Corporate & Commercial

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IS YOUR COMPANY WILLING TO DO WHAT IT TAKES?

THE UK BRIBERY ACT AND HOW IT MAY AFFECT COMPANIES IN AUSTRALIA

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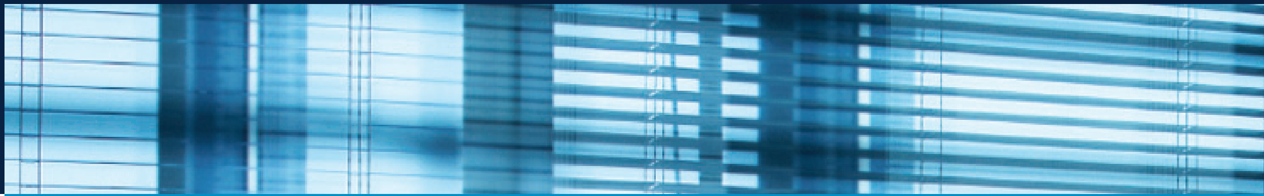
The results of a recent European Fraud Survey produced by Ernst & Young, suggested that a significant minority in management positions are prepared to do whatever it takes to help their business survive and grow, with more than a third of those questioned willing to offer cash payments, gifts or entertainment to win business.

The UK Bribery Act 2010 came into force on 1 July 2011, and at the same time the Australian Federal Police charged two Australian companies, Securency International Pty Ltd and Note Printing Australia Limited, along with six individuals, with bribery of foreign public officials. The charges relate to alleged bribes paid between 1999 and 2005 to public officials in Indonesia, Malaysia and Vietnam to secure banknote contracts. This is the first prosecution in Australia under the foreign bribery legislation introduced in December 1999. The charges against the individuals carry a maximum penalty of 10 years imprisonment and/or a fine of AUS$1.1 million.

It has been reported that Australia's own foreign bribery laws, as contained in the Criminal Code Act 1995, are likely to be reviewed in the wake of the above prosecutions, with the Australian Federal Police already liaising with the Attorney General's office over changes to enhance the current legislation and to bring it more into line with the new UK Bribery Act.

The UK Bribery Act will have a impact on all UK registered companies and non-UK companies which carry on a business (or part of a business) in the UK, as well as on British citizens worldwide. By reason of its extraterritorial application, it will impact Australian companies engaged in international activities. The Act is expected to have a particular impact in the shipping and the oil and gas sectors, with the latter accounting for 18% of all prosecutions to date under the US Foreign Corrupt Practices Act (FCPA), and which is seen as a template for the UK Bribery Act. While the oil and gas sector was seen as most at risk in terms of the number of prosecutions, Ernst & Young considered this to be a consequence of the location of those operating in the sector and did not suggest that the sector is intrinsically more corrupt that any other.

The Act is expected to have a significant impact on the shipping sector and on those engaged in international trade generally, not just the oil and gas sector. This is because it will have extraterritorial application and therefore it will apply to offences committed outside the UK. Not surprisingly, a number of P&I Clubs have already issued warnings in new Guidelines to their correspondents, reminding them that most of the Clubs are domiciled in countries that have strict bribery laws and that the Clubs' best practice systems extend to all service providers including those who act on behalf of the Clubs' members.



Under current Australian law, a person is guilty of an offence if they offer a benefit to another person with the intention to influence a foreign official and in order to obtain or retain business or to secure a business advantage that is not legitimately due. There are only two defences:

1. That the benefit was permitted by local law in the country of the foreign official.
2. Where the payment made constitutes a "facilitation payment" for the purposes of securing performance of a routine government action of a minor nature and provided that the payment is of a minor amount.

The UK Bribery Act introduces criminal offences for bribery which can be committed by commercial organisations who fail to prevent persons associated with them from committing bribery on their behalf. A company will be liable to prosecution if they fail to prevent bribery (e.g. the giving or receiving of a bribe) and if an employee or someone associated with them bribes another person intending to obtain or retain business or an advantage in the conduct of business for that company or organisation. It applies to entities incorporated or formed in the UK or that carry on business in the UK, wherever they are incorporated or formed.

As the Ernst & Young survey suggests, the risk of corruption often stems from a company's foreign subsidiaries that act as intermediaries and where they are, for example, chartering vessels, financing trades, buying or selling commodities and where "facilitation payments" are not uncommon. Companies therefore need to have in place adequate procedures to prevent bribery, as the effect of the UK Bribery Act is to make an employer liable for bribes paid by an employee, even if the employee is abroad and even if the employer did not condone the action or did not even know of it.

There is a risk of an unlimited fine and up to 10 years imprisonment and there is the risk to reputation. The only defence available for the corporate offence of failure to prevent bribery is that "adequate procedures" have been put in place to prevent bribery.

What does that mean to Australian companies?

One of the stated objectives of the

Australian legislation was to remove uncertainty for business. But many of its provisions remained undefined or were so broad as to risk putting companies inadvertently in breach. This was particularly true in relation to so-called "facilitation payments" and the need for a record to be kept of the "minor" payment made, the date of payment, the reason for it and the identity of the recipient.

With the UK Bribery Act's entry into force, the ambiguity of the Australian legislation, and the anticipated affect of the UK Act upon the global operations of any foreign business with a UK presence, it is considered prudent for any Australian company engaged in international trade not to rely on the defences available under the Australian Criminal Code Act 1995, but to safeguard against prosecution by establishing a clear framework for managing the risk. In other words, to have clear anti-corruption policies and "adequate procedures" established imposing a greater degree of control over employees working abroad and by forbidding its employees, subsidiaries or agents from offering, for example, any facilitation payments.

As to "facilitation payments", the UK Government has stated that the eradication of facilitation payments is a long-term objective which requires both economic and social progress and a sustained commitment to the rule of law in parts of the world where the problem is most prevalent. It also requires collaboration between governments. But it is considered that business has a role to play.

With that in mind, it will be no defence to a prosecution under the UK Bribery Act that the Australian company was complying with the requirements of Australian law in relation to the alleged facilitation payments.

What needs to be done?

The UK Act is not intended to prevent reasonable and "proportionate hospitality and promotional and other expenditure". What will be looked at is whether the hospitality constituted a financial or other advantage given with the intention of inducing a person to carry out their role improperly or to secure business or a business advantage. That will depend on the circumstances of each case and such things as the seniority of the person involved, the standards normally applied in the sector, the connection between the advantage and the intention to influence and secure a business advantage and whether the hospitality could, for example, be seen as being reasonable or proportionate.

In the absence of any clear guidance within the Australian law, compliance with the requirements of the UK Bribery Act and regard for what are considered under the UK Act to be "adequate procedures" that a company should have in place, is thought to be a sensible risk management approach. That is even if the Australian company may not be at immediate risk of prosecution under the UK Act. In any event, Australian companies that are at risk of prosecution under the UK Act are recommended to:

- Put in place risk assessment procedures, proportionate to the company's size, to assess the extent of its exposure to bribery risks by its employees, agents and service providers.
- Develop policies on such things as gifts, "facilitation payments" and hospitality. More thorough due diligence will be required in countries where bribery is a high risk or in high risk situations.
- Develop anti-corruption training programmes for all staff from the boardroom down. Top level management should be committed to the design and implementation of appropriate procedures and training.

- Put in place financial controls to minimise risk and to undertake regular audits and checks to assess the effectiveness of anti-bribery procedures. They should also evolve and adapt to the changing nature of the locations and scope of the business.
- Put in place measures in the supply chain to apply anti-bribery policies to trading partners and service providers. It should ensure that its bribery prevention policies and procedures are clearly communicated within the organisation and outside.

Conclusion

It is likely to be only a matter of time before Australian law is brought into line with the UK Bribery Act and as part of the broader international effort to have agreed measures in place to fight bribery of foreign public officials. Until that happens there is strong evidence to suggest that as far as the UK authorities are concerned they intend to be proactive and to prosecute UK citizens and organisations with a presence in the UK and to focus on companies operating in high risk areas.

Therefore, any company that is doing business in a region that is considered to be a high risk should be aware of the risk of liability that may result under the UK Bribery Act. It is strongly recommended that companies and even Australian companies that are likely to be affected should immediately implement bribery prevention procedures. For shipping companies, where "facilitation payments" by crew, by shipping agents and others and at ports where such practices are common if not impossible to counter, particular care will need to be taken to seek to ensure compliance with the Act.

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