INDUSTRY ALERT

The World of Secret Commissions

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Could your company be caught up in the laundering of local corrupt commissions and rewards?

Much is written about foreign bribery and corruption but, in practical terms, a higher business risk may exist in day-to-day business dealings at home. The recent public examinations in Sydney conducted by the Independent Commission Against Corruption ("ICAC") highlight a range of corrupt dealings involving local political and business figures.

In this Industry Alert, FTI Consulting examines some of the issues, differences and considerations for businesses in avoiding corruption and bribery at home where the legal implications can have just as significant and damaging effects as international anti-bribery and corruption laws.

In particular, this article discusses the risk that company accounts may become subject to money laundering should they be used to facilitate corrupt commissions and even other foreign bribery laws if the offences committed were by foreign nationals.

As an example of an Australian State's anti-bribery and corruption laws, the New South Wales provisions are set out under Part 4A in particular s.249A-J of the *Crimes Act* 1900. The provisions refer to both the giving and receiving of corrupt commissions and rewards. This section makes it an offence for a person, acting as the agent for another, to corruptly receive, or solicit, any benefit as an inducement or reward or to influence their actions. Similarly, the one who offers the inducement is subject to the same potential liability of seven years' imprisonment. The benefit or payment in question does not have to tie directly to the obtaining of a business advantage merely that it might influence or favor the decision by the agent to do or not do some action. As such, we note the absence of confusing disclaimers often seen in international corruption and bribery analysis, such as whether there might be exceptions or defences for bribes coloured as 'facilitation payments'.

The recent findings from the ICAC have clearly demonstrated the potential for such corrupt conduct involving those in public office and the significant impact it can have. The ICAC's ongoing work provides some insights into the possible scenarios which could impact private companies in the future. For example, in 2013, the ICAC found significant evidence of corruption in the awarding of security contracts for a number of NSW public authorities, and in a separate case, the ICAC found evidence of corruption in the awarding of service contracts at the University of Technology, Sydney.

What is less well-known is that the provisions of the *Crimes Act* apply to all transactions, whether involving government employees or not. The privatisation or partial privatisation of utility, telecommunications, health and other services has created commercial pressure for an even broader spectrum of sales people to secure and retain competitive commercial contracts. Hence adding to a climate of opportunity for corruption in influencing the outcomes of what may have previously been government or quasi-government provided services. Real estate deals, contracts for cleaning, security or other facilities management services and other day-to-day business transactions, may attract temptations for 'under the table' payments, gifts or promises for benefits that could be considered corrupt inducements under the State *Crimes Act*. As noted above, even 'under the table' payments for 'expedient', 'favoured' or 'priority' services, which might be thought of as 'facilitation payments' may attract full liability under this provision.

Secret Commissions May Also Trigger Money Laundering Offences

In 2012, a former employee of the retailer, Woolworths, was convicted and jailed for seven years on 14 counts of receiving a benefit corruptly. The offences related to the defendant's time as an agent for Woolworths, where he received almost AU$1.4 million in corrupt benefits for favourable selection of technology suppliers to Woolworths. Importantly, the offender

was also convicted of one count of money laundering. This related to the use of accounts in the British Virgin Islands to hide the corruptly acquired funds and obscure the purchase of an AU$250,000 Mercedes-Benz car.[1] So, the initial corrupt act, meant the proceeds of the corruption were also consequently considered as 'proceeds of crime' for money laundering purposes.

Under the Commonwealth *Anti-Money Laundering and Counter-Terrorism Financing Act*, money laundering is considered to be: Acts which deal with the proceeds of crime as defined by either State or Commonwealth laws. Thus, and as illustrated above, depending on the circumstances, a single act of corruption can have consequences under both the relevant Australian State and Commonwealth laws.

The Implications for Conducting Business in Australia

The above highlights the growing importance of considering the potential for local corruption when designing Anti-Bribery and Anti-Corruption ("ABAC") programmes. Too often, companies focus on the detection and prevention of large-scale, and often transnational, corruption. Given the international provisions governing corruption which drive most compliance programs, such emphasis is understandable. What actual experience shows, however, is that the threat of corruption is just as real at the local level as it is internationally.

Local corrupt activities have the potential to create local damage to a business' reputation in addition to involvement in complex and costly legal proceedings. As shown above, if the proceeds of a criminal act of corruption originated from or were transferred through an organisation's accounts, they would be considered to have been involved in money laundering as well. The *Anti-Money Laundering and Counter-Terrorism Financing Act* defines offences for being negligent or reckless as to whether funds were the proceeds of crime. A company defending itself against such allegations would not only have to consider court proceedings, but would potentially extend to managing the concerns of other business and trading partners — many of whom may suspend or terminate transactions until the money laundering investigation is concluded.

Foreign nationals employed by Australian companies could also subject the company to another country's anti-bribery laws; in particular for those countries that prohibit facilitation payments such as the UK, China, Brazil and so forth. For example, a UK national working in an Australian mining company who facilitates the payment of a fee to expedite a local Council's licence; or to secure an authority's permit; or offers a future job to a researcher from a government-funded university so that they report favourably in an environmental impact study, may subject the company to offences under the UK *Bribery Act*. If the Australian company had any operations or business in the UK, it too could become subject to those provisions.

Protecting the Business both on Home-Turf and Abroad

All employees, whether a procurement officer based out of the Sydney office or a negotiator that deals with entities in high-risk jurisdictions, may expose the company to substantial bribery and corruption risks. The best protection a company can put forward against the risk of such accusations is to illustrate that they have a comprehensive ABAC compliance programme which considers both local and international corruption risks. As businesses grow and develop internationally, it is critical to consider the broader implications of local events and not to just focus on perceived international business risks.

How FTI Consulting Can Help

The Global Risk and Investigations Practice ("GRIP") of FTI Consulting provides a multidisciplinary approach to a broad range of critical investigations including business intelligence and due diligence services. We combine the skill and experience of expert investigators and intelligence analysts, comprising former law enforcement, intelligence officials with the expertise of in-house forensic accountants and computer forensic specialists.

Our multilingual teams are based in 26 offices located across the Asia Pacific region and globally. We build experienced investigative teams with in-depth local knowledge and industry expertise who are able to quickly assess a situation and design an appropriately scaled investigation to be performed in a phased and cost-effective manner. Our sophisticated investigations provide value added-analysis and uncover actionable intelligence, which ensures decision-makers are able to effectively address and mitigate risk, protect assets, remediate compliance requirements, make informed decisions and maximise opportunities.

FTI Consulting can undertake the comprehensive investigations, research and inquiries outlined in this paper, applying iterative and critical analysis and documenting the investigation process. Our investigators are also supported by teams of researchers based throughout the Asia Pacific region and the globe that may undertake document retrieval, local language translation or further inquiries where needed. Our 'on-the-ground' investigation teams follow sound and robust methodologies, ensuring corruption and bribery risk inquiries are thoroughly and diligently addressed.

[1] R vs. Wills, 7 September 2012.

Should you require any advice, please contact us to further discuss how FTI Consulting can help.

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