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## UK Bribery Act passed - strict liability for bribery by corporations

*Tim Robinson and Matthew Skinner from Allens Arthur Robinson summarise the Bribery Act passed by the UK on 9 April 2010*

On 9 April 2010 the UK parliament passed a new *Bribery Act*. The Act introduces various broad offences which include (but are not limited to) bribery of foreign public officials. Under the Act corporations will be guilty of an offence of failing to prevent bribery if a person "associated with" the corporation bribes another person intending to obtain business for the corporation, subject only to a defence of having "adequate procedures" in place to prevent bribery. The offence applies to any company that carries on business or a part of a business in the United Kingdom.

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## Background

The UK has long faced criticism from the OECD for its lack of clear substantive prohibitions on bribery, and its failure to comprehensively implement and enforce its obligations under the OECD Convention on Combating Bribery of Foreign Public Officials. The *Bribery Act* represents the culmination of an exhaustive process of consultation and parliamentary scrutiny and has been supported by all three major parties in the UK. Combined with the recent increase in enforcement activity by the UK Serious Fraud Office, the Act represents a major step in global efforts to curb the supply side of corruption.

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## Act not limited to bribery of public officials

Unlike the US Foreign Corrupt Practices Act and similar Australian federal offences, the offences of offering, giving or receiving a bribe under the UK Act are not limited to bribery of public officials carrying out public duties. For example, the offences include bribing any person who is performing activities "connected to a business", activities "performed by or on behalf of a body of persons" or "functions of a public nature" to act contrary to a reasonable expectation that they will perform the function or activity in good faith or impartially. This will likely make the task of a prosecutor easier by removing any debate as to whether a recipient of a bribe is a "public official".

The Act also contains a separate offence of bribing a "foreign public official"<sup>1</sup> (defined broadly to include "individuals...exercising public functions on behalf of a [foreign] country" and individuals who are officials or agents of public international organisations, such as the UN). Importantly, unlike the US *Foreign Corrupt Practices Act*, a prosecutor does not need to prove that any payment was made "corruptly" – it is enough to prove that:

- there was an intention to influence the foreign public official in their official capacity by providing or promising a financial or other advantage;
- there was an intention to obtain/retain an advantage in the conduct of business; and
- the foreign public official is neither permitted or required by the written law of the relevant country to be influenced by the advantage offered.

The Act also contains offences clarifying existing laws against "private bribery" and will likely extend to areas of commercial fraud such as suppliers paying kickbacks to employees of customers or companies paying employees or contractors of competitors for trade secrets.

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## Strict liability for corporations – the offence of failing to prevent bribery

Under section 7 of the Act "commercial organisations" commit an offence if any person "associated with" the organisation bribes another person intending to obtain or retain an advantage in the conduct of business for the organisation. The offence is extremely broad, in particular:

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<sup>1</sup> Section 6

- persons "associated with" the organisation include any employees or agents who perform services for the organisation<sup>2</sup>;
- an offence is committed regardless of whether the associated person is actually prosecuted for the bribery offence<sup>3</sup>;
- an offence is committed irrespective of whether the associated person's actions forming part of the offence take place in the UK or elsewhere in the world<sup>4</sup>;
- an offence is committed even if the organisation did nothing to bring about or encourage the conduct and even if the organisation was unaware of the conduct.

The Act applies to partnerships and corporations incorporated anywhere in the world that carry on any part of their business in the UK.

Accordingly, Australian companies with operations in the UK will be automatically guilty of an offence (subject to the adequate procedures defence below) if a foreign agent offers or pays a bribe anywhere in the world even if the agent is not prosecuted, even if the bribe does not relate to the company's UK business and even if the company was unaware of the offer or payment of the bribe. This goes well beyond the offence of foreign bribery by a corporation under Australian law, which requires proof beyond reasonable doubt that the corporation expressly, tacitly or impliedly authorised bribery or that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the law.

The potential penalties upon conviction of the offence include an unlimited fine and potential debarment from competing for public contracts.

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## Defence of "adequate procedures"

The Act provides a defence for corporations who prove that they had "adequate procedures" in place to prevent bribery by their employees and agents. The Act does not specify what will amount to "adequate procedures" but does require the government to provide formal guidance. The UK government has promised to provide such formal guidance before the offence comes into force<sup>5</sup>.

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## Conclusion

The Act represents one of the strictest anti-bribery regimes in the world and in some ways the offences are likely to be easier to prosecute than offences under the US *Foreign Corrupt Practices Act* and the Australian Commonwealth *Criminal Code*. In order to reduce the risk of prosecution, it will be critical for all Australian companies with operations in the UK to implement policies and procedures that comply with any guidance issued by the UK government.

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<sup>2</sup> Section 8

<sup>3</sup> Section 7(3)(a)

<sup>4</sup> Section 12(5)

<sup>5</sup> House of Lords *Hansard*, 8 April 2010, column 1707, Lord Bach