

# HJ FOCUS

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## THE BAHAMAS AND THE WORLD TRADE ORGANISATION (WTO)

Ava M. Rodland

### ***What is the WTO ?***

The World Trade Organization (WTO) is an international organization whose main function is to reduce barriers to international trade so as to ensure that trade flows as smoothly, predictably and freely as possible. It provides the legal and institutional framework for the negotiation and oversight of trade agreements between member states. Currently, 160 states are members of the WTO and another 23 are in the process of joining. Decisions at the WTO are essentially all made by the consensus of the member states through rounds of negotiation.

Arguably, the central and most important pillar of the WTO is the Dispute Settlement Body (DSB). The DSB provides the exclusive forum and procedure for the settlement of disputes between member states arising out of the interpretation or application of the provisions of the various WTO agreements so as to ensure that the rules agreed to between member states are enforced.

### ***How will participation in the WTO impact The Bahamas?***

The Bahamas is currently the only country in the Western Hemisphere that is not a member of the WTO. It was initially considered by the Government that joining the WTO was not necessary. However, the Government's outlook shifted in 2001 when The Bahamas

applied to become a member.

- *Trade in goods*

The application of tariffs to foreign imports is often used as a means of protecting local industry, and can be an impediment to international trade. Empirical evidence proves that freer trade through the reduction in such tariffs can cut the cost of living and increase incomes. This has proven to be true in the case of countries that produce goods for export. However, The Bahamas is a unique case. As a country with minimal exports and totally dependent on foreign imports, import duties are imposed, not to protect local industry, but as the principal means of generating revenue for the Government. While joining the WTO would give rise to a reduction in customs duties, it is not certain whether such reduction will have a positive impact on living costs with the anticipated implementation of Value Added Tax (VAT).

Although few in number, Bahamian exporters may reap the benefits of having access to a whole range of new markets and trading partners. As a member of the WTO, The Bahamas would enjoy the concessions that all member states have granted to each other, creating better trading conditions for Bahamian exporters. Outside of the WTO, the Government could only achieve similar conditions by negotiating bilateral agreements with each trading partner.

*The information contained in this newsletter is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This newsletter can in no way serve as a substitute in such cases.*

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Such individual negotiations would put a strain on the country's limited resources and would give free reign to power politics. In the WTO's rule-based system, smaller countries can participate on a more level playing field.

Additionally, joining the WTO would require The Bahamas to modernize its laws to bring them in line with international standards, thereby increasing opportunities for Bahamian exporters wishing to enter new markets. For example, technical standards such as labelling requirements are standardized among WTO member states. Thus, exporters need to comply with only one standard as opposed to different standards for each trading partner. A modernization of laws would also require the modernization of certain agencies (e.g. Customs Department) which would increase efficiency and reduce operational costs for the Government as well as for local businesses.

Although reducing barriers to trade could potentially expose Bahamian businesses to increased foreign competition, this concern may be allayed by the fact that the WTO permits certain measures to be adopted by vulnerable developing countries to mitigate the effects of increased foreign competition.

- *Trade in Services*

The Bahamas has a services sector whose main exports, namely tourism and financial services, are already exposed to intense foreign competition. Thus, it is arguable that joining the WTO would not create any significant advantages for these sectors. However, as a WTO member, The Bahamas would have to make binding commitments in the services sectors. Even if these

commitments simply seek to maintain the status quo, the mere act of making a binding commitment would create an environment of predictability that may attract foreign direct investment.

Additionally, as a WTO member, The Bahamas would be required to reduce non-trade barriers such as bureaucratic measures, which tend to hinder the ease with which business may be conducted. Not only would the reduction in these measures create a more attractive environment for investors, it could also create the conditions necessary for diversification of the services sector, which could, in turn, create a more stable and resilient economy.

#### **A Positive Step Forward?**

Currently, the Government is in the process of negotiating the terms of Bahamian membership with WTO member states, including specific market access commitments, tariff rates and other policies on trade in services and goods. Although it was previously anticipated that The Bahamas would become a member of the WTO by December, 2014, it is unlikely that this deadline will be met since the outcome of the negotiations may determine whether further negotiations are necessary.

In an increasingly interconnected world, joining the WTO would position The Bahamas to participate more actively in international trade, secure better opportunities for Bahamian exports of goods and services and potentially improve the national economic climate. Although joining the organization will not be free from challenges, the Government's decision to join demonstrates its view that the long term benefits outweigh the immediate hurdles.

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# IMPLEMENTATION OF A REGISTER OF DIRECTORS IN THE CAYMAN ISLANDS

**Tom Mylott**

The Cayman Islands government recently passed The Directors Registration and Licensing Law 2014 (the Law), which will regulate directors of certain entities established in the Cayman Islands. This new Law has been expected since the Cayman Islands Monetary Authority (CIMA) carried out its consultation in 2013 with the private sector of the financial services industry. The Law only applies to directors of companies that are "covered entities" which are defined as:

- mutual funds which are regulated under the Mutual Funds Law (2013 Revision); or
- companies falling under section 5(4) and paragraphs 1 and 4 of the Fourth Schedule of the Securities Investment Business Law (2011 Revision).

The Law does not, however, apply to trustees or partners of partnerships.

There are three classes of directors which are now regulated under the Law:

- **Registered Directors**, who are comprised of natural persons appointed as directors to fewer than twenty covered entities. These Registered Directors will be subject to annual filing and fee requirements but are not required to maintain insurance. It is prohibited to act as a director of a covered entity unless registered under the Law and anyone who does so act without being a registered director is liable to a fine of fifty thousand dollars or to

imprisonment for twelve months or both.

- **Professional Directors**, who are comprised of natural persons appointed as directors for twenty or more covered entities. There is an exemption which applies to a director of a covered entity who is a natural person and is a director, employee, member officer, partner or shareholder of a holder of a Companies Management Licence or a Mutual Fund Administrator's licence and also to fund managers of regulated mutual funds where the fund manager is registered or licensed by an overseas regulatory authority listed in the schedule attached to the Law. These individuals are not required to be licensed as professional directors but are still required to register. The penalty for acting as a professional director without complying with these licensing requirements is a fine of one hundred thousand dollars and twelve months imprisonment or both. Professional directors must also maintain insurance with an authorised insurer.
- **Corporate Directors**, who are comprised of bodies corporate appointed as directors for any covered entity. There is an exemption from the Law which applies to the holder of a Companies Management Licence or a Mutual Fund Administrator's Licence where the holder of the

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***The penalty for acting as a professional director without complying with these licensing requirements is a fine of one hundred thousand dollars and twelve months imprisonment or both.***

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licence is providing directors to, or acting as a director of, a covered entity. Any corporate director not complying with these licensing requirements is liable to a fine of one hundred thousand dollars.

The Law applies to each class of director whether or not the director is resident in the Cayman Islands. The process of registration/licensing is effected through CIMA's online portal; natural persons seeking a licence or registration must have filed their application by 3<sup>rd</sup> September 2014 and corporate directors seeking a licence must have done so by 3<sup>rd</sup> December 2014. Licensees must comply annually with a further fee payable for the forthcoming year by 15<sup>th</sup> January of each year.

A corporate director must be registered as an ordinary resident, exempted or foreign company in accordance with the Companies Law and must have two board members who are natural persons who are also registered under the Law. Any new or additional directors appointed to its board must be approved by CIMA prior to their appointment. The transitional provision for corporate directors is six months or until a licence is refused.

The fees which are payable on application, and subsequently annually, are as follows:

- Registered Directors  
CI\$700/US\$875
- Professional Directors  
CI\$3,000/US\$3,750
- Corporate Directors  
CI\$8,000/U\$10,000

#### CIMA's Power and Duties

CIMA will be required to maintain a register of directors to include the names and addresses of the relevant directors as well as the location of the registered office and date of registration or licence. CIMA will also maintain responsibility for a general review of the qualification of directors, and examine the capacity of registered professional directors to carry out their duties. Any registered, professional or corporate director should expect CIMA to give directions where appropriate and CIMA may, where they consider it necessary, examine those covered under the Law by scrutiny of the prescribed regulatory terms or on site inspections or in such other manner as it may determine.

Should you require further guidance on, or assistance with, complying with the procedure, please contact one of our attorneys in our Cayman office who will be happy to assist.

*Tom Mylott is a Senior Associate in the Cayman Islands. He is a member of the Private Client & Wealth Management group specialising in trusts, tax planning and wills.*



# THE PREVENTION OF BRIBERY (AMENDMENT) ACT

**Andrea M. Moultrie**

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In a display of its commitment to ensure the compatibility of our legislation with the laws of the most transparent jurisdictions, the Bahamian parliament passed the Prevention of Bribery (Amendment) Act (the Amendment Act) on 1<sup>st</sup> May, 2014 but it is not yet in force. Its long title states that it is an act to “amend the Prevention of Bribery Act to provide for transnational bribery and to criminalize the corruption of or by the foreign public official and for connected purposes”. The amendments to the Prevention of Bribery Act, 1976 (POBA) mirror to a large extent the United States Foreign Corrupt Practices Act (FCPA).

POBA provides for the prevention of bribery and corruption by criminalizing the offering by any person of an “advantage” to any member or employee of the Bahamian government or a member of any paid or unpaid body which is appointed by the Bahamian government (a “Bahamian public official”) in exchange for certain types of action (or inaction) which are set forth in POBA. Persons found guilty of an offence under POBA are liable to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding four years, or to both such fine and imprisonment. An agent who acts at the behest of a principal is liable on his own behalf.

An “advantage”, as defined by POBA, includes (but is not limited to) a gift or loan consisting of money or other valuable security, property, any office, employment or contract, any service or favour (other

than entertainment, which means the provision of food or drink for consumption at the time it is provided, and any other entertainment connected with the provision of that food or drink), and a conditional or unconditional offer or promise. There is no lower limit to the size of the advantage – POBA focuses on the conduct of the person offering the advantage, rather than on what is being offered.

Since the enactment of POBA, there have been several convictions in respect thereof. However, POBA as originally enacted criminalized the bribery of Bahamian public officials only – the bribery of public officials from other jurisdictions was not prohibited. The Supreme Court case *In the Matter of the Extradition of Viktor Kozeny v. The Superintendent of Her Majesty's Fox Hill Prison and another [2007] 5 BHS J. No. 7* (the Kožený case) provides a notable example of the effect of this gap in the legislation, and was possibly an impetus behind the recent change in the law. The defendant, a Czech-born financier who is resident in The Bahamas, was alleged to have been a major player in an alleged corruption scheme in the 1990's involving the payment of millions of dollars in bribes to government officials of the Republic of Azerbaijan, in connection with the privatization of certain state assets. The alleged scheme reportedly fell apart and the defendant was arrested in The Bahamas several years later, after a request for his extradition was made to the Bahamian government by the United

States.

It was argued that, were the defendant's conduct to have occurred in The Bahamas, it would have given rise to, inter alia, various bribery and corruption offences under POBA and the Penal Code. However, the Extradition Act provides that an act will constitute an "extradition offence" only if it would be an offence under Bahamian law. The defendant was accused of bribing Azeri officials, but as POBA only prohibited the bribery of Bahamian public officials, the POBA charges against him were dismissed. An order for his extradition, which was made in the Magistrate's Court in connection with charges of corruption of a public officer under the Penal Code, was overturned in both the Supreme Court and the Court of Appeal, on the basis that references in the Penal Code to public officers meant Bahamian public officers and not foreign public officers, and accordingly the defendant's alleged bribery of Azeri officials did not constitute an extradition offence. The matter was brought before the Privy Council, which also dismissed the appeal.

Perhaps as a response to the outcome of the *Kožený* case, POBA, as amended by the Amendment Act, will prohibit the offering of an advantage to a foreign public official – that is, a person who holds a legislative, administrative or judicial position of a foreign state (a country other than The Bahamas, and this term includes a government, agency, department or branch of that other country), performs public duties or functions for a foreign state or is an official or agent of a public international organization that is formed by two or more states or governments or by two or more such public international organizations –

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**Grease payments presently occupy a grey area in the law relating to foreign corrupt practices, as the line between grease payments and bribes is regarded as unclear.**

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in order to obtain or retain an advantage in the course of business. However, if the advantage is permitted or required under the laws of the foreign state, or was made as payment for the reasonable expenses incurred by or on behalf of the foreign public official in the performance of his duties, then no offence will be committed.

Notably, the Amendment Act now provides an exception for what is commonly referred to as a "grease payment", by exempting from its scope payments made in the course of business to expedite or secure the performance of "routine acts" of a foreign public official, which are part of that foreign public official's duties or functions. The Amendment Act lists several examples of "routine acts", which include the processing of official documents such as work permits, and the provision of services normally provided, such as police protection and phone and water supply. This new provision is very similar to the analogous provision under the FCPA, which permits an exception for "facilitating payments" to foreign public officials. Facilitating payments under the FCPA are meant to persuade the foreign public official to do a job or perform a function he is already obligated to do, but not to perform acts within his discretion, award new business, or misuse public office.

Grease payments presently occupy a grey area in the law relating to foreign corrupt practices, as the line between grease payments and bribes is regarded as unclear. Although they are still permitted under the FCPA, the US Department of Justice and the US Securities and Exchange Commission have taken a disapproving view of them, and in a Resource Guide to the FCPA released by these bodies in 2012 (the Guide),

reference is made to a 2009 OECD Recommendation, which expressly urges countries to encourage companies to prohibit or discourage grease payments. The Guide further provides that while there is no size limit on an FCPA facilitation payment (as is now the case with payments for routine acts under POBA), a large payment is suggestive of a corrupt practice, and it warns that labelling a bribe a "facilitation payment" in a company's records does not make it one. Grease payments are presently prohibited under the UK Bribery Act, and recent amendments to Canada's Corruption of Foreign Public Officials Act will see the eventual elimination of its grease payments exception, while reform of comparable legislation is being seriously considered in Australia. In the

face of what seems to be a global shift away from reliance on grease payments, it remains to be seen how the Bahamian government will handle this issue moving forward.

The Amendment Act also makes it an offence for a person to hide the bribery of a foreign public official by, inter alia, knowingly using false documents, intentionally destroying accounting books and records, making transactions which are not recorded or inadequately recorded in those books and records, or entering liabilities with incorrect identification on those books and records.

Companies and persons subject to POBA should now review their anti-bribery protocols, financial controls and due diligence systems to ensure compatibility with the newly amended law.

*Andrea M. Moultrie is an Associate in the Ocean Centre office. Her main areas of practice include commercial and corporate law.*

## EXPANSION OF THE COMMERCIAL GROUP IN THE CAYMAN ISLANDS



Higgs & Johnson has expanded its corporate and commercial areas in the Cayman Islands with the addition of Senior Associate, Rob Humphries (l), who was a partner in the Corporate Commercial department of the well-known South African firm, Fairbridges.

Rob Humphries was admitted to practise (photo above) as an attorney-at-law in the Cayman Islands by the Honourable Mr. Justice Charles Quin QC, who stated that he was confident that his extensive legal experience would be put to good use at the firm.

Mr. Humphries specializes in Corporate and Commercial work, M&A and general commercial transactions. He has advised domestic and multi-national clients across a range of industries including Financial Services, Commercial Real Estate, Healthcare, Retail, Agriculture, Fishing and Marine Resources.

## BANKRUPTCY, INHERITANCE & TAXES

HIGGS & JOHNSON hosted its annual client seminar on Wednesday 1 October 2014 under the theme 'Bankruptcy, Inheritance & Taxes'. Welcome remarks were given by Dr. Earl A. Cash, Partner and Chair of the Private Client & Wealth Management group. Minister of State for Finance, the Hon. Michael Halkitis, in his opening remarks noted that The Bahamas would be entering into a new era once Value Added Tax (VAT) is introduced but emphasized that the government would also focus efforts on the more efficient collection of existing taxes.

The first session, 'Insolvency: A Tale of Two Islands' was co-presented by Partner, Tara Cooper Burnside (Bahamas) and Senior Associate, John Harris (Cayman Islands). This joint presentation reviewed both the Bahamian and Caymanian statutes on international insolvency and recognition of foreign proceedings. The speakers explained the development of English common law as it relates to insolvency matters and gave relevant case law examples.

Bahamian Associate, Alexandra Hall spoke on the topic 'VAT: Facts for Financial Services.' She highlighted the impact of VAT in the financial services area and discussed the likely challenges to be faced by the sector.

Gennette Faust, Associate of Greenberg, Traurig spoke on the topic 'Practical FATCA'. She elaborated on the practical aspects of the Foreign Account Tax Compliance Act (FATCA) and discussed FATCA classification of non-US trusts and their underlying companies. Gennette focused on issues facing practitioners making such classifications and the compliance options which exist once an entity has been classified.

The seminar concluded with an interactive segment called 'Family Feud: Disputes Over the Last Will & Testament of Henry Higgins-Johnson.' Ava Rodland, Associate in The Bahamas office, was the moderator for this session. Attendees were asked to review the Will and a number of questions raised by the moderator individually. An interactive session followed with the moderator who analyzed the difficulties presented by the Will and provided suggested answers to the questions. This exercise proved to be very stimulating and at the conclusion of this segment, Erica Culmer-Curry of KPMG, was awarded a prize for answering most of the questions correctly.

In its ongoing effort to promote education in The Bahamas, Higgs & Johnson sponsored the attendance of faculty and students of both the UWI/COB Law Degree program and the Eugene Dupuch Law School.

Sponsors of the Higgs & Johnson seminar included H&J Corporate Services Ltd. and H&J Fiduciary Services Ltd. both of which are affiliates of Higgs & Johnson.

A) Managing Partner mingles with clients during the break



B) Minister Halkitis giving opening remarks

C) Higgs & Johnson Associate Alex Hall discussing VAT



D) Higgs & Johnson Associates during the networking break

E) Clients take a break for a photo during the seminar



F) Attorneys show their appreciation by applauding



G) Winner, Erica Culmer-Curry raises her hand to answer during the Family Feud segment

H) Tara Cooper Burnside (c) with clients during the break