



**Australian Government**  
**Attorney-General's Department**

# **Guidance on adequate procedures to prevent the commission of foreign bribery**

August 2024



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# Introduction

Foreign bribery harms Australia’s trade and investment interests and can harm the growth of Australian businesses. It also undermines good governance and contributes to social and economic inequality in the local communities where it occurs.

The Australian Government has a zero-tolerance approach to foreign bribery and other forms of corruption. As a party to the Organisation for Economic Co-operation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), the Australian Government is committed to measures that will reinforce efforts to prevent, detect and investigate foreign bribery. The Australian Government is also committed to implementing the OECD’s 2021 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, including to strengthen Australia’s anti-bribery laws by incentivising corporations to develop internal controls, ethics and compliance programs to prevent and detect foreign bribery.

The *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* (the Act) introduced an offence of corporate ‘failure to prevent’ foreign bribery under section 70.5A of the *Criminal Code Act 1995* (Cth) (the Criminal Code). A corporation will not be liable under the corporate ‘failure to prevent’ offence if it can prove it had ‘adequate procedures’ in place to prevent foreign bribery. Further information on Australia’s foreign bribery laws can be found at [Appendix A](#).

The Act requires the Australian Government to publish guidance material on what constitutes ‘adequate procedures’. This document is designed to provide guidance on the steps corporations can take to ensure their anti-bribery controls are adequate. However, what constitutes ‘adequate procedures’ will ultimately be determined by the courts on a case-by-case basis.

To support corporations in establishing adequate procedures, the guidance sets out six principles:

<b>1</b>	<b>Fostering a control environment to prevent foreign bribery</b>
<b>2</b>	<b>Responsibilities of top-level management</b>
<b>3</b>	<b>Risk assessment</b>
<b>4</b>	<b>Communication and training</b>
<b>5</b>	<b>Reporting foreign bribery</b>
<b>6</b>	<b>Monitoring and Review</b>

This guidance is not intended to be used as a ‘checkbox’ approach to implementing an effective anti-bribery compliance program. Instead, it outlines elements that could be included in such a program and suggests types of controls that should be considered. In order to create adequate procedures, all topics should be considered by corporations. Importantly, the mere existence of anti-bribery controls will not be sufficient for a corporation to make use of the ‘adequate procedures’ defence. A corporation must also show that the procedures were adequate. Additional resources to support corporations on preventing foreign bribery are available on the Attorney-General Department’s website. Corporations should also consider their obligations under other laws, guidelines or rules, for example under the ASX Listing Rules or the *Corporations Act 2001* (the Corporations Act), in addition to this guidance.

Case studies and scenarios are included throughout the guidance to provide practical examples supporting the specific topic discussed. These case studies are illustrative only and are not intended to constitute legal advice.

It is reasonable to expect corporations of all sizes to put in place appropriate and proportionate controls to prevent and detect risks or incidences of bribery from occurring within their business, noting that the offence can apply in instances where a corporation is engaging an associate, including a contractor or subcontractor, to perform services on its behalf. This guidance is based on the key principle that the obligation to implement such controls will be proportionate to the circumstances of the corporation, including factors such as the scale and location of the corporation’s activities and the nature and level of risk identified. This guidance is designed to be of general application to corporations of all sizes and in all sectors.

Finally, this guidance, and the supporting material to the legislation, acknowledges the fact that foreign bribery has occurred does not, in itself, mean that adequate procedures were not implemented by the relevant corporation. Where foreign bribery has occurred, a court will determine whether adequate procedures were in place.



# 1. Fostering a control environment to prevent foreign bribery

This section provides fundamental elements to assist corporations in developing bribery prevention controls that may then contribute to a corporation's anti-bribery compliance program. All corporations should put in place effective controls scaled to the level and nature of risk the corporation faces. Corporations that face higher risks of foreign bribery will need to ensure that such controls are proportionate to, and effective in, mitigating those higher risks. Put simply, the higher the risk, the greater the controls needed. A corporation should consider its individual circumstances when deciding the type and nature of controls to include in its anti-bribery compliance program.

This guidance document does not necessarily require a corporation to introduce new controls to its compliance program if the corporation's compliance program is consistent with this guidance. However, failure to take any steps to address the risk of foreign bribery would likely result in a corporation being found to have inadequate procedures in place.

The occurrence of foreign bribery does not, in itself, necessarily mean that the bribery prevention controls within a corporation were inadequate. Whether controls were adequate or inadequate will depend on the circumstances of each case, including whether the controls were effective and proportionate to the risk posed.

## 1.1 Proportionality and effectiveness

### 1.1.1 The principle of proportionality

The controls a corporation implements to prevent foreign bribery should be proportionate to the corporation's operational circumstances, including its foreign bribery risks and the nature of its activities. Similarly, this approach should extend to any contractual clauses relating to bribery prevention. That is, they should be proportionate and based on the risk of the relationship between a corporation and the contractor.

An assessment needs to be made by each corporation of the nature and extent of its foreign bribery risks. This assessment may form part of a wider, more general risk assessment or have a specific bribery focus. It should be overseen by management and conducted by suitable personnel. The assessment may also involve input from other key stakeholders, such as suppliers and customers, where appropriate. Procedures for conducting a risk assessment are outlined in [Section 3](#). Bribery prevention controls should be proportionate to the bribery risk identified through the risk assessment.

Resourcing for anti-bribery compliance should also reflect the scale of the corporation's business, including the level of risk it faces. The level of risk a corporation faces is not necessarily determined by the corporation's size. For example, in a small corporation, top-level management may be highly engaged with the corporation's compliance framework by nature of working in close proximity to the compliance function. By comparison, in a large corporation – with multiple business units, tiered management structures and many reporting channels – more sophisticated controls may be required to connect the compliance function with top-level management.



A proportionate approach for a large multi-national corporation could be for top-level management to set bribery prevention controls and to task lower-level management to design, implement and monitor anti-bribery measures on a day-to-day basis. However, top-level management would still be responsible for conducting regular compliance reviews and seeking regular reports on the effectiveness of the implemented measures.

### ***Case Study – Proportionate Procedures***

Punky Parquetry is a small-to-medium sized wholesale trade company operating primarily in the Australian domestic market. It has a small presence in two foreign countries where it sells furniture. Customers in the foreign countries include public agencies. Punky Parquetry engages consultants in those countries in order to facilitate business opportunities, help manage business relations and assist in preparing formal tenders for new opportunities. The consultants are engaged on fee-for-service contracts and charge the company for expenses incurred in the course of their duties. The consultants were selected because they have important business contacts and specialist information about the local market.

The company's compliance risk assessment has identified that its reliance on consultants in foreign markets is a source of medium-to-high risk of foreign bribery, particularly since some of its customers and potential customers in the foreign countries are public agencies. Among other issues, it is difficult for the company to monitor consultants' cash expenditure.

To mitigate risks, Punky Parquetry could consider how to effectively communicate its anti-bribery policy, including to sales staff and consultants who could be asked to read and sign an appropriate declaration acknowledging they have read and understood the policy. New starters could also have to acknowledge that they have read and understood the policy upon commencement. Senior management could periodically emphasise this company policy at meetings, through internal company communications and less formal communications. The company could also maintain a confidential whistleblower scheme for staff or external business contacts to report suspicions of foreign bribery or otherwise raise concerns about anti-bribery compliance.

Due diligence on prospective consultants could include making enquiries through business contacts, local chambers of commerce, business associations, relevant anti-corruption civil society organisations, internet searches, interviews and through following up any business references and checking financial statements. Sales staff and other relevant employees could undertake online training on bribery prevention.

The contractual terms for consultants could require zero tolerance of bribery, set clear criteria for providing genuine and proper hospitality expenditure on behalf of Punky Parquetry, and clearly set out the basis for remuneration and expense claims, including requirements that any expenses be properly recorded and supported by documentation. Consultants may be reminded of the contractual terms under which they are engaged and consultant contracts could also be subject to periodic review and renewal, thus providing Punky Parquetry with control over the engagement.



## 1.1.2 The principle of effectiveness

The 5 main indicators of an effective anti-bribery compliance program are:

1. A robust culture of integrity within the corporation.
2. Demonstrated pro-compliance conduct by top-level management and, where applicable, the board of directors.
3. A strong anti-bribery compliance function or functional equivalent.
4. Effective risk assessment and due diligence procedures.
5. Careful and proper use of third parties.

This list is not exhaustive, prescriptive or final. In a smaller corporation it may be common for the compliance function to be part of a wider set of an individual's responsibilities. This is reasonable and acceptable provided the individual delivers an effective compliance function. The principle of effectiveness is intended to focus on whether components of a corporation's anti-bribery compliance program are operating with reasonable efficacy.

### A robust culture of integrity

A corporation with a robust culture of integrity can be demonstrated by a high degree of awareness and understanding of the corporation's anti-bribery compliance program among employees, particularly those in high-risk control functions. A robust culture of integrity could be demonstrated by a corporation that:

- conducts regular and thorough assessments of the effectiveness of bribery prevention controls and oversees these controls
- has leaders who actively examine foreign bribery risks and use both words and actions to discourage bribery and encourage compliance
- provides sufficient resourcing to put in place mechanisms that monitor the behaviour and compliance of senior leadership
- addresses concerns raised by the compliance function and deals with these appropriately and in a timely manner (for example, commits to stopping or modifying a transaction or deal that has been identified as a bribery risk)
- investigates allegations of foreign bribery, undertaking full-documented assessments conducted by suitably qualified personnel
- communicates foreign bribery risks to leaders and decision-makers
- encourages employees to disclose potential instances of bribery or corruption
- employs appropriate disciplinary actions against employees at all levels involved in foreign bribery, such as termination of employment
- takes appropriate action against associates, including contractors and consultants, for breaching contractual provisions relating to bribery prevention
- ensures that those who issue payments or review approvals apply the corporation's anti-bribery compliance program
- proactively engages with appropriate law enforcement authorities when suspected bribery is uncovered
- undertakes regular periodic surveys of the workforce to assess the anti-bribery and corruption compliance culture and identify indicators of potential foreign bribery.



## Pro-compliance conduct

A culture of integrity is based on the understanding that top-level management can demonstrate their commitment to the anti-bribery compliance program by:

- actively examining foreign bribery risks
- having a clear policy position and information on managing foreign bribery risks available on internal and external websites, including potential repercussions for failure to comply
- actively and visibly promoting an anti-bribery culture on the ground
- utilising compliance expertise
- implementing preventative controls in accordance with local laws
- implementing insider risk programs as part of their anti-bribery controls where there is a high risk of bribery or in sectors that are of interest to hostile foreign actors
- implementing a clear policy relating to facilitation payments, hospitality, gifts, sponsorships and donations
- prompting and engaging in conversations, including asking questions to promote own knowledge
- holding meetings with, and receiving briefings from, the corporation's compliance function
- examining foreign bribery risks and engaging with options for dealing with those risks
- receiving reports of internal audit findings regarding foreign bribery risks and occurrences and engaging with those findings
- ensuring the compliance function is adequately resourced to perform its functions, including responding to requests for resources in order to prevent foreign bribery
- considering strong accounting controls as a fundamental element of foreign bribery prevention.

## Anti-bribery compliance function

A strong anti-bribery compliance function or functional equivalent (whether audit, legal or financial) operates autonomously and is adequately resourced to perform its functions. To ensure its effectiveness, it should:

- regularly train employees on requirements
- report directly and regularly to top-level management and, where applicable, the board of directors
- be subject to regular performance reviews
- have full and timely access to information, including confidential information, about allegations of foreign bribery, where the law allows.

## Risk assessment and due diligence procedures

Effective risk assessment and due diligence procedures may be demonstrated where the procedures:

- identify, analyse, prioritise and address foreign bribery risks
- are endorsed and overseen by top-level management
- receive appropriate resourcing proportionate to the scale of business/risk
- are applied to relevant situations, including the process of engaging third parties and in mergers and acquisitions
- are tailored to reflect the corporation's risk profile.

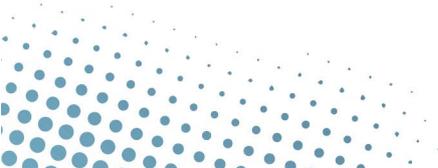


The processes for conducting risk assessments and due diligence are covered in [Section 3](#) of this guidance.

### Third-party oversight

Careful and proper use of third parties, such as agents, in dealing with foreign officials may be demonstrated if their use is:

- supported by a clear business rationale
- subject to oversight, including by top-level management, where appropriate
- subject to robust onboarding and management processes that articulate and remind third parties of their obligations
- subject to clear contractual terms that describe the services to be performed
- subject to appropriate payment terms and mechanisms to ensure the contractual work is performed
- compensated proportionate to the value of the services provided.



## 2. Responsibilities of top-level management

A corporation's top-level management personnel should play a critical role in developing, implementing and promoting its anti-bribery compliance program. Top-level management also has the responsibility for fostering an anti-bribery culture within the corporation. Top-level management can include the owners of a small-to-medium sized enterprise (SME), the Chief Executive Officer and executive team, a board of directors or equivalent persons within a corporation. Small and large corporations will likely take different approaches to achieving top-level management commitment to the corporation's anti-bribery compliance program.

Top-level management's role in developing an anti-bribery compliance program could include:

- providing leadership on the corporation's anti-bribery policies and any supporting documents, demonstrated by management initiating policy development and subsequent reviews, and by insisting on thorough and effective compliance measures
- selecting senior managers to lead anti-bribery work (or, particularly in the case of small businesses, having top-level management involved in leading the work)
- endorsing bribery prevention publications
- having specific involvement in high-profile and critical decision-making where appropriate
- providing oversight and assurance of the corruption risk assessment.

Top-level management's role in implementation and promotion of an anti-bribery compliance program could include:

- communicating the corporation's anti-bribery stance, for example, through a visible and easily accessible statement that demonstrates a top-level dedication to preventing bribery, a culture of integrity and a zero-tolerance approach to corruption
- overseeing the development and implementation of a code of conduct that reflects the anti-bribery compliance program and ensuring accessibility of the code to staff and third parties
- emphasising that compliance with the corporation's anti-bribery compliance program is a responsibility of employees and relevant third parties at all levels of the corporation
- generally overseeing responses to breaches of policies and providing feedback, where appropriate, to the board of directors (or equivalent body) on levels of compliance
- promoting the business and social benefits of preventing bribery
- eliminating inappropriate incentives that could lead to increased risk
- ensuring procedures in relation to internal recruitment decisions are followed, including recording of decisions
- declaring personal bribery risks and other conflicts of interest
- promoting and raising awareness of the corporation's anti-bribery compliance program and code of conduct among associates where there is a foreign bribery risk, including any protection and procedures for confidential reporting of bribery (whistleblowing)
- seeking reciprocal anti-bribery compliance commitments from business partners.

### ***Case Study – Top-level commitment to preventing foreign bribery***

Magnus Minerals is a medium-sized company seeking contracts in markets abroad where it is aware there is a high risk of bribery. The company has in place suitable procedures and written policies to prevent foreign bribery, that sufficiently respond to a recent risk assessment of the foreign market. As a next step, the company's senior management wants to demonstrate its dedication to ethical business practices and to preventing foreign bribery.

Prior to submitting any tenders or entering into negotiations for contracts in those markets, Magnus Minerals' top-level management could make a clear statement about its commitment to carry out business fairly, honestly, in compliance with the law and with zero tolerance for foreign bribery and other forms of corruption. The statement could reference the company's existing anti-bribery compliance program including its bribery prevention controls. It could be disseminated to staff and key business partners. If Magnus Minerals is operating in a foreign market where English is not the primary language, the company could also issue a written statement in the relevant language. Staff could be asked to sign a declaration in support of the program.

The company could also develop a code of conduct that covers foreign bribery prevention and makes existing bribery prevention controls easier for staff to understand. The code should be accessible to staff and third parties e.g. by being published on Magnus Minerals' website. Top-level management could continue to emphasise, during meetings and other interactions with staff and associates, the importance of applying the code of conduct in practice, the benefits of ethical business practices and the consequences of breaching the code.

In addition, top-level management may demonstrate its commitment to preventing foreign bribery by including specific anti-bribery and corruption contract clauses which indicate a zero tolerance of bribery. Clauses may penalise a party to the contract, or enable termination of the contract, where bribery or corruption has occurred. This would demonstrate a commitment to preventing foreign bribery, while also holding all parties to the contract accountable for instances of bribery or corruption.

# 3. Risk assessment

## 3.1 Overview

Risk assessment is the basis for the design of any anti-bribery compliance program, regardless of the size and risk level of the corporation. A risk assessment gives a systemic view of where bribery risks lie and, as a result, a corporation can design its controls accordingly. A corporation that faces significant foreign bribery risk would require a more extensive anti-bribery compliance program compared to a corporation that faces lower risk.

## 3.2 The process

Corporations should adopt a risk-based approach to developing an anti-bribery compliance program. The approach involves 3 key steps:

1. Conduct a bribery risk assessment.
2. Rate the risk.
3. Document the process and findings.

### 3.2.1 Conducting a bribery risk assessment

A bribery risk assessment may take place as part of a broader compliance risk assessment. In order to conduct a bribery risk assessment, a corporation should first identify its exposure to bribery risks by considering factors including, but not limited to:

- the countries and regulatory environment the corporation operates in
- the sector(s) in which the corporation undertakes business in
- the corporation's common transactions, including those involving foreign public officials or foreign governments
- the location of offshore operations and its rating for corruption perception, using Transparency International's Corruption Perceptions Index
- the controls the corporation has in place, including financial controls.

Corporations should also be aware of common red flags for bribery, particularly if the corporation:

- operates in locations or sectors perceived to have high levels of corruption
- deals with foreign public officials
- wins large contracts in state-run economies
- is requested to make political donations or donations to particular charities or social programs
- is requested to make facilitation payments, noting that the local law regarding facilitation payments may differ depending on the jurisdiction
- is engaging with, or has relationships with, state-owned enterprises and politically exposed persons.



The corporation should also consider the risks arising from the use of third parties, such as agents and business partners. Third-parties can pose risks unless due diligence is taken. Common red flags when using third parties may include:

- vaguely described services and deliverables
- high expenses
- upfront fees
- payments to personal accounts
- complex corporate structures or payment methods
- large or unusual commissions such as shares or incentive schemes
- requests to employ certain people (usually associated with foreign officials make the request)
- excessive hospitality, expensive gifts, sponsorships and donations
- inflated contracts.

Consultation with management and employees, particularly at a local level, will provide a good idea of where the risks of bribery lie. A corporation's risk assessment should include consultation with employees who are on the front line for the corporation and have greater awareness of specific risks and deficiencies. Consultation with sales, procurement, finance and legal areas is recommended. Corporations may also choose to consult with external stakeholders including suppliers, industry, customers, investors and peer corporations. Corporations operating overseas may also wish to engage with the Australian Trade and Investment Commission on its accreditation program as part of its compliance program.

Corporations entering new jurisdictions should seek information from local anti-corruption practitioners and civil society organisations, such as integrity institutions, Transparency International chapters and local lawyers, to better understand the local corruption risk and ensure that any compliance framework is consistent with local laws. This may assist in identifying high-risk persons and jurisdictions where a corporation may otherwise be unaware of any risks based on their own research.

Information from stakeholders could be gathered in many different ways including confidential staff surveys, desktop research, workshops, interviews and 'SWOT' analysis (an analysis of your corporation's Strengths, Weaknesses, external Opportunities and Threats). Corporations may wish to consider external assistance such as research agencies as additional sources of information.

### 3.2.2 Rate the risk

Having identified the relevant areas of risks, corporations should then rate both the likelihood that each risk might occur and the potential impact of each occurrence to determine the overall risk to the corporation. If operating in multiple countries or in multiple sectors, it is recommended that this exercise takes place for every country or every sector as the inherent corruption risks may differ across each country and sector.

To determine the overall risk, corporations should consider the:

- **Likelihood or frequency of risk occurring** – how likely is it that the risks identified will occur in business transactions – rare, possible, probable or certain.
- **Impact of the risk on the business** – what would the impact be on the corporation if the risks did occur – minor, moderate, significant or major.



Combining the likelihood and impact assessments for each risk will produce an assessment of the overall risk level without considering existing controls. This is known as the inherent corruption risk and is a priority area(s) for consideration when implementing mitigating controls.

The result of a rating exercise of this nature is for corporations to better target the risks that are most likely to occur and assess which will have the greatest impact on business. In practice, this may look like a redirection of resources to prioritise regions or sectors most in need of controls or conducting further due diligence on a particular business relationship.

### 3.2.3 Document the process and findings

Risk assessments should be documented and stored in a centralised and easily accessible location. A corporation may wish to document its risk assessments in a risk register that is reviewed and updated regularly. A risk register could contain details on each of the risks, the rating of each risk, the controls in place to mitigate the risk and when the risk was last assessed. Corporations should conduct both periodic reviews of risk, as well as reviews in response to a change of circumstance, such as entering a new market or following turnover of relevant personnel (including third parties), or where potential bribery incidents come to a corporation's attention.

#### ***Case Study – Risk assessment***

Herculean Henry Co. is a small business based in Australia that is interested in expanding its business in a foreign market. The company has considered several foreign markets, but has no particular experience or expertise in conducting a risk assessment in relation to these markets.

As part of the broader research to identify a market for expansion, Herculean Henry Co. wants to undertake a bribery risk assessment but isn't sure how to do one. It begins by making a list of countries, and consults Transparency International's Corruption Perceptions Index to gauge the ranking of the countries by their level of perceived corruption. In doing so, Herculean Henry Co. identifies that one of the markets it is considering is considered a high-risk for corruption.

Herculean Henry Co. consults local chambers of commerce, relevant non-governmental organisations and sectoral organisations in relation to the type of work it wishes to conduct in the new markets. It engages with the Bribery Prevention Network as a useful source of information and resources that could be used in this process.

Whilst the company is able to identify countries with a high-level of perceived corruption and the areas in which it may be vulnerable, it is less able to identify what controls it should have in place to prevent these risks. Herculean Henry Co. decides to seek advice from a risk advisory firm that assists Herculean Henry Co. in identifying and rating the risks to produce an assessment of the overall risk level.

Herculean Henry Co. uses this information to create a risk register that details each of the risks and the controls it will put in place to mitigate them. The risk advisory firm recommends that the company periodically review these risks and controls, in order to prevent Herculean Henry Co.'s exposure to bribery and corruption.

## 3.3 Due Diligence

Due diligence involves research, investigation, assessment and monitoring by a corporation in relation to both new and ongoing business relationships. Due diligence ensures that a corporation associates with third parties that act in a manner consistent with the corporation's anti-bribery compliance program.

Corporations may undertake due diligence as a risk mitigation measure. Thorough due diligence should be conducted before entering into a business relationship and continue throughout the relationship. The level of due diligence should be proportionate to the risks connected with the particular relationship or circumstances of that relationship. Business relationships that may need more extensive due diligence include those:

- involving third-party intermediaries where due diligence could significantly mitigate risk, e.g. the intermediary is assisting the corporation to establish business in a foreign market
- that, once established, would be difficult to end, e.g. those in jurisdictions where it is common or necessary to engage local agents
- involving mergers, acquisitions and foreign subsidiaries
- that include state-owned enterprises.

Corporations should apply a procedure to determine the scope and depth of the due diligence for each individual business relationship. The procedure may include:

- identifying and assessing negative impacts in operations, supply chains and business relationships
- ceasing, preventing or mitigating the adverse impacts
- tracking the implementation of policies and their results
- reporting and communicating how impacts are addressed.

In high-risk situations, due diligence procedures may extend to conducting direct and indirect enquiries and background research. Corporations may request details on the background, expertise and experience of relevant individuals and seek to verify the information received through independent research or by contacting referees. Practical measures may include a questionnaire for the associate to complete, web-searches, searches of relevant government/public databases and lists, or inquiries of third parties with knowledge of the associate's history and reputation. These may be carried out by the corporation or an appointed expert.

### 3.3.1 Non-controlled associates

Associates that are not controlled by the corporation but perform services for it, for example, incorporated joint venture partners or partially owned subsidiaries, are still in a position to commit foreign bribery for the profit or gain of the corporation. Therefore, these non-controlled associates should be included in the risk assessment and due diligence processes of the corporation.

Where there is a foreign bribery risk associated with a non-controlled associate, the corporation should consider whether the non-controlled associate has sufficient measures in place to mitigate the risk. The corporation may consider control measures such as:

- properly documented risk-based due diligence on the hiring or selection of the associate to perform services
- informing the associate of the corporation's commitment to anti-bribery compliance
- a requirement for the associate to demonstrate its commitment to integrity
- a requirement for the associate to demonstrate it has an effective anti-bribery compliance program noting this does not necessarily mean that adequate procedures are in place for the purpose of subsection 70.5A(5) of the Criminal Code
- implementation of bribery prevention controls by the associate that are proportionate to the risk to address the transaction between itself and the corporation
- participation in regular training in accordance with the corporation's anti-bribery compliance program
- inclusion of anti-bribery and corruption contract clauses, drafted with appropriate legal advice, which indicate a zero tolerance of bribery and assist in the mitigation of identified risk
- requiring non-controlled agents to disclose if they are engaging other agents to do part, or all, of the work for the corporation

A corporation may also check, or encourage disclosure of, beneficial ownership of non-controlled assets. This may provide an additional measure of due diligence, particularly where there may be a perceived or actual risk associated with a non-controlled associate. A non-controlled associate may operate in a complex business structure with hidden ownership. By checking, or encouraging disclosure of beneficial ownership, any potential hidden ownership may be uncovered.

If such measures are not in place, cannot be verified, or the corporation is unable to enforce implementation, there may be a significant corruption risk that will need to be appropriately managed.

Corporations are not expected to verify the full implementation of anti-bribery measures by non-controlled associates, but should be satisfied on a reasonable basis that they are complying with their measures.

## ***Case Study – Due Diligence***

Mad Mac Materials is a medium-sized manufacturing business which has experienced success in the Australian market in recent years. The company has identified an opportunity to merge its business with TexTillie, a similar sized textiles business based in the United Kingdom that conducts business in several countries.

While conducting a due diligence review into the operations of TexTillie, Mad Mac staff notice that:

- international contracts often refer to ‘administrative fees’ when with dealing with foreign departments without any specific detail of why these fees are incurred, and
- some incomplete financial record keeping.

At the same time, the business learns that a competitor is looking to acquire TexTillie. As a result, the identified issues are not thoroughly examined and Mad Mac decides to take TexTillie’s word that there is nothing to be concerned about.

Eighteen months after the merger is complete, the newly created entity is charged with foreign bribery offences for conduct that took place before and after the merger. The newly created entity finds itself facing potential criminal proceedings and is at risk of having to pay a large fine.

As part of its due diligence, Mad Mac should have followed up and investigated the red flags identified prior to, during and after the merger. In order to identify red flags, it is crucial that businesses understand its anti-bribery and corruption risks. Prevention is the strongest tool to reduce these risks, and due diligence is an integral part of that process.

*With thanks to the Bribery Prevention Network for its Case Study guidance.*



## 4. Communication and Training

Corporations should conduct communication and training to employees and associates to ensure they understand the corporation's anti-bribery compliance program, and the practical application of controls under the program. The frequency and content of communications and training should be proportionate to the bribery risks faced. Corporations should also consider whether to provide communication and training to non-controlled associates (as outlined under section 3.3.1 of the Guidance).

Communication and training should include information on how employees and associates are expected to respond to bribe solicitation and where to report bribery concerns.

### 4.1 Communication

The main goal for internal communication is for the anti-bribery compliance program to be at the forefront of an employee's mind. Internal communications need to convey managerial-level dedication to the anti-bribery compliance program and make employees aware of how particular bribery prevention controls are relevant to their day-to-day work. Simply asking employees to acknowledge that they have read and understood the anti-bribery compliance program is inadequate. Corporations could provide opportunities for employees to engage in the anti-bribery corruption program through focus groups, meetings and online training.

The controls themselves, or a document describing their practical implementation, may be communicated through a staff handbook, guidelines, intranet, notices and training materials and should be made accessible to all associates.

It is important corporations have ongoing communication on managing foreign bribery risks when working with contractors and subcontractors. External communication of the anti-bribery compliance program will convey the corporation's tone from the top, explain how the anti-bribery compliance program operates and the expectations the corporation has for business relationships. A corporation may wish to make an anti-bribery statement, or include foreign bribery in its high-level mission statement. Corporations may choose to make this statement public to help demonstrate the corporation's dedication to compliance with anti-bribery laws and promote a culture of integrity.



## 4.2 Training

Training should be tailored to the needs identified through the risk assessment process and designed to mitigate the risks identified. Potential training methods include classroom teaching, external courses, seminars, online learning and conferences, which may be supported by publications and training materials. Corporations should maintain training records of completion and participant attendance lists as a matter of good practice. Where corporations are engaging third parties, a risk-based approach to training needs should be taken, noting that in some instances a third party may need to provide training to a corporation, while in other instances internal training may be sufficient.

Training should:

- be provided to the corporation's directors, managers and employees
- be necessary for other associates, such as agents, contractors or suppliers considered at risk of foreign bribery
- be accessible in different formats and languages as necessary
- cover general and sector-specific bribery risks and the corporation's anti-bribery compliance program, including all policies relating to anti-bribery and corruption
- be tailored to employees who face particular corruption risk or work in higher risk functions, such as purchasing and contracting
- include case studies or real-life scenarios relevant to the business
- be included as part of induction for new employees
- undergo periodic review to ensure it addresses contemporary bribery risks
- be continuous
- be integrated into the business environment as much as possible, to emphasise the real harm that bribery causes.

## ***Case Study – Communication and training***

Voyage Eloise is looking to expand its business operations to establish a presence in a foreign country. The risk of bribery in the country is assessed as high. Voyage Eloise has suitable controls in place to prevent foreign bribery, which have been amended to reflect the company's risk assessment of the foreign country. The company wants to ensure these controls are communicated effectively and that staff receive proper training in relation to them.

The company should ensure through accessible ways such as face-to-face training, online modules and hardcopy resources that its employees are aware of, and understand, the company's controls to prevent foreign bribery and any related code of conduct. The content of the communications and training should include all relevant issues such as hospitality and promotional expenditure, financial control mechanisms, disciplinary actions for any breaches of the rules and instructions on how to report concerns and seek advice. Communication and training should be designed to ensure that employees understand the risks, know what the company expects of them and how to recognise and resist any demands for bribery. Employees could be required to certify on a periodic basis that they have read, understood and agree to follow the policies and procedures.

Employees who have a high risk of exposure to foreign bribery could receive specialised training about the circumstances in which typical demands for bribes may occur and how to handle them. The training could focus on developing practical skills and knowledge to resist bribe demands and to detect possible instances of bribery or bribery risks. The training could include case studies, scenario and instructions about foreign bribery red flags that have been drawn from the company's own experience and those of other companies in the same market. One of the key messages could be that employees will not be penalised for refusing to pay bribes, even if this results in delay or costs to the company.

Voyage Eloise could document training attendance by employees and provide periodic refresher training. The training program and content of communications could be updated to incorporate feedback from training participants and as the company develops operational experience in the

## 5. Reporting foreign bribery

All corporations, regardless of size, should adopt a mechanism that encourages and facilitates reporting of actual or suspected instances of bribery or bribery solicitation. Corporations must comply with whistleblower protection provisions in the Corporations Act (including requirements which may limit access to reported information, or the manner in which investigations of such reports is conducted) and should have mechanisms in place to respond to concerns.

### 5.1 Whistleblower protections

All corporations in Australia must comply with whistleblower protection provisions in the Corporations Act. The Corporations Act provides strong protections for corporate sector whistleblowers to encourage them to come forward with any concerns. The enforcement of these protections is the responsibility of regulators; however, companies have a responsibility to provide ways for whistleblowers to report misconduct.

The whistleblower protections provisions include criminal offences and civil penalties for a person causing or threatening to cause harm to a whistleblower, or breaching a whistleblower's confidentiality, including during an investigation into the whistleblower's concerns.

The Corporations Act requires public companies, large proprietary companies and corporate trustees of Australian Prudential Regulation Authority (APRA) regulated superannuation entities to have a whistleblower policy. The Corporations Act also sets out at a high-level what a whistleblower policy should contain, which can help all entities that are required to manage whistleblowing in accordance with the legislation. Companies should include the following in its whistleblower policies:

- a section that addresses the purpose and scope of the whistleblower policy
- clear instructions on how a whistleblower can disclose misconduct
- an outline of how the corporation will investigate the matter disclosed and what staff should expect after an investigation has concluded
- assurances regarding confidentiality, support and protections for staff, including how the corporation will keep the identity of whistleblowers confidential and how it will protect them from consequences that they may fear, including in the workplace or legally.

The Australian Securities and Investments Commission (ASIC) encourages corporations to:

- document its whistleblower policy
- define and allocate roles and responsibilities for its program
- design and establish supporting procedures or guidelines
- ensure the program has adequate resources and measure to keep whistleblowers' information secure.

As per ASIC's guidance, to foster a whistleblowing culture, corporations should uphold a whistleblower's right to use any legally eligible channel to make, or continue to make, disclosures. This includes, but is not limited to, a whistleblower's ability to voluntarily raise any potential disclosable matters with ASIC, APRA and any prescribed Commonwealth authority or other relevant regulator or agency.



A whistleblower policy implemented in compliance with the Corporations Act is a sufficient confidential reporting mechanism, however does not preclude corporations implementing further reporting mechanisms. Smaller corporations that are not subject to Corporations Act requirements to implement compliant whistleblower policies should ensure an appropriate reporting mechanism is in place proportionate to the corporation's risk.

## 5.2 Reporting mechanisms

An effective reporting mechanism is visible, secure, confidential, accessible and provides adequate protections. Given the transnational nature of foreign bribery, it is essential that a corporation make mechanisms for reporting foreign bribery and related offences visible and accessible. Mechanisms should be available to all employees, including those based overseas and those in roles where they would be well-placed to detect potential foreign bribery (for example, audit functions). Corporations should also provide information about protections that are available to persons who make a report, and information on how the corporation will receive, investigate or otherwise process the report as well as complaints of retaliation. Such mechanisms should make it clear to staff that it is safe to talk about ethics, how things are done and what can be improved. It should ensure that allegations are properly analysed and assessed and that reported information is accessible to the compliance function (if appropriate) to allow further steps to be taken to prevent or mitigate bribery risk.

The mechanisms should not only encourage reporting, but should provide options for reports to be made confidentially, anonymously (if required), securely and at any time. A corporation could implement an internal reporting mechanism to meet this objective. Internal investigation mechanisms that offer confidentiality and anonymity can be effective at encouraging compliance and minimising the risk of minimal cooperation including potential destruction of evidence by employees and associates.

A corporation's reporting mechanism could also be provided by a third-party with relevant training and expertise and who is authorised by the corporation to provide a whistleblower complaints service or hotline. Providing an external option could encourage disclosure from employees who would otherwise be uncomfortable making a report internally. Other alternative reporting mechanisms could also include reporting foreign bribery instances to anti-corruption or law enforcement agencies (see [Appendix B](#)).

Effective reporting mechanisms should be accompanied by a response system that ensures appropriate consideration and investigation of reports that contain allegations of foreign bribery. Investigations should be:

- properly scoped
- objective
- timely
- appropriately conducted, and
- properly documented.



Corporations should consider the findings of the investigation reports and ensure appropriate action is taken to address issues, including by:

- amending existing policies
- taking disciplinary action against wrongdoers
- putting new systems in place, and
- escalating matters to report any illegality that may have occurred (if required).

Encouraging and providing positive support for the observance of bribery prevention controls supports a strong ethical culture within a corporation.

## 6. Monitoring and Review

Monitoring the anti-bribery compliance program establishes the level of effectiveness over time, and should align to continuous improvement of the compliance program. A corporation should regularly monitor, review and adjust its program to test the effectiveness and to adapt the controls to changes in the business environment. Ways to improve the anti-bribery compliance program can be learned through the documentation and analysis of incidents and violations.

Events that may prompt a review and evaluation process outside a scheduled review could include, but are not limited to:

- entering new markets
- changes to the corporation's activities
- a bribery incident
- a corruption incident
- changes in the corporation's governance or regulatory environment
- employee or associate feedback from surveys or training.

Corporations may wish to consider the following mechanisms for monitoring and reviewing its compliance program:

- adequate internal audit and financial control mechanisms to ensure the maintenance of accurate records and accounts to detect and deter foreign bribery and monitor transactions, including by undertaking targeted data analytics and post-transaction reviews
- staff and associate surveys to test the level of awareness of the corporation's anti-bribery compliance program
- confidential and anonymous reporting channels for staff and associates to raise concerns about bribery risks, including reviews on how complaints are handled
- feedback from training (and other general feedback mechanisms) about the effectiveness of the anti-bribery compliance program
- periodic reviews conducted by suitable experts (internal or external) that are provided to top-level management for consideration
- undertaking exit interviews with staff and asking questions on corruption and bribery
- encouraging all staff to sign annual declarations on compliance with the corporation's foreign bribery policy and procedures
- relevant information from industry bodies
- verification or certification of the effectiveness of the anti-bribery compliance program provided by an external provider, noting this does not necessarily mean that adequate procedures are in place for the purpose of subsection 70.5A(5) of the Criminal Code.

The scope and frequency of the review process will depend on the assessment of risks and the effectiveness of monitoring procedures.

# Appendix A: Australia's foreign bribery laws

## Overview

Bribing, or attempting to bribe, a foreign public official is a serious crime in Australia. Australian individuals and corporations can be prosecuted under Australian law and the laws of foreign countries for bribing foreign officials. The offences for foreign bribery carry significant penalties for individuals and companies.

## The offences

### For an individual

The offence of bribing a foreign public official is contained in section 70.2 of the Criminal Code. The offence has several elements, all of which must be present for the offence to apply. A person is guilty of the offence if the person intentionally:

- provides, offers or promises a benefit to another person, or
- causes a benefit to be provided, offered or promised to another person.

The person must act with the intention of improperly influencing a foreign public official in order to obtain or retain business or a business or personal (non-business) advantage (whether or not for the person). A personal advantage could include influencing a foreign public official to bestow a personal title or honour, the processing of visa or immigration requests or in relation to reducing personal tax liability.

The offence applies regardless of whether or not the person:

- intended to influence a particular foreign public official, and
- intended to obtain or retain the particular advantage, and
- was successful in obtaining or retaining the advantages sought.

### For a corporation

Under Division 12 of the Criminal Code, corporations can be liable for Commonwealth offences. This means that a corporation can be found guilty of foreign bribery as a result of the actions of its employees and agents. This can occur where:

- the corporation's top-level management or board of directors intentionally, knowingly or recklessly committed the foreign bribery offence
- the corporation's top-level management or board of directors expressly, tacitly or impliedly authorised, or permitted the commission of, the foreign bribery offence by an agent of the corporation
- an agent of the corporation offered a bribe and it is shown that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to, the commission of the foreign bribery offence

- an agent of the corporation offered a bribe and it is shown that the corporation failed to create and maintain a corporate culture that required compliance with the laws against bribing foreign public officials.

The offence above is separate from, and in addition to, the ‘failure to prevent’ offence contained in section 70.5A of the Criminal Code. The ‘failure to prevent’ offence in section 70.5A of the Code applies to a body corporate that is:

- a constitutional corporation (a financial or trading corporation formed in Australia or a foreign corporation)
- incorporated in a Territory, or
- taken to be registered in a Territory under section 119A of the *Corporations Act 2001* (Cth) (the Corporations Act).

A corporation may still be convicted of the ‘failure to prevent’ offence even if the associate has not been convicted of an offence under section 70.2 of the Criminal Code.

## Associate

Section 70.1 of the Criminal Code defines ‘associate’. A person is an ‘associate’ if the first-mentioned person:

- is an officer, employee, agent or contractor of the other person
- is a subsidiary (within the meaning of the Corporations Act 2001) of the other person
- is controlled (within the meaning of the Corporations Act 2001) by the other person, or
- otherwise performs services for or on behalf of the other person.

## Foreign public officials

Section 70.1 of the Criminal Code defines ‘foreign public official’. The definition is broad and includes:

- an individual who performs official duties under a foreign law
- an employee of a foreign public enterprise
- an employee or official of a public international organisation
- an employee or official of a foreign government
- an authorised intermediary of a public official (or a person who represents themselves to be so)
- a member of the executive, legislature or judiciary of a foreign country, including heads of state, ministers and their staff
- an individual holding an official post as a result of a local custom
- an individual standing or nominated as a candidate to be a foreign public official
- an individual providing a public service as defined in the foreign country’s domestic law.

## Jurisdictional reach

Australia's foreign bribery laws have extra-territorial effect and apply to conduct not only occurring in Australia, but outside Australia where the offence is committed by an Australian citizen or resident, or by an Australian corporation (incorporated by or under a law of the Commonwealth or of a state or territory).

The corporate 'failure to prevent' offence will therefore apply to Australian corporations for conduct:

- committed inside Australia by an associate (whether or not the associate is an Australian individual or other person) that constitutes an offence against 70.2 of the Criminal Code, or
- committed outside Australia by an associate (whether or not the associate is an Australian individual or other person) that would constitute an offence against 70.2 of the Criminal Code if it had been engaged in in Australia.

The corporate 'failure to prevent' offence will apply to foreign corporations for conduct:

- committed inside Australia by an associate (whether or not the associate is an Australian individual or other person) that constitutes an offence against 70.2 of the Criminal Code.

## Penalties

The penalties for foreign bribery offences are found in section 70.2 of the Criminal Code. For an individual, the penalty is imprisonment for a maximum of 10 years, a maximum fine of 10,000 penalty units, or both. For a corporation, the maximum penalty is whichever is greater of the following:

- 100,000 penalty units
- if the value of the benefit can be determined – three times the value of the benefit obtained, or
- if the value of the benefit cannot be determined – 10% of the company's annual turnover.

Profits obtained through foreign bribery can be seized and forfeited as proceeds of crime under the *Proceeds of Crime Act 2002* (Cth).

## Defences

Under Australian law, there are two offence-specific defences available in relation to the foreign bribery offence at section 70.2 of the Criminal Code:

- conduct lawful in foreign public official's country (Section 70.3 of the Criminal Code), and
- facilitation payments (Section 70.4 of the Criminal Code).

There is one offence-specific defence available in relation to the corporate 'failure to prevent' offence at section 70.5A of the Criminal Code:

- adequate procedures (Subsection 70.5A(5) of the Criminal Code).

Other standard criminal law defences in Chapter 2 of the Criminal Code, including duress, may also apply as a defence to the foreign bribery offence. Ignorance of the law is not a defence.

## Conduct lawful in foreign public official's country

The defence applies where a written law in force in the foreign public official's country permits or requires the benefit to be given. For example, the defence would be available to a person who provides payment to a foreign border official in exchange for a service whereby that payment is required under the written law in force in that foreign official's country.

This defence does not apply in relation to local customs that are not evidenced by a written law.

This defence is appropriate as the defendant would be in a better position to adduce evidence of the written foreign law he or she relied on when offering or providing the benefit. The defendant could readily provide evidence of the existence of the foreign law and their reliance on it to support their case.

## Facilitation payments

While permissible under Australian law, such payments are often illegal under the laws of foreign countries. Payments of this nature can also represent a serious business risk by exposing companies to bribe requests.

The facilitation payment defence is available where:

- the value of the benefit is of minor value
- the relevant conduct was 'for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature'
- the person engaging in the conduct made a record of the payment as soon as practicable afterwards.

A routine government action does not include any decision to award or continue business or any decision related to the terms of new or existing businesses. If a payment is to qualify as a legitimate facilitation payment, detailed records must be kept.

## Adequate procedures

The defence of adequate procedures applies in response to the corporate offence of failing to prevent foreign bribery under section 70.5A of the Criminal Code.

Corporations that have adequate procedures in place designed to prevent its 'associates' from committing foreign bribery have this defence available to them.

What constitutes 'adequate procedures' would be determined by the courts on a case-by-case basis. It is envisaged that this concept would be scalable – its requirements would depend on the circumstances, including the nature of the corporation concerned and the relevant sector and geographical sectors in which it operates.

The defendant (in this case, a corporation) bears the legal burden for this defence. This creates a strong, positive incentive for corporations to adopt measures to prevent foreign bribery. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities.

# Appendix B: Self-reporting by corporations

In addition to establishing adequate procedures, if a corporation has identified an actual or suspected instance of foreign bribery, it should consider self-reporting the incident to the Australian Federal Police (AFP). The AFP and the Commonwealth Director of Public Prosecutions (CDPP) Self-Reporting Best Practice Guidelines (Self-Reporting Guidelines) explain the principles and processes that apply where a corporation self-reports a suspected foreign bribery offence. The Self-Reporting Guidelines operates within the framework of the Prosecution Policy of the Commonwealth (the Prosecution Policy). More information about self-reporting can be found on the AFP's website.

Consistent with the Self-Reporting Guidelines, a corporation may choose to self-report for many reasons, including to:

- proactively identify and address wrongdoing within the corporation
- comply with director's duties to act in the best interests of the corporation
- limit corporate criminal liability
- minimise reputational damage
- demonstrate a cooperative intent
- maximise the sentencing discount that will be available to the corporation in any relevant prosecution of the corporation
- be a good corporate citizen.

Although self-reporting is not needed for a corporation to make use of the 'adequate procedures' defence, a decision to self-report and cooperate with investigative and enforcement actions will be considered by the CDPP in determining whether a prosecution of a self-reporting corporation is in the public interest consistent with the Self-Reporting Guidelines and Prosecution Policy.

