Are your anti-bribery procedures adequate?

Guidance for SMEs

October 2021

Global Compact Network Australia

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Do you have bribery prevention measures in place?

It is important that all companies prevent bribery, particularly those with international operations

Now is the time for your business to review its approach to foreign bribery compliance. Preventing bribery and corruption is the right thing to do and bribery-related compliance risks are increasing.

As the global fight against corruption gains momentum, new and tougher regulations are emerging worldwide. This factsheet summarises your business's obligations under Australia's current and proposed laws prohibiting foreign bribery, and the compliance steps you should take to minimise foreign bribery risk.

Also see the Global Compact Network Australia's more comprehensive publication *Fighting Bribery in Business: A guide for risk, compliance and sustainability teams implementing adequate anti-bribery procedures* which will provide you with an in-depth look at what you can do to create or strengthen your anti-bribery policies and procedures.

Why you need to prevent foreign bribery

Bribery has an enormous cost

According to the World Economic Forum, corruption costs the global economy around US $3.6 trillion per year. The levels of perceived corruption in Australia are worsening and are estimated to have cost the domestic economy approximately AU **$72 billion** between 2012-2018.

A bribery incident can have devastating legal and commercial consequences for your business

Businesses can face significant direct legal penalties under Australian law if foreign bribery occurs in their operations. Almost all countries have laws prohibiting foreign bribery, so there could be legal consequences in multiple countries for both businesses and their directors.

A business may also face commercial consequences. There can be long-term reputational damage even if a business is not convicted or does not enter a guilty plea. Reputational damage may result in:

> Increased insurance costs;
> Difficulty obtaining finance;
> Loss of business partners;
> Strained relationships with community and government; and
> Difficulties recruiting and maintaining staff.

Foreign bribery enforcement activity is increasing

Australia is strengthening its laws prohibiting foreign bribery. This will make it significantly easier for enforcement authorities to investigate and prosecute foreign bribery by Australian businesses. While anti-bribery enforcement activities have largely focused on multinational companies to date, small and medium sized enterprises (SMEs) are exposed to bribery-related compliance risks too, particularly those with overseas operations.

Case study: Radiance International

In 2020 the director of Sydney-based company Radiance International Pty Ltd was sentenced to a jail term of two years and six months in connection with AU $100,000 worth of bribes paid to foreign officials in Nauru.

The company was delivering an Australian Government contract to develop accommodation in Nauru. Radiance International used its position to pay bribes to Nauruan officials relating to the trade of rock phosphate, a scarce natural resource. The benefits obtained by the company included obtaining phosphate at certain discounted prices and being able to export it to other locations.

This shows some of the risks SMEs may face and the kinds of penalties that bribery may attract.

Understanding foreign bribery laws and your business's obligations

Defining the offence

In essence, foreign bribery occurs where:

> Person A offers or gives a benefit to, or causes a benefit to be offered or given to Person B, and the benefit is not legitimately due to them; and
> Person A intends to improperly influence a foreign public official in order to get a business or personal advantage that is not legitimately due to them.

Be aware that the definitions are very broad.

> **Benefit** covers everything from making political campaign contributions, to providing gifts and entertainment, to providing business or employment opportunities to a public officials' relatives.
> **Business or personal advantage** covers things like securing endorsement for a proposed project or obtaining favourable terms in a transaction with government.
> **Foreign public official** encompasses any employee or contractor of a foreign government body.

Failing to prevent foreign bribery may soon become an offence

International best practice and proposed law reforms in Australia include the offence of failing to prevent bribery of a foreign official. This includes holding a business liable when their associates bribe a foreign official.

Associates include a range of people and businesses that an SME might deal with, including overseas consultants, intermediaries, subcontractors and suppliers. For example:

> Officers and employees;
> Subsidiaries;
> Another company over which the business exercises influence and control;
> Joint ventures; and
> Agents, contractors and any person or business that otherwise performs services for or on behalf of your business.

The proposed offence of failure to prevent foreign bribery is one of **strict liability**, meaning a business would be found guilty of the offence:

> Despite having no knowledge of the bribe; and
> Without intending for the bribe to occur or being reckless or negligent in the preventing the bribe from occurring.

However, a business would have a defence if it can show that it had **adequate procedures** in place to prevent foreign bribery.

Foreign bribery legal penalties

There can be **significant legal consequences** of foreign bribery incidents under Australian law. Businesses can be fined the greater of either:

> 100,000 penalty units (approximately AU $22 million);
> Three times the value of the benefit to the business; or
> 10 per cent of the business's annual turnover.

A foreign bribery incident can involve multiple criminal offences

Even if you are not the person who pays the bribe, if you are knowingly involved in bribery you may have criminal exposure to:

> **Money laundering offences** which prohibit individuals from dealing with money or property that might be used to bribe someone, or that has been obtained because of a bribe.
> **False accounting offences** which prohibit the intentional falsification of accounting records to disguise corrupt conduct.

Steps your business should take

To prevent bribery and mitigate associated risks, your business should implement appropriate compliance policies and processes. It is important to understand what constitutes adequate procedures to prevent foreign bribery.

Anticipating the failure to prevent bribery offence passing into law, the Attorney-General's Department has published **draft guidance** that provides the best indication yet of the Australian government's anti-bribery compliance expectations. The draft guidance gives practical directions and draws on international best practices. It recognises the different circumstances businesses face and does not prescribe a one-size-fits-all approach.

Following this guidance will provide your business with a basis for raising an **'adequate procedures'** defence, should a bribery incident occur despite the business's best efforts.

The overarching principles

Foreign bribery compliance systems should be developed with reference to two overarching principles.

1. **Proportionality:** This means that a business's foreign bribery compliance systems should be tailored to its circumstances and risk factors. For example, a small enterprise with operations in one foreign country has a different risk profile to an ASX20 company with operations across multiple continents and might reasonably choose to invest in more targeted compliance policies and procedures.
2. **Effectiveness:** This means that a business's foreign bribery policies and procedures need to be operationalised and embedded within the organisation. They should not just exist on paper, but be put into practice.

The key elements of effective systems

In addition to providing principled direction to businesses, the guidance identifies six key elements that comprise effective anti-bribery compliance systems. These are:

- **Management and senior employee commitment** to developing, implementing and promoting anti-bribery policies.
- Thorough and ongoing **risk assessments** to determine a business's bribery risk profile.
- Performing comprehensive **due diligence** when entering new business relationships and contexts.
- Effective and confidential **reporting and investigation mechanisms**.
- **Clear communication and training** on bribery prevention policies for all employees and associates.
- Regularly **monitor and review** anti-bribery policies and procedures, adjusting where appropriate.

What is required for each of these elements will vary depending on the size and nature of your business and its key risks. For example, a small business that operates exclusively in the retail sectors in Australia and New Zealand may face relatively low foreign bribery risk and adopt less stringent anti-bribery controls than a medium-sized business in the engineering, procurement, and construction sector that has complex supply chains and operations in Southeast Asia. By applying a proportionate response to foreign bribery risk, a business that operates a complex supply chain of contractors (associates) across continents, may invest more into communication and training on bribery prevention than a small Australian-based business that only employs staff directly.

Key risk factors for businesses with overseas operations

> **High-risk transactions** involving consultancy fees, facilitation payments, cooperation or service fees, excessive hospitality or gift giving;
> Working in a **country with a high-risk** of corruption (see Transparency International's **Corruption Perception Index**);
> Working in **industries** with historically increased risks of corruption issues, such as mining, construction or security; and
> Working with **high-risk third parties** such as government officials or consultants, particularly where those individuals seek excessive licencing, servicing or associated fees.

To understand more about risk factors and red flags, see the Bribery Prevention Network's resource: **I'm working in a country that is prone to bribery and corruption – what red flags does my team need to be aware of?**

Immediate actions

If your business has overseas operations and does not have anti-bribery compliance systems:

Consider developing an anti-bribery compliance system now in anticipation of law reforms.

First conduct a foreign bribery risk assessment to determinate your business's foreign bribery risk profile and identify the policies and procedures it requires to mitigate these risks.

If your business already has anti-bribery compliance systems:

Consider reviewing your compliance systems and adjusting them to respond to the guidance on adequate procedures.

For more information and resources on building a robust program, see the Bribery Prevention Network's resource: **What should I do if my organisation doesn't have an anti-bribery program?** This contains samples and step-by-step advice on establishing new policies, due diligence, training procedures and risk assessment tools.

The Ten Principles of the United Nations Global Compact

The Ten Principles of the United Nations Global Compact are derived from: the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

Human Rights

1: Businesses should support and respect the protection of internationally proclaimed human rights; and

2: Make sure that they are not complicit in human rights abuses.

Labour

3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

4: The elimination of all forms of forced and compulsory labour;

5: The effective abolition of child labour; and

6: The elimination of discrimination in respect of employment and occupation.

Environment

7: Businesses should support a precautionary approach to environmental challenges;

8: Undertake initiatives to promote greater environmental responsibility; and

9: Encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

10: Businesses should work against corruption in all its forms, including extortion and bribery.

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Australian Government
Department of Foreign Affairs and Trade

This publication has been funded by the Australian Government through the Department of Foreign Affairs and Trade.
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