

## ASIA ANTI-BRIBERY AND CORRUPTION UPDATE 2017

This briefing looks at what is happening around Asia with respect to anti-bribery and corruption laws and prosecution. In summary, most jurisdictions are continuing to strengthen their laws and/or increase corporate prosecutions.

### INTRODUCTION

Regionally, there is an increased focus on prosecuting bribery and corruption offences in order to "stamp-out" these practices. Several high profile political figures have become embroiled in bribery scandals demonstrating the region's continued focus on combatting bribery and corruption. Singapore has also sent a clear message that private sector bribery will not be tolerated and may lead to custodial sentences.

The increased focus on prosecution of bribery and corruption is coupled with proposed changes and changes to laws to strengthen the fight against bribery and corruption. Japan is introducing, and Australia is proposing to introduce, deferred prosecution agreement systems in relation to, amongst other things, corporate bribery offences. Korea has introduced a new graft law and the PRC is considering changes to its "Anti-Unfair Competition Law".

### AUSTRALIA

#### **Increasing resources to combat corruption, proposals to reform foreign official anti-bribery law and to introduce a corporate DPA scheme**

In May 2016, the Australian Government committed AU\$15 million in funding over three years to bolster law enforcement efforts to detect and combat corruption. In September 2016, the Australian Government announced that the Australian Federal Police would establish new specialist fraud and anti-bribery and corruption teams in Perth, Sydney and Melbourne.

Reforms to the definition of foreign bribery offence have been proposed, which will more closely align Australia's foreign bribery regime with the equivalent US and UK regimes. The proposed reforms include creating a new bribery offence based on recklessness – this would remove the need for corrupt intent to form part of the commission of the offence, and is intended to reduce the prosecution's burden of establishing intent (thereby going beyond the UK and US regimes). Another proposed amendment is creating a new corporate offence of failing to prevent foreign bribery, which would make a company automatically liable for bribery by employees, contractors and agents (in

#### Key issues

- Corruption crackdown continues in China.
- High profile prosecutions in Hong Kong and South Korea.
- Prosecution of private sector bribery in Singapore.
- New plea bargaining system introduced in Japan from June 2018.
- Strengthening of resources in Australia and draft DPA scheme.
- "Name and shame" database established in Malaysia.
- FCPA enforcement continues to focus on Asia as a key risk region.

Australia and overseas), unless the company could demonstrate a proper system of internal controls and compliance were in place.

A public consultation paper has also been released outlining a proposed model for a Deferred Prosecution Agreement (DPA) scheme in relation to serious corporate crimes, including foreign bribery. A DPA would only be available to companies and the proposed model draws on aspects of the UK and US DPA schemes.

## **HONG KONG**

### **Corruption level “stable”, big name features in bribery cases**

The Independent Commission Against Corruption’s (ICAC) latest Annual Report describes the overall corruption situation in Hong Kong as “stable and under control”, but nevertheless, the ICAC reported a 3% rise in corruption complaints received compared to the previous year. The Report noted that a large proportion of the private sector corruption complaints related to building management.

Prominent prosecutions include:

- Thomas Kwok (former Sun Hung Kai Properties (SHKP) co-chairman) and Rafael Hui (former Chief Secretary for Administration of Hong Kong), lost appeals against conviction in the Court of Final Appeal. Prosecutors had successfully argued that Hui received HK\$ 8.5 million (approximately US\$ 1.1 million) from Kwok via two middlemen just before Hui took office in 2005 to help ensure that the government maintained a “favourable disposition” towards SHKP. The case has clarified that it is not necessary for prosecutors to prove specific quid pro quo to establish misconduct in public office offences.
- Donald Tsang (former Chief Executive of Hong Kong) was found guilty of misconduct in public office by deliberately concealing negotiations with a property businessman to rent a luxury apartment in Shenzhen, while at the same time approving a digital radio broadcast licence in which the businessman was a major shareholder. Tsang is the highest-ranking official ever convicted of a criminal offence in Hong Kong and was sentenced to twenty months’ imprisonment.

## **JAPAN**

### **New plea bargaining system, continued pressure from the OECD to step up fight against bribery**

By June 2018, a new system of plea-bargaining for certain specified offences, including bribery-related offences, will come into force. Given the focus on third parties, the new system may lead to an increase in employees informing on their employers, resulting in a rise in corporate criminal prosecutions.

The OECD Working Group on Bribery in International Transactions sent a high-level mission to Japan in June 2016 to urge the Japanese government to step up its efforts to fight international bribery. The OECD issued a statement imploring Japan to “make fighting international bribery a priority” noting that, amongst other things, prosecutions for bribery offences have been few and far between and legislation allowing for the confiscation of proceeds of bribery has yet to be enacted.

## **MALAYSIA\***

### **New anti-corruption chief stepping up prosecutions**

The latest anti-corruption goal, as announced by the new chief of the Malaysian Anti-Corruption Commission (MACC), Datuk Dzulkifli Ahmad, is to prosecute and/or investigate one case per week over the next three years. Consistent with this drive to combat corruption, the MACC currently operates a corruption offenders database, where corruption cases are reported to the public on a regular basis. The purpose of this "name and shame" database is to serve as a deterrent, to send a clear message against corruption, and to assist the public in performing due diligence on parties. Additionally, a new Corporate Liability Act may be tabled in the upcoming session of Parliament. The proposed Act targets corporations and attempts to prevent the private sector from bribing public officials.

## **PEOPLES REPUBLIC OF CHINA (PRC)**

### **Anti-corruption crackdown continues; regulation of bribery through third parties enhanced**

The anti-corruption crackdown in the PRC, which started in 2012, has maintained its momentum. According to the Central Political and Legal Affairs Commission of the Communist Party of China, almost 100,000 corruption-related cases have been prosecuted in the five years since 2012 (representing a 32% increase over the previous five-year term), and over a hundred of these involved very senior government officials at or above the provincial and ministerial level.

The Standing Committee of the National People's Congress has reviewed a second draft amendment to the PRC Anti-Unfair Competition Law, which, among other things, addresses commercial bribery through third parties who may exert influence on transactions through the powers of government officials, thus demonstrating a continuing trend for legislators to seek to enhance the regulation of such activities.

## **SINGAPORE**

### **Corruption complaints reach new low, courts taking tough stance on private sector bribery as well**

Overall, the number of corruption complaints and cases investigated by the Corrupt Practices Investigation Bureau (CPIB) reached a new low in 2016. The CPIB received 808 complaints last year, an 8% decrease compared to the number received in 2015.

The Singapore courts have sent a strong message through decisions in several cases that private sector bribery will also not be tolerated: a first-time offender was given a custodial sentence and in another case, the judge stated there was no presumption that cases of private sector corruption would only attract non-custodial sentences.

## **SOUTH KOREA**

### **New graft law, notable investigations under South Korea's pre-existing laws**

The Improper Solicitation and Graft Act of Korea (Graft Act) took effect on 28 September 2016, bringing major changes to South Korea's anti-corruption regime. Under the Graft Act, public officials are prohibited from accepting, requesting, or promising to accept cash or benefits in connection with their duties, regardless of whether the cash or benefit is given in exchange for a favour. There is also a blanket prohibition against a public official receiving more than KRW 1 million (US\$ 875) on a single occasion, or more than KRW 3 million (US\$ 2,630) in a fiscal year, in circumstances unconnected to their duties. The "3-5-10 Regulation" provides some protection from the prohibition through low and effectively "safe harbour" thresholds for the giving and receiving of cash and other benefits.

Importantly for corporations, Article 24 of the Graft Act provides for joint liability of corporations for their employees' violations, unless the corporation has shown "due attention and supervision" to prevent the violation in question.

There have been no successful prosecutions under the Graft Act since its implementation. However, several notable investigations and criminal cases under South Korea's pre-existing laws have made international headlines recently: Former President Park Geun-hye was arrested on charges including, amongst other things, extortion of tens of millions of dollars from South Korean corporations for the benefit of foundations operated by a friend and confidant of Ms Park. Meanwhile, Samsung Electronics' vice chairman, Jae Yong Lee was sentenced to five years' imprisonment for bribery, embezzlement, perjury, concealment of criminal proceeds, and illicit transfer of assets abroad.

## **UNITED STATES (AS IT RELATES TO ASIA)**

### **Trump's stated lack of support for FCPA may not mean less enforcement, Asia-connected cases feature heavily in 2017 FCPA enforcement**

President Trump has publicly stated his lack of support for the Foreign Corrupt Practices Act (FCPA), suggesting in 2012 that FCPA enforcement has become "absolutely crazy", the FCPA is a "horrible law" that "should be changed", and it puts U.S. companies at a "huge disadvantage".

Nevertheless, in connection with his confirmation hearing, Senator Jeff Sessions stated "if confirmed as attorney general, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case".

The Department of Justice (DOJ) has begun implementing plans to increase its law enforcement resources by more than 50% by adding ten prosecutors to the FrAU\$ Section's FCPA Unit. Of note, five out of the nine cases prosecuted in 2017 to date have involved conduct in Asia. It is therefore expected that the DOJ and the Securities and Exchange Commission will continue to pursue FCPA enforcement actions, and for Asia to be a key risk region for companies.

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