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Companies take note – Australia raises its Anti-Bribery Compliance & Enforcement Game

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After broad international and domestic criticism of its efforts, the Australian Government is now showing an appetite for significant reform in the area of foreign bribery. The recent resignation of ASX Chief Executive Elmer Funke Kupper highlights reputational risks arising from allegations of questionable transactions off-shore. With proposed changes to the law the subject of a discussion paper issued by Justice Minister Keenan last week, those risks look set to escalate. ***Partner, Ted Williams*** *discusses.*

OECD criticisms

In 2012, the OECD Working Group on Bribery reported its serious concerns with Australia's record of enforcement of foreign bribery laws, warning that the government should take significant action to "ensure that corporations cannot avoid criminal liability in practice".

The Working Group's April 2015 follow-up report noted progress, yet repeated earlier calls for reform in areas including corporate liability and false accounting.

Senate Inquiry: Business calls for consistency with international standards

In June 2015, the Australian Senate commenced an inquiry into the adequacy of Australia's ABC laws. That inquiry took submissions from over 40 interested parties.

One of Australia's largest companies, BHP Billiton made a submission, reflecting on its investigation by the US SEC in relation to the 2008 Olympics (which resulted in an SEC "declination" or voluntary settlement in respect of which BHPB last year paid US$25M), noting that *"the controls we had in place at the time were insufficient to satisfy the civil books and records and internal accounting controls requirements of the Foreign Corrupt Practices Act 1977 (FCPA)."*

BHPB called for reform of Australian law to *"increase international consistency in line with the OECD Convention on Combatting [Foreign] Bribery"* and identified several reform measures including: harmonizing books/records and false accounting laws with international benchmarks; enhanced whistleblower protection (but without incentives); the introduction of Deferred Prosecution Agreements; and, publication of Australian Guidance in the manner of the US Department of Justice /Securities Exchange Commission and UK's Ministry of Justice.

BHPB's submission echoes criticism that compliance to the standards of Australian law is inadequate to address the risk of exposure to the FCPA and the UK Bribery Act.

Recent Government Action

While the Senate Committee is due to report in July 2016, the Australian government has not wasted time in responding to the latest OECD report:

- In November 2015, new laws came into force which clarified that it was not necessary to prove intention to influence a particular foreign official in order to establish a foreign bribery offence.

- On 29 February 2016, further laws as to false accounting came into effect. While not going so far as the 'books and records' provisions of the FCPA, (proof of "deliberate" or "reckless" falsification is still required under Australian) they represent a clear step in that direction.
- On 16 March 2016, at the OECD Anti-Bribery Ministerial Meeting in Paris, Australian Justice Minister announced a discussion paper canvassing the introduction of Deferred Prosecution Agreements (DPAs) for Australian corporate law offences (including securities fraud, market manipulation, and foreign bribery).

DPAs: a proven game-changer

The introduction of DPAs would be a landmark step in the development of Australian corporate and foreign bribery laws. Plea bargaining presently has no formal role in Australian law. This reflected the traditional position in the UK, which changed with the 2014 reforms there following the Bribery Act 2010.

As has been seen in other jurisdictions, DPAs would significantly alter the balance in foreign bribery prosecutions in Australia, where thresholds for conviction are very high. There has been only one successful conviction under Australia's foreign bribery laws, which were enacted in 2009.

While controversial, DPAs, have changed the landscape in US FCPA prosecutions. Since being introduced in 2004, prosecutions and corporate fines have skyrocketed (the average fine exceeding US$150M in 2014). A sentencing judge in 2012 described FCPA prosecutions as "a growth industry". United States' Assistant Attorney General Leslie Caldwell in 2014 described the DPA system as "a more powerful tool than actually going to trial". The first settlement under a DPA in the UK took place in November 2015 with US$30M in penalties and compensation.

Investigations step-up

In step with recent law reform, Australian prosecuting authorities are also demonstrating renewed vigour. On 14 March 2016, the Australian Federal Police confirmed an investigation into reports of payments in 2010 by Tabcorp Limited (a top 100 Australian company) of $200,000 to a consultancy associated with the family of the Cambodian Prime Minister. The case has drawn widespread media interest. The CEO of Tabcorp at the time of the alleged payment, Mr Elmer Funke Kupper had since become the chief executive of another company, ASX Limited, responsible for the operation and governance of the Australian Stock Exchange. On 21 February 2016, Mr Funke Kupper was reported to have resigned from his position as CEO with ASX Ltd in order to focus on criminal investigations being undertaken in Australia and the United States.

Stakes have been raised

Although the effectiveness of these reforms is yet to be seen, there is no doubt that deliberate steps are afoot to bring Australian ABC laws closer to international benchmarks.

If ever there was a time for Australian companies to bring their anti-bribery compliance up to best-practice standards that time would be now.

For more information, please contact Ted Williams.