

Australian Laws Prohibiting Foreign Bribery

An overview and practical guide to compliance 1

This page gives an overview of the current Australian legislation prohibiting the bribery of foreign officials. It also provides practical information on what is required by Australian companies to comply with the legislation. A full copy of the Criminal Code Amendment Act to which it refers can be found on Cr [Criminal Code Amendment Act: Bribery of Foreign Public Officials](#)

Introduction

It seems that when it comes to the issue of corruption overseas - the bribery of those in official positions of power in other countries - there can almost be an acceptance of the inevitability of having to "play the game" to be successful.

Reactions of Australians to the issue of foreign bribery can vary markedly: from resignation at the inevitability of having to stoop to such levels just to do business to vehement defence of the necessity of bribes.

Some people are utterly speechless when confronted with the reality of the dilemma. Others insist that there are not detrimental economic effects flowing from official corruption. Then there are those who seek to rationalise corrupt payments as a "cultural" rather than a "criminal" phenomenon which we, as citizens of western democracies, cannot hope to understand and hence must not judge as somehow evil or wrong. Rather, we must alter our mindset, undergo ethical re-education to remove our prejudices and embrace a different way of doing business.

That different way of doing business, however, has left us with one of the most debilitating legacies of the 20th century: grand corruption. Unless the scourge of corruption is combated effectively, the world beyond the year 2000 will be one where poverty, which is already at unacceptable levels, is deepened even further; the legitimacy of governments further eroded, human rights abuses proliferate; and the democratic gains of the past 50 years will be destroyed.²

It is sometimes said that corruption is just a matter between the payer and the receiver of the bribe. That bribery is a victimless crime and that the payment of bribes keeps the wheels of commerce turning and enabling business people to overcome onerous and unnecessarily detailed legal requirements.³ However the problem of corruption has reached such a scale and penetrated institutions to such an extent that policy makers and business people around the world are being forced to confront the issue as presenting a major problem for the developing as well as the industrialised world. Corruption bears with special cruelty upon the world's most poor of peoples. It debases human rights and it degrades the environment. It derails development and destroys confidence in democracy and the legitimacy of governments. It undermines human dignity and is universally condemned by the world's major religions.⁴

The Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 is seen by the Australian Federal Government as a major step in formalising Australia's

commitment to stamping out international corruption. The legislation is part of an international effort to ensure that contracts are won and awarded fairly, which was led by signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Similar legislation has been or is in the process of being introduced in over 30 countries including the United States, Japan, Korea, Canada and most European countries. It has been estimated that the signatories to the OECD Convention represent approximately 90% of world trade.

Clearly, legislation on its own is not sufficient. The Act addresses what is referred to as the "supply side" of the international bribery equation. The legislation criminalises the payment of bribes. It does not address the very real issues that operate in relation to the "demand side" of the bribery equation. Other actions are also needed in order to give effect to the aim of eliminating bribery in international business transactions. In fact, a matrix of measures is required involving all stakeholders concerned with this issue.

Multi-national corporations play a fundamental role. Laws prohibiting bribery of foreign public officials will not mean an end to such bribery - no more than laws prohibiting theft have stopped people stealing. For legislation criminalising foreign bribery to be effective, a fundamental requirement is that corporations involved in international business transactions abide by the legislative provisions. In particular, it is vital that sound compliance structures be implemented by those corporations.

The legislation which has been enacted in Australia to satisfy Australia's obligations under the OECD Convention, involves more far reaching principles of corporate criminal responsibility than exists under the common law in Australia. That alone represents a considerable shift in legal compliance obligations for Australian companies operating outside Australia.

1 The Offence of Bribery of a Foreign Public Official

1.1 Implications for corporate criminal responsibility

The most significant implications for Australian businesses arise from the inclusion of the offence of bribery of a foreign public official in the Commonwealth Criminal Code. The Code has far reaching principles relating to corporate criminal responsibility. The Code extends the usual common law principles by allowing the prosecution to lead evidence that the company's unwritten rules tacitly authorise non-compliance or fail to create a culture of compliance.

It captures situations where, despite formal documents appearing to require compliance with laws prohibiting foreign bribery, the reality is that non-compliance is expected. Compliance on "paper" is not sufficient: there must be an environment of compliance operating within the company.

A company can be criminally liable if the corporate culture:

- directs;
- encourages;
- tolerates; or

- leads to

non-compliance with the criminal provisions proscribing the bribery of foreign public officials.

In addition, under the Australian law, a company can be criminally liable if the company fails to create and maintain a corporate culture that requires compliance with the law.

Under the Australian law, corporate culture is defined to mean: an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

The new provisions relating to corporate culture significantly extend the scope for corporate criminal responsibility beyond the current position at common law. In fulfilment of fiduciary and statutory duties, directors and senior managers of companies are recommended to ensure that appropriate and effective compliance programs are in place.

A culture of compliance is critical for Australian corporations having business operations in other countries.

1.2 What constitutes foreign bribery?

The Act creates a Commonwealth offence of bribing a foreign public official. A person is guilty of the offence if the person provides or offers to provide a benefit to another person and that benefit is not legitimately due to the other person. The person providing the benefit must do so with the intention of influencing a foreign public official in the exercise of the official's duties. The aim must be to obtain or retain business or a business advantage which is not legitimately due to the recipient or intended recipient of the business advantage.

The legislation anticipates that a benefit may be provided, offered or promised either directly or through an intermediary. Those arrangements are also prohibited. The foreign public official need not be the recipient of the benefit although the actions must be committed with the intention of influencing the foreign public official in the exercise of his or her duties as a foreign public official.

There is a broad definition of "foreign public official" which extends to parliamentarians, government employees and contractors, as well as to members of the police, military and judiciary.

1.3 What are the penalties?

The maximum penalties for committing the offence of bribery of a foreign public official are imprisonment for ten years or a fine of up to \$66,000 or both. Corporations can also be liable where their employees, agents or officers commit offences while acting within the scope of their employment. The penalty for a corporation which commits an offence can be as high as \$330,000.

In addition, if an offence has been committed, there will be circumstances in which a court may confiscate property which has been illegally obtained by a company.

1.4 What are the immediate high risk areas?

Corporations which have business dealings overseas will have their own policies, procedures and ways of operating offshore. Their operations will be structured in varying ways. Set out below are a few examples of the sorts of matters which prudent corporations would be well advised to review in order to verify compliance with the new anti-bribery laws:

- contracts with consultants or agents who have been engaged to engender support of local officials, regulators or politicians;
- arrangements with consultants or agents who assist in the securing of business according to "the local way" or who arrange introductions to key government decision makers;
- projects in which a foreign public official may have a direct or indirect interest;
- ventures involving participation by a local entity and with periodic payments flowing directly or indirectly to a foreign public official;
- benefits being given to relatives of foreign public officials, for example, educational assistance, and
- company policies on business ethics, particularly with respect to giving and receiving gifts and hospitality.

Particular caution ought to be exercised where fees to consultants or agents are exorbitant in comparison to the services being provided or where the fees are expressed to be a percentage of final project costs.

1.5 Are there any defences?

There are only limited specific defences available in relation to a charge of bribery of a foreign public official. One defence is that the conduct was lawful in the country in which it occurred. Another defence is that the benefit was a facilitation payment, being a payment of a minor nature and made for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature. In order to establish the facilitation payment defence, a record of the conduct must have been kept by the accused or, the accused must be able to establish that the record has been lost or destroyed because of the actions of a third party or because of an event over which the accused had no control.

Because the offence of bribery of a foreign public official falls within the Commonwealth Criminal Code, there are general criminal law principles which apply. Those principles include the usual defences of duress and sudden or extraordinary emergency.

2 Implementing the OECD Convention

2.1 The OECD review process

The Australian legislation ought not be regarded in isolation. Co-ordinated action across the globe by OECD members and other signatories to the OECD Convention is resulting in a network of laws specifically targeted at criminalising the bribery of foreign public officials.

Although all of the laws are based on the provisions of the OECD Convention signed

in December 1997, each participating country is implementing the OECD Convention according to its own legal principles and within the constraints of its own constitutional structures. The OECD has established a Working Group on Bribery that is undertaking a procedure of self and mutual evaluation of the implementation of the OECD Convention.

The review process is being conducted in two phases. Phase 1 involves an examination of the relevant laws of each of the signatories to the OECD Convention to determine whether those laws conform to the requirements under the Convention. The first phase is a rigorous peer review process that essentially involves:

- preparation for consultation in the Working Group, including a reply by the country under review to a questionnaire which forms the basis of a provisional review;
- consultation in the Working Group; and
- adoption of a report by the Working Group.

Each report contains a review of the country's relevant laws and an evaluation which outlines the principle findings of the Working Group.

The second phase of the review process, which is to be commenced in late 2001, will focus on the application of the various laws in practice. In particular, the second phase will assess whether relevant countries have legislated to remove the tax deductibility of bribes and will also consider the efforts being made to enforce laws criminalising foreign bribery.

2.2 Evaluation of the Australian legislation

The report of the Working Group on the Australian legislation may be found on the OECD website (www.oecd.org). Overall, the Working Group has considered that the Australian legislation conforms to the standards set by the OECD Convention. Specific issues raised by the Working Group concern two defences provided for in the Australian legislation.

First, the Working Group considered the table in the legislation according to which an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country. The Working Group has stated that those provisions warrant further discussion at the end of the first phase of the review process.

Secondly, the Working Group raised two points in relation to facilitation payments defence, namely, that Australia decided not to outline a specific monetary value in relation to facilitation payments and that some of the items mentioned as "routine government action" defined under sub-section 70.4(2) of the Australian legislation entail a certain degree of discretion (eg. the processing of a work permit).

Finally, the Working Group felt that the issue of sanctions could be re-visited during the second phase of the evaluation process.

3 The Operation of Laws of Other Countries

3.1 US Foreign Corrupt Practices Act 1977

There is a complex web of laws that could potentially apply to the situation of bribes paid to foreign public officials. Australians and Australian companies are subject to the Australian legislation. Foreign nationals are also subject to the legislation when in the Australian territorial jurisdiction. However, a citizen of the United States who is employed by an Australian company would also be subject to the United States legislation, namely the Foreign Corrupt Practices Act. The Australian subsidiary of a US corporation could also be subject to the provisions of the US legislation. Indeed, it is often the case that Australian subsidiaries of US corporations adopt the compliance programs of the US parents in relation to compliance with laws prohibiting foreign bribery.

It should be recognised that as the network of laws specifically targeted at criminalising the bribery of foreign public officials is expanded and signatories to the OECD Convention enact laws to implement the Convention, the laws that could potentially apply in any given situation will be further complicated.

3.2 The operation of laws in host countries

Although a great deal of emphasis has been placed on the potential application of laws of developed countries to the payment of bribes to foreign public officials, it should not be overlooked that the countries in which Australian businesses are operating have their own legal regimes and their own laws that could potentially apply.

One of the major reasons for the OECD Convention is that although there are laws in those host countries, to prohibit the making of corrupt payments to officials, the enforcement of those laws is sporadic and unpredictable precisely because their systems of justice and government have been undermined by corruption. Nevertheless, reputable multi-national corporations seeking to act as good corporate citizens are advised to be aware of those laws, how they could operate and to comply with those laws.

4 Integrity and due diligence

4.1 The role of a professional adviser

As professional advisers, lawyers and auditors bear special responsibilities when it comes to compliance with laws prohibiting the bribery of foreign public officials.

Lawyers, as officers of the court, have professional and ethical duties to uphold the law. Under no circumstances should a lawyer assist or advise a client to commit a criminal offence. A legal adviser must exercise particular caution not only to ensure that he/she does not become complicit in the commission of an offence, for example by aiding and abetting prohibited conduct, but also to ensure that the legal adviser's professional responsibilities are discharged at all times.

Schemes that are predicated upon "turning a blind eye" or adopting a position of

"wilful blindness" by engaging a third party to ensure that business is done "the local way" are fraught with danger. The Australian laws criminalising the bribery of foreign public officials extend to ancillary offences of conspiracy and complicity and could potentially apply to professional advisers involved.

For auditors reviewing offshore projects, caution ought also be exercised and risks addressed. For example, in certain circumstances, Australian or applicable local laws could operate to enable authorities to seek to confiscate profits or to seek forfeiture of assets that have been acquired as the result of corrupt conduct.

A prudent auditor will ascertain if there is any such risk to an offshore business venture, before giving a sign-off on the project. This ought to be the case regardless of whether the venture is a new proposal or an existing business. For example, the Board of a company might rely on an auditor's financial assessment of one of the company's existing offshore business ventures when deciding whether to inject further capital into that business. Consider the situation of a Board resolving to invest millions of dollars in such a venture - only to discover, a few years later when the business is highly successful, that the authorities, licences or regulatory approvals fundamental to the business's operations had been obtained corruptly.

The legal issues that could arise include:

- whether those authorities, licences or approvals essential for the business's continued operations could be at risk either because they could be revoked or are void or voidable;
- whether any laws (Australian, local or even U.S.) operate to permit confiscation of profits derived from the tainted authorities, licences or approvals;
- whether any laws could result in forfeiture of assets;
- what disclosure obligations operate at the time of becoming aware of the corrupt conduct - and in the future (for example, in relation to a prospectus);
- whether the company has any legal recourse, for example against a previous owner of the business, an existing partner or against any of the professional advisers.

Particular care is recommended if exercising a judgement as to whether the risks are material. A strong argument can be made that even though a bribe may be of an insignificant amount by the particular company's materiality standards, the reputational risks alone will always compel a matter pertaining to the bribery of a foreign public official to be regarded as being material.

4.2 A due diligence checklist

Entering into joint venture or acquisition arrangements in foreign jurisdictions can present particular issues in relation to the application of laws prohibiting foreign bribery. It is recommended that Australian corporations take steps to ensure that a proposed joint venture partner understands and agrees to abide by the relevant company policy prohibiting the bribery of foreign public officials, in relation to the relevant project. In addition, it is prudent to make enquiries to verify that the joint venture partner or any business or entity to be purchased is not tainted by bribery allegations. In the event that part or all of the business operations of an entity or business to be acquired cause concern, it is prudent to ascertain whether or not there

is, or is likely to be, any ongoing effect on the Australian company, the entity concerned, the entity's business or its assets.

Set out below are examples of the sorts of areas warranting initial attention in a due diligence investigation when considering compliance with laws prohibiting the bribery of public officials. The following is not an exhaustive list and enquiries about such issues should be more intensive in, for example, countries where the risk of corruption is perceived to be higher.⁵ Clearly, the depth of any ethical due diligence will depend on the particular circumstances. It is vital, however, that records be kept of all checks and enquiries and that sound business judgement be exercised. Be mindful that any decision as to the extent of the due diligence enquiries may later be scrutinised by others, including law enforcement authorities.

Examples of the sorts of areas warranting attention include:

- Authorisations, approvals, licences

Does the target company, or any part of the company, depend on any government or official authorisations, approvals, licences etc in order to conduct its operations?

If so, could such authorisations, approvals, licences etc be revoked or cancelled if it transpired that:

- they were obtained unlawfully or corruptly?
- they were renewed or extended as a result of unlawful or corrupt conduct?
- the company's operations were, or are being, permitted to continue as a result of unlawful or corrupt conduct?
- Public officials

Are any of the partners, share holders or senior managers public officials or associated (directly or indirectly) with a public official who is in a position of influence with respect to the company, its operations or the industry in which it operates?.

Do any of those persons have a poor or questionable reputation for ethical practices?
Are their references reliable?

Are the business practices of those persons consistent with your own organisation's high standards?

- Agents

A careful review of consultants, agents, intermediaries involved in the transaction is always warranted.

- Documentation

Careful review of the company's accounts or other documents ought to be undertaken to verify that the entity is not being used to pay bribes to foreign public officials.

- Other

In the course of the negotiations have there been any unusual requests for special payment arrangements? Also, decision makers involved in the transaction ought to verify in writing that they are not aware of any matters of concern in this area.

5 An effective compliance program

In Australia, there is a recognised standard for compliance programs which covers the structural, operational and maintenance elements to be included in any program. The standard is known as Australian Standard AS3806. It describes a comprehensive compliance management system, using elements common to systems of management and quality. The Australian Standard is general in its terminology because it applies to compliance programs across all areas of compliance.

Accordingly, it does not prescribe the actual elements of an international corruption compliance program, or indeed any specific compliance program. It does, however, serve to signpost the essential components of an effective compliance program.

The purpose of the Australian Standard is to provide a framework for an effective compliance program, the performance of which can be monitored and assessed. The Australian Standard states:

A compliance program is an important element in the corporate governance and due diligence of an organisation, and should -

- (a) aim to prevent, and where necessary, identify and respond to, breaches of laws, regulations, codes or organisational standards occurring in the organisation;
- (b) promote a culture of compliance within the organisation; and
- (c) assist the organisation in remaining or becoming a good corporate citizen.⁶

The integration of business ethics into the corporate governance framework has been addressed by the Australian Standard in a number of respects. In promoting and maintaining a culture of compliance with the provisions prohibiting the bribery of foreign public officials, the Australian Standard provides excellent guidance to assist corporations comply with the new laws.

5.1 Promoting a culture of compliance

(a) High level commitment

As a fundamental aspect of any compliance program, there must be commitment to effective compliance demonstrated at the most senior levels of the organisation. The Board or the governing body, the Chief Executive and senior management must be committed to complying with the relevant laws. Such commitment may be demonstrated by, for example, minuted resolutions of the Board of the company together with a clear and concise statement of policy. The responsibility for translating that high level commitment into reality lies with the Chief Executive Officer. Management is also required to convey the message to staff and other relevant people that the organisation is committed to compliance with laws prohibiting foreign bribery and that lipservice to those laws does not constitute compliance.

Commitment, as well as the actions to realise that commitment, must be ongoing. Making a policy and merely informing staff that they must comply is not sufficient. Leadership needs to be shown. Appointing a senior executive with the responsibility for compliance and the authority to exercise that responsibility gives the whole compliance system the requisite imprimatur to ensure that it does not lack credibility or power within the company.

(b) Compliance policy and operating procedures

Not only should there be a clearly stated compliance policy, it is also necessary to

state how the commitment is to be carried out. Accordingly, the compliance program should be developed and implemented in consultation with staff. Examples of the sorts of elements which an anti-corruption program may include are:

- a matrix of certifications;
- an education program;
- procedures to ensure contractors, agents and joint venture partners also meet their obligations.

Depending on the particular corporation's internal documentation process, a compliance policy together with operating procedures may be appropriate to assist the corporation meet its obligations. Control of contractors, agents and, where possible joint venture partners, is very important, especially where the delegation and outsourcing of functions to third parties is prevalent. A company must not seek to delegate or outsource its responsibilities for legal compliance.

(c) Management responsibility and supervision

All relevant managers must understand, promote and be responsible for compliance with the legislation. This is not limited to operational managers but includes the most senior corporate managers and the Chief Executive. As a result, the Australian Standard recognises that managerial roles and responsibilities should be articulated and understood. Management supervision is an integral part of an effective compliance program.

It is intended that the responsibility for compliance be with management, not compliance officers or legal advisers. Managers should require their immediate subordinates to regularly report on compliance issues and should include compliance as a standing item on the agenda for management meetings with their subordinates.

(d) Resources

Adequate resources are required to implement an effective compliance program. Included in resources are people. People are an important resource in any compliance program. A lack of adequate resources is often indicative of a lack of commitment to compliance. There must be adequate resources for training as well as access to more senior employees of the corporation to assist staff who may require advice and mentoring.

Some corporations have implemented hotlines in order to assist staff to have access to senior personnel who have the appropriate expertise and understanding of the area to give advice and assistance.

Manuals, whether electronic or hard copy, must be accessible and easily understood. Resources are needed to produce manuals and to keep them current. Technical jargon in manuals should be avoided. Where possible, manuals should be developed jointly by management and staff and should contain practical directions and examples.

(e) Record keeping

Because the Australian legislation can result in a corporation being criminally liable if it fails to create and maintain a culture of compliance, keeping proper and detailed records about the components of the compliance program is vital. The components of the compliance program should be systematically recorded and accurate up to date records should be maintained. This is critical if the company ever needs to

defend itself against criminal charges of bribery of a foreign public official.

Record keeping assists a corporation not only with respect to compliance with the Australian criminal law, but also in the monitoring and review processes of its compliance program.

The Australian Standard recognises that record keeping must include recording and classifying complaints and alleged compliance failures as well as the steps taken to resolve them. Sometimes however, it may be necessary to obtain legal advice when documenting sensitive issues such as an alleged failure to comply with criminal laws prohibiting foreign bribery. In that respect, adequate training and resources ought to be provided to management and staff. It may be useful to develop guidelines for staff on how to properly manage reports of alleged compliance failures.

(f) Reporting

The Australian Standard states that all compliance failures need to be reported.

This principle is particularly important with respect to allegations concerning non-compliance with laws prohibiting foreign bribery. Not only do the laws relate to criminal offences, the penalties may be quite severe and have far reaching consequences for an organisation. For example, some business licences may state as a condition of the licence that the licensee not engage in any criminal conduct. If the sanction for such conduct is a potential revocation of the licence, the very foundations of the corporation's business may be under threat.

It is not only systemic and recurring compliance failures which ought to be reported and addressed. A compliance failure which is isolated in nature may be of serious concern if it is intentional or if it is significant in quantum. Apparently minor compliance failures may create the perception within the organisation that failure to comply is not important and can even lead to non-compliance becoming a systemic problem.

Accordingly, formal reporting lines should be known and understood within the organisation. Staff must understand that in discharging their reporting responsibilities, nothing of relevance must be withheld. Those formal lines of reporting should be non-threatening in nature, otherwise staff may be reluctant to raise the issues. In that respect, it may be appropriate for an organisation to give consideration to having a formal mechanism within the corporate structure to provide an avenue for "whistle blowers" to report compliance failures without fear of retribution. "Whistle blowing" would not provide immunity if the whistle blower is actually culpable in paying a bribe to a foreign public official. Exposing the conduct may, however, afford the culpable "whistle blower" some leniency by the employer company and law enforcement authorities.

5.2 Maintaining a culture of compliance

(a) Education and training

It is important, particularly with new laws which extend corporate criminal responsibility to circumstances relating to an organisation's corporate culture, that there be education and training of all relevant staff. In fact, any compliance program must involve education and training relevant staff about the issues and the elements of the compliance program itself.

Education and training should be an ongoing part of the company's operations and, with respect to education and training about laws prohibiting foreign bribery, it should be linked to the company's corporate training system. The education and training should be appropriate and practical and structured so that it is readily understood by the target audience.

It is important that education and training about the company's anti-corrupt conduct policy be part of the corporate induction program for new recruits as well as containing an ongoing element in order to keep relevant staff up to date with their obligations.

As minimum requirements, the Australian Standard has set out the following criteria:

- the content of the training should include examples which are reflective of the industry or sector in which the company operates and should be relevant to the day to day work of the target audience;
- the content should be readily understood and should avoid technical jargon, for example, technical legal definitions used in the Commonwealth Criminal Code;
- teaching methods which involve participation by the staff should be used.

It is recommended that the education and training expressly identify the learning outcomes to be achieved. For example:

- to understand that it is prohibited by Australian, USA and relevant local law to pay bribes and secret commissions;
- to understand that company policy prohibits corrupt conduct;
- to be better informed about the company's compliance program, including the various certification processes;
- to be aware that contracts must include anti-corrupt conduct clauses; and
- to be informed of the legal ramifications for the company and the employee of non-compliance.

Ideally, although not stated in the Australian Standard itself, a mechanism for testing whether or not the learning outcomes have been achieved ought to be included.

To continue to maintain high standards with respect to the education and training component of any compliance program, the effectiveness of the education and training program should be periodically evaluated, reviewed and updated.

Maintaining records to verify that the training has been conducted, the names of the attendees, the content of the training and achievement of the learning outcomes is very important (see 5.1(e) Record keeping).

(b) Visibility and communication

In implementing a compliance program with respect to compliance with laws prohibiting the bribery of foreign public officials, the policy and program should not be restricted in its dissemination.

Indeed the policy and program should be widely publicised within the organisation so that it is understood and becomes part of everyday practice. Maintaining the visibility and communication of the program can be achieved in a number of ways, including

through the education and training program, reminding staff of their obligations in corporate newsletters and on bulletin boards. E-mail reminder messages and prominently placed posters also assist. A timetable of regular communications may be developed as a prudent measure to assist in achieving regular communication of the required message.

(c) Monitoring and assessment

Maintaining the effectiveness and viability of the compliance program requires regular monitoring of the program and its elements and assessing the performance of the program.

Monitoring and assessment are essential.

It is recommended that a clear strategy for continual monitoring be developed and that the strategy specifically sets out both internal and external monitoring processes.

An outline of the schedule for monitoring, the resources required and the data to be collected should be specified.

In order to undertake effective assessment of the compliance program, it is recommended that there be pre-determined objectives which have been documented to assist in evaluating the performance of the compliance program. Monitoring and assessing the process and the paperwork is necessary but not sufficient. Ascertaining the culture of the operating environment and the awareness of the need for compliance is also required.

(d) Review

The review aspect of an effective compliance program is not simply another form of monitoring and assessment. It goes beyond what would be required in terms of monitoring. Reviewing the operation of any compliance program is necessary to identify and understand reasons for compliance failures. In addition, the review of the program assists an organisation to identify and to design improvements.

Under the Australian Standard, it is recommended that reviews occur at specified intervals to ensure that the compliance program is operating effectively and that it is still appropriate to the organisation's operations. The Australian Standard recognises that the actual depth and frequency of such reviews will vary with the nature of the organisation and its policies.

With respect to laws prohibiting the bribery of foreign public officials, much will depend on the nature of the organisation's particular activities. If the company operates in countries which are perceived to be "high risk" in terms of corruption and in industries which are also perceived to be "high risk", the depth of such reviews may be more extensive and the frequency more regular than for another area of legal compliance which does not present such a high level of importance in terms of regulatory compliance.

Reviews are necessary to identify and understand the risk areas and the reasons for compliance failures. They also assist in assessing if the compliance program is performing effectively. Although a company's compliance manager may organise a review, the review itself should not be carried out by the manager having day to day responsibility for compliance within that part of the organisation being reviewed. It is

important that there be independence brought to bear either by the review being conducted by a manager from another part of the organisation or by an independent reviewer or consultant.

(e) Liaison

A corporation's compliance program may also include liaison with other bodies and advisers. Liaison is important to assist an organisation in maintaining its awareness of current problem areas and new developments in compliance methods.

For example, with respect to a compliance program dealing with anti-bribery legislation, membership of, or regular contact with, Transparency International will assist a company to obtain early warning of intended changes to laws or practices.

The newsletters and other publications produced by Transparency International and professional advisers, such as lawyers and accountants, are useful means of supplementing liaison with the relevant regulatory authorities and other bodies.

(f) Accountability

Any legal compliance program requires management skills to make it work. Compliance officers themselves have the responsibility of organising and assisting to bring about compliance with laws prohibiting foreign bribery. However, compliance staff cannot discharge a company's compliance responsibilities.

Compliance not only requires commitment at senior levels. Communication of that commitment throughout the organisation coupled with input from and involvement of relevant staff from all levels of the organisation is also needed. It is important that the appropriate staff understand and accept their accountability for compliance.

In particular, performance evaluation of the compliance program should be reported as set out in the program itself, including reporting to the Board or governing body, audit or compliance committee and the Chief Executive Officer.

Those personnel who have an accountability and responsibility for compliance with anti-corrupt conduct laws should have those accountabilities and responsibilities reflected within their relevant job descriptions. It should also be clear that any relevant Board or management committee having such a responsibility, has that particular responsibility clearly articulated in its terms of reference. One aspect of discharging accountability could be the production of annual compliance reports for the Board as well as ad hoc exception reports or the governing body as appropriate.

An area where companies may expose themselves to risks, if not of prosecution at least of adverse public comment and reputational risk, is in promoting staff who fail to demonstrate a commitment to compliance. In other areas of the law, such as trade practices (also known as anti-trust), promoting staff who have a poor compliance record or attitude has been adversely commented upon by the courts. Rewarding staff who flout the company's compliance program to achieve commercial targets will have damaging effects: the compliance program will be undermined, the company's credibility will be weakened, the risk of prosecution will be increased.

(g) System for handling compliance failures

Embedding a compliance program into an organisation's operations requires the inclusion of a system for handling compliance failures, regardless of whether those

compliance failures are major or minor in nature.

Clearly, systemic and recurring problems will be of fundamental importance in terms of compliance with anti-bribery laws. However, an isolated incident of compliance failure could also present serious potential difficulties for any corporation, particularly if that compliance failure is significant in nature and has occurred through the deliberate conduct of an employee. Indeed, even small compliance failures may demonstrate the existence of a systemic problem with respect to the organisation's operations.

It is important that there be a system in place to classify, analyse and have a process for investigating allegations and specific incidents of compliance failure. Such a system provides useful feedback to the organisation and can assist in such areas as:

- re-designing the program;
- changing organisational practices and procedures;
- re-focussing of the education and training program; and
- providing an early warning of potential problems.

(h) Continuous improvement

The relevance and effectiveness of a corporation's compliance program will be influenced by whether or not the organisation has some means of incorporating continuous improvement philosophies into its procedures. Both the compliance objectives and the assessment criteria ought to involve ongoing review for continuous improvement to be effected.

Continuous improvement assists in keeping the company abreast of developments and in fostering a culture of compliance within the organisation. Innovation is encouraged where continuous improvement philosophies are promoted.

A way of maintaining and motivating continuous improvement is to recognise exemplary compliance behaviour within the workforce of the organisation. In this way, good corporate practice by staff is not only encouraged, it is also rewarded. Ethical conduct by employees assists in enabling the company embrace good ethical practices as an integral part of its corporate governance framework. Benefits will flow to the company with its enhanced reputation as a good corporate citizen.

6 Legislating for integrity

The Australian Criminal Code which contains the offence of bribery of a foreign public official has the effect of exposing a company to criminal charges if the corporate culture of the company directs, tolerates or leads to non-compliance with the criminal provisions. In addition a company can be criminally liable if the company fails to create and maintain a corporate culture that requires compliance with the law. As a result, a culture of compliance is critical for Australian companies conducting business outside Australia.

Promoting and monitoring compliance can be a challenging and difficult undertaking. However, in Australia the Australian Standard AS3806 on compliance programs provides detailed guidance on the necessary elements for implementing, operating and maintaining any compliance program.

The Australian Standard for compliance programs may also provide useful guidance for effective compliance with anti-corrupt conduct laws in other countries.

The Australian legislation implementing the OECD Convention requires companies to scrutinise the prevailing cultures within those parts of the businesses involved in its overseas operations. It is vital that a culture of compliance with foreign bribery laws be established, promoted and maintained. Bringing about change in organisational cultures can be extremely difficult and time consuming. A company which has permitted a culture to develop which tolerates or encourages the payment of bribes to foreign public officials will experience difficulties in re-educating staff, changing the corporate culture and implementing a compliance program to meet the Australian Standard. Nevertheless, it is essential under Australian law.

If a prohibited culture is permitted to persist within an Australian company, that organisation will remain at risk of prosecution under Australian Commonwealth criminal law. Directors and senior officers of such a company would also risk being in breach of their fiduciary and statutory duties. In addition to their legal obligations, advisers such as lawyers and auditors have special professional and ethical responsibilities to discharge.

However, there are practical limitations on the extent to which legislation can effectively require ethical conduct. The mere passage of criminal laws will not obliterate the scourge that corrupt payments have created nor miraculously alter individual behaviour. The issue of international corruption is multi-faceted and requires complex and multi-faceted responses in return. Nevertheless the role that companies can play is fundamental. To combat grand corruption, corporations involved in international business transactions must embrace good corporate citizenship behaviours and be prepared to insist upon high standards of integrity in their dealings - an ideal is that is easier to state than it is to implement.

This information paper was prepared by Gayle Hill who at the time of writing was
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Endnotes

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2 The Durban commitment to effective action against corruption, 9th International Anti-Corruption Conference, Durban, South Africa, October 1999. [The Durban Commitment](#)

3 Transparency International "The OECD Convention: Sharp Edged Sword or Blunt Weapon?" 31 March 2000.

4 The Durban Commitment to Effective Action Against Corruption [The Durban Commitment](#)

5 The annual Transparency International Corruption Perception Index is an indicator that could be taken into account when determining whether or not a particular country is regarded as "high risk". [TI Corruption Perception Index](#)

6 Australian Standard AS3806 - 1998, Compliance Programs, Standards Australia, page 4. [AS3806 Compliance Programs](#)