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## Customs, Trade and Transport Law e-alert

### When you least expect it – The UK Inquisition

Australian companies trading overseas face a variety of regulation which governs their operation. That regulation includes the following:

- Australian laws governing trade in Australia;
- Australian laws governing trade overseas;
- International conventions governing trade in Australia and overseas;
- Sanctions, whether international or specific to Australia;
- Overseas laws governing trade in Australia; and
- Overseas laws governing trade overseas.

Importantly, the regulations do not merely prohibit or restrict trade, they also provide penalties for companies, their officers and advisors who are party to the breach of the regulation. These penalties, largely financial but in some circumstances leading to jail terms can be significant. In any event, the mere conviction for committing such an offence can have consequential adverse risk to the reputation of the company as well as triggering default events under financial arrangements with external financiers. Recent examples of note include the penalties issued around the world against airlines for price fixing and other cartel behaviour.

The scope of regulation extends to all stages of trade such as the way goods are transported, the handling of goods on their arrival at overseas ports, the treatment and taxation of the financial proceeds from trade and types of behaviours which are prohibited. For example, Australian legislation prohibits the payment of bribes and other inducements by Australian businesses in overseas jurisdictions.

Those trading with the United Kingdom now need to pay careful attention to the new *UK Bribery Act* which has been described as the broadest anti-bribery legislation in the world going beyond the United States *Foreign Corrupt Practices Act*. In this context, it should be kept in mind that it is not purely “bribery” in the normal sense which is prohibited, but also the offer of other types of inducements as well as failing to stop bribery.

The Act, will commence on 1 July and is comprehensive as it impacts any company with operations in the United Kingdom, notwithstanding the original jurisdiction or place of establishment for that company or the place in which the offence takes place.

Essentially, the Act contains four offences on bribery including:

- Offering or giving a bribe;
- Requesting or accepting a bribe;
- Bribing a foreign official in order to obtain a business advantage; and
- Failing to prevent bribery.

These provisions are interesting in that they prohibit not only certain actions but also prohibit the failure to prevent proscribed conduct from occurring. This raises the need for companies to have policies and practices to ensure that the offences are not committed.

Consistent with other regulation, it will be important to demonstrate efforts to comply with the UK Act by way of what are described as “adequate procedures”. This is not only to limit the potential commission of an offence but to minimise potential penalties or other consequences. Given the scope of the legislation, the United Kingdom Ministry of Justice has issued “Guidance” which includes six criteria as to what will satisfy steps required to take “adequate procedure”. As many readers would be aware, Australian legislation also provides mitigation of liability for those parties who take appropriate and reasonable steps to comply with regulations. For example, the Guidelines to Customs Infringement Notice Scheme requires Customs to take into account “efforts to comply” when deciding whether to issue Infringement Notices. Another example is the “reasonable steps” defence against liability in Chain of Responsibility legislation.

Without suggesting for one moment that anyone in industry would deliberately engage in actions which could be construed as bribery in the United Kingdom or elsewhere in the world, parties could be surprised as to what types of practices could be caught by the UK Act or other legislation. In any event, the offence of failing to prevent bribery, places a positive obligation on companies which may be affected by the UK legislation to take steps to adopt procedures and policies to minimise the prospects of such offences. Even if companies' trading does not have any exposure to the UK legislation, taking steps to have adequate policies in place to ensure compliance with domestic and international anti-bribery legislation has significant value in stopping offences being committed in the first instance and mitigating any potential penalties which may apply.

As ever, we would be pleased to assist with such policies and procedures as we have in other areas affecting industry.

## Contacts

Andrew Hudson, Melbourne    +61 3 8602 9231    [ahudson@hunthunt.com.au](mailto:ahudson@hunthunt.com.au)

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