

## ■ The risks of “special payments” to foreign officials

Picture this scenario: You are a director of a company that has embarked on an exciting venture in a growing third world market. It will involve securing various types of government licences for its operations. For this purpose, your company is using the services of a competent local intermediary. So far the project feasibility study has been expensive but yielded attractive prospects.

You learn with some surprise that the local agent has made clear privately to an executive in the field that significant personal benefits will need to be provided to local officials – benefits which usually will not appear on the books. It is made clear that under embedded local custom it is regular practice – and necessary even for import approvals. That executive discreetly signals to you that he wants authority for him to engage. Various ways to disguise the payments are being explored, such as artificially inflating the commission paid to the agent to cover all these costs.

Should you be concerned? Yes.

“The lessons from the AWB case were different in nature, but still have relevance. In particular, after the Cole Inquiry into the affair, the Criminal Code was significantly tightened in 2007 for the foreign bribery offence,” says Michael Ahrens, executive director of Transparency International Australia.



“Even though all aspects of the proposed arrangement take place abroad, there are severe penalties under the Criminal Code. You will naturally ensure that you obtain competent legal advice about that – in particular the implications of the 2007 amendments, such as that now in a prosecution of such an offence, it is not necessary to show that any business advantage was actually obtained. The fact that the benefit was customary or necessary in the situation is also now irrelevant to the prosecutor.

“Moreover, even if the prospect of a gaol term is seen as remote, last week the penalties for committing such an offence were heavily ramped up to \$1 million for individuals and a minimum of \$10 million for corporations.

“Your legal advice will not give great comfort. It will clarify that the ‘facilitation payment’ defence will not extend far at all, and will doubtless point also to the potential liability of the company if the facts are proven.

“In that context, you will doubtless turn to the official Code of Conduct of the company and inquire about the extent to which it complies with relevant standards, such as AS8001-2008, issued and revised by Standards Australia as part of its well known suite of governance standards.”

What are the practical risks? On top of the likely investigation of the books by the Australian Taxation Office, which will be keen to disallow a deduction for any such bribe, you cannot disregard the chance that those privy to the arrangement may at some time include a whistleblower or a party with a grudge, able to compromise or extort the company with that knowledge. “Such instances are becoming more frequent,” warns Ahrens.

“All in all, you may consider that the project is not worth the risk if the officials refuse to back away from their demands. Added to the legal and reputational risk to the company, your risk of liability should not be overlooked.”

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