Charting and Meeting the Rising Tide of Anti Bribery Regulation

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Nowhere is the importance of taking a 'global' rather than 'local' view more apparent than in the area of compliance, and one of the most complicated areas on an international level is managing anti bribery and corruption. This area is governed by a matrix of legislative provisions, many of which have the added complexity of extraterritorial effect. It also requires companies, and their compliance and legal functions, to take into account local customs and a range of cultures which impacts not only local regulation, but also ethical issues and local business and state practice and actors. A daunting task for a legal or risk professional sitting in a corporate HQ many thousands of miles away.

Anti-bribery and corruption sits towards the top of many enforcement authorities' priority lists[2] - therefore it should be on the radar of all companies operating globally - and not just those operating in so-called 'high risk' jurisdictions or industries. Indeed, making assumptions about the relative level of risk your organisation is exposed to could create a regulatory and compliance blind-spot, and could leave you ill prepared to detect and deal with bribery and corrupt conduct within the organisation, or on the part of those it deals with. Further, with corporate "culture" increasingly under the microscope, and the move towards "failure to prevent bribery" offences in a number of jurisdictions, such a failure could give rise to additional legal and reputational risk.

This paper provides a short refresher of key provisions of the FCPA, then looks at how similar (but not identical) legislation has been enacted in other jurisdictions. Australia is used as a case study to illustrate:

- the rising tide of anti-bribery regulation - Australia introduced 'books and records' offences in 2016, further laws are currently before the parliament which, if passed, will introduce the offence of failing to prevent bribery, as is legislation which will enact sweeping reforms to existing whistleblower protections and will impose positive obligations on certain organisations to have whistleblower policies in place; and

- that in the global fight against bribery and corruption, simply having the right laws in place is not considered enough - for some time Australia has faced criticism for a perceived failure to enforce its legislation - and there is certainly a stark contrast in the record of the Australian and US enforcement authorities in this regard. There is an obvious parallel that can be drawn here with corporations - it is not enough to have the right policies and compliance framework in place - you will be expected to live them.

We conclude with a consideration of some matters that corporate counsel and compliance professionals can take into account when formulating their own approach to anti-bribery regulation.

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[2] For example, the https://www.afp.gov.au/about-us/governance-and-accountability/governance-framework/ministerial-direction

Setting the Benchmark - the FCPA

The Foreign Corrupt Practices Act of 1977 as amended, 15 U.S.C. §§ 78dd-1, et seq. (**FCPA**) was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. As is well understood, for present purposes there are two broad offences under the FCPA:

- **the anti-bribery provisions**: Under the FCPA, it is a criminal offence to make a payment or offer payment to a foreign official for the purposes of obtaining business for any person; and

- **the 'books and records' provisions**: the FCPA also requires companies whose securities are listed in the United States to meet the so-called 'books and records' accounting provisions. These were designed to work in tandem with the anti-bribery provisions and require corporations covered by the provisions to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls.

A convenient guide on the ins and outs of the FCPA is the detailed joint guidance first published by the Department of Justice (**DOJ**) and Securities and Exchange Commission (**SEC**) in November 2012 - the "*Resource Guide to the U.S. Foreign Corrupt Practices Act*".[3]

The anti-bribery provisions of the FCPA originally applied to all US persons and certain foreign issuers of securities, however following amendments in 1998, the anti-bribery provisions now also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. The DOJ takes an expansive approach to jurisdiction - an approach has been mirrored more recently in the legislation and prosecutorial approach in other countries.

Just as the DOJ takes an expansive approach to jurisdiction, it also takes a 'global', rather than 'local' approach to investigation and enforcement. For example, when discussing a recent DOJ enforcement action Deputy US Attorney General Rosenstein confirmed that the DOJ had cooperated with enforcement authorities in the UK, Brazil, Austria, Germany, the Netherlands, Singapore and Turkey, and noted that the DOJ looked forward to continued international cooperation.[4] This move to increased cooperation is supported by 2016 figures, which showed that more than 40% of the resolutions in US foreign bribery cases involved co-operation with foreign law enforcement agencies.[5]

<u>Enforcement Record</u>

[3] Available at: https://www.justice.gov/criminal-fraud/fcpa-guidance

[4] See: https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign

[5] See: http://www.oecd.org/daf/anti-bribery/data-on-enforcement-of-the-anti-bribery-convention.htm

The FCPA celebrated its 40th birthday in 2017. While perhaps an underachiever in childhood and into its teenage years, it has racked up an impressive resume of enforcement actions and sanctions:[6]

- a total of 523 enforcement actions have been brought (205 by the SEC and 318 by the DOJ);
- of these, the vast majority have been settled (92.50% of defendants settle with the SEC and 76.19% of defendants settle with the DOJ); and
- $10,712,420,673 in monetary sanctions have been imposed in all FCPA-related enforcement actions.

The billions of dollars in corporate sanctions and fines often dominate the headlines, however the DOJ is focussed on the investigation and prosecution of individuals for FCPA offences. The US Deputy Attorney General observed in November 2017 that a total of 19 individuals had pleaded guilty or been convicted in FCPA-related cases that year, and used the point to somewhat ominously illustrate that[7]:

> *"Effective deterrence of corporate corruption requires prosecution of culpable individuals. We should not just announce large corporate fines and celebrate penalizing shareholders."*

Sometimes, prosecutorial focus will shift from the corporation and its executives to those who advise them. In 2010 the DOJ announced personal charges against the attorney for a major pharmaceutical company alleging obstructing an official proceeding, concealing and falsifying documents to influence a federal agency, and making false statements. The conduct occurred in the context of a Food and Drug Administration (**FDA**) into off-label promotion of a pharmaceutical product.[8] The attorney was acquitted under Federal Rule of Criminal Procedure 29 on the grounds that the government had failed to present evidence sufficient to prove any of the counts beyond a reasonable doubt.[9] In its judgment, the Court stated:

> *"a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud.*
>
> *There is an enormous potential for abuse in allowing prosecution of an attorney for the giving of legal advice."*[10]

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[6] Figures taken from the Stanford Law School Foreign Corrupt Practices Clearinghouse: http://fcpa.stanford.edu/statistics-keys.html

[7] See: https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign

[8] See: https://www.justice.gov/sites/default/files/civil/legacy/2014/01/09/DOJ_Press_release_11-9-10.pdf

[9] *United States v Stevens*

[10] Decision available at: https://jenner.com/system/assets/assets/165/original/United_States_v._Stevens.pdf?1314198465

As an aside, while the attorney was successful in the defence of the individual charges, eventually the company agreed to pay $3 billion to settle the corporate proceedings.[11]

The Rising Tide of Regulation - OECD Convention, the UK and Australia

OECD Convention

Like the US, Australia is a signatory to the Organisation for Economic Co-operation and Development (**OECD**) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (**OECD Convention**). The OECD Convention requires signatories to criminalise bribery of foreign public officials in international business transactions and implement a range of related measures to make this criminalisation effective.

There are currently 35 OECD countries and 8 non-OECD countries who are signatories to the OECD Convention - and this list is increasing. The coalescence of global business practices and technology (which could see a nexus with a particular jurisdiction established in unusual and unexpected ways), together with an increasing number of jurisdictions enacting anti-bribery legislation, and aggressive approaches to jurisdiction taken by enforcement agencies in a number of these jurisdictions mean that anti-bribery and corruptions needs to remain top of mind for corporate legal and compliance.

To illustrate the point, in its December 2017 publication "Fighting the Crime of Foreign Bribery",[12] the OECD noted:

- foreign bribery is a crime in all 43 parties to the OECD Convention;
- in the period between 1999 and the end of 2016, 443 individuals and 143 entities have been sanctioned under criminal proceedings for foreign bribery in 20 countries which are parties to the OECD Convention (while 23 countries had yet to conclude a foreign bribery enforcement action);
- 500 investigations were ongoing in 29 countries; and
- 125 individuals and 19 entities were subject to prosecution in 11 countries for offences under the OECD Convention.

UK

The *UK Bribery Act 2010* (**Bribery Act**) was introduced with considerable fanfare in 2011. One significant difference between the FCPA and the Bribery Act was the introduction of a *'failure to prevent bribery'* offence. Under section 7 of the Bribery Act, a commercial organisation is guilty of failure to prevent bribery if a person associated with the commercial organisation bribes another person intending:

(a) to obtain or retain business for the commercial organisation, or

[11] See: http://www.nytimes.com/2012/07/03/business/glaxosmithkline-agrees-to-pay-3-billion-in-fraud-settlement.html

[12] Available at: http://passthrough.fw-notify.net/download/370579/http://www.oecd.org/corruption/Fighting-the-crime-of-foreign-bribery.pdf

(b) to obtain or retain an advantage in the conduct of business for the commercial organisation.

It does not matter if the associated person is a British citizen who could be prosecuted for the offence or not, meaning that a company with a jurisdictional link to the UK could be prosecuted for something that a non-British citizen did outside the UK.

If the commercial organisation can prove that it had in place "adequate procedures" designed to prevent persons associated with it from committing these acts, then it has a defence to the charge. The UK Ministry of Justice has published Guidance which deals with what might constitute adequate procedures. [13]

Following the introduction of the Bribery Act there was a period where section 7 remained untested. This changed when the Serious Fraud Office (**SFO**) entered into its first Deferred Prosecution Agreement (**DPA**) in respect of the offence under section 7 in November 2015 (ICBC Standard Bank Plc), and achieved its first conviction in February 2016 when a construction and professional services company (Sweett Group PLC) was sentenced and ordered to pay £2.25 million as a result of a conviction arising from a Serious Fraud Office investigation into the activities of one of its subsidiaries in the United Arab Emirates. In sentencing, the Court observed:

> *The whole point of section 7 is to impose a duty on those running such companies throughout the world properly to supervise them. Rogue elements can only operate in this way – and operate for so long – because of a failure properly to supervise what they are doing and the way they are doing it.*[14]

More recently, the SFO entered into a DPA with Rolls-Royce PLC which involved the payment of £497.25 million (plus the SFO's costs in the amount of £19 million) - this was the highest ever enforcement action against company in the UK for criminal conduct - and was reached in circumstances where Rolls-Royce PLC fully cooperated in the investigation, and introduced a programme of corporate reform and compliance.[15] Importantly, the DPA did not prevent further investigation into the conduct of individuals, and indeed Rolls-Royce PLC agreed as a condition of the DPA to cooperate with any future prosecution of individuals. Similar agreements have been announced between Rolls-Royce PLC and authorities in the US and Brazil.

Australia

Australia ratified the OECD Convention in 1999. Australia is also a party to the United Nations Convention against Corruption (**UNCAC**) of 2003. Both treaties require state parties to criminalise bribery of foreign public officials in the course of international business.

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[13] Available at: https://www.gov.uk/government/publications/bribery-act-2010-guidance

[14] See: https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/

[15] See: https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/. The SFO press release explains: "*The indictment, which has been suspended for the term of the DPA, covers 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. The conduct spans three decades and involves Rolls-Royce's Civil Aerospace and Defence Aerospace businesses and its former Energy business and relates to the sale of aero engines, energy systems and related services. The conduct covered by the UK DPA took place across seven jurisdictions: Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia.*"

Australia has given effect to its treaty obligations in Division 70 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). Section 70.2(1) makes it an offence to provide, offer or promise to provide a benefit not legitimately due to another person, with the intention of influencing the exercise of a foreign public official's duties in order to obtain or retain business or a business advantage. The terms "*foreign public official*" and "*benefit*" are both broadly defined, and the offence captures bribes made to foreign public officials either directly or indirectly via an agent, relative or business partner.

Unlike the UK, Australia retains the 'facilitation payment' defence.

The legislation prescribes maximum penalties for individuals (up to 10 years imprisonment and fines of up to AUD$2.1, or for corporations the maximum penalties are the greater of:

- AUD$21 million (USD$16 million, EUR€13.2 million) fine;
- three times the total benefit obtained from the bribe; or
- 10% of the company's annual turnover.

In addition to criminal penalties, any benefits obtained by foreign bribery can be forfeited to the Australian government under the *Proceeds of Crime Act 2002* (Cth). That Act establishes a regime that allows proceeds of Federal-indictable offences to be traced, restrained and confiscated by a court. It also confers power on a court to order that a person appear before it to demonstrate that unexplained wealth was acquired by lawful means.

In recent years there has been considerable change to the anti-bribery landscape through the enactment (or proposed enactment) of new anti-bribery legislation and progress in the enforcement of such legislation.

In March 2016, the foreign bribery offence was supplemented by 'books and records' style accounting offences. The two new offences criminalise both intentional and reckless false dealing with accounting documents.[16] The prescribed penalties for intentional false dealing with accounting documents are the same as for the foreign bribery offence, while those penalties are halved for the offence of reckless false dealing.

In December 2017, the Australian Government introduced further legislation into parliament which, amongst amendments which "*aim to remov[e] undue impediments to successful investigation and prosecution of foreign bribery offending*",[17] seeks to introduce a new offence of failure of a body corporate to prevent foreign bribery by an associate, and a deferred prosecution agreement scheme (which would apply not only to foreign bribery, but also to other corporate offences).[18] Like the UK Bribery Act, the offence of failure to prevent bribery would not apply if the body corporate can establish that they had "adequate procedures" designed to prevent the commission of the foreign bribery offence by its associates. What will constitute "*adequate procedures*" is not defined in the legislation, rather the Minister will be required to publish

[16] See Division 490 of the *Criminal Code Act 1995* (Cth).

[17] Explanatory Memoranda [5].

[1818] See *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*.

guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials.

The importance of whistleblowing to the detection of corrupt conduct was acknowledged by the in a recent Australian decision (discussed below), where the Judge observed:

> *I infer that the offence is difficult to detect. None of the parties to a conspiracy to bribe has an interest in its disclosure. The victim is the nation state whose foreign public officials are to receive a benefit. Absent telephone interception or a whistle-blower, it is difficult to discern how it could be detected.*[19]

It is therefore noteworthy that the Australian Government has introduced legislation which will, if passed, significantly bolster the requirements on publicly listed companies and large private companies to have whistleblower policies in place, and the protections and remedies afforded to whistleblowers in certain circumstances.[20] Interestingly, the bill does not seek to introduce a US-style 'bounty' system to reward whistleblowing, but rather focuses on compensating whistleblowers who suffer loss or damage after blowing the whistle, and otherwise avoiding or punishing reprisals.

Enforcement Record

As at December 2017, authorities in Australia had secured seven convictions in two cases and were conducting 19 ongoing investigations - nowhere near the numbers achieved in other jurisdictions, and indeed this has not gone unnoticed by the OECD Working Group on Bribery which observed: *"In view of the level of exports and outward investment by Australian companies in jurisdictions and sectors at high risk for corruption, Australia must continue to increase its level of enforcement."*[21]

In September 2017, three individuals who attempted to bribe a foreign official in Iraq with an amount of approximately AUD$1million to improve the chances of their company in obtaining construction contract valued at up to AUD$500 million were sentenced to four year's imprisonment. Two of the individuals were also fined AUD$250,000.[22]

We will be monitoring enforcement activity in Australia in the coming years should the legislation which is currently before Federal parliament be passed. It addresses a number of elements of the offence which enforcement authorities complained prevented effective enforcement action and Deferred Prosecution Agreements will be added to the enforcement authorities toolkit.

Some Considerations

Due Diligence

[19] R v Jousif; R v I Elomar, R v M Elomar [2017] NSWSC 1299 at [269] per Adamson J.

[20] See: *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*

[21] See: http://www.oecd.org/corruption/australia-takes-major-steps-to-combat-foreign-bribery-but-oecd-wants-to-see-more-enforcement.htm

[22] See: R v Jousif; R v I Elomar, R v M Elomar [2017] NSWSC 1299 - available at https://www.caselaw.nsw.gov.au/decision/59cad2c0e4b074a7c6e18f96 .

Corporations operating across multiple jurisdictions will inevitably deal with, or conduct business through, third parties. It is not only important to regulate the behaviour of your own organisation, it is also very important to know who you are doing business with and who is doing business on your behalf.

Further, given the potential for successor liability, when considering the acquisition of a business effective due diligence on matters relating to bribery and corruption is a critical step.

Culture and Conduct

The second practical step that an organisation can take is to think about achieving compliance outcomes not only through the means of policies and procedures designed to meet the letter of legal and regulatory obligations, but also through the lens of fostering a positive culture within their organisation in an effort to encourage good conduct and business practices.

Having the right policies in place will only get you so far - 'tone from the top' and the manner in which behaviours are modelled from the top of the organisation through middle management to the front line are crucial. Further, how performance is measured and rewarded, whether poor conduct is detected and punished, and whether communication and challenge is encouraged or stifled, will impact the culture of the organisation and the behaviour of employees.

Speaking on the issue of culture and ethics in the banking sector, Paul Volker (former head of the US Federal Reserve) noted:

> *"All these banking institutions have fine statements of their ethical practices on paper, but how much it's really enforced,* ***how much is in the instincts of staff****...up and down the ranks, is difficult to say."*[23]
>
> (our emphasis)

You want good conduct within your organisation to be a matter of instinct, and not a 'tick-a-box' compliance exercise. Partners of the author, Nicholas Mavrakis and Narelle Smythe, argue:

> "*Thinking about culture holistically and as a weapon that can be used to enhance competitive advantage, rather than as a regulatory compliance burden and risk management issue, can aid... There is no one-size-fits-all solution to culture, but market forces are likely to put pressure on companies to get it right*."[24]

The cost of getting culture and conduct wrong can be immense, not only in terms of regulatory fines, customer compensation, and compliance and legal costs, but also in terms of reputational damage. The above may be illustrated by an example from Australia. After years of political and public pressure and press reports of 'banking scandals' the Australian banking, superannuation and financial services industry are currently fronting a Royal Commission. The Royal Commission is examining, via public hearing, matters including:

- *Whether any conduct, practices, behaviour or business activities by financial services entities* ***fall below community standards and expectations****; and*

[23] See: http://www.newsweek.com/paul-volcker-greedy-bankers-ryan-plan-and-fed-64791

[24] See: https://www.claytonutz.com/knowledge/2016/august/take-culture-out-of-the-risk-pile-and-make-it-your-competitive-advantage

- *Whether any findings in respect of the above:*

    - *Are **attributable to the particular culture** and governance practices of a financial services entity or broader culture or governance practices in the relevant industry or relevant subsector; or*

    - *Result from other practices, including risk management, recruitment and remuneration practices, of a financial services entity, or in the relevant industry or relevant subsector.*

  (our emphasis).

Detection, Investigation and Disclosure

Detection of bribery or corrupt conduct may arise as a result of a tip-off from a whistleblower, or from other sources within or outside of the business. Once appraised of such allegations, it is important to promptly and properly investigate them. In order to preserve privilege, such investigations are generally driven by in-house counsel. While such investigations may be limited to activities in the home jurisdiction, increasingly they will focus on activities of the corporation (or its employees or agents) abroad. Some matters that should be top of mind when conducting such investigations include:

- have I provided employees involved in the investigations with the necessary warnings? For example, in the US corporate counsel provide employees with the so-called "Upjohn Warning" which covers matters such as the fact that the counsel represents only the corporation and not the employee as an individual;

- do I understand how privilege operates (if at all) in the jurisdiction to ensure that I do not take steps which could inadvertently waive such privilege; and

- are there workplace or labour laws in the jurisdiction which impact the manner in which I can conduct my investigation?

Finally, should you detect bribery or corrupt conduct within your organisation then serious thought should be given to self-reporting and cooperation with the relevant authorities. Care must be taken to manage such reporting and cooperation as the policies and procedures of each jurisdiction vary, and both the enforcement policies, and the tools short of prosecution available to enforcement agencies are in a state of flux.

For example in November 2017 the DOJ announced a revised FCPA Corporate Enforcement Policy.[25] The policy now provides:

> *When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, **all in accordance with the standards set forth below**, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.*
>
> (our emphasis)

[25] Available at https://www.justice.gov/criminal-fraud/file/838416/download

Critically for in house counsel, careful regard must be had to the terms of the enforcement policy to ensure that the steps taken by the organisation meet DOJ expectations - otherwise those steps may fall short of the required standard and the organisation may not achieve the full benefits associated with voluntary self-disclosure.

It is worth noting that if, notwithstanding voluntary self-disclosure, full cooperation and timely remediation, aggravating factors are present, and a criminal resolution rather than a declination is sought, there are still significant benefits to voluntary self-disclosure as the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and

- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

By contrast, in circumstances where the organisation has fully cooperated and remediated, however it has not self-reported, the policy relevantly provides: *"the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.*" There is no presumption of a declination, and the appointment of a compliance monitor remains on the table. The new policy provides companies with a clear incentive to self-report, and indeed this is one of its stated aims.

Conclusion

As global efforts increase to regulate, detect and prosecute bribery and corrupt conduct - wherever it may occur - lawyers must keep appraised of international regulatory developments, understand and embrace the complexity of a global rather than local view, and be ready to act decisively to investigate and address any allegations of such conduct within their own organisations.

Organisations also need to think about corporate culture holistically, and recognise that in so doing such an approach can be used not only to assist in regulatory compliance, but also to enhance competitive advantage.