

Fighting Bribery in Business

A guide for risk, compliance and
sustainability teams implementing
adequate anti-bribery procedures

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Global Compact
Network Australia

Allens > < Linklaters





Acknowledgement of Country

We acknowledge Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia. We pay our respects to Elders past, present and emerging. Our vision for reconciliation is a future where Australians are united by our shared past, present, future and humanity.

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Authors

Global Compact Network Australia
Allens

Copy Editors

Influence Global

Designers

Gosh Creative™



Australian Government
Department of Foreign Affairs and Trade

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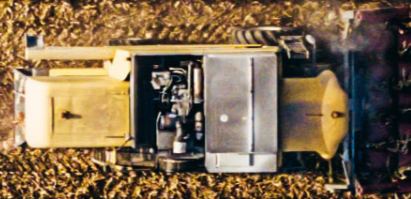
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Acronyms and Abbreviations

Australian Guidance	Attorney-General's Department's <i>Draft guidance on adequate procedures to prevent the commission of foreign bribery consultation paper</i>
AUSTRAC	Australian Transaction Reports and Analysis Centre
Business	This term is used throughout the report to refer to body corporates and other business structures. While it is recognised that 'failure to prevent bribery' offences with respect to bribery apply specifically to body corporates, this guidance encourages all businesses to implement adequate procedures to prevent bribery.
CLACCC	Australia's Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019
Corporations Act	Australia's <i>Corporations Act 2001</i> (Cth)
DOJ	United States Department of Justice
ESG	Environmental, social and governance
ISO	International Organization for Standardization
SDGs	Sustainable Development Goals
SFO	United Kingdom Government's Serious Fraud Office
UK	United Kingdom
UK Guidance	United Kingdom Government's Ministry of Justice's <i>Guidance on the Bribery Act 2010</i> (UK)
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
USA	United States of America
USA Guidance	The collated guidance resources on anti-bribery and corruption provided by the United States Department of Justice and Securities and Exchange Commission. This includes the <i>Resource Guide to the US Foreign Corrupt Practices Act</i> , and the <i>Evaluation of Corporate Compliance Programs</i> .

Introduction



Introduction

As the global fight against corruption gains momentum, new and tougher regulations are emerging worldwide.

Proposed legislation is before the Australian Parliament that would create a corporate offence of failing to prevent foreign bribery. The proposed offence is based on a similar United Kingdom (UK) law, the highest benchmark for global foreign bribery laws available to date. The proposed Australian offence would hold a business liable if an associate bribes a foreign public official. To avoid legal liability, companies will need to demonstrate that they had adequate procedures in place to prevent its associates from committing foreign bribery. Once in effect, this offence will have serious implications for Australian businesses operating overseas, particularly in industries and countries with high bribery risks. This guide supports Australian businesses to understand how to implement these adequate procedures.

The case for preventing bribery

Anti-corruption measures are not only about avoiding legal liability. Corruption, including bribery, has a significant impact on economic and social development and the environment, disproportionately impacting the world's poorest communities. It also threatens the reputation of businesses, undermines fair competition and raises the cost of doing business.

The Tenth Principle of the *United Nations (UN) Global Compact*¹ states that 'businesses should work against corruption in all its forms, including extortion and bribery'. This is supported by Sustainable Development Goals (SDGs) 16 and 17:

Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

Target 16.5: Substantially reduce corruption and bribery in all their forms.

Goal 17: Strengthen the means of implementation and revitalise the global partnership for sustainable development.

Together, they provide a basis for incorporating responsible business practices that address corruption into business strategy and operations.

About this publication

This guide supports compliance and sustainability teams to 'fight the anti-bribery fight', by providing practical and illustrative direction on developing and implementing procedures that align with the Attorney-General's Department's *Draft guidance on adequate procedures to prevent the commission of foreign bribery consultation paper* (Australian Guidance).

The first chapter benchmarks Australia's proposed adequate procedures requirements against regulatory frameworks in the UK and the United States of America (USA). The report then explains how to build adequate procedures into a good compliance system. This includes a description of each element of the adequate procedures (see Figure 1) and good practice case studies from Australian companies. Finally, it maps the intersections between adequate procedures and other compliance areas, including human rights (e.g., modern slavery), economic and trade sanctions, foreign influence and anti-money laundering.

The guide accompanies the factsheet *Are your anti-bribery procedures adequate?: Guidance for SMEs*. It provides more detailed information for those responsible for practically implementing procedures to prevent bribery and corruption.

Six key elements of a good compliance system



Management and senior employee commitment to developing, implementing and promoting anti-bribery policies.



Thorough and ongoing **risk assessments** to determine a business's bribery risk profile.



Performing comprehensive **due diligence** when entering new business relationships and contexts.



Effective and **confidential reporting and investigation** mechanisms.



Clear **communication and training** on bribery prevention policies for all employees and associates.



Regular **monitoring and review** of anti-bribery policies and procedures, adjusting where appropriate.

1.Overview of Adequate Procedures Frameworks and International Guidance



1. Overview of Adequate Procedures Frameworks and International Guidance

Under proposed legislation, the Crimes Legislation Amendment (*Combatting Corporate Crime*) Bill 2019 (CLACCC Bill),² an Australian business commits a criminal offence if it fails to prevent its associates paying a bribe for its 'profit or gain'.³

The offence is one of strict liability, meaning that if such circumstances arise, a body corporate commits an offence whether or not it intended for, or even knew that its associate paid a bribe. However, a business has a defence if it can prove that it had 'adequate procedures' in place to prevent foreign bribery.⁴ The Attorney-General has published draft guidance (Australian Guidance)⁵ on the steps that a business should take. The guidance anticipates that the proposed failure to prevent bribery offence will be passed into law. It provides the best indication yet of the Australian government's anti-bribery compliance expectations.

Globally, many countries are incentivising businesses to adopt systems to prevent foreign bribery. *Transparency International* identifies the UK and USA as leading foreign bribery enforcement jurisdictions,⁶ which publish comprehensive and

influential guidance on the systems businesses should adopt to prevent misconduct.

Many Australian businesses have already aligned their anti-bribery compliance systems with UK and USA regulatory guidance. The UK and USA guidance also informs Australia's adequate procedures guidance.

Who is an associate?

Associates include a range of people and businesses that a body corporate might deal with, for example:

- > Officers and employees;
- > Subsidiaries;
- > Intermediaries, suppliers and any other company over which the business exercises influence and control;
- > Joint ventures; and
- > Overseas consultants, agents, contractors, subcontractors and any person or business that otherwise performs services for or on behalf of the business.⁷



UK guidance

In 2010, the UK enacted legislation to make a commercial organisation automatically liable for bribery by its associates unless it can prove it had adequate procedures in place to prevent it. This provides an incentive for businesses to invest in anti-bribery compliance.

The UK Government's Ministry of Justice's *Guidance on the Bribery Act 2010* (UK Guidance)⁸ distils adequate procedures into six principles, which are broadly mirrored in the Australian Guidance. It has proved to be highly influential and businesses in the UK and around the world have developed and improved their anti-bribery compliance systems with reference to the document.







USA guidance

In contrast to the UK, the USA does not have a corporate 'failure to prevent bribery offence'. However, the United States Department of Justice (DOJ) has incentivised companies to invest in anti-bribery compliance by adopting a prosecutorial policy offering significant discounts to fines—and sometimes declining to prosecute at all—where companies have good compliance measures in place.

Several pieces of guidance are provided, including the *Resource Guide to the US Foreign Corrupt Practices Act*⁹ and a more detailed guidance document co-authored by the DOJ and Securities and Exchange Commission, the *Evaluation of Corporate Compliance Programs*.¹⁰

In general, the Australian, UK and USA guidance is aligned. However, as set out in Table 1, some jurisdiction's guidance provides more detail on a topic than others.

Table 1: Comparison of adequate procedures across jurisdictions

	 Risk assessment	 Management dedication	 Due diligence	 Communications and training	 Confidential reporting and investigation	 Monitoring and review
If you already have procedures informed by the UK or USA Guidance, note that the Australian Guidance provides more detail on...	...common risks, including risks associated with third parties.	...the role of management in implementing and promoting bribery prevention procedures.	...conducting due diligence on third parties.		...what constitutes effective reporting mechanisms and effective response systems.	
If you are developing procedures for the first time, note that the UK Guidance provides more detail on...		...the nature of effective communications.	...who might be an associate.	...externally communicating a body corporate's stance on bribery.		
If you are developing procedures for the first time, note that the USA Guidance provides more detail on...	...how regulators assess a body corporate's risk assessment program.	...how regulators assess management dedication.	...how to gather information on counterparties and how to conduct acquisition due diligence.	...managing training and communications and designing of bribery prevention policies.	...conducting effective investigations.	...effectively monitoring and reviewing policies and procedures.
Other guidance:	For further guidance from other jurisdictions, consider: New Zealand's Ministry of Justice's <i>Anti-Corruption Guide</i> , ¹¹ Singapore's Corrupt Practices Investigation Bureau's <i>Practical Anti-Corruption Guide for Business</i> ¹² and Hong Kong's <i>Independent Commission Against Corruption's Resources</i> . ¹³					

2. Building Adequate Procedures into a Good Compliance System



2. Building Adequate Procedures into a Good Compliance System

Australian businesses should ensure that adequate procedures are embedded in their compliance system, regardless of whether the CLACCC Bill is passed by the Australian Parliament.

In accordance with international trends, we expect processes and procedures will be scrutinised based on their effect in practice and often with the benefit of hindsight. Businesses should be ready to answer tough questions, like:

- > Are you confident that you know what bribery and corruption risks you face?
- > How have you mitigated these risks?
- > How do you know your chosen approach is working?

To answer these questions, businesses need to develop a multifaceted system to deal with the risks of bribery and corruption and remain vigilant to the effectiveness of that system.

Key principles: Proportionality and effectiveness

Policies and procedures will need to be both **proportionate and effective**.¹⁴ This means, proportionate in scale and extent to consider all risks associated with the exposure, nature and size of the business, and effective in addressing these risks and identifying potential misconduct.

Key elements of adequate procedures

The Australian Guidance identifies the key elements of an anti-bribery and corruption compliance system as:

- > **Management dedication** to bribery and corruption prevention;
- > Carrying out **risk assessments** to identify areas of bribery and corruption risk and weaknesses in compliance processes already in place;

- > Carrying out bribery and corruption **due diligence** on counterparties and adopting appropriate **anti-bribery and corruption controls**;
- > Establishing appropriate channels for the **reporting** of, and processes for the investigation of, bribery and corruption incidents;
- > Establishing anti-bribery and corruption **communications and training** programs; and
- > Continuously monitoring, **reviewing and improving** each of the above.¹⁵

Developing and operationalising each of these elements requires careful consideration and execution. However, businesses should consider that some can be more time and resource intensive than others and must plan accordingly.

There are three components to our approach to heightened foreign bribery risk. We need to be able to demonstrate that we lead. We need to be able to demonstrate that we look, and we need to be able to demonstrate that we act. And that combination of leading, looking and acting forms the heart of our adequate procedures philosophy.

– Financial institution representative



Management dedication

A business's board of directors is responsible for establishing its governance structure and risk management framework. Together with its owners and senior managers, it is best positioned to define its culture, ethics and values. Consequently, the Australian Guidance requires that a business's owners, directors and senior managers prioritise the development, implementation and promotion of strong anti-bribery and corruption policies and procedures.

The board and senior management's role in the development of anti-bribery and corruption policies and procedures may include:

- > Allocating clear responsibilities for anti-bribery and corruption compliance and establishing clear reporting lines;
- > Devoting sufficient human and financial resources to anti-bribery and corruption compliance;
- > Initiating and overseeing key risk assessment processes;
- > Initiating and overseeing key policies, procedures and risk management systems that are responsive to risk assessments; and
- > Endorsing a written anti-bribery policy that is robust, up-to-date, easily accessible and sets out a zero-tolerance approach to bribery and corruption.

The board and senior management's role in implementing and promoting anti-bribery and corruption policies and procedures may include:

- > Clearly communicating a business's 'zero tolerance' stance on bribery and corruption to internal and external stakeholders (e.g. through a dedication statement);
- > Establishing employee performance measures that promote and prioritise integrity;
- > Receiving periodic reports on anti-bribery and corruption compliance; and
- > Overseeing responses to anti-bribery and corruption policy breaches.

Boards and senior managers should be mindful that their ongoing commitment to anti-bribery and corruption compliance underpins the efficacy of the procedures discussed in the following subsections. Without a strong tone from the top, the effectiveness of even the best-designed compliance systems can be compromised.

They should also always consider that their business may have a range of related compliance obligations, including in relation to anti-money laundering, economic and trade sanctions and human rights. They should ensure that anti-bribery and corruption measures are integrated with other compliance policies and procedures and look for efficiencies and synergies.

Case study: Global and MineCom (Anonymised)*

For Global*, anti-bribery is top of mind. In 2017, the global resources company detected bribery in the operations of MineCom*, a company that it acquired in West Africa. Global self-reported incidents of bribery carried out by MineCom prior to acquisition to the Anti-Corruption Commission in West Africa and the Serious Fraud Office (SFO) in the UK.

Despite the political and legal ramifications the board and senior executive were resolute in self-reporting. After a detailed investigation and co-operation from staff within MineCom and Global, the SFO discontinued its investigation. This followed a submission from Global and MineCom that it was not in the public interest for action to be taken against MineCom in circumstances where Global was the innocent acquirer of the MineCom business. The SFO's actions were consistent with the approach taken by USA enforcement agencies in similar circumstances.

The board effectively engages with anti-bribery issues because of a balance and diversity of skills, expertise and experience among directors, including legal expertise. The incident in West Africa serves as an important source of learning. Global operates a zero-tolerance culture and policy on bribery. This culture is supported by strong board leadership and communicated through training and development, which begins at the board-level.

People throughout the company undertake anti-bribery and corruption training, including directors, senior executives and staff. Training occurs both in Australia and West Africa and includes recognising red flags for bribery and how to respond to and report a bribery incident. Critically, training incorporates tools that staff need to resist the pressure to bribe.

The company's zero-tolerance expectation is also communicated to contracting parties through anti-bribery and corruption contractual clauses. Global's zero-tolerance policy initially presented challenges for its operation in West Africa. An unmet expectation from various officials that facilitation payments would be paid initially caused delays for MineCom. These expectations changed when West African officials accepted that the zero-tolerance policy meant that MineCom employees would not make these payments.

Global's risk reduction procedures also make it easier for MineCom staff to comply with this policy. These measures include limited access to cash and a requirement to make payments to government officials and departments by cheque and direct debit.

The Global board is also responsible for monitoring standards of conduct in the company. While whistleblower reports are received by the legal and risk teams, the board has oversight of grievance and whistleblowing reports through audit and risk committees. All complaints and reports are taken seriously. Staff are encouraged to quickly report incidents when they occur, for instance, if a payment is made under physical threat.

*Note: This case study is anonymised and company names have been changed. Any resemblance between company names presented and actual businesses is unintended.



Risk assessment

A risk assessment is the foundation of an effective compliance program. It provides insight into a business's risk profile and identifies areas where further controls may be needed. Conducting regular risk assessments ensures that compliance procedures are continually fit for purpose.

Anti-bribery and corruption risk assessments should:

- > Be thorough and well documented;
- > Identify and rate risks based on the business's geographical presence, sector and activities;
- > Identify gaps in the business's risk management systems; and
- > Identify any compliance processes that need to be strengthened.

This will generally require considering:

- > The perceived levels of corruption in the places the business operates;
- > The extent to which the business engages or transacts with foreign public officials, government entities or potentially exposed persons (e.g. as a part of a tender or seeking approvals for a project);
- > Involvement in high-risk transactions, such as charitable or political donations, the seeking of licences and permits or public procurement;
- > Involvement in high-risk projects, such as projects with a high dollar value or a price that does not reflect the market, projects involving multiple contractors or intermediaries, projects in a high-risk or highly regulated sector or projects without a clear legitimate objective;
- > Engagement of any third-party agents or intermediaries as representatives, especially in commercial negotiations with a foreign public official for the award of business or another advantage where proper due diligence has not been conducted;
- > Any joint venture partners;
- > Payments made that are not properly accounted for or documented, whether they be cash payments or otherwise;
- > Gifts, entertainment, or sponsored travel provided to foreign public officials; and
- > Internal risk factors, such as the business's culture and whether a strong directive regarding anti-bribery and corruption is set by the business's leadership, the training provided to employees, the availability of performance-based incentives and the availability and adequacy of existing controls.

After risks and compliance gaps have been identified, it may be necessary to strengthen policies and procedures; training programs; contractual controls; financial controls; reporting and investigation processes; due diligence measures; and third-party monitoring systems.

Because risk profiles can change over time, it is important that risk assessments are conducted both regularly (e.g. every two years) and when there are significant change in the business's circumstances. Relevant changes in circumstances can include a merger or acquisition, entering a new market or a turnover of relevant personnel.

Case study: ResourceCorp (Anonymised)*

ResourceCorp*, a leading global resources company, identified that relationships with, and insights from, people on the ground are critical to effectively anticipating and responding to corruption risk. Relationships with staff support updating its understanding of risk in existing locations. Engagement with in-country staff, consultants, other companies and non-governmental organisations helps identify risk scenarios in new jurisdictions and business contexts.

These risk scenarios are central to risk assessments. They guide engagement with employees and stakeholders and determine the types of controls and training that are developed and implemented. For instance, specific scenarios are used to ensure that the correct controls are in place, the right people are being trained and to align training to actual risks being faced by those people. As stated by a representative, 'they may be in far flung locations, or very junior in the organisation in functions that they might think would not normally have corruption risk associated with them. So that's why [using specific scenarios in training] is very valuable'. The granular detail in these scenarios helps to ensure the people on the front line of risk are equipped to deal with bribery and corruption.

ResourceCorp employs a participatory approach to risk assessment. It involves leaders who can set the tone and allocate resources to address issues and people on the ground who face the risk. A primary risk-related goal is empowering people to understand the risks they face and to talk to their stakeholders about them. Risk assessments are live documents that form a foundation for engagement. Actionable 'tone from the top' also plays an important role in managing corruption risk. The company stated that its leadership routinely asks questions about these risks to keep them on the agenda, which has a cascading effect throughout the business.

The company's size means that it is expected to understand risk at a granular level and to respond proportionately. However, when starting to build a compliance program, early, quick and inexpensive risk assessments, are critical to informing the development of anti-corruption policy and training. These risk assessments can then be expanded as experience and understanding of risk grows. The company also identified that once risk controls are established, their effectiveness needs to be continuously assessed, in part, by assigning a single point of ownership and accountability for each control.

ResourceCorp identified that breaking down culture barriers, particularly in high-risk countries, was important to generating a compliance culture. Establishing forums to effectively engage and empower internal anti-corruption champions, particularly younger staff, was cited as a key measure to building a culture of compliance.

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Due diligence

Due diligence is a process of collecting and analysing information before making a decision. It is a fundamental component of business decision-making and can be a highly effective means of minimising exposure to risk.

Bribery and corruption risk often arises from relationships with third parties that act for, or on a business's behalf. This includes agents and intermediaries that represent it, suppliers and distributors that are embedded in its supply chain and business partners with which it pursues joint ventures. Bribery and corruption risk can also arise from other third-party engagements, including charitable and community donations or sponsorships, as these organisations could be used as conduits for the payment of bribes, and corporate acquisitions, as a business can be liable for the historical misconduct of its acquisition targets.

It is critical that before entering such relationships:

- > Businesses undertake sufficient anti-bribery and corruption due diligence to evaluate the level of bribery and corruption risk a third party presents; and
- > If the business decides to proceed with the relationship, it adopts anti-bribery and corruption controls that are commensurate to the risk the third party presents.

The Australian Guidance provides that 'level of due diligence should be proportionate to the risks connected to the particular relationship or situation'.¹⁶ However, businesses should not conduct anti-bribery and corruption due diligence on an ad hoc or inconsistent basis but should proactively and systematically consider, develop and operationalise due diligence procedures and tools. For example, businesses should consider:

- > Clearly allocating responsibilities for anti-bribery compliance;
- > Developing guidelines on when enhanced anti-bribery and corruption due diligence is required (e.g. based on the nature of the third party, the types of activities they will perform and the places they will operate);
- > Developing due diligence manuals and checklists; and
- > Establishing a central repository for due diligence reports.

Businesses should also consider developing controls to mitigate third-party bribery and corruption risk, like standard anti-bribery representations, warranties and undertakings for agreements with third parties and processes to monitor third parties once engaged.

Strong anti-bribery and corruption compliance programs include due diligence procedures and third-party controls that are continuously improved based on their compliance learnings and changes in the business and risk environment. It is good practice for businesses to use the trends they identify through anti-bribery and corruption due diligence to refine their organisation-wide risk assessments and tailor their training programs to reflect the live compliance issues they face.

Case study: ResCom (Anonymised)*

ResCom*, a global resources company operating in Australia and overseas runs a risk-based, anti-bribery and corruption compliance program. It implements internal controls that consider key regulatory guidance on adequate procedures from Australia, the UK, the USA and if available, other countries where the company conducts business.

ResCom has a dedicated business integrity team that supports its global business, including its activities in higher bribery risk jurisdictions. With on-the-ground business integrity officers located in South America, Australasia and Africa, the team combines expertise in legal, accounting, treasury, forensic accounting, fraud and IT forensic investigation. The team reports directly to the Vice President of Legal, who in turn reports to a member of the executive lead team and works closely alongside the company's legal team. The business integrity team also reports regularly to the board's risk and audit committee.

The business integrity team is responsible for designing, implementing, managing and reporting on the company's compliance programs on anti-bribery and corruption, sanctions, and anti-money laundering, as well as its business conduct response framework. The team performs risk-based due diligence on a range of business activities, including on higher bribery and corruption risk relationships such as:

- > Third-party representatives who interact with government officials and beneficiaries of community investments on ResCom's behalf; and
- > New customers and existing customers and suppliers who are considered higher risk from a sanctions compliance perspective.

The company's due diligence and risk assessment extends to its non-operated, non-controlled business ventures, proportionate to the level of ownership interest it holds.

The business integrity team also implements training for identified personnel, to supplement the company's code of business conduct training that is completed by all employees.

To ensure that its internal controls are appropriate to mitigating bribery risks, ResCom aims to implement a continuous risk assessment approach. This includes supplementing its periodic risk assessment work with monitoring and other activities. This approach aims to capture new risks and respond to existing risks as they evolve. It is informed by evidence gathered from changes in business activity, interactions with internal stakeholders, events or internal investigations, regulatory updates or developments and monitoring. Critical anti-bribery and corruption controls are tested at least every six months.

The business integrity team conducts most of the company's anti-bribery and corruption due diligence work, with support from suitable third-party due diligence providers as needed.

Questionnaires are used to obtain key information directly from relevant counterparties, such as community partners or recipients, third-party representatives, new customers and new joint venture partners. The team verifies and screens using publicly available sources, as well as subscription-based due diligence tools. Using questionnaires to gather key information is particularly important in jurisdictions where publicly available information, including corporate records, are not easily accessible.

The company highlighted that in general, most counterparties nowadays co-operate and provide requested information. They appreciate that it is needed to meet internal governance requirements and external stakeholder expectations. However, in non-English speaking jurisdictions language and terminology can sometimes be a barrier, with more work needed to educate and raise awareness about the company's expectations and requirements.

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Confidential reporting and investigation

Bribery and corruption concerns or incidents may occur even when strong anti-bribery and corruption procedures are in place. It is critical that those responsible for anti-bribery compliance are informed of such occurrences so that the business can properly investigate and respond to them.

Sometimes business structures and power dynamics might dissuade someone from reporting a potential bribery or corruption incident. It is vital to have an accessible, straightforward and confidential process for employees and other stakeholders to report bribery-related concerns.

To facilitate and encourage reporting, a business should:

- > Adopt and publicise a written policy—within its anti-bribery and corruption policy or as a standalone whistleblower policy—stating the business's strong support for bribery and corruption reporting, how disclosures should be made and the protections against detriment or victimisation that the business will provide; and
- > Establish accessible, confidential and secure reporting channels internally and externally, such as a whistleblower hotline, a designated email address, an online reporting system or a postal address.

To ensure that reported incidents are properly investigated and addressed, businesses can adopt a written incident response procedure. Whether or not such a procedure is adopted businesses should ensure:

- > Reported incidents are investigated in a timely, thorough and proportionate manner;
- > Investigations are properly documented;
- > Investigation results are escalated appropriately;
- > Disciplinary actions are taken against employees involved in an incident, and
- > Steps necessary to remediate any compliance failures are taken.

Some businesses utilise third-party whistleblower and corporate investigations service providers. Listed and large proprietary companies are already obliged to adopt whistleblower programs that comply with the requirements of the *Australian Corporations Act 2001* (Cth) (Corporations Act).¹⁷ Companies with such programs should assess the extent to which they apply to their overseas operations. If they do not, they should consider extending them or adopting complimentary anti-bribery reporting and investigation processes. Companies that do not already have Corporations Act-compliant whistleblower programs may find the *Australian Securities and Investments Commission's* regulatory guidance¹⁸ to be useful.

Strong anti-bribery and corruption compliance programs use incident reports to deepen understanding of the anti-bribery and corruption risks and the ways in which the business can improve their policies and procedures.

Case study: FinCom (Anonymised)*

FinCom*, a financial institution, explained that it takes care to understand its current and foreseeable statutory reporting obligations in jurisdictions where it has ongoing operations. It explained that the proposed introduction of a new failure to prevent an act of foreign bribery offence makes consideration of voluntary reporting (of an incident to authorities) even more important.

The company, which operates in Australia and overseas, identified several ethical and legal considerations underpinning its approach to reporting, including:

- > Comprehending evolving laws;
- > Business integrity;
- > Ethical leadership;
- > Quality decision making that considers the convergence between environmental, social and governance (ESG) matters and anti-bribery; and
- > Oversight on a management and non-executive level.

FinCom invests in prevention and uses its governance structures to ensure that issues are discovered, investigated and remedied quickly. This includes ensuring that there is no systemic neglect, so that if problems occur, they are based on the actions of an individual, rather than corporate malfeasance.

To promote a culture of 'speaking up', all employees and contingent workers undertake mandatory annual training on the company's code of conduct and whistleblower policy. This training is supported by awareness raising sessions and periodic whistleblowing awareness events. These activities are also aimed at building trust, which FinCom measures through trust surveys with staff. These surveys specifically ask staff about the whistleblowing program and whether they would use it. The company measures and monitors trust in speak up mechanisms on an ongoing basis.

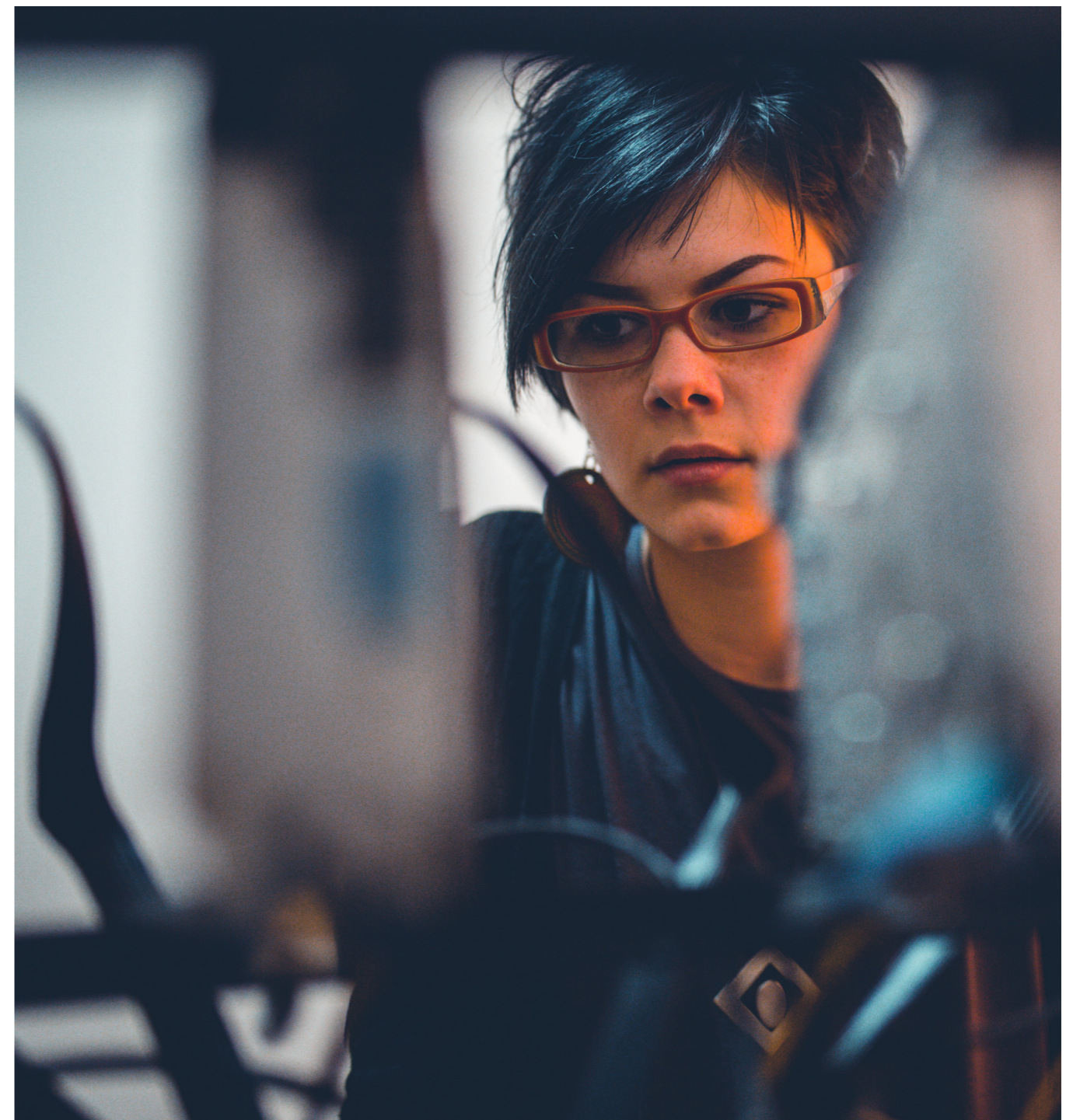
Current and former employees, contractors, sub-contractors and associates are protected as eligible whistleblowers under law and can confidentially report ethical concerns, including those related to foreign bribery and corruption, through several channels (e.g. email, phone, post and an external reporting service operated by a third party). Employees can also report concerns through internal escalation channels and directly to the company's integrity group.

The whistleblowing program is global in scope, with those legally eligible to receive whistleblower reports receiving training through an e-learning module. A centralised team located in Australia—including whistleblower protection officers—maintains end-to-end responsibility for reports made, including assessing from the onset which whistleblowing investigator will be assigned to the matter. For matters occurring overseas, investigators may be based in-country. Functionally, there is a distinction between investigation, governance and oversight of matters that are reported. While there is internal investigative capacity, external investigators are brought in when needed.

Trends emerging from whistleblower reports and investigations are reported at executive and board levels. For instance, the Whistleblowing Program Lead reports monthly to the Chief Compliance Officer who is responsible for the whistleblower policy and who in turn reports to the board's Ethics, Environment and Social Committee, which oversees the effectiveness of the program. FinCom is developing metrics to measure effectiveness and map

trends in relation to whistleblower reports. In a recent ESG corporate sustainability report, the company identified that its investigations into reports were operating effectively and driving action.

*Note: This case study is anonymised and company names have been changed. Any resemblance between company names presented and actual businesses is unintended.





Communications and training

Effective internal communications and training programs are important for businesses of all sizes. They can help define the business's culture, ethics and values, build employee understanding of the risk environment and operationalise risk mitigation procedures.

Some bribery and corruption incidents occur when employees consciously disregard obligations. But many others occur when employees:

- > Perceive that a business takes an equivocal stance on bribery and corruption;
- > Do not understand the wide range of forms bribery and corruption can take;
- > Misdiagnose bribery and corruption risks; or
- > Improperly apply anti-bribery and corruption procedures.

Consequently, it is crucial that businesses adopt anti-bribery and corruption communications and training programs that convey a 'zero tolerance' approach to bribery and corruption. They must also build employee awareness of the bribery and corruption risks they may face in their roles, explain the anti-bribery and corruption procedures that exist within a business and ensure employees understand the part they play in operationalising them.

Internal anti-bribery and corruption communications should take various forms, including:

- > Written policy documents, formally setting out the 'zero tolerance' approach and available procedures, translated into local languages as necessary;
- > Intranet pages that collate written policy documents, reporting resources and other anti-bribery and corruption resources in one central repository;
- > Periodic organisation-wide email reminders from senior managers, setting a strong message and reminding employees of their anti-bribery and corruption obligations and the resources available to them; and
- > Casual email and verbal reminders from line managers, doing the same.

Additionally, many businesses publish their anti-bribery policies on their websites to communicate their commitment to their external stakeholders.

Anti-bribery and corruption training programs should be based on the business's risk assessment and designed to mitigate the risks the business faces. In practice, this often means that interactive instructor-led training should be provided to people with significant anti-bribery compliance responsibilities. For example:

- > Directors and senior managers may require training on their obligations, a business's risk environment and its procedures, so they can properly monitor compliance and continuously improve procedures;
- > Legal, compliance, risk management and internal audit personnel may require training on the same topics, as they are likely to have a range of anti-bribery and corruption compliance responsibilities; and
- > Employees operating in high-risk contexts may require training on the specific risks they may face in their roles and the procedures they are to apply.

Additionally, online training should be provided to employees who fall outside these categories. It may also be appropriate to extend training programs to third parties like agents, intermediaries and distributors that act for a business or on its behalf. No matter its form, training must be part of the induction process, be continuous and be updated periodically. Training is most effective when it incorporates case studies and real-life scenarios relevant to participants.

Strong anti-bribery and corruption compliance programs use training as an opportunity for two-way communication, as it allows the business to learn the on-the-ground realities of participants and identify potential risks or discordance between policy and practice.

Case study:
ResourceCorp (Anonymised)*

ResourceCorp* applies a risk-based and engagement approach to developing and implementing anti-corruption training. The company delivers training to its staff at three levels, depending on the level of risk identified. For instance, all employees undertake basic training on the business's code of conduct. In environments and functions where there are higher levels of corruption risk (e.g. finance and procurement), staff undertake anti-corruption training online. More intensive, instructor-led training is delivered in higher-risk settings, including in relation to exploration, license and permit activities. Also, before beginning a new project or entering a new country, ResourceCorp identifies which staff to train and on what risks.

Through risk assessments, ResourceCorp identifies scenarios that reflect real risks faced by their staff and stakeholders in higher-risk settings. Targeted training is developed by regional members of the central independent compliance team, who identify which employees and contractors are most likely to be exposed to these scenarios and design training that incorporates these scenarios.

"When we identify through a risk assessment that a corruption scenario—for example corruption in the award of exploration and mining licenses and permits—is relevant to a specific part of the business, we identify employees that perform roles relevant to those scenarios and train them on actual and/or hypothetical case studies. In the scenario mentioned, this would be all employees involved in applying for licenses and permits and we would train them on the risks associated with the dealings with officials involved in awarding these licenses and permits."

– Company representative

Using scenarios based on local understandings of risks, enables ResourceCorp to demonstrate to its staff that it seeks to understand the environments in which they operate and that it will provide practice advice and support to any employees who need to navigate these risks. Interactivity is promoted by using scenarios in instructor-led training. In turn, this creates a basis for two-way communication and learning, enabling the company to learn from participants about on-the-ground realities. The effectiveness of this training is in part measured by the high level of participation, engagement of staff and staff feedback.

ResourceCorp identified that ongoing engagement and communication complement training. The compliance team regularly engages with higher-risk teams to understand how risks might be changing and to ensure that all the right controls are in place for new high-risk activities. These engagements are critical to informing the updating of risk assessments. A range of communications are fostered by the compliance team with relevant teams, including updates on recent enforcement actions or news stories, knowledge sharing sessions and legal updates.

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Monitoring and review

The bribery and corruption risks of a business will likely change over time, particularly if it enters a new market, changes its activities, or if there is a change in the regulatory environment. As such, it is important to regularly monitor, review and adjust anti-bribery procedures to ensure their ongoing effectiveness.

As with other aspects of an effective compliance system, monitoring and review should be proportionate to the level of risk. For example, relationships with third parties in higher risk settings should continue to be monitored beyond the initial due diligence process.

Strong monitoring and review procedures take several forms, including:

- > Surveying employees across the business to test their awareness of policies and procedures and gain feedback on the effectiveness of policies, communication and training;
- > Providing confidential channels where employees can anonymously report any concerns about bribery risks;
- > Periodically conducting formal reviews of policies and procedures and sharing findings with directors and senior managers; and
- > Engaging an external third party to evaluate and report on a business's anti-bribery mechanisms.

However, it is not enough to merely put effective monitoring and review systems in place if the results are not considered and policies adapted accordingly. Businesses should be willing to take on feedback and adjust anti-bribery policies and procedures where shortcomings are identified.

Businesses with strong anti-bribery and corruption compliance strive for continuous improvement and use other compliance processes like risk assessments, due diligence, training, reporting and investigations to reflect on the performance of their anti-bribery and corruption policies and procedures and strengthen them as required.

Case study:
ResourceGlobal (Anonymised)*

ResourceGlobal*, a global resources company operating in Australia and overseas, has developed an Ethics and Compliance Framework in alignment with International Organization for Standardization (ISO) frameworks and adequate procedures guidance. Starting with risk assessments and legal obligations, the framework enables the company to map the implementation and effectiveness of controls, training, communications, investigations and issue management and reporting, to promote continuous improvement.

This framework enables staff across the business, including people working on sites in international jurisdictions, to live-report potential risks (e.g. high-risk transactions, gifts, conflicts of interest, donations and sponsorship) to risk registers, through an online information management dashboard. Each register has a workflow attached to ensure that appropriate levels of approval are obtained, with enhanced approvals required in higher risk situations.

The framework's accessibility means that nuanced data is captured across ResourceGlobal's sites. Each site and exploration activity has an Ethics and Compliance Champion who is responsible for monitoring and offers 'eyes and ears on the ground'. These champions predominantly sit in supply or risk and insurance teams, with others in the social performance team. Bigger sites also include a champion that sits in the senior leadership team to promote senior commitment and accountability.

Data accessed via the dashboard forms a basis for monitoring, review and reporting. For instance, the supply team undertakes anti-bribery and corruption checks with vendors, which are registered and visible in the dashboard. In turn, trends in this data are reviewed by the ethics and compliance team and champions on a quarterly basis.

Qualitative insights are turned into business-wide learning through fortnightly meetings with the global team of champions. These meetings help identify issues with the effectiveness of controls, whether these are raised through observation, investigations or whistleblowing reports. In response to issues arising, training packs are developed in alignment with legal and cultural obligations and delivered to champions, who in turn, deliver these on-site. These meetings also allow the sharing of valuable insights from on-site staff, which supports the continued and iterative review of controls as needed.

ResourceGlobal highlighted the strong link between culture and training and monitoring and review. An annual, two-day community of practice which incorporates training, also supports continued learning and improvement. More broadly, the dashboard is also used to monitor training delivery and completion across all sites and modules.

In addition to periodic reviews, several circumstances would prompt ResourceGlobal to re-evaluate or adapt its risk mitigation measures. These include:

- > Regulatory and legislative changes, with alignment to the highest standard across jurisdictions;
- > Entering new jurisdictions;

- > A breakdown in controls;
- > Whistleblower complaints;
- > Direction from the board;
- > Business-wide risk management framework requirements;
- > Membership and industry body certification requirements; and
- > Learning from other companies.

*Note: This case study is anonymised and company names have been changed. Any resemblance between company names presented and actual businesses is unintended.

Practical pointers when implementing adequate procedures

Know your risks

Some businesses operating in the Australian economy place less emphasis on conducting robust bribery and corruption risk assessments than their foreign counterparts. This is problematic, as controls may be built on unfounded assumptions or may target the wrong risk areas.

Match controls to risks

The bulk of attention is often directed towards improving controls that are in place rather than surveying whether those controls cover the relevant risk areas. Being able to substantiate the precise areas of the business most susceptible to bribery and corruption risks and how those risks might manifest is critical to the overall assessment of whether adequate procedures exist and in turn drives the controls used.

Understand where and how misconduct might occur

Businesses need to understand where and how misconduct is or could be occurring. Risks of bribery and corruption are quite distinct from many other risks in that they almost always involve an element of deliberate misconduct. For instance, recent enforcement cases have seen false information provided to risk committees and internal and external false declarations made as to the purpose of funds. Businesses must continuously interrogate their processes and consider if those actively involved in bribery and corruption can easily circumvent

controls to avoid detection. Businesses should also be ready to actively monitor their work. For example, checking that services rendered by third parties match their invoices or that the purpose of certain payments can be independently verified. The existence of such monitoring and review will be important to rebut any allegation that existing measures are prone to evasion.

Do not 'set and forget'

Despite substantial efforts being made to implement effective processes early on, procedures sometimes become outdated due to companies 'setting and forgetting'. Australian businesses will need to carefully consider how they intend to monitor for risks and implement oversight and reporting frameworks domestically and extraterritorially. The requirement for vigilance extends to operations conducted internationally and to the acts of international entities within the corporate group.

Implement adequate procedures that work for your business

There is no one-size-fits-all approach. Rather, businesses should focus on whether their compliance system at large is well-designed, has been implemented properly and, simply, whether it is working. If businesses can confidently answer 'yes' to these questions—through the holistic application of the elements addressed in this section—there will likely be ample evidence to suggest a good compliance system with adequate procedures exists.

3. Mapping Intersections between Adequate Procedures across Compliance Areas

3. Mapping Intersections between Adequate Procedures across Compliance Areas

Anti-bribery and corruption issues intersect with other compliance and sustainability issues, including anti-money laundering, economic and trade sanctions, foreign interference and human rights.

Bribery and corruption have similar root causes to such issues and compliance incidents often arise in similar contexts. For example, a lack of government accountability and transparency creates the conditions for bribery and corruption by preventing scrutiny of how public officials use and direct resources, while also facilitating human rights abuses by watering down the consequences for such abuses. Also, participants in corrupt schemes often attempt to launder the means and proceeds of bribery, to disguise their criminal conduct.

The fundamental features of strong anti-bribery and corruption compliance programs resemble those of other issues. Key elements include a strong tone from the top, appropriate governance, risk assessments, due diligence and strong training and communication programs.

There are a growing number of initiatives that address the nexus between bribery and corruption and compliance and sustainability issues. For instance, several countries are considering or adopting novel anti-kleptocratic measures. Canada, the European Union, the UK and the USA have adopted sanctions programs targeting individuals and entities involved in grand corruption. Australia is considering a similar proposal.

Given these strong intersections, while each compliance area needs to be managed in accordance with any legislative or regulatory requirements or guidance, businesses should give consideration to how anti-bribery and corruption policies and procedures can be integrated with other compliance policies and procedures and look for efficiencies and synergies.

Anti-money laundering

Businesses that participate in sectors of the Australian economy that are particularly prone to money laundering are required to maintain an anti-money laundering and counter-terrorism financing program, perform customer due diligence and report suspicious matters and certain kinds of transactions to the *Australian Transaction Reports and Analysis Centre (AUSTRAC)*. This includes the financial services, gambling, digital currency and bullion sectors. Those that operate outside these sectors are not subject to the same regulatory obligations but may be criminally liable if they knowingly or recklessly deal with the instruments or proceeds of crimes.

For businesses that operate outside regulated sectors, bribery, corruption and money laundering risks intersect because their officers, employees or associates may attempt to disguise funds used for, or received from, corrupt conduct. There are many opportunities for synergy, including by adopting a clear delegation of authority framework, strong financial controls, an effective internal audit function and developing holistic training and communications programs on the spectrum of financial crime risks a business faces.

Economic and trade sanctions

All Australian corporations, and individuals, must comply with Australian economic and trade sanctions laws. These laws endeavour to advance Australia's foreign policy by imposing restrictions on engaging with designated foreign individuals and entities, and trading in designated goods, services and commercial activities.

Bribery, corruption and sanctions risks intersect because sanctions are most often imposed in relation to countries with weak rule of law and because bribery and corruption risks are most acute in such countries. Increasingly, these risks are also intersecting because large Western economies are using sanctions to target individuals and entities engaged in grand corruption schemes. Again, there are opportunities for synergy, including through the integration of bribery, corruption and sanctions risk assessment and due diligence processes. For instance, a business's assessment that a high level of corruption exists in a sector of a foreign country's economy could indicate that the sector is a potential target of anti-corruption sanctions and the business will likely find it efficient to conduct anti-bribery, corruption and sanctions screening on third parties at the same time.

Foreign influence and interference

Australia's *Foreign Influence Transparency Scheme* was introduced in December 2018. It imposes reporting requirements on entities that engage with the Australian Government on behalf of a foreign entity connected with a foreign government to generate 'real time' data of potential foreign influence.

Bribery, corruption and foreign influence and interference risks intersect because both may arise during engagements with third parties that have relationships with foreign governments. Compliance procedures overlap because both sets of issues necessitate thorough screening of business partners and clear channels for rapidly reporting and escalating compliance issues. The emergence of foreign influence and interference as a compliance area underlines the importance of holistically assessing relationships with business partners. Conducting bribery and corruption due diligence and foreign influence and interference due diligence separately could cause a business to consider the onshore and offshore aspects of its relationship with a business partner in isolation and form an incomplete understanding of the risks a relationship poses.

Human rights

A range of hard and soft law instruments and standards require companies to have human rights compliance programs and conduct human rights due diligence. These include the Commonwealth *Modern Slavery Act 2018* (Cth)¹⁹ and the *UN Guiding Principles on Business and Human Rights* (UNGPs).²⁰ While the level of prescriptiveness varies between laws and standards, some (for example the UNGPs) establish a very clear roadmap for the steps businesses need to take as part of their responsibility to respect human rights.

Bribery, corruption and human rights risks intersect because they are both most acute in jurisdictions with weak institutions and can have mutually reinforcing effects. Bribery and corruption can destabilise and weaken institutions through which essential services, education and healthcare are delivered, which in turn can impact human rights like the rights to health and education. Considering the effects of corruption through a human rights lens can create a stronger foundation for addressing the root causes of corruption and achieving more enduring results. A responsible business approach puts people at the centre and means corruption is less likely to be seen as a victimless crime. Having an anti-bribery and corruption program that recognises the interconnectedness of human rights and corruption can lead to a more preventative approach, rather than one based on subject-specific requirements.

Removing silos and developing an integrated approach

Removing compliance silos is crucial to developing adequate compliance procedures. While the subject matter and specific requirements will differ between compliance regimes, there are significant advantages to drawing on the experience and skills of different compliance professionals and having a holistic view of compliance management. The methodologies, processes and controls implemented will have similarities and leveraging those will be beneficial from both an efficiency and substantive risk management perspective.

Summary



Summary

In 'fighting the anti-bribery fight', compliance and sustainability teams need to consider the following measures when developing and implementing adequate procedures to prevent bribery.



Preventing bribery is not just about avoiding legal liability. It also protects economic and social development, the environment and vulnerable communities, as well as business reputation. It also supports fair competition.



The proposed '**failure to prevent**' offence applies to a body corporate whether or not it intended for, or even knew that its associate paid a bribe.



A corporation has a defence to the proposed 'failure to prevent' offence if it can prove that it had '**adequate procedures**' in place to prevent foreign bribery.



Adequate procedures are made up of six **elements**: management dedication, risk assessment, due diligence, confidential reporting and investigation, communication and training, and monitoring and review.



Developing and **operationalising** each adequate procedures element requires careful consideration and execution. Businesses should consider that some procedures can be more time and resource intensive than others and plan accordingly.



The Attorney-General has published the draft Australian Guidance on the **steps** that a business should take to implement adequate procedures as part of a good compliance system. This guidance is informed by UK and USA regulatory guidance.



Anti-bribery policies and procedures should be **proportionate** and **effective**. This means, proportionate in scale and extent to consider all risks associated with the exposure, nature and size of the business, and effective in addressing these risks and identifying potential misconduct.



When establishing procedures, businesses need to know their risks, match **controls** to risks, understanding where and how misconduct might occur, continue to monitor the effectiveness of procedures and implement procedures that are tailored to the business.



Boards and senior managers should ensure that anti-bribery and corruption policies and procedures are integrated with other compliance policies and procedures and look for efficiencies and synergies.



Removing compliance **silos** is crucial to developing adequate compliance procedures.

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The Ten Principles of the United Nations Global Compact

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



Human Rights

- 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- 2: Make sure that they are not complicit in human rights abuses.



Labour

- 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- 4: The elimination of all forms of forced and compulsory labour;
- 5: The effective abolition of child labour; and
- 6: The elimination of discrimination in respect of employment and occupation.



Environment

- 7: Businesses should support a precautionary approach to environmental challenges;
- 8: Undertake initiatives to promote greater environmental responsibility; and
- 9: Encourage the development and diffusion of environmentally friendly technologies.



Anti-Corruption

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

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