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FIFA in DoJ's sights: no holds are barred, and their reach is long

The FIFA scandal illustrates plainly the risk of exposure to FCPA prosecution for any organisation undertaking business activity off-shore.

The US Department of Justice's (DoJ) creative, ambitious and aggressive assertion of jurisdiction in the FIFA case is merely the latest in a long series of cases where targets are offered an Hobson's choice: enter an early plea bargain and hopefully preserve some form of future or face the might of the US Government and watch in shock and awe as your reputation is systematically destroyed, years before trial becomes due.

Such considerations were likely to have been high on the mind of former US FIFA executive Chuck Blazer in considering his 2013 guilty plea, only disclosed last week after the raids in Zurich.

The case shows how Australian companies operating abroad can take no comfort from mere compliance with Australian anti-corruption laws which have been heavily criticised by the OECD. Compliance to the level of Australian law would be unlikely to meet a minimum of standard of protection when considering the DoJ's approach to foreign corruption, which targets any transaction with an American link, even apparently tenuous.

Interestingly and despite the fanfare, no FIFA official has been charged with bribery: the charges are for racketeering, wire fraud and money-laundering.

DoJ's very long arm

If your company or any of its securities is listed on the Securities Exchange Commission or American Depository Receipts or trades in the over-the-counter market in the US, it is an "Issuer" in terms of the US *Foreign Corrupt Practices Act* (FCPA) and within the DoJ's jurisdiction.

The DoJ's November 2012 FCPA Guide makes it clear that "Issuers", their officers directors, employees, agents or stockholders using US Mail or an "*instrumentality of interstate commerce*" in furtherance of a corrupt payment to a foreign official are liable to US prosecution.

The Guide warns that "*Thus placing a telephone call or sending an email, text message, or fax from, to or through the United States [or] sending a wire transfer from or to a US bank or otherwise using the US banking system…*' may be sufficient for the DoJ to claim jurisdiction. Unsurprisingly, many email exchange servers are physically located in the US.

Further, DoJ targets parties to any transaction which touches the US banking system (including "correspondent banks" in clearing payments). Australian banks routinely act as correspondent banks in US$ transactions.

A generous bounty program under the *Dodd Frank Act* encourages whistleblowers to disclose information which gives rise to a prosecution and provides bounties to a value of between 10 and 30% of fines levied over $1m. The US does not prescribe penalties for foreign bribery offences, however the average corporate fine in 2014 was US$155m.

In September 2014, the DoJ announced its intention to pay a bounty of $30m to a non-US national in respect of a foreign bribery case. In the same month, a US court held that the protections under *Dodd Frank* did not apply to foreign whistleblowers, although it remains unclear whether bounties still apply.

In comparison to the US, the approach of the Australian Federal Police to foreign corruption cases as been tame: there has been one successful prosecution under Australian law. Similarly Australian legislation has not kept pace with developments

in major jurisdictions such as the US, UK and Canada. Nevertheless recent high profile allegations have stirred the AFP and ASIC to upgrade its resources in the area.

Rather than provide Australian companies with comfort that Australia's less aggressive approach to these issues may make their compliance task easier, modelling programs on Australian law thus carries with it significant risk.

Whilst it may be convenient to take the view that DoJ's aggressive assertion of jurisdiction may be ripe for challenge, the reality is that few (if any) companies would be capable of playing that hard in a prosecution of a true geopolitical scale. A better approach would be to model your anti-corruption program to world best practice.