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Don't Overlook Your Books: The Rise of Books and Records Provisions in Global Anti-corruption Legislation

Given the increased use of the 'books and records' provisions of the US *Foreign Corrupt Practices Act 1977* (**FCPA**) by the US Securities and Exchange Commission (**SEC**) to target corporate entities whose accounting records do not accurately and fairly reflect the company's transactions, it may come as little surprise that other jurisdictions are starting to introduce similar regimes into their anti-bribery legislation.

Australia for example, has recently introduced accounting offences in its foreign bribery legislation which are based loosely on the FCPA 'books and records' provisions.

The trend of the SEC pursuing only books and records charges such as in the cases of Mead Johnson and Hitachi during 2015 demonstrates that, with a lower evidentiary burden on the prosecution than the related bribery offences, the introduction of anti-bribery 'books and records' provisions may prove an increasingly attractive option to other jurisdictions outside the US.

Key issues

- Increased use by SEC on FCPA 'books and records' provisions
- Australia bows to OECD pressure and introduces its own 'books and records' provisions
- Australian amendments suggests other countries may also respond to OECD pressure

The FCPA 'books and records' provisions

The FCPA books and records provisions create two principle obligations:

- first, to make and keep records which are accurate and fairly reflect the transactions and dispositions of the assets of the issuer; and
- second, to devise and maintain sufficient internal accounting controls to provide reasonable assurances that (amongst other things) transactions are recorded in accordance with management authority and to enable accountability of assets and that access to assets is permitted only in accordance with management authority. In circumstances in which the issuer controls an entity in which it holds less than 50 per cent or less of the voting power, the obligation is reduced to a requirement to "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances" to cause the entity to implement adequate controls.

Knowingly failing to implement a system of internal accounting controls or knowingly falsifying books or accounts kept in accordance with the FCPA obligations will, if detected, result in prosecution.

The case against Hitachi focused on Hitachi's sale of a 25 per cent share in a South African subsidiary to a company allegedly serving as a front to the African National Congress (ANC) facilitating the ANC's ability to share in profits derived from any contracts to build power stations in South Africa that Hitachi was awarded. Various payments were subsequently made to the ANC's front company as 'dividends' or 'success fees' that were inaccurately booked as consulting fees.

The SEC alleged that Hitachi's "lax internal control environment" enabled the payment of millions of dollars to the politically connected front company which Hitachi then allegedly characterised as consulting fees and other legitimate payments in its books and records. Hitachi has agreed to pay $19 million to settle the SEC charges (with no admission or denial of liability).

Developments in other jurisdictions

In 2013 Canada made various amendments to its *Corruption to Foreign Public Officials Act* (**CFPOA**) including the introduction of a books and records provision which is closely aligned with its FCPA counterpart. The CFPOA provisions attach criminal liability to, amongst other things, failing to record or inadequately recording transactions, recording expenditures that did not occur, knowingly using false documents, incorrectly identifying the purpose of a liability and intentionally destroying accounting books and records earlier than permitted by law.

The Organisation for Economic Co-Operation and Development (**OECD**) has also applied pressure on various other countries such as Ireland, Argentina, Austria, Belgium and Denmark in its reports on compliance with Article 8 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**OECD Anti-Bribery Convention**). Article 8 requires signatories to the OECD Anti-Bribery Convention to take all measures necessary in relation to the maintenance of books and records to combat the bribery of public officials.

In 2015, the OECD found that one of the shortcomings of Australia's anti-corruption legislations was that it had still not implemented offences of false accounting for the purpose of concealing or enabling bribes to a foreign official as required by Article 8 of the OECD Anti-Bribery Convention.

In response, on 1 March 2016 the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016* came into force which introduces new offences for false dealing with accounting documents. The amendments to the *Criminal Code* (Cth) create two new offences:

- an offence to make, alter, destroy or conceal an accounting document, or to fail to make or alter an accounting document a person is required by law to make or alter, with the intention that such conduct would facilitate, conceal or disguise the giving or receiving (by any person) of a benefit that is not legitimately due, or a loss not legitimately incurred; and
- an offence to make the same conduct an offence where the person is reckless (rather than intentional) about whether the conduct would facilitate, conceal or disguise an illegitimate benefit or loss.

Penalties for individuals committing the former offence can include up to ten years imprisonment, up to AUD$1.8 million, or both. For a corporation an offence can result in a fine of up to AUD$18 million, an amount three times the value of the illegitimate benefit obtained by the company for the offence, or ten percent of the company's turnover for the 12 months before the offence was committed, whichever is greater. Penalties for reckless conduct are half that. Notably, for both offences, it will not be necessary for the prosecution to prove that a benefit was actually given or received, or a loss incurred, or that the defendant intended that a particular person receive a benefit or incur a loss.

While the new offences have received support from the Senate Committee (which was inquiring into the proposed amendments) and the Australian Securities and Investments Commission, concern was expressed that the absence of a nexus with foreign bribery and the breadth of the provisions means the offences have the potential to impose criminal liability in an unintended and unreasonable range of situations. Others sought broader application and, like their US equivalents, an express obligation on persons to maintain proper accounting records for the purpose of demonstrating compliance with the foreign bribery provisions.

Looking forward

The introduction of the new offences in Australia raises a number of interesting issues and in particular:

- whether the scope of the new Australian offences will extend beyond conduct relating to bribery of foreign officials and into, as the Attorney General's Department has suggested, "*all manner of duplicitous payments*"; and
- whether Australian prosecutors will be hindered by the absence of an FCPA style express obligation to maintain proper accounting records for the purpose of demonstrating anti-bribery compliance to allow prosecutions similar to the SEC's recent settlements.

In a broader context, other jurisdictions outside the US may follow suit with the introduction of their own 'books and records' style provisions to supplement their anti-bribery regimes. This will particularly be the case in the context of increased OECD pressure on various countries for Article 8 compliance.

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