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WHITE PAPER

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"Absolute Liability" for a Failure to Prevent Foreign Bribery: Significant Change Ahead in Australia?

Australia's Federal Government has tabled the Crimes Legislation Amendment *(Combatting Corporate Crime) Bill 2017*. The legislation introduces a number of changes to the country's foreign bribery regime, notably, an "absolute liability" corporate offence for a failure to prevent foreign bribery, except in cases where it is clear that "adequate procedures" were in place to the offence. That being the case, corporations should remain diligent in ensuring that adequate procedures are implemented and be prepared to prove that the obligation was met in the event of foreign bribery charges.

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On 6 December 2017, Australia's Federal Government tabled the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* ("Bill"), which contains various amendments to Australia's foreign bribery regime, including introducing an "absolute liability" corporate offence for a failure to prevent foreign bribery.

THE CATALYST FOR CHANGE

In recent years, the Federal Government has allocated significant resources in an attempt to satisfy its OECD Convention obligations by increasing Australia's prosecution rate for foreign bribery offences, including establishing a "multi-agency" Fraud and Anti-Corruption Centre and providing an additional $15 million dollars in funding to tackle foreign bribery.

Despite these initiatives, only two cases have reached the courts. In seeking to increase prosecutions of the offence, the Bill attempts to overcome some of the existing evidentiary difficulties in sheeting home liability to corporations under the current regime, most significantly by the introduction of the absolute liability offence for failing to prevent foreign bribery.

FAILURE TO PREVENT FOREIGN BRIBERY—A NEW APPROACH

Under the Bill, a corporation would be automatically liable for the bribery of an "associate" in circumstances in which the associate bribes a foreign official "for the profit or gain of the corporation" and the corporation is unable to demonstrate that it had in place "adequate procedures" designed to prevent the commission of the offence by the associate.

The provision is modelled broadly on section 7 of the United Kingdom's *Bribery Act*, which the Serious Fraud Office has utilised to secure several notable corporate convictions since the introduction of the offence in 2011.

LIABILITY FOR THE CONDUCT OF AN "ASSOCIATE"

A notable feature of the proposed offence in Australia is the broad definition of "associate" which covers the following relationships.

Officers, Employees, Agents and Contractors

The definition of "associate" extends beyond officers and employees of the corporation and includes agents and contractors over whom the corporation may, in a practical sense, have little oversight or control. The inclusion of contractors also means the new offence would extend beyond the existing test for the attribution of fault to corporations under Part 2.5 of the *Criminal Code*, which attributes to corporations only the conduct of officers, employees or agents acting within the actual or apparent scope of their authority.

Subsidiaries

The proposed offence adopts the definition of "subsidiary" from the *Corporations Act*. Accordingly, foreign subsidiaries over which an Australian corporation has majority ownership but over which it has no practical oversight or control would be considered an "associate" of the Australian corporation under the Bill.

Concerns were raised in the recent Senate inquiry into foreign bribery that an absolute liability offence that extends a corporation's liability to conduct of parties such as subsidiaries has all of the hallmarks of a regulatory offence, which would ordinarily attract a significantly lower penalty range than the substantive offence. In this instance, however, the failure to prevent a foreign bribery offence has the same maximum penalty as intentionally bribing a foreign official which, if the court cannot determine the value of the benefit received, can result in a fine of 10 per cent of the annual turnover of the company (which could easily be in the order of hundreds of millions of dollars).

Control or the Provision of Services: Joint Ventures?

The "associate" definition also extends to an entity that is "controlled" by the corporation (defined in the *Corporations Act* as having the capacity to determine the outcome of decisions about that entity's financial and operating policies) or "otherwise performs services for and on behalf of" the corporation.

The extended definition of "associate" may cause concern to companies involved in unincorporated joint ventures ("JV") and may operate in a particularly punitive manner in circumstances in which JV partners assume different roles, such as one party providing finance whilst the other assumes responsibility for the day-to-day project management. Much will depend on whether the Australian corporation has the capacity to

determine the outcome of decisions about that entity's policies or whether the party engaged in foreign bribery is "providing services" for and on behalf of both parties to the JV.

While the failure to prevent a bribery offence also requires the payment of the bribe to be done "for the profit or gain of" the accused corporation, this is likely to apply to both parties in a JV situation.

GUIDANCE FROM THE MINISTER

Perhaps of some comfort is the requirement for the relevant Minister to provide guidance on the procedures companies can take to prevent their "associates" from engaging in foreign bribery. The extent to which this guidance will clarify the way in which Australian corporations with offshore operations will be required to impose obligations on unrelated third parties remains to be seen.

The Attorney-General's Department has indicated that the Minister will, to the extent possible, draw upon the material published by the United Kingdom's Ministry of Justice in relation to the equivalent provision in the UK *Bribery Act*; however, that offence relates to conduct of "associated persons", which are defined simply as persons who "perform services" for the corporation. While this could also extend to employees, agents or subsidiaries, the UK provision is narrower in scope than its Australian equivalent, which does not require there to be a "provision of services" from, for example, a subsidiary for liability for that entity's conduct to extend to the corporation.

ABSOLUTE LIABILITY

The "absolute liability" nature of the offence means that, in the absence of demonstrating adequate procedures to prevent foreign bribery of associates, a corporation will be automatically liable without the need for the prosecution to establish a fault element (such as intention or recklessness) on the part of the corporation. "Absolute liability" is a defined term under the *Criminal Code* (Cth) and is essentially a more extreme version of "strict liability" (the distinction being for a strict liability offence, a defence of mistake of fact is available, which is not the case for an absolute liability offence).

REVERSAL OF THE ONUS OF PROOF

Concerns were also raised during the course of the recent Senate inquiry in relation to the reverse onus of proof in the proposed offence, which places a legal (as opposed to evidential) burden on the corporation to demonstrate that it has adequate procedures in place to prevent the commission of the offence by its associate. This requires the accused corporation to prove, on the balance of probabilities, the existence of a matter that is essential to the determination of its innocence (in this case, the existence of adequate procedures), whereas an "evidential burden" only requires an accused to point to evidence that suggests "a reasonable possibility that the matter exists or does not exist".

From a practical perspective, the reversal of onus is not only unusual (noting that the Attorney-General Department's "Guide to Framing Commonwealth Offences" states that "placing a legal burden of proof on a defendant should be kept to a minimum"). It also means the failure to prevent a foreign bribery offence is likely to become the "go to" offence for the prosecution, meaning Australian companies with offshore operations or subsidiaries need to be forward-thinking in how they might discharge the obligation to identify "adequate procedures".

ADEQUATE PROCEDURES—WHAT IS ADEQUATE?

As discussed, the Commonwealth Attorney-General's Department has already indicated an intention in the course of the Senate inquiry to draw considerably from the United Kingdom guidance on the meaning and extent of "adequate procedures".

The UK guidance suggests that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six overarching principles:

1. **Proportionate Procedures**: In essence, a company's bribery prevention procedures should be proportionate to the risks that the company faces. This in turn will depend to a great degree upon the persons or entities associated with the company (which of course is not a constant), the jurisdictions in which the company operates, the extent of foreign

government interface, whether the company has identified foreign bribery issues in the past and the appropriate level of due diligence on agents and other third parties.

2. **Top-Level Commitment**: Those at the top level of an organisation are best equipped to foster a culture of integrity where bribery is considered unacceptable. The UK guidance suggests that both communication of the organisation's anti-bribery stance and an appropriate degree of involvement in developing prevention procedures are critical.

3. **Risk Assessment**: The "commonly encountered" risks are themselves categorised into five broad groups—country, sectoral, transaction, business opportunity and business partnership risk.

4. **Due Diligence**: Perhaps of most relevance when dealing with "associates" over which a party has no oversight or control, the UK guidance suggests considerable care is required when entering particular relationships (such as, unsurprisingly, where local convention dictates the use of third-party agents).

5. **Communication (including training)**: Communication should extend to agents and subsidiaries and could include bribery prevention policies, controls, sanctions and rules governing recruitment, procurement and tendering. Similarly, training could be mandatory for agents and contractors and can be tailored to the specific risks posed by the role in question.

6. **Monitoring and Review**: Organisations with specific risk profiles should monitor and evaluate the effectiveness of their anti-bribery policies and might also include seeking some form of external verification of the effectiveness of existing policies and procedures. However, the UK guidance stresses that external certification will not necessarily ensure an organisation's bribery prevention procedures are "adequate" for the purpose of the failure to prevent bribery offence.

While all these suggestions are of considerable assistance, there may still be significant hurdles for Australian companies that are required to vet and enforce policies and training on third parties, particularly in jurisdictions where the use of local agents is expected or even mandatory. The use of terms such as "reasonable", "proportionate" and "appropriate" are of limited practical assistance. By way of example, performing "due diligence" on relatively obscure local agents (by, as the UK guidance optimistically suggests, "undertaking research, including internet searches") may not be quite as straightforward as the guidance suggests. Similarly, insisting upon corrupt practices training for foreign agents whilst ensuring that training is accurately translated into a foreign language, understood and actually followed may also pose problems in practice.

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