



Australian Government  
Attorney-General's Department

## **CONSULTATION DRAFT:**

Draft guidance  
on the steps  
a body corporate  
can take to prevent  
an associate from  
bribing foreign  
public officials

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# Introduction

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1. The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (the Bill) enhances Australia's response to foreign bribery.

## *Amendments to the substantive foreign bribery offence*

2. The Bill proposes to achieve this by expanding the foreign bribery offence in section 70.2 of the Commonwealth *Criminal Code* and removing undue impediments to the successful investigation and prosecution of foreign bribery.

3. The Bill proposes to amend the previous foreign bribery offence by:

- a) extending the definition of 'foreign public official' to include a candidate for public office
- b) extending the offence to cover bribery to obtain a personal (i.e. non-business) advantage
- c) replacing the requirement that a benefit and business advantage must be 'not legitimately due' with the concept of 'improperly influencing' a foreign public official, and
- d) removing the requirement that the foreign public official must be influenced in the exercise of the official's duties.

4. The Bill does not propose to amend the penalties or defences for the foreign bribery offence.

## *New corporate offence of failure to prevent foreign bribery*

5. The Bill also proposes to introduce a new corporate offence of failing to prevent foreign bribery in new section 70.5A of the Criminal Code. This offence is modelled on section 7 of the *Bribery Act 2010* (UK). The offence applies where an associate of a corporation has committed bribery for the profit or gain of the corporation. The offence does not apply if the corporation is able to demonstrate that it had 'adequate procedures' in place to prevent the commission of foreign bribery by its associates.

6. The Bill proposes that the Attorney-General be required to publish guidance on the types of measures that are likely to constitute 'adequate procedures' (proposed section 70.5B of the Criminal Code). If passed, the amendments in the Bill would commence 6 months after the Royal Assent to the Act, to allow sufficient time for Government to publish finalised guidance and for corporations to implement these procedures.

7. This document contains, for public consultation, a draft version of this guidance (the Draft Guidance).

8. The Draft Guidance comprises three Parts:

**Part 1** sets out the foreign bribery offence and the new corporate offence of failing to prevent foreign bribery. It includes examples to illustrate how the foreign bribery offences operate.

**Part 2** sets out draft guidance on the types of measures a body corporate could implement and steps it could take to prevent an associate from bribing a foreign public official. This guidance is principles-based, rather than a checklist for compliance. It is designed to be of general application to corporations of all sizes and in all sectors.

**Part 3** provides examples to demonstrate how policies and procedures to prevent foreign bribery could be applied in practice.

9. We welcome industry and other views on the Draft Guidance. The Government will review feedback received through the consultation process on the proposed guidance before releasing a final version of the guidance. Such guidance will be finalised before the new foreign bribery offences are operative, if the Bill is passed by Parliament.



Australian Government  
Attorney-General's Department

**DRAFT**

**COMBATTING CORPORATE CRIME BILL 2019**

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

**DRAFT**

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# Part 1: Australia's foreign bribery laws

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1. This Part outlines Australia's foreign bribery laws:

**Section I** outlines the substantive foreign bribery offence

**Section II** provides examples of how the section 70.2 foreign bribery offence may apply, and

**Section III** outlines the new corporate offence of failing to prevent foreign bribery.

CONSULTATION DRAFT

## Section I: Australia's substantive foreign bribery offence

2. Bribing, or attempting to bribe, a foreign public official is a serious crime. 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.

*What are the elements of the foreign bribery offence?*

3. The offence of bribing a foreign public official is contained in section 70.2 of the Criminal Code. It has a number of elements which can be divided into steps. All of these elements must be present for the offence to apply.

4. 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

AND

- does so with the intention of improperly influencing a foreign public official in order to obtain or retain business or a business or personal advantage (whether or not for the first mentioned person).

5. The offence applies regardless of whether or not the person intended to influence a particular foreign public official.

6. The offence also applies regardless of whether the bribe obtained the advantages sought.

7. The offence can apply to conduct by corporations as well as individuals (see further discussion below).

*Where does this law apply?*

8. Australia's foreign bribery laws have extra-territorial effect and apply to conduct occurring:

- in Australia, and
- 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).

*What is a benefit?*

9. A benefit is any advantage. It is not limited to money or property. A benefit could include, but is not limited to, discounts, training and education, entertainment, meals and drinks or promises of future employment.

10. A benefit can be large or small, a one-off payment or a routine payment. It does not need to be provided or offered to the foreign public official (that is, it can be provided or offered to another person). It can also be provided or offered by an agent.

*Who is a foreign public official?*

11. The definition of a 'foreign public official' (section 70.1 of the Code) is very broad. It includes:

- a person who performs official duties under a foreign law
- an employee of a state-owned 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 him/herself to be so)
- a member of the executive, legislature or judiciary of a foreign country
- a person holding an official post as a result of a local custom
- a person standing or nominated as a candidate for public office.

*What does 'improper influence' mean?*

12. The determination as to whether influence is improper is a matter for the courts, and will be made on a case-by-case basis. Section 70.2A of the Criminal Code sets out relevant factors for the court's consideration, including whether the benefit was provided, or the offer or promise to provide the benefit was made, dishonestly.

13. For example, a payment to a foreign public official made through unofficial or undisclosed accounts, or a payment that is not properly recorded in a company's records, *could* indicate an intention to improperly influence a foreign public official.

14. The explanatory memorandum to the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, which proposes to introduce the 'improper influence' element of the offence, clarifies that dishonesty in this context would be determined according to the standards of ordinary people and whether the defendant must have realised his or her conduct was dishonest according to those standards. The explanatory memorandum makes it clear that dishonesty is not to be assessed by reference to the standards at the location of the foreign public official.

*What defences are available to the offence of bribing a foreign public official?*

15. There are two specific defences available for the foreign bribery offence:

1. The defence of local law



This defence applies where a written law expressly permits or requires the benefit to be given. This defence does not apply to local customs that are not supported by a written law.

2. The benefit constitutes a facilitation payment

This defence can apply where:

- the benefit is of a minor value
- the benefit was offered 'for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature', and
- the person 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 business.

**Note: The Australian Government strongly discourages Australian companies from making facilitation payments. While permissible under Australian law, such payments may be illegal under the laws of foreign countries. They can also represent a serious business risk by exposing companies to bribe requests.**

16. 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.

17. Ignorance of the law is not a defence.

*Can corporations be liable for bribery offences?*

18. 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 agents and employees. It is therefore important to create and maintain a corporate culture that requires compliance with the law.

19. Corporations can be liable for foreign bribery by employees and agents where:

- the company's board of directors, or a high managerial agent of the company, intentionally, knowingly or recklessly committed the foreign bribery offence
- the company's board of directors, or a high managerial agent of the company, expressly, tacitly or impliedly authorised, or permitted the commission of, the foreign bribery offence by an agent of the company
- an agent of the company offered a bribe and it is shown that a corporate culture existed within the company that directed, encouraged, tolerated or led to the commission of the foreign bribery offence, or
- an agent of the company offered a bribe and it is shown that the company failed to create and maintain a corporate culture that required compliance with the laws against bribing foreign public officials.

20. This means that a corporation could be found guilty of the substantive foreign bribery as a result of the actions of its agents and employees. This is separate from and in addition to the 'failing to prevent' offence discussed below at Section III. Corporations prosecuted under the substantive bribery offence would be unable to rely on the section 70.5A(5) defence of 'adequate procedures' discussed below at paragraphs 60-61.

*What are the penalties?*

21. The penalties for foreign bribery are considerable. They reflect the serious criminal nature of bribery and the detrimental effects it has on Australian trade and reputation, and international governance.

22. As at October 2019, for an individual, the maximum penalty is 10 years' imprisonment and/or a pecuniary penalty of up to \$2.1 million. For a company, the maximum penalty is whichever is the greater of the following:

- a. \$21 million
- b. three times the value of benefit obtained, or
- c. 10% of the company's annual turnover (if the value of the benefit cannot be determined).

23. Profits obtained through bribery can be seized and forfeited as proceeds of crime.

## Section II: Examples of the substantive foreign bribery offence

24. The examples in this section outline how the substantive foreign bribery offence (which applies to both individuals and corporations) may apply.

25. The hypothetical examples in this section are intended to be illustrative only and are not provided as legal advice. Whether an individual or corporation has committed the substantive foreign bribery offence is a matter for the courts (including juries and judges) to determine.

### *Example 1: Typical two-party foreign bribery scenario*

#### *A) Cash payment to influence public procurement decisions*

26. An Australian businessperson, Anna, offers a cash payment valued at \$100,000 to a foreign public official, Dan. Dan is influential in making decisions around public procurement in his country.

27. Anna offered the cash payment to influence Dan to provide an advantage in the form of favourable treatment in one or more of the following business contexts:

- a. winning a contract
- b. influencing a procurement process
- c. circumventing the rules for importation of products
- d. gaining access to non-public bid tender information
- e. evading taxes or penalties
- f. influencing the adjudication of lawsuits or enforcement actions
- g. obtaining exceptions to regulations, or
- h. avoiding contract termination.

28. Anna provided the cash in a concealed manner, under the cover of a falsified contract for consultancy services. Anna incorrectly recorded the payment in her company's books and records as a 'fee for consultancy services'. There was no legal obligation to provide this payment to Dan.

29. In this example, it is likely that Anna would have committed a foreign bribery offence.

30. It is important to note that an offence could still be made out even if Anna offered, but did not actually provide the cash payment, and even if Dan did not provide the advantage Anna sought.

31. There is no minimum value threshold for a cash payment or any other benefit to be considered a bribe. However, a very low value payment, for example a \$30 meal at a fast

food restaurant, would be less likely to suggest intention to exert improper influence than a substantial cash payment or extravagant hospitality.

*B) Intangible benefit may still amount to improper influence*

32. Other types of benefit, including a non-monetary or intangible benefit such as travel, entertainment, food and alcohol, holidays and education expenses, could still trigger Anna's liability. Improper influence could be made out if for example, Anna provided:

- an overseas trip for Dan that consisted primarily of touring activities and included visits to wineries, dinners, entertainment and spending money
- a lavish gift, such as a vehicle, to Dan or Dan's partner
- an 'open' scholarship to Dan's child.

33. Depending on the circumstances, minor hospitality or entertainment benefits may be considered reasonable and directed at properly establishing a business relationship or maintaining one, and would be unlikely to meet the threshold of improperly influencing a foreign public official to obtain business or provide a business or personal advantage.

34. Refer to Examples 6 and 7 for examples of hospitality or entertainment benefits which would be unlikely to trigger the foreign bribery offence.

*Example 2: Payment through an intermediary*

35. An Australian businessperson, Franco, wants to enter into a contract with the local provincial authority in a foreign country. He instructs his accountant in that country, Claire, to offer the provincial planning officer a payment in a bid to have his tender proposal considered favourably.

36. Despite not offering the bribe himself, Franco could be prosecuted in Australia for foreign bribery.

37. If Claire is an Australian citizen or resident of Australia, she may also be prosecuted in Australia.

*Example 3: Payment to a third party*

38. An Australian businessperson in a foreign country, Emma, has entered into a contract with the local provincial authority. Certain legislative obligations apply to the contract. In an attempt to have those legislative obligations waived, Emma provides expensive gifts to the provincial planning officer's partner.

39. Despite the activity having taken place in the foreign country, and the bribe not having been paid directly to the government official, Emma could be prosecuted in Australia for foreign bribery. This applies regardless of whether the legislative obligations were in fact waived.

*Example 4: Indirect benefit to a foreign public official*

40. An Australian businessperson, Tom, wants to win a tender in a foreign country. A foreign official in that country, Graeme, arranges for Tom to purchase services in connection with the tender at an inflated price. In return, Graeme promises to award the government contract to Tom.

41. Tom's purchasing of services from Graeme at an inflated price could indicate Tom's intention to improperly influence Graeme. Tom could be prosecuted in Australia for the offence of bribing a foreign public official.

*Example 5: Facilitation payment to secure a routine government action*

42. An Australian business (AB) is seeking to establish new office premises in a foreign country. The state-owned energy company in that country has failed to connect AB's business premises to the local power grid. AB has obtained the necessary permits to conduct its business in the country and filed the appropriate documentation and associated fees for energy connection. AB is not aware of any legitimate reason for the energy company to refuse to provide the service.

43. AB has approached a local representative of the energy company, Julia, who is responsible for connecting the power supply, to discuss the matter. Julia indicates that there is an additional fee for the connection that can only be paid in cash. AB questions the legal basis for the payment and asks to speak to a more senior official of the energy company. Julia refuses these demands and adds that a receipt will not be issued for the payment.

44. AB instructs its local agent to make a one-off cash payment of AUD\$50 to Julia. The payment is fully documented in AB's business records and full details are passed on to the company's senior management. Senior management considers reporting the issue to the local Australian embassy or consulate to intervene with local authorities.

45. The facilitation payment defence may apply to this particular payment. The defence applies if the value of the benefit to the foreign public official was of a minor nature, the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature and the payment is properly recorded. Routine government action has a narrow definition (see subsection 70.4(2) Criminal Code) and does not include any decision to award or continue business, or any decision related to the terms of new or existing business. The records required to be kept are detailed in subsection 70.4(3) of the Criminal Code.

**Corporations are discouraged from making facilitation payments**

*NOTE: Individuals and companies must be aware that, even if a benefit constitutes a legitimate facilitation payment under Australian law, people making these payments may be liable for bribery under the laws that govern the foreign public official.*

*The Australian Government strongly recommends that individuals and companies make every effort to resist making facilitation payments. A growing body of research and the experiences of a growing number of major companies demonstrate that by refusing to make payments, businesses can successfully encourage foreign public officials not to demand facilitation payments in the first place.*

*The Australian Government acknowledges that this can be a difficult position to take, with short-term risks for business, and that this difficulty is increased for smaller businesses that may feel they*

*lack the bargaining power of major companies. However, the Australian Government is committed to global efforts to reduce corruption and to supporting Australian businesses seeking to eliminate payments to officials.*

*Example 6: Distribution of promotional material at a trade show*

46. A large engineering company, with global operations in more than 30 countries (including a number that have a high risk of corruption), has officers and employees who come into regular contact with foreign officials. At a trade show, the company has a booth at which it offers free pens, hats, t-shirts, and other similar promotional items with the company's logo. The company also serves free coffee, other beverages and snacks at the booth.

47. These are legitimate expenditures made for the purpose of promoting the company. On its face, there is nothing to suggest intent to improperly influence the officials who attend the trade show. The company could also consider inviting a group of foreign public officials to a meal and drinks, provided the expense, in all of the relevant circumstances, remained moderate.

*Example 7: Presentation of gifts*

48. Executives of a small company are meeting with executives of a foreign state-owned enterprise with which the company has an ongoing business relationship. The company executive presents a moderately-priced gift to the general manager of the state-owned enterprise as a token of esteem.

49. This would be appropriate, provided the gift is made openly and transparently, properly recorded in a company's books and records and given only where appropriate under local law, customary in the place in which it is given and reasonable for the occasion.

### Section III: Corporate offence of failing to prevent foreign bribery

50. Due to the complex corporate structures of international corporations involved in foreign bribery, it can be challenging to establish criminal liability for corporations under the existing corporate criminal liability provisions in the Criminal Code.

51. The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 proposes a new corporate offence of failing to prevent foreign bribery. This offence would automatically trigger the liability of a corporation where an associate of the corporation commits a foreign bribery offence, under section 70.2 of the Criminal Code, for the profit or gain of the corporation.

52. However, the offence would not apply if the corporation has adequate procedures in place designed to prevent its associates from committing foreign bribery (guidance on the types of measures that may constitute ‘adequate procedures’ is set out in Part 2 of this document).

53. A similar offence has been successfully implemented in the United Kingdom and has reportedly had a significant positive influence on the adoption of effective corporate compliance programs to prevent bribery.

*What is a body corporate?*

54. The offence would apply to a ‘body corporate’ that is a constitutional corporation, incorporated in a Territory or taken to be registered in a Territory under the *Corporations Act 2001* (Cth).

55. Generally, a constitutional corporation is a financial or trading corporation formed in Australia or a foreign corporation. A business is usually a constitutional corporation if it has ‘Pty Ltd’ or ‘Ltd’ within its business name.

*Who is an associate?*

56. An associate is defined as an officer, employee, agent, contractor, subsidiary or controlled entity<sup>1</sup> of the body corporate or a person who otherwise performs services for the body corporate. This person can be an individual, or an incorporated or unincorporated body. This definition includes a subsidiary that is incorporated outside of Australia.

57. This list extends to a broad range of individuals and entities. In some circumstances, this will include contractors or agents over whom the corporation may have limited control.

58. However, under the offence of failing to prevent foreign bribery, a corporation’s liability for the actions of its associates would be limited to circumstances in which the associate committed foreign bribery for the profit or gain of the corporation.

59. Corporations are expected to mitigate the risk of bribery by its associates, including non-controlled associates. Guidance on this point is provided in Part 2 of this document.

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<sup>1</sup> Controlling an entity means the capacity to determine the outcome of its decisions.

*What defences are available?*

60. The offence would not apply if the body corporate could prove that it had in place adequate procedures designed to prevent an associate from committing foreign bribery. The body corporate would bear a legal burden in relation to this matter.<sup>2</sup>

61. What constitutes 'adequate procedures' would be determined by the courts on a case-by-case basis. The concept is intended to be scalable, depending on the relevant circumstances, including the size and nature of the body corporate.

*What are the penalties?*

62. The penalty for failing to prevent bribery is proposed to be consistent with the penalty for a corporation that commits a foreign bribery offence under section 70.2 of the Criminal Code.

63. The maximum penalty would be whichever is greater of the following:

- a. \$21 million
- b. three times the value of benefit obtained, or
- c. 10% of the company's annual turnover (if the value of the benefit cannot be determined).

64. The corporate offence is proposed to be separate from and in addition to the substantive foreign bribery offence under section 70.2 of the Criminal Code. Companies should be aware that the 'adequate procedures' defence will not apply if there is evidence that their high managerial agents engaged in bribery and the primary offence (under section 70.2) is substantiated.

*How can companies put in place adequate procedures to prevent associates from paying bribes overseas?*

65. Companies that have a foreign bribery risk should have clear policies, procedures and reporting mechanisms around foreign bribery. The below guidance sets out the types of measures that are likely to constitute 'adequate procedures' to prevent an associate from bribing foreign public officials. This guidance is not prescriptive and adds to a range of relevant guidance on this topic such as guidance published by the OECD, UNODC, Austrade and Transparency International.

66. Companies may also seek expert advice, including from professional services firms, specialist risk consultancies or law firms, on establishing or enhancing these procedures.

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<sup>2</sup> As the legal burden is on the body corporate, the corporation is required to prove the existence of adequate procedures, rather than to point to evidence that suggests a reasonable possibility that such a situation exists (as would be the case if the 'evidential burden' defence was prescribed instead). Foreign bribery may occur in instances of recklessness or wilful blindness by senior management to activities occurring within their corporations and a lack of readily-available written evidence to establish intention. Placing a legal burden on corporations to prove the existence of adequate procedures enables prosecuting authorities to deal more appropriately with corporations where senior management turn a blind eye to bribery occurring in their businesses.



## Part 2: Guidance on preventing foreign bribery

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67. This part sets out guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials under section 70.5B of the Criminal Code.

68. This guidance is principles-based, aimed at helping corporations understand the types of steps that can be taken to prevent bribery of a foreign public official. This guidance is designed to be of general application to corporations of all sizes and in all sectors. It comprises suggested anti-bribery policies and procedures that should be read against the background of two overarching guiding principles: proportionality and effectiveness.

69. Companies of all sizes should put in place effective and proportionate procedures to prevent bribery from occurring within their business. However, considering corporations operate in a wide variety of circumstances, for example as a consequence of their size, type or industry, the application of steps to prevent foreign bribery will differ substantially from corporation to corporation.

70. Departure from the suggested procedures in this guidance does not of itself suggest that a corporation does not have adequate procedures in place. Not all of the policies and procedures suggested in this guidance are necessarily applicable to the circumstances of each corporation.

71. While the guidance provides for flexibility in application, it aims for effective outcomes regardless of circumstances. The thorough implementation of robust and effective steps to prevent foreign bribery should result in a strong and genuine culture of integrity. For instance, a high degree of awareness of the corporation's anti-bribery policy among all relevant employees and officers, as well as demonstrated practical implementation of the policy, would help to indicate such a culture.

72. In line with the preference Australian industry has expressed through various consultation fora, the guidance is broadly consistent with that issued by the United Kingdom Ministry of Justice under section 9 of the *Bribery Act 2010* (UK).<sup>3</sup> This is intended to enable Australian companies that have already framed their anti-bribery policies on international guidelines to easily incorporate additional policies relevant to the Australian context.

73. In preparing this guidance, the Government also had regard to existing guidance published by the Australian Trade Commission,<sup>4</sup> United States Department of Justice,<sup>5</sup>

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<sup>3</sup> United Kingdom Ministry of Justice, 2012, "Bribery Act 2010: Guidance to help commercial organisations prevent bribery" <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181762/bribery-act-2010-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf)>.

<sup>4</sup> Australian Trade Commission (Austrade), undated, "Anti-bribery and corruption (ABC): A guide for Australians doing business offshore" <<https://www.austrade.gov.au/Australian/Export/Guide-to-exporting/Legal-issues/Bribery-of-foreign-public-officials>>.

International Organization for Standardization,<sup>6</sup> OECD, UNODC and World Bank<sup>7</sup> and Transparency International UK.<sup>8</sup>

74. This part comprises four sections to help corporations understand the types of policies and procedures that can be implemented to create an effective compliance regime and prevent foreign bribery by their associates.

**Section I** discusses the principle of proportionality

**Section II** discusses the principle of effectiveness

**Section III** sets out elements of bribery prevention policies, and

**Section IV** sets out recommended procedures for implementing a compliance framework. This section focuses on the following procedures:

- a. Risk assessment
- b. Management dedication
- c. Due diligence
- d. Communication and training
- e. Confidential reporting and investigation, and
- f. Monitoring and review.

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<sup>5</sup> United States Department of Justice and Securities and Exchange Commission, 2012, “A resource guide to the US Foreign Corruption Practices Act” <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>>; United States Department of Justice, 2017, “Evaluation of corporate compliance programs” <<https://www.justice.gov/criminal-fraud/page/file/937501/download>>.

<sup>6</sup> International Standards Organization (ISO), 2016, “ISO 37001: Anti-bribery management systems—requirements with guidance for use” <<https://www.iso.org/standard/65034.html>>

<sup>7</sup> Organisation for Economic Development and Co-operation (OECD), United Nations Office on Drugs and Crime (UNODC), World Bank Group (World Bank), 2013, “Anti-corruption ethics and compliance handbook for business” <<http://www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm>>.

<sup>8</sup> Transparency International UK, June 2014, “Countering small bribes” <[http://www.transparency.org.uk/publications/countering-small-bribes/#.Wsbi\\_RN97RY](http://www.transparency.org.uk/publications/countering-small-bribes/#.Wsbi_RN97RY)>; undated, “Doing business without bribery” <<http://doingbusinesswithoutbribery.com>>; July 2010, “The 2010 UK Bribery Act adequate procedures: guidance on good practice procedures for corporate anti-bribery programmes” <<http://www.transparency.org.uk/publications/adequate-procedures-guidance-to-the-uk-bribery-act-2010/#.WsbnrBN97RY>>.

## Section I: Principle of proportionality to risk, size and nature of activities

75. The policies and procedures a corporation implements to prevent foreign bribery should be proportionate to the corporation's circumstances, including its foreign bribery risks, its size and the nature of its activities.

76. Each corporation should make an assessment of the nature and extent of the foreign bribery risks it faces. The assessment may form part of a wider, general risk assessment or have a specific bribery focus. Management should oversee this assessment and suitable personnel should conduct it. 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 IV of this Part.

77. Bribery mitigation policies and procedures should be proportionate to the bribery risk identified through the risk assessment. For example, a corporation with limited or no exposure, directly or indirectly, to foreign officials would be expected to adopt less extensive bribery mitigation measures than corporations faced with high risk, such as business conducted in countries perceived to have high corruption levels or involving high-value dealings requiring approvals or licences from foreign officials.

78. Corporations should develop and implement anti-bribery policies and procedures suitable to the size and structure of the corporation and to the nature and scale of its activities. The guidance outlined below—anti-bribery policies (Section III) and procedures for demonstrating management is dedicated to preventing foreign bribery (Section IV)—should be read against the background of the principle of proportionality. This means the specific policies and procedures a corporation adopts will need to address its particular risk profile and circumstances.

79. Generally, small corporations would not necessarily need to implement measures as extensive as those expected of large corporations. In a small corporation, senior management may be highly engaged with the company's compliance framework by working closely with the compliance function on a routine basis or by carrying out the compliance function. By comparison, in a large corporation—with multiple business units, tiered management structures and many reporting channels—more complex processes are required to connect the compliance function with senior management and the board of directors. Resourcing for anti-bribery compliance should also reflect the scale of the organisation's business and the need to identify and mitigate relevant risks.

80. Small and large corporations will likely take different approaches to achieving top-level management commitment to the corporation's anti-bribery compliance measures. Top-level managers may need to be personally involved in developing and implementing these measures in small companies. A proportionate approach for a large multinational corporation could be for the board of directors and top-level management to set bribery prevention policies and to task lower-level management to design, implement and monitor anti-bribery measures on a day-to-day basis. However, the board would still be responsible for seeking regular briefing on the effectiveness of the measures and for conducting regular compliance and/or audit reviews.

## Section II: Principle of effectiveness

81. The steps a body corporate takes to prevent an associate from bribing foreign public officials must result, in practice, in an effective anti-bribery compliance program. Robust written policies that are clear and accessible are a key element of corporate compliance programs, but are of no value unless operationalised effectively.

82. Five main indicators of an effectively implemented compliance program to prevent foreign bribery are:

1. a robust culture of integrity within the corporation
2. demonstrated pro-compliance conduct by top level management and the board of directors (where applicable)
3. a strong anti-bribery compliance function
4. effective risk assessment and due diligence procedures, and
5. careful and proper use of third parties.

83. Key factors that demonstrate these five indicators are set out below.

1. A **robust culture of integrity** within a corporation may be demonstrated by factors including:
  - a. a high degree of awareness and understanding of the corporation's anti-bribery policy and procedures among relevant employees, particularly those in high-risk control functions
  - b. the corporation conducting regular and thorough assessments of whether anti-bribery policies and procedures are effective, and updating these regularly
  - c. senior leaders being aware of and actively examining foreign bribery risks
  - d. words and actions of leaders that discourage bribery and encourage compliance
  - e. use of mechanisms to properly monitor senior leadership's behaviour, including through the sufficient resourcing and independence of the compliance function
  - f. senior leaders and middle management's specific actions that demonstrate their commitment to compliance
  - g. senior management dealing appropriately with concerns or objections raised by the compliance function, for example by stopping or modifying specific transactions or deals
  - h. those responsible for anti-bribery policies and procedures being held accountable for misconduct that occurs under their supervision and being held accountable for supervisory oversight

- i. appropriate disciplinary action being taken against employees involved in foreign bribery, such as termination
  - j. appropriate action being taken against other associates, including contractors, for breaching contractual provisions relating to bribery prevention
  - k. those who issue payments or review approvals being aware of, and applying in practice, the corporation's anti-bribery policies and procedures, and
  - l. proper and comprehensive assessment and investigation of allegations of foreign bribery, that are conducted by suitably qualified personnel and are fully documented.
2. **Pro-compliance conduct by top level management and the board of directors** (where applicable) may be demonstrated by factors including that group:
- a. engaging and utilising compliance expertise
  - b. holding meetings with and receiving briefings from the corporation's compliance function
  - c. examining foreign bribery risks and engaging with options for dealing with those risks
  - d. receiving reports of internal audit findings regarding foreign bribery risks and occurrences and engaging with those findings
  - e. ensuring the compliance function is adequately resourced to perform its functions and treating seriously and positively, requests by the compliance or relevant control function for resources for measures to prevent foreign bribery
3. A **strong anti-bribery compliance function or other control function** (whether audit, legal or financial) may be demonstrated by factors including if it:
- a. operates autonomously, including by identifying and raising concerns about foreign bribery risk and plays a role in strategic and operational decisions
  - b. is adequately resourced to perform its functions
  - c. is involved in training other employees
  - d. reports directly and regularly to senior management and, where applicable, the board of directors
  - e. is subject to regular performance reviews
  - f. has full and timely access to information, including confidential information, about allegations of foreign bribery.

In the event that the compliance function has been outsourced:

- a. there should be a clear business rationale for doing so

- b. there should be strong and effective oversight of the external provider
  - c. the provider should have adequate access to company information
  - d. the effectiveness of the outsourced process should be assessed regularly.
4. **Effective risk assessment and due diligence procedures** may be demonstrated by factors including where the procedures:
- a. identify, analyse, prioritise and address foreign bribery risks
  - b. are endorsed and overseen by senior management
  - c. receive appropriate resourcing proportionate to the scale of business
  - d. are applied to the process of engaging third parties and in mergers and acquisitions, among other relevant situations.
5. **Careful and proper use of third parties** in dealing with foreign officials, such as agents, may be demonstrated by factors including if their use is:
- a. underlined by a clear business rationale
  - b. subject to appropriate oversight by top level management
  - c. subject to clear contractual terms that describe the services to be performed
  - d. subject to appropriate payment terms and mechanisms to ensure the contractual work is performed
  - e. subject to actual oversight of records and underlying documents
  - f. compensated by consideration proportionate to the value of the services provided.

84. The above factors are not exhaustive, prescriptive or determinative. Implementation of these factors may depend on the circumstances of the body corporate (see Section I on the principle of proportionality). For example, it may not be necessary for a smaller corporation to have in place a compliance function of the same complexity and size as that of a larger corporation, but the function must still be effective in practice. It is common for the compliance function to be part of a wider set of an individual's responsibilities in a smaller corporation, which is entirely reasonable and acceptable provided the person's work delivers an effective compliance function.

### Section III: Elements of bribery prevention policies

85. A corporation's bribery prevention policy should clearly articulate its position on preventing foreign bribery. It should be able to be easily understood by all of the corporation's associates, including management, the board of directors (where applicable), employees and other associated persons. This policy should articulate the corruption risks the corporation faces, the activities and processes designed to mitigate these risks and the measures designed to prevent bribery by associates of the corporation. It should be part of induction programs to ensure all incoming associates are made aware of the corporation's bribery prevention policy.

86. While specific elements of the policy will need to address the particular risk profile and circumstances of the corporation, there are some fundamental elements for which inclusion in any corporation's bribery prevention policy is generally considered necessary.<sup>9</sup>

87. Fundamental elements of bribery prevention policies include:

- a. risk assessment procedures
- b. board and managerial-level dedication to foreign bribery prevention
- c. the corporation's approach to mitigation of its bribery risks, including due diligence
- d. the corporation's implementation strategy for its bribery prevention policies, including communication and training,
- e. reporting obligations, protections and secure channels for whistleblower reporting, and
- f. monitoring and review of compliance programs.

88. There are additional elements that corporations could address in their bribery prevention policies, depending on the particular risks they face. These elements include, but are not limited to:

- a. mitigation of risks arising from the conduct of agents and intermediaries
- b. the corporation's approach to the provision of gifts, hospitality, promotional expenditure, political donations, charitable donations and other benefits provided under corporate social responsibility programs
- c. the corporation's approach to the provision of facilitation payments
- d. the involvement of top-level management and the board of directors in bribery prevention

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<sup>9</sup> The elements listed in this part are primarily based on the equivalent guidance issued by the United Kingdom. See United Kingdom Ministry of Justice, 2011, "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)", p.22, available at <https://www.gov.uk/government/publications/bribery-act-2010-guidance>

- e. responses to bribery solicitation and extortion
- f. due diligence, particularly of associates and prospective associates, including agents
- g. employment arrangements and business relationships, which should include appropriate due diligence procedures to mitigate risks of bribery
- h. financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure
- i. transparency of transactions and disclosure of information to the compliance function, senior management and the board of directors
- j. the processes for identifying, avoiding and managing conflicts of interests, and
- k. decision making, including delegation of authority and separation of functions

89. Bribery prevention policies should be clear, practical and accessible. They should be designed to ensure effective application across all relevant functions of the corporation. They may be recorded in a standalone document or form part of other related policies, for example on recruitment or on public procurement.

90. A corporation should also adopt a policy of requiring other entities over which it has control, such as agents, subsidiaries and contractors, to implement adequate anti-bribery measures, for example as a condition of engagement. These measures may be specific to the relevant entity or analogous to the corporation's own measures. This requirement need only extend to mitigating the specific bribery risks identified in that particular entity's risk assessment.

91. Risk assessment or due diligence procedures may also identify associates not controlled by the corporation that are in a position to commit foreign bribery for the profit or gain of the corporation. Suggested procedures for mitigating this risk are discussed under due diligence (Section IV).



## Section IV: Procedures

92. This Section outlines suggested procedures that corporations may adopt to implement the key elements of bribery prevention policy outlined in Section III, such as:

- a. risk assessment
- b. management dedication
- c. due diligence
- d. communication and training
- e. confidential whistleblowing reporting mechanisms, and
- f. monitoring and review of compliance programs.

### *Risk assessment*

93. A corporation that faces significant risk will need more extensive anti-bribery policies and procedures than a corporation that faces lower risk. This applies to all organisations regardless of their size.

94. However, in general, small firms may need less extensive policies and implementation mechanisms than large organisations that face the same foreign bribery risk because larger organisations will need to implement the policies on larger scale (and usually have more complex reporting and managerial structures).

95. The Australian Trade Commission (Austrade) has recommended a risk-based approach to developing an anti-bribery and corruption compliance program, involving three key steps:

- a. conduct a corruption risk assessment
- b. rate the risks, and
- c. document the process and findings.<sup>10</sup>

96. Periodic re-evaluation of risk is necessary as circumstances change, such as entering a new market or following turnover of relevant personnel.

97. When conducting a corruption risk assessment, corporations should be aware of the following commonly encountered external risks, including whether by the corporation or its associates:

- a. transact with foreign public officials or foreign government entities, for example as part of tenders or in seeking necessary approvals

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<sup>10</sup> Austrade, undated, 'Anti-bribery & corruption: a guide for Australians doing business offshore', available at <<https://www.austrade.gov.au/Australian/Export/Guide-to-exporting/Legal-issues/Bribery-of-foreign-public-officials>>, see pages 5-9.

- b. conducts business in jurisdictions or sectors where the level of corruption is perceived to be high
- c. is involved in high-risk transactions, such as charitable or political donations, licences and permits, and those relating to public procurement
- d. is involved in high-risk projects, such as those of high value, those involving multiple contractors or intermediaries, those that do not reflect market prices, or those that do not have a clear legitimate objective
- e. engages third party agents or intermediaries who represent the corporation in commercial negotiations with a foreign public official for the award of business or another advantage
- f. has joint venture partners
- g. has relationships with politically exposed persons (for example, persons entrusted with a prominent public function)
- h. makes payments in relation to business transactions that are not properly accounted for or documented
- i. engages with foreign public officials in a risky manner, for example by providing extravagant or expensive meals, accommodation or activities.

98. Third party agents are a common means of gaining access to foreign markets. However the use of such agents can pose risks, unless appropriate due diligence is taken. Austrade cautions that common red flags when using third party agents or intermediaries include:

- a. vaguely described services and deliverables
- b. lack of experience in the sector
- c. transacting with or through a shell company
- d. a transaction made at the request of a foreign public official
- e. large commissions (that may be used as 'slush funds' to bribe officials)
- f. high expenses
- g. upfront fees
- h. urgent payments
- i. cash payments
- j. payments in multiple small amounts, and
- k. payments to personal accounts, offshore accounts or trusts.

99. Bribery risk factors internal to the corporation should also be examined in the risk assessment process. These factors include poor employee awareness and training, rewards for excessive risk taking, unclear anti-bribery policies and procedures (including around provision of gifts, hospitality, promotional expenditure and political or charitable donations) and inadequate financial controls.

#### *Management dedication*

100. A corporation's management personnel should play a critical role in developing, implementing and promoting its anti-bribery policies. The responsibility applies to top-level management—the owners, board of directors, or equivalent persons—and may also extend to lower tiers of management for implementation and promotion. However, top-level management has the greatest responsibility for fostering an anti-bribery culture within the corporation.

101. Management's role in developing anti-bribery policies and procedures should extend to:

- a. leadership on the corporation's written anti-bribery policy, demonstrated by management initiating the policy's development and subsequent review, and by insisting on thorough and effective compliance measures
- b. 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)
- c. endorsement of all bribery prevention-related publications
- d. specific involvement in high profile and critical decision making where appropriate, and
- e. oversight and assurance of the corruption risk assessment.

102. Management's role in implementation and promotion should include:

- a. communicating the organisation's anti-bribery stance, such as through a statement that demonstrates top-level dedication to preventing bribery, a culture of integrity and zero tolerance for corruption
- b. overseeing the development of a code of conduct that reflects the anti-bribery policies and procedures and is accessible to staff and third parties
- c. generally overseeing breaches of policies and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance
- d. promoting the business and social benefits of preventing bribery
- e. promoting and enforcing the compliance program through appropriate incentives and disciplinary measures, and
- f. promoting and raising awareness of the corporation's bribery prevention procedures and code of conduct among associates where there is a foreign

bribery risk, including any protection and procedures for confidential reporting of bribery (whistle-blowing).

### *Due diligence*

103. Corporations should apply due diligence procedures as part of the bribery risk assessment relating to associates and as a risk mitigation measure. The level of due diligence should be proportionate to the risks connected to the particular relationship or situation. Many relationships will require relatively limited due diligence, but those to which bribery risk attaches may require substantial due diligence procedures.

104. Thorough due diligence procedures should be applied prior to entering into a business relationship. Continued monitoring of business relationships for foreign bribery risks may be required and should be proportionate to the associated risk. Higher-risk relationships that may justify substantial due diligence measures include those:

- a. involving third party intermediaries where due diligence of prospective third party intermediaries could significantly mitigate risk (for example, procedures would likely need to be extensive if the intermediary is assisting the corporation to establish business in a foreign market)
- b. that once established would be difficult to end (for example in jurisdictions where it is common or necessary to engage local agents), or
- c. involving mergers, acquisitions and foreign subsidiaries.

105. In higher 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 and by contacting referees. Some 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.

106. Associates that are not controlled by the corporation (but provide services for it) are still in a position to commit foreign bribery for the profit or gain of the corporation, and therefore should be part of the risk assessment and subject to due diligence procedures where necessary. Associates in this category may include joint venture partners or other contractual relationships where the corporation has little influence over the other entity. Where there is a foreign bribery risk associated with a non-controlled associate, the corporation should determine whether the associate has sufficient measures in place to mitigate the risk. The corporation should require the associate to demonstrate its commitment to integrity and to implement anti-bribery measures proportionate to the risk as necessary to address the transaction between the corporation and the other entity. If such measures are not in place, cannot be verified, or the corporation is unable to require the entity to implement them, this may raise a significant red flag for corruption risk that will need to be appropriately managed (including by considering whether it is appropriate to proceed with the transaction).

107. 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. Where the bribery risk is low and the required anti-bribery measures are straightforward, the associate's relevant policy documents may be an adequate basis for this purpose. More substantial monitoring processes to ensure compliance may be warranted in higher risk cases.

### *Communication and training*

108. Communication and training should be carried out for the purpose of ensuring that associates understand the corporation's anti-bribery policies and the practical application of related procedures that implement the policies. The frequency and content of communications and training should be proportionate to the bribery risks faced, size of the corporation, and the nature of its activities.

109. Internal communications need to convey managerial-level dedication to anti-bribery policies and to make employees aware of how particular anti-bribery policies are relevant to them in their day-to-day work. Through communication and training, employees and other associates whose functions expose them to greater bribery risk should be made aware of the consequences of engaging in foreign bribery, how they are expected to respond to bribe solicitation and where to report bribery concerns.

110. Bribery prevention policies should be communicated and made accessible to all associates. The policies themselves, or a document describing their practical application, may be communicated through a staff handbook, guidelines, intranet, notices and training materials. A corporation may wish to make its anti-bribery policy or high-level mission statement about foreign bribery public. This measure could help demonstrate the corporation's dedication to compliance with anti-bribery laws and contribute to promoting a culture of integrity (if also backed up by implementation actions).

111. The nature of training should depend on the risk assessment, so that training is designed to mitigate the particular risks. It is necessary to provide training to the corporation's employees, directors and managers and it may also be necessary to provide training to other associates, such as agents, contractors and suppliers, depending on risk. Training should cover general and sector-specific bribery risks and the corporation's anti-bribery policy and procedures (particularly those procedures relevant to the people receiving the training). Corporations should consider providing tailored training to employees who face particular corruption risk, such as roles in contracting, marketing and sales and roles based overseas or that interact with foreign public officials. Corporations may wish to incorporate case studies and other real life scenarios relevant to its business. Training should be delivered to new employees or agents on a risk basis as part of induction, and be continuous. Training delivery and materials should be reviewed periodically to ensure it addresses contemporary bribery risks and the needs of training recipients and remains engaging and relevant to staff.

### *Confidential reporting and investigation*

112. All corporations, regardless of size, are encouraged to adopt a reporting mechanism that allows internal and external stakeholders to raise concerns about bribery risks, report instances of bribery or bribery solicitation, request advice and suggest improvements to anti-bribery policies and procedures.

113. An effective reporting mechanism is visible, secure, confidential, accessible and provides adequate protections. Such a mechanism should ensure that allegations are properly

analysed and assessed and that reported information is accessible to the compliance function (if appropriate). The reporting mechanism should provide information about protections that may be available to people making reports, including procedures for investigating retaliation complaints.

114. A corporation's reporting mechanism could be provided by a third party with relevant training and expertise. It could be provided in the form of a hotline or online portal.

115. An effective reporting mechanism is accompanied by an effective response system that gives appropriate consideration to and investigation of reported allegations. Investigations should be properly scoped, objective, timely, appropriately conducted and properly documented. Investigations could be conducted by an independent third party.

116. Corporations should properly consider the findings of investigation reports and ensure appropriate action is taken to address issues, including by amending existing policies, taking disciplinary action against wrongdoers or putting in place new systems. Corporations may use the findings of investigation reports to explore root causes, vulnerabilities and accountability lapses.

#### *Monitoring and review*

117. Corporations should monitor, review and adjust their policies and procedures designed to prevent foreign bribery. The purpose is to test the effectiveness of existing policies and procedures and to adapt them to changes in the business environment.

118. In line with the principle that policies and procedures should be proportionate to bribery risk, as a corporation's bribery risks change, so must the risk mitigation measures. Entering new markets, changes to the corporation's activities, a bribery incident or changes in the governmental or regulatory environment in which the corporation operates are all events that may prompt an evaluation.

119. Corporations may wish to consider the following internal and external mechanisms for monitoring and reviewing policies and procedures:

- a. internal audit and financial control mechanisms can be used to detect and deter foreign bribery and monitor transactions
- b. surveys of staff and other associates in order to test levels of awareness of the corporation's policies and procedures
- c. confidential and anonymous reporting channels for associates to raise concerns about bribery risks
- d. feedback from training and other general feedback mechanisms about the effectiveness of anti-bribery mechanisms
- e. periodic reviews conducted by (internal or external) suitable experts and provided to top-level management for consideration
- f. relevant information published by industry bodies

- g. verification or certification of the effectiveness of anti-bribery policies and procedures by an external provider (note such verification or certification does not necessarily mean that adequate procedures are in place for the purposes of proposed subsection 70.5A(5) of the Criminal Code).

CONSULTATION DRAFT

## Part 3: Examples

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120. The hypothetical examples contained in this part are intended to be illustrative only and are not intended to be legal advice. These examples do not form part of the guidance issued under section 70.5B of the Criminal Code. The examples look at how the offence of failing to prevent bribery may operate in practice. This includes how the policies and procedures to prevent foreign bribery by an associate discussed in Part 2 may be applied.

121. The examples of measures to prevent foreign bribery by an associate are intended to assist corporations to decide on the policies and procedures that are most suitable to their needs. They should not be seen as setting conclusive standards, or establishing any presumption as to what does or does not constitute adequate procedures. They do not provide a comprehensive consideration of all issues and are not intended to reflect a minimum baseline of action to prevent foreign bribery.

122. Under the Australian Constitution, the interpretation of the law is a matter for the courts to determine on a case-by-case basis. Whether a corporation has failed to prevent bribery or whether a corporation had in place adequate procedures designed to prevent foreign bribery will ultimately be questions for courts (including juries and judges) to determine.

### *Example 1: Absolute liability for failing to prevent and the adequate procedures defence*

123. If an associate of a corporation commits the substantive foreign bribery offence (section 70.2 of the Criminal Code) for the profit or gain of the corporation, the corporation will be automatically liable for the offence of failing to prevent foreign bribery.

124. For example, a corporation would be liable if a sales representative employed by the corporation (or, for example, a contracted agent engaged to provide local services or a subsidiary corporation) committed the substantive foreign bribery offence for the profit or gain of the corporation. It is irrelevant to the issue of the corporation's liability whether the sales representative (or the contractor or subsidiary) was prosecuted or convicted for their misconduct.<sup>11</sup>

125. However, the corporation would not be liable if it proves, on the balance of probabilities, that it had in place adequate procedures designed to prevent foreign bribery by its associates.

126. The concept of adequate procedures is considered in the subsequent examples.

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<sup>11</sup> In most cases, the individual who committed the foreign bribery would be prosecuted and any conviction would trigger the corporation's liability for failing to prevent foreign bribery. However, in rare circumstances where it is impracticable to prosecute the individual (for example, where the person may have absconded or died), the corporation may still be prosecuted for failing to prevent foreign bribery.



*Example 2: Proportionate procedures for a small company with no exposure to foreign markets*

127. A small construction company is operating entirely within Australia. It prepares and submits its own tenders for work and does not engage external consultants. Its suppliers and customers are all based in Australia. The company's corruption risk assessment has identified no external risks of foreign bribery and the company has recorded that it conducts no transactions with foreign public officials or foreign government entities. The company has in place a broad-ranging integrity policy that demands compliance with the law and states zero tolerance for corruption with no specific reference to foreign bribery.

128. The company faces a very low risk of foreign bribery. A proportionate response by the company could be to record the findings of the risk assessment and to commit to reviewing the foreign bribery risk if the company's circumstances change, for example if it begins to engage with foreign suppliers.

*Example 3: Proportionate procedures for a small to medium sized enterprise that relies on consultants in foreign countries*

129. A small to medium sized wholesale trade company is operating primarily in the Australian domestic market and has a small presence in two foreign countries where it sells furniture. Customers in the foreign countries include public agencies. The company engages consultants in those foreign countries to facilitate business opportunities, help to manage business relations and to assist in preparing formal tenders for new business. The consultants are engaged on fee-for-service contracts (they are not employees) and charge the company for expenses incurred in the course of duties. Sales staff of the company selected those consultants because they have important business contacts and specialist information about the local market.

130. The company's corruption 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.

131. To mitigate these risks, the company could consider how to effectively communicate its anti-foreign bribery policy, including to sales staff and consultants who could be asked to read and sign an appropriate declaration regarding the policy. Senior management could periodically emphasise this company policy at meetings and in internal company newsletters/bulletins. 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.

132. Due diligence on prospective consultants could include making enquiries through business contacts, local chambers of commerce, business associations, 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 and receive supporting written guidance.

133. The contractual terms for consultants could require zero tolerance of bribery, set clear criteria for providing genuine and proper hospitality expenditure on behalf of the company

and clearly set out the basis for remuneration and expense claims, including requirements that any expenses be properly recorded and supported with documentation (such as receipts). Consultant contracts could be subject to periodic review and renewal, thus giving the company control over the engagement.

*Example 4: Risk assessment of an unfamiliar market*

134. A small retail trade company is interested in expanding its business in a foreign market. There are several foreign markets under consideration and the company has no particular experience or expertise in conducting a risk assessment in relation to these markets.

135. The company could consider incorporating assessing bribery risk as part of the broader research to identify the favoured market for expansion. It could seek advice from Australian diplomatic services and Austrade about the markets.

136. The company could also seek advice from industry peak bodies and other industry representatives, and seek specialist advice from a suitable expert (such as a risk advisory firm). Publications by local chambers of commerce, relevant non-governmental organisations and sectoral organisations may also contain useful information.

*Example 5: Hospitality and entertainment policies*

137. A company periodically provides training to employees of a foreign state-owned enterprise at its facilities in Australia. The state-owned enterprise pays for this training as part of the contract. Senior officials of the state-owned enterprise inform the corporation that they want to supervise the training to ensure it is working well. The company would like to pay for the senior officials' travel to Australia, including airfare, hotel and transportation, and to take the officials to a sporting event as a cultural activity during their stay.

138. Before the company organises the flights, meals and accommodation of the visiting senior officials, the company could ensure that it has in place a proportionate and reasonable policy and appropriate controls for the provision of gifts, hospitality and promotional expenditure, and that this policy is adhered to throughout the period of the senior officials' visit.

139. The policy could be by reference to the standards and entitlements of the company's own employees. For example, if employees are entitled to business class travel for overseas business trips, it may be appropriate for the senior officials to also travel in business class, but not in first class. The policy could also require documenting a clear link between the expense incurred and a legitimate business purpose.

*Example 6: Communicating top-level commitment to preventing foreign bribery*

140. A medium sized mining company is 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 respond to a recent risk assessment of the foreign markets in question. As a next step, the company's senior management wants to demonstrate its dedication to ethical business practices and to preventing foreign bribery.

141. Prior to submitting any tenders or entering into negotiations for contracts in those markets, the company's 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-foreign bribery policies and procedures. It could be disseminated to staff and key business partners. Staff could be asked to sign and submit a declaration of support for the statement.

142. The company could also develop a code of conduct that covers foreign bribery prevention and makes existing policies and procedures around anti-bribery easier for staff to understand. The code should be accessible to staff and third parties, for example by being published on the company's website. The code of conduct could be promoted through an internal launch event with a message of commitment to it from senior management. Senior 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. Breaches of the code should be taken seriously and dealt with appropriately.

143. A senior company official could be given responsibility for receiving and responding to concerns or queries relating to foreign bribery risks.

*Example 7: Due diligence of an agent in an emerging market*

144. A large Australian construction company with operations in several countries has an opportunity to enter an emerging market for the first time. It is pursuing a government building contract in the emerging market. It is common for foreign companies to operate through a local agent and the company takes care to appoint a reputable agent and to minimise the risk of foreign bribery.

145. As part of the due diligence process, the company could seek to obtain a complete profile of each potential agent's background, skills, experience and reputation. This process could include compiling a suitable questionnaire to uncover resumes and references for the individuals who would be involved in performing the work, details of any directorships they hold, existing partnerships and third party relationships (particularly any with public officials) and any relevant judicial or regulatory findings against them. The company would also need to understand the details of ownership if the agent is a corporation, including the profile of every person identified as having a degree of control over its affairs. The company could follow up references, clarify any matters arising from the questionnaire and seek to verify the information received through enquiries with relevant local authorities.

146. To supplement the questionnaire, the company could undertake or commission independent research on the prospective agents, including from local industry, government and non-governmental sources.

147. The company could also take steps to ensure a clear understanding of the nature of the proposed agent's business. This might include a statement about the services offered, costs, commissions, fees and the preferred means of remuneration. Agents could be asked to provide a copy of their own anti-bribery policies and reporting procedures.

148. In selecting a suitable agent, the company could ensure that the agent has the requisite expertise, is not connected directly to public officials, has a good reputation for ethical business conduct, appears to take measures to prevent bribery seriously, understands the company's zero tolerance for bribery, would be paid at a reasonable commercial rate and

would not expect reimbursement for making payments that are not properly documented or otherwise appear unjustified.

149. The company could undertake further due diligence enquiries on a periodic basis once an agent is appointed.

*Example 8: Due diligence of foreign subsidiaries*

150. A large financial services company with international operations in several countries has acquired an interest in two small subsidiary companies (Subsidiary A and Subsidiary B) that are registered and operate in a foreign country. The company's due diligence process reveals both subsidiaries have a moderate to high foreign bribery risk.

151. The company wholly owns and exercises considerable control over Subsidiary A. The company partly owns Subsidiary B and has no control over its management decisions. The company has robust policies and procedures for preventing foreign bribery and wants to mitigate the risk of foreign bribery by these two foreign subsidiaries.

152. The company could require Subsidiary A to conduct a risk assessment of its local bribery risks and to implement proportionate and effective measures to prevent that risk. As Subsidiary A is smaller than the company, the company might decide that it is unnecessary for Subsidiary A to adopt the same measures as those implemented by the company itself (provided the measures it does adopt are adequate and respond appropriately to the identified risk).

153. In relation to Subsidiary B, the company has taken steps to determine the subsidiary's foreign bribery risks and to make an assessment of whether it has implemented proportionate and effective measures to mitigate them. The company determined that Subsidiary B has close relations and regular business dealings with public officials in the foreign country and does not have proper measures in place to prevent bribery. In particular, Subsidiary B appears to lack a strong anti-bribery compliance function and its management has not demonstrated commitment to developing an anti-bribery culture.

154. As a result, the company makes efforts to require Subsidiary B to implement adequate anti-bribery measures, but these efforts are unsuccessful and the subsidiary insists it has no resources for compliance matters.

155. The company reassess the foreign bribery risk posed by Subsidiary B in light of the identified problem and the refusal to implement measures. It determines that the risk of foreign bribery is high and that it cannot reasonably be mitigated by the company. At this point, the company could decide to terminate the relationship and dispose of its interest in the subsidiary.

*Example 9: Communication and training*

156. A large travel services company is expanding its business operations to establish a presence in a foreign country. The risk of bribery in the country is assessed as high. The company has suitable policies and procedures 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 policies and procedures are communicated effectively and that staff receive proper training in relation to them.

157. The company could ensure, through face to face training, online modules and hardcopy resources, that its employees who are involved in the business expansion are aware of and understand the company's policies and procedures regarding preventing 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, sanctions 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.

158. The company could consider establishing an advice hotline that can provide an additional route for communicating the company's policies and procedures, and a confidential whistleblowing channel to which anonymous reports about foreign bribery issues can be made.

159. Employees who have a high exposure risk 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, scenarios 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.

160. The company could document training attendance by employees and the provision of periodic refresher training. The training program and content of communications could be updated to incorporate relevant feedback from training participants and as the company develops operational experience in the foreign country.

*Example 10: Trigger to monitor and review a compliance program*

161. A medium sized transportation company has had its employees and agents operating in several foreign countries for many years. The company works in international freight shipping and deals with foreign customs officials on a routine basis. Most of the foreign ports and airports in which it operates are run by state-owned entities. It has assessed its foreign bribery risks in each of these countries and implemented measures in response to prevent foreign bribery by its associates.

162. As part of an annual review of the broader compliance program, the company decides to survey its overseas employees to measure the compliance culture and the strength of internal controls designed to prevent foreign bribery. The survey reveals that a significant proportion of its employees deployed abroad reported that they would not know how to respond to bribery solicitation by a foreign customs official. The survey also uncovered employee concerns about the conduct of an agent who had failed to obtain approvals before spending company money on hospitality for senior officials of state-owned ports, in breach of company policy.

163. The company could respond to the survey results by providing specific and targeted training and information sheets to employees based abroad to improve their ability to respond

to bribery solicitation in line with the company's anti-bribery policy. The company could also commit to following up on this issue at a point in future to test the effectiveness of the training.

164. The company could investigate the transactions of the agent to uncover details of the expenditure and whether the agent or any other agents had engaged in other similar conduct. Appropriate measures in response may include terminating the agent's contract or imposing other contractual sanctions for the misconduct, reviewing the contractual terms, implementing better controls for financial expenditure by agents or providing further instruction or training to the agent.

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