

BRIBERY UPDATE: AUSTRALIA

WHAT STEPS SHOULD YOUR COMPANY BE TAKING TO ENSURE COMPLIANCE WITH ANTI-BRIBERY AND CORRUPTION LEGISLATION?



In 2012's Corruption Perceptions Index published by Transparency International, Australia was ranked 8th least corrupt out of 174 countries surveyed.

Despite this positive ranking, no country or company is perfect. Australian companies have fallen foul of anti-bribery laws both domestically and internationally. Statistics were published by the Organisation for Economic Co-operation and Development ("OECD") late last year showing that of 28 foreign bribery referrals received by the Australian Federal Police, 21 have been concluded without charges, and one foreign bribery case has led to prosecutions, leaving 7 investigations ongoing at the time of publication. We outline below some key practices which companies should consider adopting to support a positive corporate culture and effective system of compliance to meet their domestic and international obligations. To put this into context, we have summarised key points concerning Australian, UK and US Legislation which might affect an Australian company. This is particularly important for the mining, energy and shipping sectors, as these regularly operate in high risk jurisdictions.

Australia: Bribery of Foreign Public Officials

The Australian Criminal Code provides that a person is guilty of an offence if he:

- provides, causes to be provided, or offers a benefit to another person;
- with the intention of influencing a foreign public official;
- in order to obtain or retain business or to secure a business advantage that is not legitimately due.

There are two defences:

1. that the benefit was permitted or required by the local written 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.



It is not relevant whether the benefit is considered customary in the circumstances. A “routine government action” does not include any decision to award or continue business.

The legislation applies to Australian citizens, residents of Australia, or a body corporate incorporated under a law of the Commonwealth or of a State or Territory.

Whilst the Australian position remains that “facilitation payments” are permitted, it should be noted that such payments are illegal in the United Kingdom, the United States, and are soon to be in Canada following an announcement in February 2013. Australia launched a consultation on this point in 2011, but no conclusions have yet been reached. This is indicative of the contemporary trend against such payments.

International Legislation: UK Bribery Act

In previous bulletins we have considered the effect of the UK Bribery Act on Australian companies. The important point to note is that the Act creates an offence where “a *relevant commercial organisation*” fails to prevent a “*person associated with*” it from paying bribes on its behalf. The offence has a wide territorial scope because a “relevant commercial organisation” includes not only UK companies and UK partnerships, but also any company (wherever incorporated) or any partnership (wherever formed) “*which carries on a business, or part of a business, in any part of the UK*”. The guidance to the Act states that having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies. The only defence to the offence is for the commercial organisation to show that

it had in place adequate procedures designed to prevent other people from paying bribes on its behalf. Australian companies carrying on businesses or parts of businesses in the UK should satisfy themselves that they are complying with such international obligations.

International Legislation: US Foreign Corrupt Practices Act

The US Foreign Corrupt Practices Act has international scope and may reach the following:

- Australian companies that issue securities in the US;
- Australian companies with US operations;
- Australian companies with any nexus in the US that is used in furtherance of bribes being paid anywhere in the world; and
- Officers, directors, and employees within affected Australian companies.

There has been an increase in prosecutions by the US Securities and Exchange Commission and the US Department of Justice against individuals who have received, paid or facilitated the payment of a bribe to foreign government officials. It is common for them to work with other international regulators and enforcement agencies, such as the Australian Federal Police. This has been highlighted by recent US investigations into alleged foreign corrupt practices of a major Australian iron ore mining company.

Key Developments in Australia

Penalties

Up until 27 December 2012 under Australian law a person convicted of bribing a foreign public official was liable to a maximum penalty of 10

years imprisonment and/or a fine of AU\$1.1m. However, with effect from 28 December 2012, the Australian Government has increased the value of the fine. For an individual, the maximum fine is now AU\$1.7m, and for a corporation the fine is the greater of a fine up to AU\$17m per offence, or three times the value of the benefit derived, or 10% of the company's turnover during a 12 month period from the month during which the offence was committed.

Directors' obligations

Directors may be in contravention of their duties under the Corporations Act 2001 (Cth) where they participate in actions of foreign bribery, and this can lead to civil penalties. In *Australian Securities and Investments Commission v Ingleby* [2013] VSCA 49, the Victorian Court of Appeal criticised an agreed statement of facts relied upon by ASIC and AWB Ltd's former CFO, in the context of an appeal by ASIC against a reduced sentence imposed on the CFO. This arose out of AWB Ltd's wheat trade with Iraq and misuse by AWB Ltd of the Oil-for-Food program administered by the United Nations. The Court reinstated the original fine and period of disqualification, but commented that the penalty might have been higher if proper determination had taken place.

AFP Panel of Experts

The Australian Federal Police has established a Foreign Bribery Panel of Experts, which comprises AFP officers said to have experience in foreign bribery investigations, following criticism from the OECD during the Phase 3 Review in late 2012. This demonstrates the increasing trend of the AFP to deal with allegations of foreign bribery seriously.



Best Practices

The following is a non-exhaustive list of steps which Australian companies should consider in order to comply with their obligations under Australian, UK, and US legislation.

1. **Review internal controls and policies** and consider whether they provide the company with sufficient protection under the various regimes in light of the nature and reach of the company's businesses and business activities.
2. Establish a thorough and effective **compliance program**. As a minimum this will require the company to prepare and implement a written policy against violating Australian legislation, and any other relevant anti-corruption laws. Education of employees, at all levels of seniority, along with contractors will be essential: in person training should be organised at regular intervals. In addition to preparing an anti-corruption policy, this will need to be implemented, and the company may need to do this by developing a system of procedures and standards, along with a means to monitor these on an ongoing basis. The company should ensure that those acting on its behalf or with whom the company has business relationships should also be informed of the procedures and policies (for example, agents and joint venture partners).
3. Establish a **reporting policy**.
4. Consider preparing **standard clauses** to be used in contracts with employees, business partners and agents.
5. **Test** the policies and procedures for effectiveness.

The types of controls, policies, and procedures which may need to be implemented will depend on the nature of the company's business.

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