

BRIBERY OF FOREIGN OFFICIALS

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Global trade brings global risk. Countries representing the vast majority of the world's trade all have anti-corruption laws. Breaching these laws can have devastating consequences, as the Stern Hu case in China dramatically confirmed.

In Australia, the Commonwealth Criminal Code contains provisions known as the *Bribery Act*. Australian companies and Australian citizens or residents face huge penalties for bribing for foreign officials – 10 years in jail or fines of \$1.1m for individuals or \$11m for companies. The United States has similar sanctions under its *Foreign Corrupt Practices Act 1977*. The United Kingdom has updated its corruption laws under its new *Bribery Act 2010*, which received Royal Assent on 8 April 2010 and at the date of writing is now only awaiting coming into force. It contains provisions prohibiting bribery of foreign officials. Virtually all OECD countries and other trading partners have anti foreign corrupt practices laws.

Companies and their directors or other officers who allow or turn a blind eye to corrupt practice may be complicit in criminal offences. In addition to the penalties under the Act, a breach could result in reputational risk, losing contracts or the right to trade in a country (think of AWB Limited's problems after the Iraq bribery scandal), exclusion from tender lists and general loss of business. Directors who do not act to avoid damage to their company resulting from corrupt actions by employees are likely to feel the wrath of shareholders.

To summarise the Australian *Bribery Act*, it is an offence for:

- an Australian person or corporation within or outside Australia;
- to directly or indirectly promise, offer or provide a benefit to another person;
- that benefit is not legitimately due to the other person;
- with the intention of influencing a foreign public official (who may or may not be that other person) in the exercise of that official's duties;
- in order to obtain or retain business or a business advantage that is not legitimately due.

A "foreign official" could be at any level of foreign government, including any agency or instrumentality, whether in the executive, legislature, judiciary or military or may be an official in or worker for an organisation involving or supported by 2 or more governments, such as a United Nations body or the Red Cross.

The response that "everyone here does it" or "it is the only way to get business done" will not be a defence. Nor will paying an agent if some or all of the payment goes to a foreign official. It will however be a defence if the payment or benefit in question is required or permitted by the *written* law of the foreign official's country. It is not safe to assume that a payment or benefit will be so permitted. Before making or offering a payment or benefit, the legal status of it should be clarified.

There is also a defence for *genuine* facilitation payments. In summary, these are *small* payments or benefits of *nominal* value which are made in order to have an official do a routine government action expeditiously. These are actions which would need to be done in any case. The *Bribery Act* gives some examples. A payment, however small, that is made with the intention of obtaining or retaining business or a business advantage to which the payer is not legitimately entitled will not qualify for the defence. A person trying to rely on the facilitation payment defence

must prove that a payment was a genuine facilitation payment. A written record must also have been made at the time of payment, to record all relevant details. Failure to make, keep and be able to produce the record will mean the defence is not available, unless the record was lost or destroyed through no fault of the person liable to make it.

What should directors do? As a starting point, companies should adopt a formal written zero tolerance policy against foreign corrupt practices. Compliance must become a fundamental part of the company's culture. This will call for active implementation of the policy and regular training and reinforcement. Consider online employee compliance and training modules and targeted training in situation avoidance or management for employees likely to be in risk areas. Give staff "red flag" lists to help them identify potential danger situations. Staff must be confident that senior management and the board will back them, even if refusing to pay a bribe results in lost business. This is where the rubber hits the road. Transparent enforcement of the policy in the case of a breach will be very important.

I recommend companies establish protocols and pro forma documents for payment approvals and record keeping and reporting. Establish a reporting system which may allow for anonymous reports and a procedure for quickly and thoroughly investigating possible infringements. Consider engaging an independent person who has the skill and experience to conduct enquiries. In addition to the internal benefits to the company, the independent enquiry and report may be an important factor in convincing prosecutors, foreign governments and other interested parties just how seriously the company treats these matters.

A final point. Companies should ensure that potential foreign corrupt practices issues are covered in due diligence investigations when appointing foreign business partners, contractors or agents of in the context of business and company acquisitions. Making an acquisition and then discovering a corruption tolerating corporate culture or reputational problems may be a serious value destroyer and may not be adequately covered by warranties and similar deal mechanisms.

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