

First Australian Foreign Corruption Case Highlights Third Party Agent Risk

The first charges brought under the foreign bribery provisions of Australia's Criminal Code demonstrate the high level of cooperation between authorities in Asia and throughout the world, but also highlight the potential risks of using third party agents in developing markets.

The 1st July 2011 was not only the date the UK Bribery Act came into force, it also marked a major anticorruption action by Australian authorities. The sporting rivalry between Australia and Britain is well known and, not to be outdone by the Brits in their approach to bribery and corruption, the Australian Federal Police arrested and charged six former executives of Securrency International Pty Ltd and Note Printing Australia Limited with bribery offences. Securrency is a polymer banknote technology company which produces counterfeit-resistant banknotes which are in use in Australia and New Zealand as well as different denomination notes in 29 other countries around the world from Bangladesh to Zambia. Alongside the individual arrests, the two companies were also charged with related offences reported to be linked to alleged bribes paid to public officials to secure banknote contracts in South East Asia between 1999 and 2005.

Significance

The developments are significant on a number of levels and should be considered closely not only by Australian businesses operating abroad but also as indicative of how rapidly the global enforcement environment is changing. The charges were the first to be brought under the foreign bribery provisions of the Criminal Code since Australia ratified the OECD Anti-Bribery Convention and amended the relevant sections of the Code to cover foreign officials in 1999.

Announcements and press coverage of the charges against Securrency have also revealed the astonishing scope of the investigations and the level of cooperation between enforcement agencies in countries across the world over the last two years. The investigation is reported to have encompassed jurisdictions as diverse as Vietnam, Paraguay, Malaysia, Nigeria, and Indonesia as well as several European countries. This led to a series of coordinated police raids and searches in Australia, the UK and Spain in October 2010. The participation in one investigation of law enforcement agencies including the Indonesian National Police, the UK's Serious Fraud Office (SFO), the Australian Federal Police, Malaysian Anti-corruption Commission (MACC) and the Guardia Civil in Spain is unprecedented.

Australian companies view South East Asia as their back yard and have been extremely successful at operating in these markets. Similarly, a growing number of US and European companies have sought to take advantage of Australia's time zone, and use of the English language and legal system to use the country as their regional headquarters. This case and the fact these markets remain among some of the most corrupt emerging markets in the world will mean many companies operating in Asia from Australia will have to look again at their anti-corruption compliance policies and procedures.

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Agent Risk

In response to these allegations, Securrency commissioned an independent [evaluation](#) of its internal policies and compliance with them. According to the company's statements, KPMG found:

- Securrency's records lack documentation to evidence compliance with the company's policies relating to the appointment and monitoring of agents and the recording of relevant information concerning payments to agents.
- The company did not have a formally documented process for responding to concerns or allegations relating to agents, and the manner in which management dealt with concerns raised by an employee in 2007 about the activities of some agents was not transparent.
- It concluded that management had not properly implemented policies and procedure.

While the full facts of the Securrency case are yet to be heard in court, the potential risks of using third party foreign agents has again been highlighted. The use of agents to develop overseas business opportunities remains a widely established and practiced business model, particularly among fast growing companies who are keen to access new markets. Indeed, in some developing markets the use of local agents is often the only way to access customers or contracts. In Saudi Arabia, for example, foreign companies bidding for government contracts must appoint a Saudi service agent and in many other countries companies must secure the participation of a local entity.

The Securrency affair may well prove to be a landmark case in Australia but prosecutions in the US under the US Foreign Corrupt Practices Act (FCPA) have been consistent in demonstrating the potential liability companies face if they do not have the correct procedures in place. In June 2008, Minnesota based medical devices manufacturer AGA Medical Corporation, entered into a deferred prosecution agreement with the US Department of Justice (DoJ) in which it agreed to pay a USD 2 million criminal penalty. The fine was the result of improper payments made through its Chinese distributor to physicians employed by Chinese State Owned or controlled hospitals and officials. AGA is alleged to have conspired with its Chinese distributor to make improper payments to physicians employed by the hospitals so that they would purchase AGA products.

In February 2009, Halliburton agreed to settle DoJ and Securities and Exchange Commission (SEC) enforcement actions relating to the award of USD 6 billion construction contracts to build the Bonny Island Facility in Nigeria between 1995 and 2004. The DoJ alleged that Kellogg Brown & Root LLC (a wholly owned subsidiary of KBR Inc and a former wholly owned subsidiary of Halliburton) paid USD 182 million in bribes to Nigerian government officials in exchange for the contracts. The payments disguised as "consulting fees" were allegedly made by agents from the UK and Japan who were hired to obtain business in Nigeria. The combined USD 579 million penalty Halliburton and KBR agreed to pay as part of the settlement was the largest combined penalty ever paid to resolve an FCPA investigation by a US company.

It is notable that Halliburton did in fact conduct due diligence on the UK agent involved. In a number of previous enforcement actions, the basis for the internal controls violation had been identified as a total lack of due diligence on a foreign third party. However, in this instance, the SEC alleged that the due diligence undertaken by Halliburton was not adequate because Halliburton and KBR attorneys did not identify the owners of a Gibraltar-based consulting company used by the UK agent it employed and did not check all of the agent's references. While not only highlighting the risk of using third party agents, the Halliburton settlement suggests that the level of due diligence which will be deemed adequate by US authorities has increased.

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The use of third party foreign agents will remain an essential part of business for many firms operating internationally. Even those firms who do not engage agents will often retain other third party links through distributors, franchisees, consultants or joint venture partners. As part of its response to the allegations, Secrecy sought the “termination of every agency arrangement”. Such drastic action, which may well have been appropriate in this case, is simply not an option for most companies operating internationally. Instead, companies need to ensure that they have adequate knowledge about the ownership and links of any third party they are engaged with and have the correct procedures in place and in use to manage and monitor these relationships.

While the Secrecy case may represent a sea change in the local enforcement landscape in Australia and a welcome advance in international cooperation to combat bribery, it does not tell us anything we did not already know about third party agent risk. It only serves to highlight the need for robust anti-corruption policies and procedures to prevent bribery and the ongoing requirement for firms to undertake adequate due diligence on agents and all foreign third parties.

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