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# Collateral civil action lawsuits for corrupt wrongdoing: New to Australia

When US listed companies discover circumstances of alleged bribery, their consequent internal investigations and disclosures to relevant enforcement agencies are very often only half the battle. United States companies have increasingly been faced with follow-on civil lawsuits brought by aggrieved stakeholders who claim that the corrupt wrongdoing, or the failure to disclose it, as actionable offenses. This is not just a US problem; the first class-action law suit has been filed in Australia against a company for its alleged failure to disclose corrupt wrongdoing. The high cost of collateral civil actions and the resulting reputational damage are two good reasons companies in Asia should consider carefully how to manage corrupt wrongdoing internally *and* externally.

## Collateral Civil Actions in the US

Shareholder lawsuits related to the US Foreign Corrupt Practices Act ("FCPA") usually take one of two forms in the United States: derivative suits or securities fraud class actions. A derivative action is brought by shareholders on behalf of the company to remedy harm purportedly done to the company by directors and officers who violated their fiduciary duties. A securities fraud claim, often filed as a class action, is brought by shareholders of the corporation alleging that the company failed to disclose (or disclosed in a misleading manner) material information relating to the company's FCPA compliance efforts. These law suits are usually triggered by the announcement of a government FCPA investigation or by the notification of substantial penalties being paid by the company following a settlement.

Companies that have been the target of such lawsuits in recent years include Baker Hughes Inc, Hewlett-Packard Company, Hercules Offshore, Parker Drilling Company, Pride International, SciClone Pharmaceuticals, Siemens AG, Tidewater Inc., Wal-Mart Stores, Avon Products, PetroChina and most recently, in December 2014, Petroleo Brasileiro. The law suits against Avon Products and PetroChina targeted companies operating in China. While most of these civil actions have been dismissed, a number of them have settled, and the costs involved in defending the suits have been considerable, regardless of the result.

## Class actions in Australia

The number of class actions in Australia has increased over the last few years, with Australia second only to the United States. Companies face an increased risk of class actions in Australia because it is relatively easy to form a class, Australia has plaintiff friendly procedures, and third party litigation funders are on the rise. Unlike other jurisdictions, such as the United States, which require a plaintiff to show that common issues within the class predominate over individual issues, Australian plaintiffs are required only to show that there is at least one substantial common issue of law or fact between members of the class.

Australian regulators have publicly encouraged class actions as they purportedly assist in holding companies accountable. In this respect, the Australian Securities and Investments Commission ("ASIC") has willingly shared information obtained in the course of its investigations with class action plaintiffs. For example, in a class action against Bell Potter Securities, who

was accused of failing to disclose a conflict of interest when encouraging clients to invest in overvalued shares, plaintiffs were able to obtain information through ASIC's voluntary provisions of documents. Section 25(1) of the ASIC Act allows ASIC to provide copies of a record of examination and related books if ASIC is satisfied that the lawyer's client is carrying on or contemplating a proceeding related to the examination.

While historically used only in product liability claims, class actions have increasingly been used to allege that listed companies have breached their continuous disclosure obligations and/or engaged in misleading or deceptive conduct, such as failing to disclose conduct involving bribery or corruption. Sections 674(1) and (2) of the Corporations Act and the Australian Securities Exchange ("ASX") listing rules require an ASX listed entity to immediately disclose to the ASX any information that a reasonable person would expect to have a material effect on the price or value of the entity's securities, once the entity is or becomes aware of that information. However, one of the exceptions to disclosure under the ASX listing rules is that the information (i) comprises matters of supposition or is insufficiently definite to warrant disclosure, (ii) is confidential, and (iii) is information that a reasonable person would not expect to be disclosed. Further, under section 1041H of the Corporations Act, a corporation is prohibited from engaging in conduct which is misleading or deceptive conduct or likely to mislead or deceive.

There has only been one reported class action in Australia filed in relation to alleged bribery but that is primarily because enforcement agencies in Australia had not prosecuted a company for bribery before 2011. Further, there have been no derivative action cases brought by shareholders on behalf of the company against directors and officers who may have violated their fiduciary and statutory duties by approving or permitting bribery or corruption.

# First Corruption-related Class Action in Australia

In 2011, Leighton Holdings Limited (a company listed on the ASX) voluntarily reported to the Australian Federal Police ("AFP") a possible breach of its Code of Ethics relating to payments that may have been made by a subsidiary in connection with an infrastructure project in Iraq, which if substantiated, may contravene Australian laws.

Leighton Holdings did not announce that it was co-operating with the AFP until February 2012 as the AFP was conducting an investigation into these allegations and informed Leighton Holdings that the matter should be treated in the strictest confidence. In July 2012, Leighton Holdings announced that its internal review of the Iraq projects undertaken by its subsidiary had identified instances of failures to meet governance standards, subsequently dismissing a senior manager. In early October 2013, several reports were made in the Australian press raising allegations of bribery and corruption associated with the various infrastructure projects undertaken by Leighton subsidiary companies and that the directors of Leighton Holdings failed to exercise their duties.

Leighton Holdings was served with a class action in October 2013 by a shareholder on behalf of a class of shareholders alleging that the company breached its continuous disclosure obligations under the Corporations Act and the ASX Listing rules by failing to reveal allegations of bribery and corruption when they were known. The class action also raised allegations that Leighton Holdings engaged in conduct which was misleading and deceptive in filing capital raising documents in April 2011 and making the announcements in February 2012 about the AFP investigation without disclosing any information about the alleged bribes.

Leighton Holdings has said in its defence that at the relevant times referred to in the class action, it did not have information regarding the alleged bribes and, had it known, disclosure was not required because the information comprised matters of supposition or was insufficiently definite, was confidential, and a reasonable person would not have expected that information to be disclosed prior to the relevant times. The company has also denied that such information would have had a material effect on the price or value of shares in the company.

Given the increasing crackdown and enforcement by regulators on bribery and corruption (and the OECD's recent criticism of lack of anti-bribery and corruption enforcement by Australian regulators) and the increasing appetite of litigation funders to fund class actions, it can expected that more of these types of class actions will be brought when allegations of bribery and corruption become public. Generally, in Australia, there has been an increase in continuous disclosure class actions and the extension to bribery and corruption matters is a natural extension to that trend.

# Takeaways

The rise in class actions in an environment where regulators are increasingly targeting corrupt wrongdoing should concern companies operating in Asia Pacific even if civil law suits have only had minimal impact on companies in this region. Companies should consider disclosure to the government and shareholders as a tool to be mastered, rather than a defense mechanism.

Companies should implement strategies as part of their compliance plans which involve engaging regulators as early as possible and informing them of any intention to make public announcements of suspected wrongdoing. Further, companies should consider minimizing class action risk by taking one or more of the following steps: disclosing broad details concerning the alleged wrongdoing, indicating that the allegations are being investigated but not yet substantiated, and informing shareholders that the company will provide additional information once the investigation has been finalised.

Once an internal investigation is finalized, companies should consider carefully what disclosure can be made to shareholders, keeping in mind whether any privilege attaching to internal investigation documents should be waived, what facts disclosed to the public can be used against the company by future law suits, and how best to present the company's compliance efforts.

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