defence and DPA scheme. The adequate procedures guidance is likely to be a key benchmark against which existing compliance systems should be compared, given a company that fails to prevent an associate from bribing a foreign official will bear the onus of establishing the 'adequacy' of its systems.

There will also be an opportunity to comment on the draft DPA Code of Practice, which should provide further clarity on the key risks and incentives of self-reporting under the proposed scheme.

In the meantime, it is important for companies to start to consider reviewing and strengthening their anti-bribery policies and procedures. If the new laws pass, those policies and procedures will become more important than ever – not only as a tool to prevent bribery from occurring, but potentially as the last line of defence against criminal liability (and substantial penalties) for foreign bribery committed by an "associate" whose conduct might be largely unseen and unheard by the company.

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