

RESPONSE TO AUSTRALIAN GOVERNMENT CONSULTATION PAPERS

AMENDMENTS TO FOREIGN BRIBERY OFFENCE AND PROPOSED MODEL FOR DEFERRED PROSECUTION AGREEMENTS

Background

Orica is the world's largest provider of commercial explosives and innovative blasting systems to the mining, quarrying, oil and gas and construction markets, a leading supplier of sodium cyanide for gold extraction, and a specialist provider of ground support services in mining and tunnelling. We have a diverse workforce of around 11,500 employees and contractors, with operations in more than 50 countries servicing customers across more than 100 countries.

Orica is grateful for the opportunity to respond to the Australian Government's Consultation papers on proposed amendments to the foreign bribery offence and on a proposed model for a Deferred Prosecution Agreement (DPA) scheme in Australia.

Orica is committed to doing business with integrity. Integrity is one of Orica's key values recorded in our Charter. We continue to invest in enhancing our anti-corruption compliance program.

As a multi-national company that competes for business all over the world, Orica has a keen interest in reducing overall levels of corruption in all countries. Our approach to proposed changes to anti-corruption laws and enforcement mechanisms is informed by the following principles:

- We support any proposals which promote effective and globally consistent anti-corruption laws and enforcement mechanisms and which provide incentives to companies to implement effective anti-corruption compliance programs.
- Consistent and effective enforcement and incentives for corporate compliance programs can have the effect of levelling the playing field and preserving the ability of ethical companies to compete.
- Preserving the ability of ethical companies to operate and compete in challenging markets should be a key objective of global anti-corruption laws and enforcement policies. If law and policy settings cause ethical companies to withdraw from challenging markets, this can leave those markets open to others who do not share our commitment to ethical business conduct. This can increase overall levels of corruption to the detriment of communities in developing countries. Conversely, enforcement frameworks that encourage ethical companies with anti-corruption compliance programs to invest in acquiring entities with less developed anti-corruption compliance programs or to invest in challenging jurisdictions can reduce overall levels of corruption in a given industry or country.

In this response, we do not propose to provide comment or legal analysis on each specific element of the proposals or legislation. We instead offer our perspective and comment, based on the principles outlined above.

Amendments to the foreign bribery offence

Most of the proposed amendments to the foreign bribery offence will have the effect of strengthening Australian law and will promote the objective of consistency with other international laws.

Corporate offence of failure to prevent bribery

One of the more significant proposed amendments is the introduction of a corporate offence of failure to prevent bribery by associates (as defined), coupled with a defence if a corporation can demonstrate that it had in place adequate procedures designed to prevent bribery. This offence would represent a significant change in the attribution of criminal liability to corporations under Australian law.

In principle, introduction of an offence which is substantially similar to the 'failure to prevent' offence in the UK Bribery Act meets the objective of promoting effective and globally consistent anti-corruption laws. Similarly, introduction of an adequate procedures defence would provide a clear incentive to companies to implement effective anti-corruption compliance programs.

Having regard to the principles outlined above, we offer three additional comments in relation to introduction of this offence:

1. Background and context to 'failure to prevent' offence in the UK Bribery Act

The corporate 'failure to prevent' offence was introduced into the Bribery Act after an extensive deliberative process which considered multiple different options for promoting more effective corporate liability for foreign bribery. This process included two consultations by the UK Law Commission (in 1997-8 and 2007-8), resulting in over 600 pages of consultation papers and reports¹, followed by extensive debates in committees of the House of Lords and House of Commons² as the bill progressed through parliament. These deliberations considered many of the issues and competing proposals raised in the current consultation paper, including the 'failure to prevent' offence and the scope of corporate liability for the acts of others (ie. the definition of 'associated persons' in the UK Act or 'associates' in the proposed Australian legislation) and proposals to vary the appropriate standard for intent (intent versus recklessness). The enactment of the Bribery Act in 2010 in its current form – including the 'failure to prevent

¹ Law Commission 2007-8 Consultation Paper and Report: <http://www.lawcom.gov.uk/project/bribery/>. Law Commission 1997-8 Consultation Paper and Report: <http://www.lawcom.gov.uk/project/corruption/>.

² See <http://services.parliament.uk/bills/2009-10/briberyhl/stages.html> for details of all House of Commons and House of Lords debates.

offence' and 'adequate procedures' defence – represented the culmination of this extensive process of consideration and debate.

Since commencement, the Bribery Act has proved an effective means to attribute liability to corporations, as can be seen from multiple successful corporate enforcement actions, including recent large and complex cases relating to Standard Bank and Rolls Royce which were resolved via use of deferred prosecution agreements. The Act has also contributed to a widespread increase in anti-corruption compliance initiatives among multi-national corporations.

The success of the Bribery Act in meeting these key policy objectives, and the extent of the deliberative process that led to introduction of the offence in the Bribery Act, suggests that any proposal to introduce different concepts or concepts rejected during the development of the Bribery Act should be subject to careful consideration.

2. The value of consistency

It is important that any Ministerial guidance published in connection with the 'adequate procedures' defence be consistent with guidance published by UK and US enforcement agencies. The anti-corruption compliance programs implemented by many multi-national companies aim for consistency with this detailed published guidance, and significant variations could introduce unnecessary cost with little benefit. In this regard, and consistent with the process adopted in the UK, it would be beneficial for companies and other stakeholders to have the opportunity to comment on draft guidance before it is published.

Consistency with US and UK guidance would also mean that Australian law and Australian companies benefit from the extensive history and experience on which the US and UK guidance is based. For example, the US guidance on 'Hallmarks of effective compliance programs' published by the US Department of Justice and Securities and Exchange Commission in 2012³ drew upon hundreds of enforcement actions and opinion procedure releases relating to the US Foreign Corrupt Practices Act since its enactment in 1977.

3. Preserving competitiveness of Australian companies

Adoption of a 'failure to prevent' offence will put the Australian government, like the UK government, in a position of strength with which to argue for enhancements to foreign bribery laws of other jurisdictions, particularly those which have ratified the OECD Ant-Bribery Convention. It will be important for Australia to utilise this opportunity as a means to promote international consistency in enforcement and therefore create a level playing field which enables ethical Australian companies to compete around the world.

³ See <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> , p 57-62

Deferred prosecution agreements

Deferred prosecution agreements can improve levels of enforcement while providing credit for companies that are committed to operating ethically and invest in appropriate compliance frameworks.

The DPA scheme proposed in the consultation paper meets these policy objectives by providing a number of benefits:

- To the extent the scheme reflects the UK model, it increases international consistency and provides a further opportunity to provide consistent guidance and incentives for compliance programs;
- DPAs can provide a more efficient and cost effective method to conclude anti-corruption investigations, including investigations across multiple jurisdictions. This brings benefits for law enforcement such as rapid and cost effective access to evidence spread across multiple countries, thereby saving costs and generating effective enforcement outcomes, while providing greater certainty for companies that seek to resolve issues arising from corrupt conduct by employees;
- More effective enforcement is also a powerful deterrent of misconduct by individuals – an objective shared with corporate compliance programs.

It will be necessary for the DPA scheme to retain public confidence while also providing certainty and other benefits to companies which are sufficient to incentivise their participation in negotiations. Many issues relating to balancing these objectives have been addressed in the consultation paper and submissions during the prior consultation process conducted in 2016 and in most cases we consider that the proposal strikes an appropriate balance.

We offer the following comments on certain aspects of the proposal:

- To ensure public confidence in the scheme, further consideration should be given to an appropriate mechanism to allow for oversight and approval of DPAs by the courts. The need for judicial oversight was identified in the submissions of a number of respondents to the 2016 consultation including the Law Society of New South Wales, the International Bar Association and the Law Council of Australia, which suggested that constitutional issues with judicial approval could be resolved;
- Consistency with DPA schemes in other countries will also be important in order to facilitate the resolution of multi-jurisdictional investigations and to avoid creating unusual disincentives for Australian companies. For example, while the UK DPA scheme requires companies to admit detailed underlying facts, it does not require an express admission of criminal liability (which can lead to collateral consequences such as breach of banking covenants and debarment from contracting with certain governments and multilateral development banks).

Incentives for cooperation by companies which have not committed a corporate offence

While DPAs will provide a potential avenue to secure the cooperation of companies that could be charged with a foreign bribery offence, detailed consideration should also be given to providing clear incentives for self-reporting and cooperation by companies that are unlikely to be liable for an offence - for example, companies that have clearly implemented an anti-corruption compliance program consistent with the 'adequate procedures' guidance – but that nonetheless become aware of conduct which may amount to an offence by an employee or 'associate' (as per the proposed definition).

These incentives could be provided in the form of written immunity undertakings under section 9(6D) of the Director of Public Prosecutions Act 1983. The provision of an immunity undertaking in exchange for continued cooperation would provide benefits to both the prosecutor and the company over and above the alternative of declining to prosecute and/or terminating DPA negotiations. For the prosecutor and investigative agencies, the terms on which immunity is granted could secure the ongoing cooperation of the company in any investigation of its associate(s), including in relation to collation of evidence located overseas. For the company, the existence of the immunity undertaking would provide greater certainty and finality.

The Prosecution Policy of the Commonwealth contains general guidelines in connection with immunity undertakings, but there is an opportunity for the DPP to provide more detailed guidelines specifically directed at incentivising self-reporting of foreign bribery matters by corporations. These guidelines could contain factors similar to some of those proposed as relevant to entering into a DPA negotiation⁴ and could also include a mechanism for providing immunity conditional on ongoing cooperation. The existing detailed guidance in Annexure B of the Prosecution Policy covering Immunity from Prosecution in Serious Cartel Offences – while necessarily different – provides a potential model for providing more detailed guidance and incentives for self-reporting and cooperation in order to achieve public policy objectives associated with specific offences.

Conclusion

Orica welcomes the Australian government's continuing commitment to enhancing anti-corruption laws and enforcement policies and remains committed to working with all governments in the global fight against corruption.

Orica Ltd
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⁴ DPA Consultation Paper, p 7