

# Minimising the corruption risk to your business from counterparties

As Australian and international regulators and prosecutors increase their efforts to combat corruption and bribery, companies need to monitor the actions of third parties as closely as those of their own employees.

Liability is no longer limited to a company's home country; acts committed abroad can attract prosecution at home and under other countries' legislation. Australian regulators will investigate foreign official bribery allegations against Australian companies under the Criminal Code (Cth), while the enforcement of the UK Bribery Act and the US Foreign Corrupt Practices Act (FCPA) reaches far beyond those countries' borders.

Corruption investigations and prosecutions can damage a business' profits and reputation. In this briefing, we explain what Australian companies should be doing to minimise the risk posed by corruption and bribery carried out by counterparties.

## What laws apply to Australian companies?

Australian companies are of course subject to the anti-bribery provisions of the Criminal Code (Cth), but they will also be subject to anti-bribery laws of other countries if conduct forming part of a bribery offence occurs within these jurisdictions.

Additionally, some countries, such as the UK and the US, have anti-bribery laws with very "long reach" that apply to Australian companies even where

the conduct in question occurs wholly outside their borders.

The UK Bribery Act's corporate offence of failing to prevent bribery by an "associated person"<sup>1</sup> applies to a company which "carries on a business, or part of a business, in any part of the United Kingdom"<sup>2</sup> and it is not a requirement of the offence that the offending conduct take place in the UK. Accordingly, Australian companies which carry on part of their business in the UK may find themselves liable for the bribery of

## Key issues

- Australian companies may be subject to far-reaching international anti-corruption and anti-bribery laws
- Companies may be liable for the criminal acts of third parties
- Companies need robust strategies to minimise their counterparty corruption and bribery risks.

others that occurs wholly outside the UK.

The anti-bribery provisions of the US FCPA apply not only to US companies but also to non-US companies that are issuers of securities on a US stock exchange, that are required to file SEC reports, that are registered in the US or that cause, directly or through agents, any act in furtherance of a bribe to a foreign official to take place within the US. "In the US" is interpreted broadly and, for example, use of the US

financial system (most US dollar payments are cleared through a US correspondent bank) in the commission of a bribe will be sufficient to bring a non-US company within the reach of US prosecutors. Furthermore, the US is now regularly pursuing non-US companies for aiding and abetting US persons and businesses in violating the FCPA for bribery that has occurred wholly outside the US.

Another matter to be aware of with respect to these "long-reach" jurisdictions is the relative likelihood that a company will be liable for the bribery of third parties.

The UK Bribery Act's corporate offence makes a company strictly liable for the bribes of its "associated persons" that are performed for its benefit. Under the FCPA, companies are responsible for bribery committed on its behalf by officers and employees as well as by third parties if an officer or employee (regardless of level) had "knowledge"<sup>3</sup> that the third party would engage in the bribery.

Given the broad reach of the UK Bribery Act and the FCPA, and the relative likelihood that a company could be held responsible for the actions of third parties, it makes sense for Australian companies to have robust anti-bribery policies and procedures to prevent bribery by their own officers and employees as well as third parties that are involved in their business.

If the Australian company has exposure to the UK Bribery Act, it needs to also ensure that these policies and procedures cover the UK

Bribery Act's additional prohibitions on facilitation payments and private sector bribery that are not found in the FCPA and the Criminal Code (Cth).

Whilst the Criminal Code (Cth) does not simply attribute the actions of other parties to the company<sup>4</sup> the consequences of being associated with parties who have been or are involved in corrupt activities can be severe. Even Australian companies without exposure to the "long-reach" jurisdictions need to take care when engaging or otherwise doing business with third parties.

## What should Australian companies be doing to minimise this risk?

### Step 1: Extensive due diligence and risk assessment

Due diligence enables a party to obtain a better understanding of the counterparty, its assets and liabilities and its business risks. Anti-corruption and anti-bribery due-diligence should be:

- viewed as a necessary part of the investment assessment process and should be included with traditional financial and legal due-diligence;
- proportionate to a company's assessment of the corruption and bribery risks associated with the business; and
- conducted as early as possible to provide for sufficient time to assess the impact of newly discovered risks.

### Focus points

When conducting anti-corruption and bribery due diligence and risk assessment on a counterparty, companies should focus on the following:

- whether the counterparty has an existing and current anti-corruption and anti-bribery policy;
- whether there has been any conduct by the counterparty or its directors and employees which may violate anti-corruption and anti-bribery laws; and
- the terms of contracts the counterparty has in place with third parties (such as joint venture partners, suppliers or service providers).

More generally, companies should also consider:

- geopolitical factors of the countries to which the counterparty is exposed;
- the industry sector and key markets of the counterparty; and
- the people or parties with whom the counterparty may have to deal.

The outcomes of these risk assessments will help the company determine what procedures need to be put in place as part of its overall risk mitigation strategy.

Whilst it will not always be possible for a company to discover everything relevant in its anti-corruption and anti-bribery due diligence exercise, spending time in crafting carefully considered and focussed questions for the counterparty with respect to business areas where corruption risks

<sup>1</sup> The UK Bribery Act, which came into effect on 1 July 2011, provides that companies are responsible for the actions of "associated persons" in the context of the corporate offence of failing to prevent bribery. "Associated persons" is defined in the UK Bribery Act to be persons (individuals or corporate bodies) "who perform services for or on behalf" of the company. Employees are presumed to be associated persons of their employer. Other examples of possible associated persons includes, but are not limited to agents, consultants, lobbyists, subsidiaries, franchisees, joint venture partners and members of consortia. Associated persons may be of any nationality.

<sup>2</sup> There is not yet a court decision which interprets the meaning of this phrase but UK prosecutors have indicated they will seek a broad interpretation of it.

<sup>3</sup> A person will be deemed to have knowledge if they are aware of a "high probability" that prohibited conduct will occur or if they demonstrate conscious disregard, wilful blindness or deliberate ignorance of prohibited conduct.

<sup>4</sup> A company may be charged if it aids, abets, counsels or procures the commission of the bribery offence by another, or conspires with another, to commit the bribery offence.

might exist will assist in the assessment of risk.

In a mergers and acquisitions context, where acquiring companies may not be able to obtain a complete picture until after completion, it would be prudent to continue with post-completion due diligence to identify and assess risk areas.

### Step 2: Risk minimisation in contractual terms: what provisions should a company include in its contracts?

Companies should look to include warranties as to past and representations of future compliance with anti-corruption and anti-bribery laws in their contracts. It would be best practice for companies to contractually require counterparties to establish necessary controls, policies and procedures to address corruption and bribery risks. The benefits of including such clauses should be assessed by companies against their assessment of the risk of corrupt activity taking place by counterparties.

Earlier this year the Association of International Petroleum Negotiators updated its Joint Operating Agreement model contract to include similar provisions with respect to anti-corruption and anti-bribery. These amendments indicate increasing awareness of companies, industry and professional associations of “white-collar” issues and the need to expressly recognise various obligations and policies to combat corruption and bribery.

### Step 3: Addressing existing contractual arrangements

Whilst it might be difficult to amend contracts that are already in place to include anti-corruption and anti-bribery provisions, companies wishing to demonstrate positive action against bribery and corrupt conduct should consider entering into supplementary

Examples of contractual provisions to minimise corruption and bribery risk:

- **Warranties and representations:** that a party’s respective directors, officers, employees and agents have not provided or offered, and will not provide or offer, benefits to public officials contrary to the applicable anti-corruption and anti-bribery laws.
- **Internal controls and policies:** requirements that the counterparty maintain necessary internal controls so as to satisfy any anti-corruption and anti-bribery representations. This can stretch out to require the counterparty to put in place back-to-back arrangements with its contractors or suppliers requiring them to also establish like controls and policies.
- **Books and records:** counterparties being required to maintain books and records and properly record and report transactions in a manner that accurately and fairly reflects their assets and liabilities according to applicable accounting standards.
- **Notification:** requirements to notify (and keep informed) all parties of any investigations or proceedings in relation to alleged violation of applicable anti-corruption and anti-bribery laws.
- **Indemnification:** an indemnity from the counterparty against all loss and damage caused by its breach of applicable anti-corruption and anti-bribery laws.
- **Termination of contract:** right to terminate in the event that there is an admission by the counterparty of breaching, or there has been a finding of guilt in relation to a breach of, applicable anti-corruption and anti-bribery laws.

agreements or establishing joint anti-corruption and anti-bribery policies or action statements with existing counterparties.

Outside such contractual arrangements, companies should engage and discuss with counterparties their corruption and bribery risks and take steps to combat non-compliant behaviour at all levels of their businesses.

### Step 4: Ongoing monitoring

As a company grows so too will its exposure to corruption and bribery risks. In this context, companies should:

- periodically monitor compliance and review their anti-corruption and anti-bribery policies and

procedures and their interaction with counterparties;

- conduct further reviews when significant commercial events occur, such as the acquisition or development of a new business;
- review other policies and procedures, such as financial control mechanisms, which may provide supplementary measures to reduce corruption and bribery risks; and
- have their policies and procedures reviewed by an independent third party.

## Conclusion

With the globalisation of business, companies need to be aware of the increasing prevalence of corruption and bribery risks to which they and their employees and agents are exposed.

Taking the steps listed in this briefing, in addition to putting in place the necessary codes of conduct and compliance training programmes, will assist a company to mitigate these risks and help in establishing a defence to attributable allegations of corruption or bribery by employees, contractors or agents.

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