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Australia considers introducing Deferred Prosecution Agreements

In March this year, the Australian Government released a public consultation paper on whether Australia should introduce Deferred Prosecution Agreements (DPAs), agreements usually between prosecutors and corporate defendants in which prosecution for alleged offences of economic crime is deferred provided the corporation fulfils agreed conditions. This note looks at the possible changes being considered in light of the US and UK experience.

Overview

Organisations that engage in activity which may involve liability for criminal penalties under Australian laws, including domestic bribery and foreign bribery under the Criminal Code Act 1995 (Cth), can face investigation from enforcement agencies such as the Australian Federal Police (AFP) and the Australian Securities and Investments Commission (ASIC).

An investigation is usually referred to the relevant Director of Public Prosecutions who decides whether to prosecute. While early cooperation can be taken into account in sentencing, ultimately its impact will be at the discretion of the Court.

There is considerable time, expense and uncertainty associated with identifying and prosecuting complex financial crimes. Key enforcement agencies are often held back in Australia by an endemic lack of resources, which in the case of ASIC appears partly responsible for its selective enforcement approach.

Criticism has welled in recent years regarding enforcement results in the wake of well publicised supposed failings, including those cited in the OECD Phase 3 report in 2012 (and follow-up report in 2015) which found fault with Australia's commitment to the Anti-Bribery Convention, including with respect to its framework to tackle self-reporting and plea bargaining.

Public consultation paper

The March 2016 paper describes a DPA scheme as where prosecutors have the option to invite a company or individual who has engaged in serious corporate crime to agree to comply with specified conditions in return for deferred prosecution.

Such conditions typically require cooperation with any investigation, admitting agreed facts, payment of a financial penalty and execution of a compliance programme. The prosecution is discontinued once the terms are fulfilled, however, if there is a breach of the conditions the prosecution can resume and additional penalties may apply.

The consultation paper states that an Australian DPA regime may improve the ability of agencies to detect and pursue corporate crime, improve compliance and corporate culture, avoid lengthy and costly investigations and prosecutions, minimise the impact of criminal convictions on third parties (employees etc) and provide greater certainty for organisations seeking to resolve misconduct.

A public response was sought on 14 questions, including the usefulness of a DPA regime, the circumstances in which DPAs should be available, whether DPAs should be offered to individuals, the involvement of the courts and how negotiations should be structured.

Key issues

- Australia is considering introducing a DPA regime.
- There is no timing as yet.
- Organisations should have intuitive anti-bribery and corruption systems in place.

Overseas experience

United States

The US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have used DPAs (and the related Non-Prosecution Agreement (NPA)) since the early

2000s. These authorities have entered into more than 290 such agreements and have accrued financial penalties of more than USD42.5 billion in the period from 2000 to July 2014.

Since 2010, 86% of corporate enforcement actions under the US Foreign Corrupt Practices Act 1977 (FCPA) have involved a DPA or NPA. The regime, which has grown organically, rather than by legislation, is characterised by substantial prosecutorial discretion, wide applicability to federal crimes, availability to both companies and individuals and comparatively limited judicial oversight.

Clifford Chance recently secured a significant victory for Fokker Services B.V., a Netherlands-based aerospace services company, in the US Court of Appeals for the District of Columbia Circuit in establishing precedent for a new standard of judicial review of DPAs. The ruling limited the ability of a District Court to second-guess the validity of DOJ's charging decisions or the specific terms of a DPA.

The DOJ introduced a pilot programme in April 2016, promising that the size of its FCPA unit would increase by more than 50% and that the DOJ would strengthen international coordination, including as regards sharing documents and witnesses. It said it would also implement a regime to promote self-reporting by giving guidelines around standards for mitigation credit.

United Kingdom

The UK introduced a DPA regime in February 2014. In contrast to the US position, DPAs in the UK are subject to appreciable judicial oversight, characterised by formal policy and procedure. DPAs are only available for selected crimes and are not available for individuals. The regime has been introduced against the backdrop of considerable discussion about widening the scope of corporate criminal liability.

On 9 June 2016, Alun Milford, General Counsel of the Serious Fraud Office (SFO), repeated calls for an extension of section 7 UK Bribery Act 2010, which makes it an offence for an organisations to fail to prevent bribery carried out by persons associated with it.

In November 2015, the SFO entered into the first UK DPA with Standard Bank Plc in relation to allegations of failure to prevent bribery contrary to this law. The bank agreed to pay GBP21.7 million and undertake remediation. Notably the SFO worked with the DOJ and SEC to remove the inherent double jeopardy aspect of the investigation.

In February 2016, Sweett Group plc was convicted under the UK law and ordered to pay GBP2.35 million. In this case, the SFO did not consider that there had been sufficient cooperation in order to merit a DPA.

What to expect

The public consultation period ended on 2 May 2016. Of the 16 responses, 14 were in favour of the introduction of a DPA regime, including the responses from ASIC and the Australian Taxation Office.

Australia may take cues from overseas agencies as to the appropriate framework and approach for a DPA regime. The SFO asserts its role as primarily a prosecutor and its expectations for DPA cooperation are high (including waiver of legal privilege). The DOJ requires disclosure of an individual's conduct to allow it to consider feasible individual prosecution (as endorsed in the DOJ's "Yates Memorandum").

For now, drawing on the overseas experience, Australia could expect:

- greater enforcement (ASIC and the AFP have recently received additional funding);
- an initial focus on foreign bribery and corruption matters;
- rising collateral class actions (which may use DPA admissions);
- increasing co-ordination between international agencies; and
- increasing sophistication being needed for internal investigations.

With the experience of UK's DPA regime helping to erase some of the intrinsic hesitation towards DPAs in an Australian setting, there must be a real possibility that a DPA regime will happen in Australia and that it will more closely resemble the UK rather than the US model.

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