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News From Down Under: The Case Against Leighton Holdings Further Highlights Problems With The Facilitation Payments Exception

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Kathleen L. Matsoukas
Partner
White Collar, Compliance and Investigations
Co-Chair

Traditionally, Australia has not vigorously enforced its anti-corruption laws. In fact, an OECD report released in October 2012 found that, as of that date, enforcement of Australia's Bribery of Foreign Officials Act was "extremely low," considering the number of Australian companies exposed to bribery risk. It notes that as of 2012, only 1 of 28 referred allegations resulted in a prosecution. That may be changing with Monday's report in the Australian Financial Review that Leighton Holdings, an international contracting company based in Australia and active in mining and oil and gas, has internal emails and other documents that show that it have paid substantial bribes in Iraq to secure oil and gas contracts. According to that article, among other things, certain leaked emails which are part of an investigation by the Australian Federal Police "warn a $24 million 'facilitation payment' linked to a 2010 Iraq contract would 'attract attention' from auditors." The AFP is reportedly finalizing a case to present to prosecutors based on these and other documents. The Australian Financial Review previously reported on an internal memorandum between two top executives that stated that oil pipeline contracts in Iraq were won by Leighton Holdings' payment of multi-million-dollar bribes and that more kickbacks were needed. Other leaked documents reportedly reflect that payments were made to a Monaco company named Unaoil, after Unaoil promised that they could "facilitate" matters with the Iraqi government-owned Southern Oil Company in exchange for $24 million. Others also apparently reflect that in 2011, Leighton Offshore (a subsidiary of Leighton Holdings) made large payments – recorded as payments "for friend" – to three separate companies owned by a middleman who had told the company that he had connections with Iraqi officials. The Leighton Holdings matter highlights the confusion that inevitably results when a country's anti-corruption law permits facilitation payments. The Australian government's information page on the Bribery of Foreign Officials Act explains that while the facilitation payment defense is available under the law, it is limited to circumstances involving "routine government action," and "does not include any decision to award or continue business, or any decision related to the terms of new or existing business." It also notes that "[i]f a payment is to qualify as a legitimate facilitation payment, detailed records must be kept including the value of the benefit concerned, the identity of the foreign official and the person receiving the benefit, and particulars of the

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routine government action sought." Finally, it recommends that "individuals and companies make every effort to resist making facilitation payments" as "[a] growing body of research and the experiences of a growing number of major companies demonstrate that businesses can achieve net gains by refusing to make payments." While this guidance is helpful, the 2012 OECD Report (which would have covered the period in which the Leighton Holdings bribes were allegedly made) identified problems with the facilitation payments defense under Australia's law, identifying the confusion that can result with such an exception and noting that:

> Australia has made efforts to raise awareness of the facilitation payment defence, including through its proactive consultation process. *Nevertheless, there continues to be substantial confusion over the scope of the facilitation payment defence*. The lead examiners therefore recommend that Australia continue to raise awareness of the distinction between bribes and facilitation payments, and *encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures*, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records.

OECD Report at 11 (emphasis added). The Leighton Holdings emails likely reflect a minimal effort to "legitimize" obviously corrupt payments by labeling them as "facilitation payments," despite that they did not come close to fitting the definition of a facilitation payment that would qualify for any exception or defense. Nevertheless, the documents may reflect a flawed understanding at the corporate level that the facilitation payment exception is a permissible or viable exception to the rule. Categorizing or differentiating facilitation payments from bribes has proved a " slippery task," and ultimately many commentators have concluded that the difference is " illusory." This has led some jurisdictions, including the United Kingdom, Japan, (and soon Canada), to refuse to permit facilitation payments. While the FCPA currently allows for the use of facilitation payments, the November 2012 DOJ/SEC guidelines discourage their use, and there have been calls to ban their use outright, or at least to reduce their use to a mitigating factor for penalties. The Leighton Holdings case is just the most recent example of why companies should expressly forbid facilitation payments and train their executives that they cannot rely on the concept or catchphrase of "facilitating payments" as an exception or defense to applicable anti-bribery laws. Under today's anti-corruption regimes, categorizing something as a "facilitation payment" is no longer a strategy that is legally or practically sound.