



### Seminar on the UK Bribery Act and its Implications in Indonesia

*Described as the “toughest anti-corruption legislation in the world,” the UK Bribery Act 2010 follows in the footsteps of the US Foreign Corrupt Practices Act in terms of having great extraterritorial reach. The UK Bribery Act 2010 applies to both UK companies and companies with links to the UK. It creates offences that carry prison terms of up to 10 years and unlimited fines, including the far-reaching new offenses of failing to prevent bribery and bribing a foreign official. The wide-ranging scope of the Act will undoubtedly have significant implications for both UK companies doing business in Indonesia and their trading partners in this country, as well as Indonesian companies that carry on business or part of a business in the UK, or perform services, such as on an outsourcing*

*basis, for UK companies.*

Assegaf Hamzah and Partners (AHP) is privileged to have recently hosted a half-day seminar on the implications of the new United Kingdom Bribery Act (“Bribery Act”) for both British companies operating in Indonesia, and Indonesian and other companies that carry on business in, or have links to, the UK.

Moderated by AHP Partner Ibrahim Assegaf, the main speaker at the seminar was Ms. Wendy Wysong, a partner in the Washington DC office of Clifford Chance, now based in Hong Kong, who specialises in anti-corruption laws. During the event, Wendy succinctly described the salient features of the new UK legislation, what companies can do to avoid falling foul of it, and how it compares with the United States’ Foreign Corrupt Practices Act (“FCPA”), as summarized below:

#### **Bribery Act Offenses**

The Bribery Act 2010, which came into force in mid 2011, *confers extraterritorial jurisdiction on the UK courts to try cases involving both public and private sector corruption, whether or not the alleged offense is committed in the UK or by a UK or foreign company, provided that the requirements laid down by the Act are satisfied.*

The Bribery Act establishes four offences

- (a) the offense of “bribing” (Section 1)
- (b) The offence of “being bribed” (Section 2)
- (c) The offence of bribery of a foreign public official (“FPO”) (Section 6);
- (d) The new strict-liability corporate offence under Section 7 of “failure by commercial organizations to prevent an associated person from bribing another person” (“New Corporate Offense”)

Violations of the Bribery Act carry penalties of a maximum of 10 years’ imprisonment, along with an unlimited fine, and the potential for the confiscation of property and disqualification of directors.

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## **Liability**

Liability arises under the Act if part of the offense is (i) committed in the UK, (ii) committed by a person with a “close connection to the UK” (e.g., a British citizen, citizen of a UK overseas territory, UK resident, UK incorporated business), or (iii), in the case of the New Corporate Offense, committed by an associated person (of any nationality) acting on behalf of a company that carries on a portion of its business in the UK.

*Thus, irrespective of whether a company is a UK company or not, it may be prosecuted under the Bribery Act if a portion of its business is “carried on” in the UK and a bribe is paid in connection with the company’s business by an “associated person” (for example, an employee, see below for more on the meaning of associated person). Accordingly, if an employee or agent of an Indonesian company that carries on some business in the UK pays a bribe in Mongolia, for example, it is possible that the Indonesian company could be prosecuted in the UK under the Bribery Act.*

*It is also clear that a British citizen working for an Indonesian company comes within the ambit of the Bribery Act. Further, Indonesian companies that have established subsidiaries or special purpose vehicles in British dependent territories, such as the British Virgin Islands or the Cayman Islands, need to be aware that many of their employees will also be subject to the Bribery Act. While the legislation does not have direct application in such territories (nor indeed in British crown possessions, such as the Channel Islands), it is nevertheless applicable to individuals with a “close connection to the UK”, the definition of which is wide and includes various classes of British nationality including, for example, British citizens (which also includes Jersey and Guernsey in the Channel Islands), British overseas territories citizens (i.e., citizens of Anguilla, Bermuda, British Virgin Islands and Cayman Islands, to name a few), British Nationals (Overseas) and British Overseas Citizens. As a result, they will be subject to the Bribery Act personally as they will have a [“close connection”](#) with the UK (notwithstanding they do not live in the UK).*

## **New Corporate Offense**

The New Corporate Offense of “failure by commercial organizations to prevent an associated person from bribing another person” is a strict liability offense. Consequently, there is no requirement that the company was aware of or turned a blind eye to the bribe. For the purposes of the New Corporate Offense, *the “associated person” does not need to be closely connected to the UK and the bribery may take place anywhere in the world.* The sole defense available to the company is to show that it had put “adequate procedures” in place to prevent bribery by an associated person.

“Associated persons” are defined as persons who perform services for or on behalf of the company. Persons who may fall within this definition include employees (assumed), agents, subsidiaries, consultants, joint venture partners, consortia members and franchisees.

## **Facilitation Payments**

A facilitation payment is a low value payment made to an official to perform something that the official is required to do as part of his or her job, such as a payment to ensure processing of a permit. Guidance to the Bribery Act issued by the UK Ministry of Justice (“MoJ Guidance”) states that while facilitation payments are prohibited, there is scope for prosecutorial discretion and the Director of the Serious Fraud Office (“SFO”), the body responsible for enforcing the Bribery Act, has stated that while he does not

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expect facilitation payments to disappear overnight, he does expect corporates to work towards their elimination over a period of time.

### **Corporate Hospitality**

The Bribery Act is silent on the issue of corporate hospitality. However, the MoJ Guidance<sup>1</sup> states that the legislation is not intended to prohibit “reasonable and proportionate hospitality and promotional or other similar expenditure” for the purposes of better presenting products/services and establishing cordial relations.

The inference that expenditure is intended as a bribe will be strengthened (a) if there had been any unjustifiable “add-ons,” for example, with regard to travel or accommodation (such as a side trip to Disneyland for officials and their families), or (b) if the expenditure in question could be related in time to some actual or anticipated business with the recipient, particularly in a competitive context.

### **Gifts**

In the private sector context, reasonable and proportionate expenditure on gifts would probably not amount to a bribe under the Bribery Act provided that it does not violate the recipient company’s policy on gifts and entertainment and is not provided to induce someone to perform their job improperly. In the private sector context, while there is no one size fits all rule, small tokens and modest gifts bearing the company's corporate logo would likely be low risk (so long as such gift is not against the recipient's company policy). However, due to the stricter test for bribery of FPOs, any gift to an FPO bears a high risk. *It should be remembered that from the British perspective, FPOs include Indonesian public officials, as well as employees of Indonesian state-owned enterprises.*

### **Offsets**

Offsets refer to the common practice of companies providing industrial, commercial or other economic benefits as part of winning a state-funded contract (e.g., building schools, improving the transport network, etc.). This may amount to a Bribery Act offence (FPO bribery) if not permitted or required by local written law. Consequently, companies should obtain advice from legal practitioners in the jurisdiction concerned as to whether such offsets are specifically permitted or required under local written law before proceeding.

### **Likely Prosecution Targets**

The authorities have clearly stated that countries and industries that are known as being particular vulnerable to corruption will be first on the list to be targeted. As US enforcement trends will be followed in the UK, it is salutary to note that over 1/3<sup>rd</sup> of all 2010 FCPA investigations involved Asia, and 8/10<sup>th</sup> of the highest FCPA fines arose from conduct in Asia. *Unfortunately, this means that Indonesia, and this country’s primary industries, in particular the mining and oil and gas sectors, are regarded as being particularly susceptible to corruption. State-owned or state-controlled enterprises are also deemed to be especially at risk. Accordingly, organizations that operate in Indonesia need to waste no time in addressing these issues.*

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<sup>1</sup> It is important to note that at the end of the day, the MoJ Guidance is not binding on the courts.

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## **Anti-Bribery Compliance**

There is only one defense to the New Corporate Offence: the company must prove that it had "adequate procedures" in place designed to prevent persons associated with it from undertaking acts of bribery. In other words, the company will need to show that it has adopted a Bribery Act compliance program. In this regard, an FCPA compliance program will not be enough as the Bribery Act is more stringent than the US legislation.

## **Conclusion**

The scope of the Bribery Act captures, among others, UK companies doing business in Indonesia and Indonesian companies that carry on business, or part of a business, in the UK. It also applies to employees of Indonesian companies with a close connection to the UK. In the case of the New Corporate Offense, liability arises if the offense is committed by an associated person acting on behalf of a company that carries on a portion of its business in the UK, and the only defense to this is an adequate Bribery Act compliance program. Thus, if an Indonesian company carries on a portion of its business in the UK, it should consider designing a compliance program as a matter of urgency to avoid falling foul of the new legislation's provisions.

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