

PENALTIES FOR CORPORATE OFFENDERS IN AUSTRALIA SET FOR SIGNIFICANT INCREASE

Australia is preparing for a big increase in the maximum penalties for corporate crime. The proposed increases bring Australia into line with the sanctions available in other jurisdictions, particularly the UK and US, thereby increasing their deterrent value to potential wrongdoers.

INTRODUCTION

On 20 April 2018, Australia's Minister for Revenue and Financial Services announced the government's intention to increase maximum penalties under Australia's Corporations law ten-fold.

Corporations found to have committed criminal offences under the Corporations Act will be subject to a maximum penalty of AU\$9.45 million (increased from AU\$1 million), alternatively three times the benefits received or 10% of annual turnover.

Individuals will be subject to a maximum penalty of AU\$945,000 (up from AU\$100,000) or three times the benefits received. The maximum penalty of ten years' imprisonment for individuals will remain.

The increase in civil sanctions will be even higher. Corporations may face maximum penalties of AU\$10.5 million (increased from AU\$1 million), while individuals may face penalties up to AU\$1.05 million (increased from AU\$200,000).

THE RIGHT MOVE?

Commentators have largely welcomed the proposed increases. However, to maximise the proposed benefits from this change, significant and ongoing discussions between corporates and regulators are required, to encourage early engagement and assistance in the investigation process. There should also be options for negotiated outcomes that avoid significant penalties, particularly if the corporation's procedures and policies aim to prevent such breaches in the first place.

Self-reporting is most effective when there is a demonstrated benefit in bringing breaches to the regulator's attention before the investigation has already been initiated and before investigators have already had the opportunity to form definite views. As it stands, the limited number of successful prosecutions to date would seem to discourage self-reporting if

Key issues

- The Australian government is planning to increase ten-fold the penalties on corporate crime.
- Corporations found to have committed criminal offences will be subject to a maximum penalty of AU\$9.45 million, or three times the benefits received or 10% of annual turnover.
- The increase, together with the proposed introduction of Deferred Prosecution Agreements, is intended to encourage corporations to self-report corporate crime.

potential wrongdoers believe they are unlikely to suffer any real consequences of a breach of the law.

DPAS

The proposed increase in penalties and introduction of Deferred Prosecution Agreements (DPAs) may change the calculation, however. Proposed legislation, tabled in December 2017, includes the introduction in Australia of DPAs and will allow prosecutors to negotiate with a corporation alleged to have engaged in serious corporate crime, such as foreign bribery, money-laundering, and fraud. Prosecutors will be able to require the corporation to agree to certain facts, pay fines and/or cooperate with law enforcement (including making available individuals to give evidence against others), in exchange for an agreement not to prosecute the corporation.

Similar arrangements have been in place for years in the United States and the United Kingdom. In the United States, the concept of DPAs has been part of the corporate regulator's repertoire since the early 1990s. DPAs have been effectively utilised in a number of investigations including each of the top ten Foreign Corrupt Practices Act fines which, it is understood, have been paid by companies as part of a DPA or plea agreement, not through contested trials.

In the UK, DPAs were introduced in 2014 but take-up has been slow, with only four being agreed to date. In early 2017, a DPA was approved by the courts for disgorgement, penalties, and costs of more than GBP500 million (including an agreed GBP13 million in payment of the regulator's legal costs).

In Australia, the Attorney-General's Department has prepared a draft code of practice regarding the engagement and enforcement of DPAS and a consultation process is underway, with submissions due by 9 July 2018. Regulators believe that DPAs, in conjunction with the new offences of failing to prevent bribery, will see corporations less likely to run the risk of detection and subsequent prosecution, and instead be more ready to self-report.

CHANGED THINKING

The regulatory space in Australia has undergone significant developments in recent times. Regulators such as the Australian Securities and Investments Commission have shown an increased appetite in progressing matters of a more high-profile nature and with increasing speed.

The introduction of significantly increased penalties together with the proposed introduction of DPAs could see a significant shift in the way companies and individuals interact with regulators. DPAs should be considered more fully, recognising that the use of these mechanisms to resolve disputes will depend entirely on the nature of the investigation and a corporation's willingness to challenge the regulator's position as opposed to cooperating and potentially assisting regulators in their pursuit of individuals.

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