

# The Bribery Act

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SHAKESPEARES

# What is the problem?

- Impact of bribery
  - globally
  - nationally
  - businesses large and small

# What is a bribe?

- Financial or other advantage
- Directly or indirectly through a third party
- Monetary or non-monetary
- Gifts; business opportunities; contributions to charities; employment opportunities

# The four key offences

- Offering, promising or giving a bribe with the intention of inducing a person to perform (or of rewarding them for performing) improperly, a relevant function or activity
- Requesting, agreeing to receive or accepting a bribe intending that a relevant function will be improperly performed (or as a reward for the improper performance of a relevant function)

# The four key offences

- Bribing a foreign public official
  - with the intention of influencing the official and obtaining business or a business advantage
  - no exception for facilitation payments

# The four key offences

- The new “corporate” offence
- A person associated with a commercial organisation bribes another person intending to obtain or retain
  - business; or
  - an advantage in the conduct of business for the organisation

# The new “corporate” offence

- “Associated” person
- Someone who performs services for or on behalf of the organisation
- Includes employees, agents, subsidiaries and other third parties
- Strict liability – the organisation’s knowledge or culpability is irrelevant

# Jurisdiction

- Applies to the general offences
  - if the offence is committed in the UK; or
  - regardless of where the offence is committed
    - By a British citizen; or
    - Person ordinarily resident in the UK; or
    - A body incorporated in the UK



# Jurisdiction

- Applies to the corporate offence if
  - the offence is committed in the UK; or
  - regardless of where the offence is committed
    - The organisation is incorporated in the UK; or
    - The organisation is carrying on all or part of their business in the UK

# Penalties

- Corporate offence
  - unlimited fine
  - confiscation of up to the gross benefit accruing from the bribe (Proceeds of Crime Act 2002)
  - barred from public sector contracts for up to five years (Public Contracts Regulations 2006)

# Penalties

- For individuals – 10 years imprisonment/unlimited fine
- For companies – unlimited fine
- For Directors – personal liability if they consented or connived in the company's offence
- Disqualification from acting as a director

# Defence to the corporate offence

- If the organisation can show it had in place “adequate procedures” designed to prevent those persons performing services on its behalf from committing bribery
- What are “adequate procedures”?

# Government guidance

- Not prescriptive – to help commercial organisations in formulating their procedures rather than prescribe what those procedures should be
- Policies **and** procedures
- Based on six principles

# The six principles

- Proportionate procedures
  - to the bribery risks; and to
  - the nature, scale and complexity of the activities

# The six principles

- Top level commitment:
  - the top level management of a commercial organisation are committed to preventing bribery by persons associated with it
  - they foster a culture in which bribery is never acceptable

# The six principles

- Risk assessment
  - the commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery



# The six principles

- Due diligence
  - the commercial organisation applies due diligence procedures taking a proportionate and risk based approach, in respect of persons who perform services on its behalf to mitigate identified bribery risks

# The six principles

- Communication
  - bribery prevention policies and procedures are understood throughout the organisation
  - internal and external communication
  - training

# The six principles

- Monitoring and review:
  - the commercial organisation monitors procedures and makes improvements where necessary

# Corporate hospitality

- “The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional expenditure intended for these purposes” BUT
- It can be bribery if the intention is to influence an official and secure a business advantage

# Corporate hospitality

- Acceptable
  - ordinary travel and lodging to enable a public official to visit a hospital run by a commercial organisation
- Unacceptable
  - offering the official an unrelated five-star holiday

# Corporate hospitality

- Acceptable
  - flights, accommodation and reasonable hospitality to enable public official to meet an organisation's executives in New York for mutual convenience
- Unacceptable
  - where the meeting could easily have taken place in the official's own country

# Corporate hospitality

- Consider
  - timing
  - lavishness
  - intention of giving
  - the standards or norms of the sector
  - open or secretive

# Due diligence of agents

- Compiling suitable questionnaire
- Be clear about services, costs, commissions, fees
- Research (including persons with control of corporate body)
- Follow up references
- Does the agent have an anti-corruption policy
- Does it make commercial sense



# Have you got adequate procedures?

- Anti-corruption policy
- Procedures for risk assessment and due diligence
- Review of systems and controls around procurement
- Training
- Regular review by internal audit

# Whistleblowing

- Effective whistleblowing policies
  - extend to include third parties such as contractors, sub-contractors and casual/agency staff
  - clearly explain rights of employees and third parties to make protected disclosure
  - set out guidance on the procedure for doing so
  - identify personnel to whom disclosures should be made
  - express requirement to report own wrong-doing and wrong-doing of other employees

# Questions?

