

ADEQUATE PROCEDURES UNDER AUSTRALIA'S FOREIGN BRIBERY REGIME:

GUIDANCE ON GOOD PRACTICE PROCEDURES FOR CORPORATE ANTI-BRIBERY AND ANTI-CORRUPTION PROGRAMS

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1. FOREWORD

Corruption is the abuse of entrusted power for private gain. For Transparency International Australia, foreign bribery is the most direct and damaging form of corruption. When an Australian company pays a bribe to a foreign official for a mining license, infrastructure contract or preferential treatment, everyone loses.

Australia's international reputation suffers, markets and competition are distorted, communities miss out on essential services and economic development, governance systems become corrupted, and corrupt officials are enriched without any consequences.

Foreign bribery also enables other serious crimes, including human trafficking and environmental damage, money laundering and drug trafficking. All these crimes impact the most vulnerable in our society.

Almost twenty years ago, Australians were shocked to learn that an Australian company - AWB Ltd - was the single largest source of kickbacks to the Iraqi regime. Part of a UN Oil-for-Food Programme, the kickbacks went to greedy officials whilst people went hungry. The failed prosecution of AWB Ltd first drove Transparency International Australia's advocacy to strengthen Australia's foreign bribery laws.

Almost two decades on, and after many years of low enforcement of foreign bribery in Australia, we warmly welcome the government's passing of major improvements to Australia's foreign bribery regime.

Significantly, the Crimes Legislation Amendment (Combating Foreign Bribery) Act 2024 (Cth) creates a new failure to prevent offence. In response, Transparency International Australia and Corrs Chambers Westgarth have developed this guidance to help your organisation develop

and strengthen your anti-bribery and corruption compliance program. We hope this helps to ensure your organisation has adequate procedures in place to prevent foreign bribery taking place.

The business case for combatting bribery and corruption is more than just compliance. Aside from mitigating the reputational, legal, operational and financial risks and costs of corruption, an organisation dedicated to combatting foreign bribery sends a clear signal of its commitment to responsible behaviour, business integrity and sustainable development. Countering corruption and bribery also makes your organisation a more attractive employer and gives you a competitive edge by appealing to customers, governments, investors, and suppliers who value transparency and integrity.

Importantly, I'd like to express my gratitude to Corrs for their generous pro-bono work on helping draft this guidance, the experts from Transparency International Australia's corporate members who helped, and the 47th Parliament of Australia for passing these historic improvements to Australia's foreign bribery laws.

Thank you for using this guidance and for helping to combat bribery and corruption.

Clancy Moore
Chief Executive Officer
Transparency International Australia

2. INTRODUCTION

On September 9 2024, important changes to Australia's foreign bribery laws took effect. These changes include the introduction of a new offence that applies to corporations for a 'failure to prevent foreign bribery'.¹

The new offence is modelled on similar laws that were introduced in the UK in 2010 by the Bribery Act 2010 (**UK Act**). The new foreign bribery laws also introduce a defence to the 'failure to prevent offence' for organisations who can show they had **adequate procedures** in place to prevent the commission of foreign bribery.²

This *Guidance on Good Practice Procedures for Corporate Anti-Bribery and Anti-Corruption Programs (Guidance)* is intended to provide an overview of the matters you will need to demonstrate to show you had adequate procedures to prevent foreign bribery; this is also sometimes described as an 'effective compliance program'.

In August 2024 the Commonwealth Attorney-General published guidance on adequate procedures to prevent the commission of foreign bribery on the steps corporations can take to ensure their anti-bribery controls are adequate. The Attorney-General's Guidance has been considered in preparing this Guidance.

3. AUSTRALIA'S NEW FOREIGN BRIBERY LAWS

Key elements of the offence

In 2024, the Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024 (Cth) (Act) introduced four major changes to Australia's foreign bribery laws:

- (a) a new offence for corporations who fail to prevent foreign bribery, committed by an 'associate',³ if the commission of the offence is done for the profit or gain of the organisation;
- (b) a defence to the new offence for corporations if they can prove that adequate procedures were in place to prevent the commission of a foreign bribery offence;

- (c) expanding the scope of a 'foreign public official' to include candidates for public office; and
- (d) expanding existing foreign bribery offences in s 70.2 of the Criminal Code to include:
 - (i) conduct for the purpose of obtaining personal (i.e. non-business) benefits;
 - (ii) foreign public officials being influenced outside the exercise of their duties; and
 - (iii) the concept of 'improperly influencing' a public official (removing the requirement that a benefit or business advantage must be 'not legitimately due').

¹ The offence, contained in section 70.5A of the Criminal Code Act 1995 (Cth) (Criminal Code), will apply from 9 September 2024.

² The offence applies to constitutional corporations; corporations incorporated in a Territory; or corporations taken to be registered in a Territory under 16 section 119A of the Corporations Act 2001. For simplicity, we have used the term 'organisation' in this Guidance.

³ 'Associate' is broadly defined at s 70.1 of the Criminal Code to include 'an officer, employee, agent or contractor of the other person', 'a subsidiary (within the meaning of the Corporations Act 2001) of the other person', a person 'controlled (within the meaning of the Corporations Act 2001) by the other person', or a person who 'otherwise performs services for or on behalf of the other person'.

The 'failure to prevent foreign bribery' offence is an absolute liability offence. This means that if an associate of the corporation engages in bribery for the 'profit or gain' of the organisation, the corporation will commit for the failure to prevent bribery offence (unless it can make out the defence – see below).

An organisation can be convicted of 'failing to prevent foreign bribery' regardless of whether the associate has been convicted of the act of a foreign bribery offence. Also, an organisation will not avoid conviction simply because they were unaware of or had not directed the commission of the foreign bribery offence.

KEY TERMS

Meaning of 'associate'

'Associate' is defined broadly under the Act. It includes subsidiaries (if the organisation has control over the board or the majority of the shares),⁴ controlled entities,⁵ officers, employees, agents, contractors or any person who performs services for or on the organisation's behalf. The last category of associate is a new concept under Australia's foreign bribery regime. It could conceivably include suppliers and other individuals and entities over which the company does not have control. The full scope of the definition of 'associate' has not been determined by Australian courts.

Meaning of 'foreign public official'

The definition of 'foreign public official' in the Criminal Code has been expanded to include candidates for foreign public office. This means that organisations need to ensure their anti-bribery measures are capable of applying to these individuals; for example, that due diligence processes for the awarding of contracts to business ventures identify whether political candidates have a connection to the business.

Personal or Business Advantage

The type of advantage that may be a bribe or benefit now includes personal benefits. This means that a benefit derived by an 'associate' does not need to be received to benefit the organisation, but can be a benefit which the individual receives (for example, the granting of a visa).

Improper Influence

The conduct which will be foreign bribery has also been simplified. The prosecution does not need to prove that the benefit provided was 'not legitimately due'. It could be a benefit was provided with the intention to influence the foreign public official.

Penalties

If an organisation is found guilty of a failure to prevent foreign bribery it may be penalised with a maximum fine that is the greater of:

- 100,000 penalty units, (which is equivalent to AUD \$31,300,000 as at 1 July 2023);
- three times the value of the benefit obtained by the associate and attributable to the conduct; of
- if the value of the benefit can be determined, 10 per cent of the annual turnover of the company for the period of 12 months prior to the commission of the offence,

³ See the definition of subsidiary in the *Corporations Act 2001* (Cth).

⁴ Within the meaning of the *Corporations Act 2001* (Cth) being in a position of financial and/or operational control.

4. USING THE GUIDANCE

The Guidance is a starting point for organisations who are designing, implementing or assessing their anti-bribery and anti-corruption procedures. However, please remember that the adequacy of your organisation's procedures will be assessed in light of a range of individual factors, such as its risk profile, steps taken to assess those risks, and whether its policies and procedures were responsive to identified risks.

If you already have an anti-bribery and anti-corruption compliance program that has been designed to comply with the requirements of another jurisdiction, this Guidance can be used as a basis to undertake a review of those procedures so that you can be comfortable that:

- (a) existing procedures are well-understood by all persons and entities caught by the expanded definition of 'associate';
- (b) there are no material gaps between policy requirements and how they are being applied in practice; and
- (c) the procedures in place are appropriate, regularly reviewed, and are aligned with global best practice bribery prevention measures.

If you do not yet have an anti-bribery and anti-corruption compliance program, this Guidance including the checklist, resources and tools, provides a useful starting point for the development of a program that is appropriate for the risk profile of your organisation.

5. ADEQUATE PROCEDURES CHECKLIST

Our checklist has been developed to help you review your anti-bribery and anti-corruption procedures and identify and address compliance gaps to meet the standard of 'adequate procedures'. The checklist along with guidance of adequate procedures is provided throughout this guide.

The checklist is not exhaustive and should be used in accordance with this Guidance and legal advice so that your procedures are fit for purpose for your organisation.

6. KEY CHARACTERISTICS OF ADEQUATE PROCEDURES

Proportionate procedures

The policies and procedures which you implement to prevent foreign bribery should be proportionate to the organisation's circumstances, including its foreign bribery risks, its size and the nature of its activities.

There are four central features of an effective bribery prevention program:

- (a) risk assessments and due diligence;
- (b) corporate culture and governance;
- (c) compliance and controls; and
- (d) oversight and monitoring.

7. RISK ASSESSMENTS AND DUE DILIGENCE

7.1 RISK ASSESSMENTS

Undertaking a risk assessment is a critical first step to determine the level of exposure to bribery risk for your organisation. It will also help you to design controls to mitigate that risk.

A risk assessment also provides information that helps organisations to allocate appropriate resources based on the level of risk identified in areas of its operations.

Risk assessments must be undertaken periodically to identify material changes in the risk profile of business operations, certain sectors, jurisdictions or third-party business relationships. Both the process and outcome of the risk assessment should be documented and then reviewed on a periodic basis.

A risk assessment may involve one or more of the following:

- Stakeholder consultation and interviews. This can include confidential questionnaires for personnel in frontline roles, in-person workshops or roundtables with relevant employee groups and business functions and engaging with personnel operating on the ground in high-risk jurisdictions or engaged in high-risk roles for bribery.

- Engaging an external independent consultant to prepare a report identifying key areas of risk for the business, including reviewing the practices of the organisation's contractors, agents and other external parties acting on its behalf.

- For some organisations assessing bribery risks may form part of a broader ESG risk assessment which considers a range of areas. For example, this could include modern slavery, sanctions and/or anti-money laundering and counter-terrorism financing. This may be an efficient approach for SMEs in particular, as it provides an opportunity to address a number of external risks together that will require input from similar parts of the organisation.

The risk assessment should consider both internal and external bribery risk factors. Examples of internal risk factors include:

- The nature of the business and particular functions that could be higher risk such as dealing with public officials, large number of third parties, or processing of payments;

- the existence of performance-based incentives and a remuneration structure that rewards maximising profits but does not include key performance indicators (KPIs) linked to business integrity;
- a corporate culture of ‘exceptionalism’ where there is repeated non-compliance with organisational procedures; and
- unsatisfactory attendance at training programs and updates to the anti-bribery program.

Examples of external risk factors include:

- **Country risk** – business activities in locations where bribery and corruption are known to be relatively common and where the government is typically involved in commercial dealings through licensing, approvals, security or other services.
- **Sector risk** – sectors that have significant government involvement are inherently high risk for bribery and corruption. Examples include: government is a counter party to a transaction, the government is the gatekeeper for organisations wanting to access a particular sector, or where a sector contributes to the fiscal position of the government.
- **Transaction risk** – transactions where the organisation has more limited access to information about a transaction – such as the ultimate purpose of funding, or the conduct of other parties involved in or benefiting from the transaction are higher risk. Such transactions can include donations to political and charitable organisations, as well as participation in joint ventures and consortia (particularly where one of the parties is a state-owned entity).
- **Business model risk** – operating models that rely on a complex chain of intermediaries or agents operating in jurisdictions where the organisation has limited visibility of the operating environment and risks are inherently high risk. Similarly, high-value projects or transactions where there is significant complexity and competitive tension in the tendering and bidding process may create higher risks of bribery occurring.

CASE STUDY: DUE DILIGENCE FOR MERGERS

SwiftCo is a medium-sized telecommunications business planning to merge with ByteCo, a similar-sized telecommunications business based in Europe that already conducts business in several countries. The merger will create a new entity, incorporating parts of the businesses with executives from both firms sitting on the board of the new entity. SwiftCo is currently conducting a due diligence review of ByteCo’s business, with a particular focus on its service contracts, communications with clients and financial documents. While conducting the review, SwiftCo staff notice:

International service contracts often refer to ‘administrative operations fees’ in connection with dealings with foreign departments without any specific details of why these fees are incurred; and some incomplete financial record-keeping.

SwiftCo’s staff are unsure of how to interpret these issues. At the same time, the business learns that an Australian competitor is looking to acquire ByteCo and is keen to seal the deal. As a result, issues identified by SwiftCo’s staff are not thoroughly examined. SwiftCo decides to take ByteCo’s word that there is nothing to be concerned about.

After the merger, SwiftCo staff notice invoices issued to ByteCo sometimes do not match the service contracts agreed to by overseas customers and correspondence about meetings with customers shows that meetings regularly take place in fancy restaurants with ByteCo executives often treating customers to expensive meals.

SwiftCo’s senior executives do not want to create complications with their new business partners. They assume this conduct is ‘business as usual’ in the overseas markets in which ByteCo operates, and remind themselves that nothing of concern was identified in the due diligence process.

Eighteen months after the merger is complete, the newly created entity is charged with foreign bribery offences for conduct that took place before and after the merger. SwiftCo’s executives learn that prior to the merger, ByteCo’s growth strategy relied heavily on third-party consultants to facilitate entry into offshore markets. These consultants received large administrative operations fees from ByteCo that do not appear attributable to services provided. The newly created entity finds itself facing potential criminal proceedings and is at risk of having to pay a large fine.

What should SwiftCo have done to prevent this risk?

SwiftCo should have ensured thorough due diligence and followed up, and investigated the red flags that were identified prior to, during and after the merger. Its ‘desktop’ review of ByteCo was insufficient and contributed to the failure to identify further red flags post-merger.

To be able to pick up on red flags in the first place, it is crucial that businesses understand anti-bribery and corruption risks. Prevention is the strongest tool to reduce bribery and corruption risks. Due diligence is an important step in that process. It can save a business from serious financial and legal problems if red flags are identified and properly addressed at an early stage.

Due diligence is also required for business relationships – it is not only necessary in mergers and acquisitions. Robust due diligence is vital in preventing and detecting bribery and corruption.

The measures below will help a business avoid a situation similar to the one SwiftCo finds itself in.

STEP 1

Help staff understand how to identify risks of **bribery and corruption in their industry**

STEP 2

Evaluate the target business’s approach to anti-bribery and corruption compliance through due diligence

STEP 3

Promote anti-bribery and corruption within the merged entity through post-acquisition activities

STEP 4

Ensure effective audit processes are in place

Read more at the full case study:

<https://briberyprevention.com/wp-content/uploads/2021/11/Conducting-thorough-due-diligence-1.pdf>

7.2 DUE DILIGENCE

Undertaking a risk assessment is a critical first step to determine the level of exposure to bribery risk for your organisation. It will also help you to design controls to mitigate that risk.

A risk assessment also provides information that helps organisations to allocate appropriate resources based on the level of risk identified in areas of its operations.

Risk assessments must be undertaken periodically to identify material changes in the risk profile of business operations, certain sectors, jurisdictions or third-party business relationships. Both the process and outcome of the risk assessment should be documented and then reviewed on a periodic basis.

A risk assessment may involve one or more of the following:

- Stakeholder consultation and interviews. This can include confidential questionnaires for personnel in frontline roles, in-person workshops or roundtables with relevant employee groups and business functions and engaging with personnel operating on the ground in high-risk jurisdictions or engaged in high-risk roles for bribery.

- Engaging an external independent consultant to prepare a report identifying key areas of risk for the business, including reviewing the practices of the organisation's contractors, agents and other external parties acting on its behalf.
- For some organisations assessing bribery risks may form part of a broader ESG risk assessment which considers a range of areas. For example, this could include modern slavery, sanctions and/or anti-money laundering and counter-terrorism financing. This may be an efficient approach for SMEs in particular, as it provides an opportunity to address a number of external risks together that will require input from similar parts of the organisation.

The risk assessment should consider both internal and external bribery risk factors. Examples of internal risk factors include:

- The nature of the business and particular functions that could be higher risk such as dealing with public officials, large number of third parties, or processing of payments;

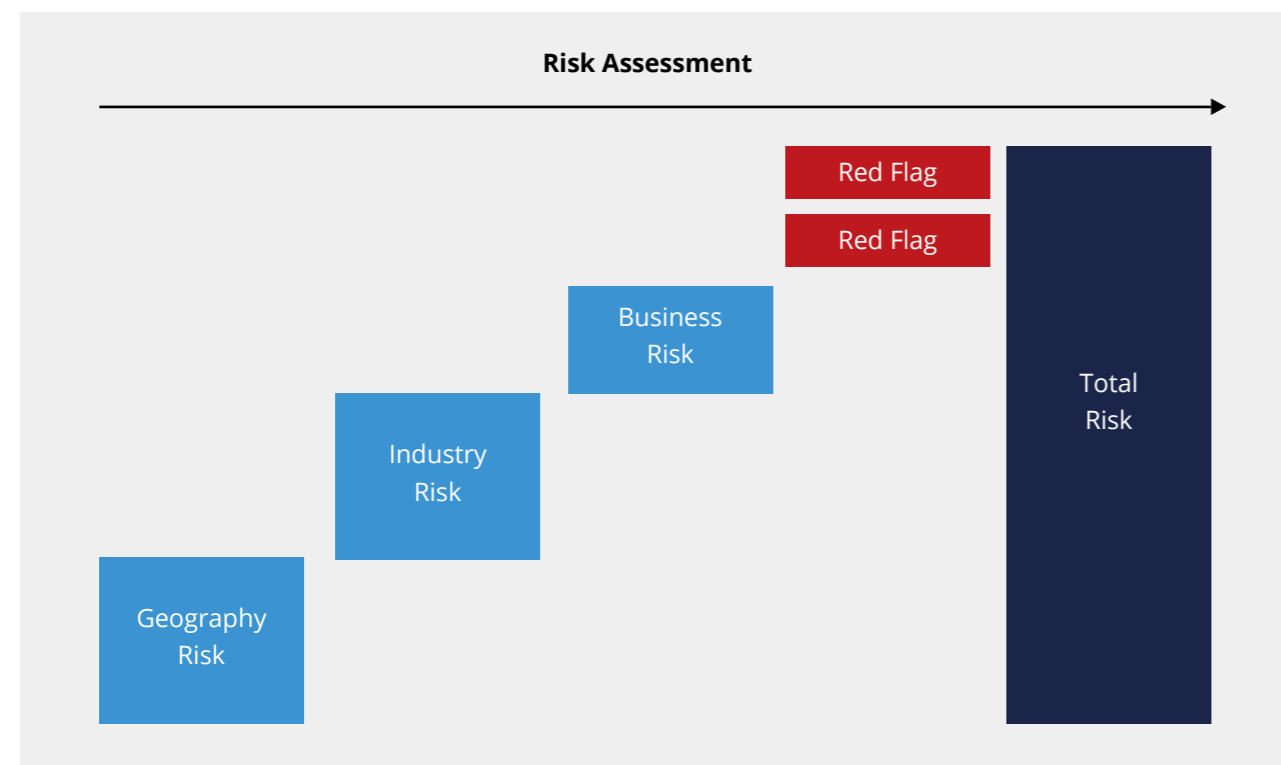
The nature and scope of due diligence measures that is appropriate for your organisation will vary depending on the level of risk assessed for the relevant party or relationship. For example, in some higher risk contexts, due diligence procedures may include engaging external advisors; it may also be prudent to consult external stakeholders such as an embassy, or to speak with international businesses already operating in a new market where the organisation is seeking to enter. Industry associations or civil society groups are also valuable sources of information.

For SMEs, incorporating targeted bribery and corruption questions into existing third-party due diligence processes (e.g. as part of the assessment of credit risk) can be a useful and practical way to mitigate third-party risk in a relatively efficient way. For example, SMEs should consider how they engage with new partners, suppliers and markets. It would be appropriate to review onboarding and tendering processes to evaluate the adequacy of the inquiries made. This may lead organisations to provide training for procurement or other relevant roles on bribery and corruption awareness.

What should you do if you discover a third-party you are dealing with has been linked to bribery and corruption?

Engaging with an entity which has been associated with bribery and corruption requires careful and heightened due diligence. You should consider asking key questions such as:

- Is the entity's leadership the same as when the bribery occurred?
- Is there evidence that the entity has taken responsibility for the conduct, for example, by taking disciplinary action against staff involved or self-reporting the incident?
- Has there been a review of the entity's bribery risk management procedures, and how have the results of this review been implemented?
- What are the factors, for example, a criminal conviction for bribery, that need to be considered to terminate or end the relationship with the third party?



Publicly available resources should be used to identify contexts where bribery risks are more likely to arise and where more detailed due diligence should be conducted; for example, where a SME is looking to contract with an entity located

in an industry and/or jurisdiction where bribery risks are elevated.

Due diligence of third parties should also include scanning of beneficial ownerships to identify any possible red flags or risks.

7.3 RESOURCES: RISK ASSESSMENTS AND DUE DILIGENCE

- The 2023 Corruption Perceptions Index (CPI). <https://www.transparency.org/en/cpi/2023>
- The Global Corruption Barometer assesses general public attitudes towards, and experience of, corruption in dozens of countries around the world. <https://www.transparency.org/en/gcb>
- Transparency International's Responsible Mining Business Integrity (RMBI) Tool <https://mining.transparency.org.au/responsible-mining-business-integrity-tool/>
- TI UK's anti-bribery risk assessment guidance. https://www.antibriberyguidance.org/sites/default/files/pdf/publications/Diagnosing_Bribery_Risk.pdf

7.4 RISK ASSESSMENTS AND DUE DILIGENCE CHECKLIST

		Y	N	Plan date	Comment	Evidence
1.	Does your organisation have a <i>risk assessment</i> process that considers bribery and corruption risks? When you consider this question, ask:					
2.	Does the risk assessment rate or categorise bribery and corruption risks (i.e., does the assessment use reputable, independent resources such as Transparency International's Corruption Perception Index to determine which jurisdictions may have an inherently higher risk for bribery and corruption practices)?					
3.	How frequently is the risk assessment carried out?					
4.	Do your anti-bribery and anti-corruption procedures identify trigger events when a risk assessment must be carried out? This should address the frequency when regular risk assessments will be undertaken and the kind of unusual events that mean the organisation should refresh its risk assessment, such as a material change in business operations.					
5.	Does your risk assessment incorporate stakeholder participation (i.e., does the assessment rely only on a 'desktop' assessment, or are there qualitative assessments, such as surveys and engagement with employees)?					
6.	Do you have a <i>due diligence</i> process for assessing exposure to bribery and corruption risks and practices? When you consider this question refer to questions 7-9.					

		Y	N	Plan date	Comment	Evidence
7.	Is the anti-bribery and anti-corruption due diligence process integrated with your organisation's broader due diligence frameworks e.g., commercial and operational risks, as well as modern slavery, ESG, AML and CTF?					
8.	How does the anti-bribery and anti-corruption due diligence process identify and define 'red flags' for bribery and corruption risk?					
9.	Do your organisation's anti-bribery and anti-corruption procedures specify trigger events when due diligence must be carried out on third parties that your organisation is dealing with?					
10.	Does your organisation conduct corruption and integrity due diligence on third parties before onboarding and on an ongoing basis?					
11.	Does your organisation look into the beneficial owners of third parties as part of the due diligence process?					

8. CORPORATE CULTURE AND GOVERNANCE

A clear, public commitment to a policy of zero-tolerance for bribery, supported by a robust 'tone from the top', provides the foundation for an effective anti-bribery program.

Irrespective of the level of bribery risk your organisation faces, establishing adequate procedures will in almost all cases require the Board and senior management to be involved in establishing and promoting the organisation's anti-bribery commitment and program.

(a) Policy commitment

Organisations should adopt a commitment to a zero-tolerance approach to bribery, which may be emphasised in a code of conduct, code of ethics or corporate values document.

The anti-bribery / anti-corruption policy should:

- (i) include a definition of 'bribery' which is consistent with the definition in Australia's foreign bribery laws and any other relevant bribery laws where organisations are located;

8. CORPORATE CULTURE AND GOVERNANCE

- (ii) describe the anti-bribery / anti-corruption procedures that the organisation has implemented (and direct personnel to the intranet site where relevant documents are made available);
 - (iii) be made available in the languages spoken by the organisation's workforce;
 - (iv) be formally adopted with written approval of the Board;
 - (v) be communicated to external stakeholders by making the policy publicly accessible or clearly articulating the commitment and Board-level endorsement in external-facing communications (e.g. on the organisation's website); and
 - (vi) be reflected in the organisation's values statement and/or business integrity commitments.
- (b) 'Tone from the top'

The Board or principal governing body is responsible for instilling a culture of zero tolerance for bribery, and for ensuring that your anti-bribery and corruption program is designed and implemented to effectively prevent bribery.

The Board and senior management should play an active and visible role in:

- (i) establishing and endorsing a zero-tolerance policy to bribery and corruption;
- (ii) setting the strategy for identifying, preventing and mitigating bribery risk;
- (iii) overseeing the anti-bribery program and ensuring its performance is reviewed against stated objectives;
- (iv) communicating and regularly reinforcing your zero-tolerance approach to bribery through internal and external communications (e.g. reporting on the anti-bribery program publicly, discussions at organisation-wide 'town hall' or 'all-hands' meetings, participating in training sessions and workshops with staff); and
- (v) Having standard agenda item at board or relevant committee meetings on anti-bribery and corruption compliance.
- (vi) Having a dedicated forum or platform for anti-bribery and corruption discussions including senior management.

8.1 RESOURCES: CORPORATE CULTURE AND GOVERNANCE

- Anti-Corruption Toolkits for Business. <https://www.transparency.org/en/toolkits/business>
- G20/OECD Principles of Corporate Governance 2023. <https://www.oecd.org/en/publications/g20-oecd-principles-of-corporate-governance-2023-ed750b30-en.html>
- Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises. <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0414>
- Principles and guidance for anti-corruption corporate transparency. <https://transparency.org.au/open-business-principles-and-guidance-for-anti-corruption-corporate-transparency/>

8.2 CORPORATE CULTURE AND GOVERNANCE CHECKLIST

		Y	N	Plan date	Comment	Evidence	Evidence
1.	Does your organisation have an anti-bribery and anti-corruption policy?						
2.	Does the anti-bribery and anti-corruption policy include a definition of 'foreign bribery' that is consistent with the new foreign bribery laws?						
3.	Does the anti-bribery and anti-corruption policy cross-reference the internal procedures that the organisation has to give effect to its anti-bribery commitments?						
4.	Does the policy identify who (or which business units / functions) is responsible for ensuring that there is compliance with the organisation's anti-bribery and anti-corruption procedures?						
5.	Is the policy actively communicated to internal stakeholders, such as through organisation-wide training?						
6.	Is the policy communicated to external stakeholders, including third parties that the company contracts with or engages?						
7.	Do your organisation's directors and senior management demonstrate the organisation's commitment to anti-bribery and anti-corruption practices in its values, business integrity commitments, internal communications and broader statements to the community?						

9. COMPLIANCE AND CONTROLS

The control environment is made up of the policies, procedures and risk management system that your organisation implements in response to the bribery risks it has identified through risk assessments. This includes internal controls to address the behaviour of directors, senior management and employees, as well as external controls to adequately prevent the commission of foreign bribery offences by third parties, subsidiaries and other parties captured by the definition of 'associate'. Maintaining accurate, complete and current books and records is another good practice for internal controls.

Ideally, you should ensure that anti-bribery controls are integrated within the broader risk management framework, particularly as it relates to other 'governance' issues including AML CTF, sanctions, corporate fraud and human rights and modern slavery. An integrated approach to assessing and managing these risks for the business will enable your organisation to:

- streamline its processes;
- leverage the expertise and knowledge of specialists within the business; and
- facilitate early identification of emerging and intersecting risks (e.g. increased bribery, corruption and human rights risks associated with political unrest or armed conflict).

(a) Communication

Your anti-bribery policies and sanctions for non-compliance should be clearly communicated to any third parties you have a business relationship with, and ideally before you are engaged in a contractual relationship with that entity. You could achieve this by including anti-bribery and corruption clauses in supply and contractor agreements, requiring third parties to have

adequate procedures for preventing bribery, or requiring contractors you engage to comply with your anti-bribery policy.

Your anti-bribery policy, the procedures adopted to operationalise the policy, and the requirements imposed on workers should also be clearly and regularly communicated to the workforce. An effective internal communication strategy will often also involve regular communication from senior management or directors, in the form of emails or verbal updates reminding personnel of the policy's requirements and their obligations to prevent bribery.

External communications reporting on the measures you have in place to manage bribery risks will help your organisation demonstrate accountability to external stakeholders, including customers, consumers and the communities impacted by your operations. While public reporting can invite greater scrutiny of the organisation's performance in respect of bribery, transparency will often incentivise more rigorous monitoring and self-assessment and therefore provide greater confidence that procedures are adequate. It will also increase the likelihood that an organisation will identify and swiftly address any instances of foreign bribery if they occur.

(b) Training

Training provides an important tool to ensure the substantive requirements of an organisation's anti-bribery policy and program are well understood and effectively implemented. The level of training that is appropriate for employee groups with an organisation will depend on the potential bribery risks they will be exposed to. An organisation may consider implementing one or more of the following training models:

- (i) Organisation-wide training, which may be delivered through an interactive online learning system, instructor-led sessions and seminars, or externally-run courses. Training on the organisation's anti-bribery program should form part of the compulsory induction training for any new recruits (including new directors).
- (ii) Employees or agents working in jurisdictions or sectors that the organisation has determined carry higher risks of bribery may require training on the specific risks of bribery such as facilitation payments, gifts, hospitality and expenses, the procedures they must follow and scenario-based skills training (e.g. negotiation skills or how to resist demands for bribes and handle attempted extortion).
- (iii) Personnel within the business that are assigned anti-bribery compliance responsibilities, (e.g. procurement, members of the internal audit, human resources, sales and marketing, risk and compliance or legal functions) should receive tailored training on their responsibilities, how to monitor and assess compliance within their division, and when and how to escalate concerns regarding bribery.
- (iv) Directors and the senior management team should receive tailored training to ensure they understand the organisation's risk environment, its policies and procedures, and their responsibilities under the anti-bribery program.

(c) Third-party relationships

You should develop specific controls to manage bribery risks that may arise in the course of the following third-party relationships: contractors, agents and intermediaries, joint venture partnerships, consortia and partially-owned subsidiaries. These may include:

- (i) due diligence to ascertain whether third parties have an anti-bribery program;
- (ii) encouraging third parties to implement policies and procedures that reflect the elements of your anti-bribery program (where the organisation has leverage, influence or effective control);
- (iii) contractual mechanisms to enable you to require a third-party to take corrective action to address deficiencies in bribery risk mitigation, apply sanctions and/or rely on termination provisions where material policy breaches or bribery incidents occur;
- (iv) ongoing monitoring of high-risk business relationships; for example, agents and intermediaries you engage to assist with entry into a new market that is high risk for corruption, members of a consortia that are state-owned enterprises or a sole supplier of relevant goods or services that are critical to business continuity; and
- (v) clear communication of the requirements on third parties imposed by your anti-bribery policy, code of conduct or similar policy, and the sanctions attaching to non-compliance;

CASE STUDY: THIRD-PARTY DUE DILIGENCE AND MANAGEMENT OF RELATIONSHIPS

A medium-sized construction company is looking to enter into a market in a high-risk jurisdiction for bribery and corruption because of the potential to expand the business and earn considerable revenue. There is an opportunity to tender for a project administered by the country's Department of Infrastructure. To assist with the tender process and to better understand the jurisdiction, the company engages a local consulting company who states that they have strong relationships with the Department and other government contacts. The contract of engagement with the local consultancy includes a success fee of 2.6 per cent of the value of any contracts won through the tender process.

In this scenario, the construction company should be aware of some of the 'red flags' in this arrangement and implement the steps above to:

- assess the controls the consultancy has in place to prevent bribery and corruption, including the disclosure of conflicts of interest and relationships with government;

- ensure the contract of engagement clearly addresses the precise scope of services to be provided by the consultancy in return for the success fee, including clear communication around the expectations of delivery of these services;
- require formal invoicing and documentation to detail what and how services were rendered prior to making any payments to the consultancy; and
- implement audit and oversight rights in respect of communications with the Department throughout the tender process.

Mechanisms for oversight and monitoring are explained further at section 5.5

(d) Reporting and responding to incidents

It is important that potential bribery issues can be raised confidentially across multiple and culturally sensitive channels (and ideally anonymously) with personnel who have received appropriate training to receive and deal with complaints relating to bribery.

Organisations should ensure the availability of a whistleblowing or other confidential reporting mechanism for raising concerns about bribery. Fostering a 'safe to speak up' culture is very important to help prevent, detect and reduce the risk of bribery, corruption and other wrongdoing. Communications about the reporting tool should be directed to employees, third parties and external stakeholders.

It is also important to take steps to mitigate the risk of retaliation for individuals who report concerns. This will be assisted by implementing procedures that explain the organisation's process for responding to alleged or identified incidents of bribery (amongst other issues). The procedure should, at a minimum, clearly identify:

- (i) the business functions and/or personnel responsible for triaging a report or complaint when received;
- (ii) the process with clear timelines and aims to identify and address root cause of the bribery allegation, that must be followed in conducting and documenting an investigation;

- (iii) when and how the business should engage its internal or external lawyers; and
- (iv) at what stage in any investigation the allegations or incidents of bribery should be reported to the Board and senior management and matters that will be considered in determining whether or not to self-report the matter to law enforcement authorities.

CASE STUDY: INVESTIGATING AN INTERNAL COMPLAINT

Sarah's business, MacNuts Pty Ltd, grows macadamia nuts in rural New South Wales. A senior employee, Andy, recently engaged a food distributor to distribute the nuts to supermarkets in a European country. Sarah is delighted as the European market is hard to break into. A few months later, Sarah receives an internal email from the business's financial officer, Laura. Laura states that Andy's customs payments have increased substantially, even though the quantity of the orders has not changed. Laura queries the increase and recommends Sarah look into it. When Sarah asks Andy about the customs payments, Andy responds:

"The food distributor told me that government customs requirements are very complex in that country. Because of this, they usually refer suppliers to an intermediary business they are familiar with to arrange all the customs

paperwork. Customs can be very slow and using an intermediary is normal and will speed things up. I was worried about meeting the milestones required by the food distributor and meeting our sales targets, so I engaged the intermediary's services to avoid possible delays. There is a signed contract. It's nothing to worry about."

Sarah reviews the contract with the intermediary and she is immediately concerned about costs described as 'service fees' that are payable to the intermediary. The amount seems high for the relatively straightforward work involved for the services. She is worried these payments are being made to the intermediary to improperly obtain assurances from government officials or to speed up the importation of the macadamia nuts. Sarah suspects that Andy, and her business, may have engaged in bribery to secure their entry into the European market.

CONTINUED...

What should Sarah do next?

Sarah and the business should consider the following steps.

- 1. Be proactive:** follow up the concern. At best it will result in the action being found to be valid, at worst, ignoring the red flag may result in the business being assessed as endorsing an illegal arrangement.
- 2. Undertake a risk assessment** to identify common standards in the country. If the arrangement appears at odds with common standards, that may be another red flag. It may be unusual that the service fee is conditional upon obtaining assurances from government officials to hasten the customs process.
- 3. Investigate the arrangement** to assess whether it was valid or not. In this example, the company should:
 - review communications between Andy, the distributor and the intermediary and whether there is anything more to the arrangement that Andy has not disclosed; and
 - review the invoices, receipts and actual services provided by the intermediary to check if the intermediary is providing the services they are engaged for, or if they are doing something else. For example, if the intermediary is paid a 'success fee', this could raise more concerns than charging an hourly rate.

4. Consider the risk assessment and if necessary, terminate the arrangement: The business may avoid any suggestion that it did not comply with its own anti-bribery and corruption policies and that it approved the arrangement which may reduce the risk of significant penalties by a regulator. Also, if the business makes a further payment to the supplier in circumstances where it knows, is reckless or negligent as to whether the payment will be used for an unlawful activity, each further payment can itself be a criminal offence.

5. Consider legal advice: If the investigation reveals potential evidence that the intermediary made improper or corrupt payments, consider obtaining legal advice about reporting the issue to authorities and other legal issues that can arise.

Prevention is the best method to deter bribery

Implementing an effective anti-bribery and corruption compliance program and providing ongoing training encourages employees like Andy to escalate concerns initially and foster an organisational culture that is proactive about avoiding bribery issues.

Source: Bribery Prevention Network. Developed by Corrs Chambers Westgarth

9.1 COMPLIANCE AND CONTROLS

- Anti-Corruption Ethics and Compliance Handbook for Business. https://www.oecd.org/en/publications/anti-corruption-ethics-and-compliance-handbook-for-business_e1cf4226-en.html
- Legal incentives for compliance in the private sector. <https://knowledgehub.transparency.org/helpdesk/legal-incentives-for-compliance-in-the-private-sector>
- OECD, Due Diligence Guidance for Responsible Business Conduct. <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>
- United Nations Office on Drugs and Crime, An Anti-Corruption Ethics and Compliance Programme for Business: A practical guide. https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf

9.2 COMPLIANCE AND CONTROLS CHECKLIST

		Y	N	Plan date	Comment	Evidence
1.	Does your organisation provide anti-bribery and anti-corruption training?					
2.	Does your organisation monitor timely completion of anti-bribery and anti-corruption training?					
3.	At a minimum, does your organisation provide anti-bribery and anti-corruption training for all employees or agents who work in jurisdictions or sectors that have an inherently high risk of bribery or corruption?					
4.	Does this training address:					
5.	the specific compliance obligations for employees when they are working in high-risk contexts?					
6.	how to assess compliance with the organisation's anti-bribery and anti-corruption policy and procedures?					
7.	how to escalate concerns regarding bribery or corruption?					
8.	How are directors and senior management trained and assessed on their understanding of the organisation's risk profile, its policies and procedures, and their responsibilities under the anti-bribery and anti-corruption program? Does your organisation have contract terms with third parties which enable it to:					
9.	request information about the third-party anti-bribery and anti-corruption programs?					
10.	require a third-party to take corrective action to address deficiencies in their anti-bribery and anti-corruption risk management procedures?					

9.2 COMPLIANCE AND CONTROLS CHECKLIST CONTINUED...

		Y	N	Plan date	Comment	Evidence
11.	apply sanctions and/or rely on termination provisions where material policy breaches or bribery incidents occur?					
12.	Do you have policies and procedures on responsible political engagement which covers donations and other contributions?					
13.	Does your organisation have ongoing monitoring and governance of declarations related to gifts, entertainment, sponsored travel, personal conflicts and outside business interests?					

10. OVERSIGHT AND MONITORING

(a) Role of the Board and senior management

In addition to its role in establishing a culture of compliance with the organisation's anti-bribery policy and program, the Board of Directors also has ultimate responsibility for overseeing governance of the organisation's foreign bribery risk. This will typically include:

- (i) delegating day-to-day management and oversight of the anti-bribery program to the appropriate members of senior management;
- (ii) designing remuneration for the senior management team to incentivise business integrity and effective implementation of the program;
- (iii) overseeing the risk assessment and development of anti-bribery policies and procedures;
- (iv) allocating adequate resources to support the anti-bribery program;

(v) receiving periodic updates on the anti-bribery program, risk assessments, reports of any internal audit findings, reports on any breaches of the organisation's policies or material bribery incidents, and considering the effectiveness of the organisation's response; and

(vi) engaging an independent third-party to undertake external verification or assurance of anti-bribery procedures.

Members of senior management will typically be responsible for implementing the organisation's anti-bribery policy and procedures, and report periodically to the Board. Senior management's role will include:

- (i) assigning accountability for compliance to appropriate business functions and personnel and establishing clear reporting lines;

- (i) overseeing employee remuneration, performance targets and incentives to ensure they reward employees who prioritise business integrity;
- (vii) identifying key bribery risks for the business and integrating consideration of those risks into existing risk management frameworks;
- (viii) receiving and reviewing reports on the implementation of the anti-bribery program, internal audit findings and complaints or grievances raised;
- (ix) overseeing investigations and sanctions in relation to any identified incidents or breaches of policy;
- (x) overseeing procedures to review results of internal audits and address identified issues, including through the development of corrective action plans; and
- (xi) providing necessary approvals for key controls (e.g. appointments of agents or other intermediaries, hospitality or travel expenses exceeding stipulated monetary thresholds).

(b) Internal audits and monitoring

Internal audits assess the efficacy of the controls you have in place and the accuracy of your processes for documenting the implementation and performance of those controls. For larger organisations, this will often be carried out periodically by the internal audit function. Organisations that do not have an audit function may consider engaging an external auditor (see 'External verification' below).

Adequate procedures for an internal audit of an organisation's anti-bribery program will typically consider the following:

- (i) whether directors, senior management, employees and associates (including agents and suppliers) receive training tailored to their roles and responsibilities under the anti-bribery program and, where appropriate, the risks likely to arise in their business area, jurisdiction or sector;

- (ii) whether employees understand their obligations under the organisation's anti-bribery program and follow the requirements of policies and procedures in their dealings with third parties;
- (iii) whether the organisation's anti-bribery policies are effectively operationalised through its procedures and controls, and whether those controls are responsive to the risks identified for the business through regularly updated risk assessments; and
- (iv) whether allegations or incidents of bribery have been dealt with in accordance with policies and procedures, and whether sanctions have been applied to those responsible.

There are certain trigger events that should prompt ad hoc reviews to evaluate the effectiveness of existing controls; for example, when entering new markets, changes to operations and activities, a bribery incident, regulatory audits, or changes in the regulatory environment in a jurisdiction where the organisation operates.

Feedback from employees and other stakeholders can also be a useful prompt to assess aspects of the anti-bribery program. For example, seeking employee feedback following their participation in training programs can assist to identify opportunities to improve training content and guidance materials, and interviews with personnel with core accountabilities under the anti-bribery program can provide an indication of whether reporting lines are clearly understood and used effectively.

Having in place a process to capture learnings by documenting and analysing bribery risks or incidents identified by the organisation's controls is also critical to building a robust understanding of the organisation's risk profile and the effectiveness of its controls.

(c) External verification

For large organisations, it is good practice to periodically engage an external expert to review the anti-bribery program and provide verification or assurance as to its adequacy and effectiveness.

External reviews should assess:

- (i) the adequacy of the design and implementation of the program considering the bribery risks relevant to the business' location, size, operations and business model; and

- (ii) the *effectiveness* of the policies and procedures.

It is important to note that organisations engaging external verification should carefully consider and act on findings of any external review.

10.1 RESOURCES: OVERSIGHT AND MONITORING

• The **Self-Evaluation Tool** helps businesses to determine where they stand with their anti-corruption programme and identify improvements, based on an easy-to-use checklist that comprises an in-depth and extensive range of more than 240 indicators. https://images.mutualcdn.com/transparency-org/images/2014_TI_AntiBriberyChecklist_EN.pdf

• Guide for practitioners: How to effectively monitor anti-corruption compliance | Article | Compliance Week <https://www.complianceweek.com/third-party-risk/guide-for-practitioners-how-to-effectively-monitor-anti-corruption-compliance/28128.article>

10.2 OVERSIGHT AND MONITORING CHECKLIST

		Y	N	Plan date	Comment	Evidence
1.	Does your organisation's remuneration structures incentivise business integrity, including compliance with its anti-bribery and anti-corruption procedures? When you consider this question, also consider the following questions.					
2.	Is the Board and Management accurately and timely informed about the results of risk assessments, reports of any internal audit findings, and reports on any breaches of the organisation's policies or material bribery incidents)? Does the Management oversee any required mitigation diligently?					
3.	Does your organisation conduct audits, either internally or via an external auditor, in respect of anti-bribery procedures?					
4.	What is the frequency of anti-bribery audits conducted within the organisation?					
5.	To what extent do the audits consider how effectively the organisation's anti-bribery procedures identify and mitigate bribery risks and/or conduct?					
6.	How do the audits assess the extent of employees' understanding of their anti-bribery compliance obligations and the implementation of the organisation's anti-bribery policies, including when engaging with third parties?					
7.	Are reviews conducted where allegations and incidents of bribery are identified, and do these reviews consider the extent to which the organisation's anti-bribery procedures were effective?					
8.	Does your organisation engage independent third parties to periodically undertake external verification or assurance of anti-bribery procedures?					

11. SELF-REPORTING INCIDENTS

Self-reporting incidents of bribery is not required under the Act. However, there are a number of factors that weigh in favour of self-reporting at an appropriate time.

- The harms related to bribery offences are increased where organisations do not voluntarily report or cooperate with authorities.
- The continuous disclosure obligations contained in the Corporations Act 2001 (Cth) (Corporations Act) require organisations to disclose information to the market which a reasonable person would expect to have a material effect on the price or value of the organisation's securities. Bribery offences (or credible allegations of bribery) are matters that can considerably harm an organisation's reputation, future opportunities for business (such as being excluded from public tenders) and result in substantial financial penalties.
- Directors are required to exercise their powers and discharge their duties with a degree of care and diligence that a reasonable person would

exercise in their position, and to make business judgments in good faith. It would be expected that a director acting in accordance with their ethical obligations would consider whether self-reporting of bribery incidents was in the best interest of the organisation.

Organisations must exercise care to ensure any internal investigation is documented appropriately and conducted in accordance with the organisation's policies. Open, transparent and meaningful cooperation with relevant authorities investigating bribery incidents will also ensure the organisation is acting consistently with its obligations.

Where an organisation is considering self-reporting a potential bribery incident, it will be necessary to seek advice from the organisation's internal or external legal counsel to ensure that legal, operational and reputational risks are appropriately managed and mitigated.

11.1 RESOURCES: REPORTING

- The UNGC-TI Reporting Guidance on the 10th Principle Against Corruption helps businesses to report on the anti-corruption programme by providing a comprehensive set of 22 Reporting Elements which can be used to provide information in a mainly descriptive manner. <https://www.transparency.org/en/publications/un-global-compact-ti-reporting-guidance-on-the-10th-principle-against-corru>
- This guide from TI Australia provides guidance on to develop a speak up culture. <https://transparency.org.au/report-the-business-case-for-speaking-up/>
- Video from the Bribery Prevention Network on tips and experiences from a range of speakers exploring the challenges that SMEs face in embracing a speak-up culture. <https://vimeo.com/707704134/f6b3ae6a9b>
- ASIC guide on whistleblowing under the Corporations Act: <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>

CASE STUDY: IMPORTANCE OF HAVING A 'SPEAK UP' CULTURE AND LISTENING TO WHISTLEBLOWERS

Australia's first conviction of foreign bribery involved two subsidiaries of the Reserve Bank of Australia (RBA) Securrency and Note Printing Australia pleading guilty in 2011 to charges of conspiracy to commit foreign bribery between 1999 and 2004 in Indonesia, Malaysia, Vietnam and Nepal in order to win banknote supply contracts. This was in a large part due to two brave whistleblowers, James Shelton and Brian Hood,

who were repeatedly ignored by their employers, the AFP, and politicians, and forced to go the media about Securrency and Note Printing bribing foreign officials to use Australia's award-winning polymer note printing technology. Eventually, the Supreme Court of Victoria fined both companies a total of \$21 million and five individuals involved in the offences were given suspended sentences.

