

Comment on Compliance Obligations relating to Australian Government’s proposal to introduce a new Corporate Offence of “Failing to Prevent Bribery”

In mid-2017, the Australian Government proposed a number of amendments to the foreign bribery offence, which are intended to improve the effectiveness of addressing foreign bribery and to remove possible impediments to successful prosecutions. These amendments, which include a new corporate offence of “**Failing to Prevent Bribery**” and the introduction of a “**Deferred Prosecution Agreement scheme**” are contained in the Crimes Legislation Amendment Bill 2017^I (“Corporate Crime Bill”), which has been before the Senate since December 2017. Following re-election of the government, it is likely this will be refined and passed in the near future.

AAMEG provided a submission in May 2017 in response to the Public Consultation paper issued by the Minister of Justice in April 2017, supporting all the proposed changes.

In March 2018, the Senate approved the introduction of the corporate offence of failing to prevent bribery, as well as approving substantial reforms to Australia’s private sector whistleblower protection laws.

The proposed introduction of this new corporate offence highlights the need for directors and senior managers of companies to ensure that their Corporate Compliance Programs are adequate, and that adequate procedures are in place designed to prevent foreign bribery in order to be able to benefit from available defences. Ministerial guidance on steps companies can take will be published, but in the meantime, the following factors have been identified in guidance issued by the Australian Government^{II} (based on decisions in the UK and USA together with guidance materials from the International Standards Organisation), as relevant in determining whether or not a company has taken “adequate steps” to prevent the commissioning of a bribery offence by an employee, consultant, contractor or agent^{III}:

A ‘culture of compliance’ and genuine engagement with anti-bribery obligations – companies should be able to demonstrate that there is a culture of compliance within their organisations in relation to anti-bribery controls, that appropriate policies and procedures, proportionate to the size of the company and the specific circumstances, have been implemented and communicated effectively, internally and externally. Furthermore, companies are required to undertake regular risk-based due diligence reviews and ongoing monitoring that does more than just “scratch the surface”. This is particularly important in the case of agents and third-party partners and relationships with foreign officials.

Quality of policies and substance/effectiveness of training – companies with adequate policy content, effective training and where each of these are both fit for purpose and tailored to the company’s specific circumstances, will be better placed from a preparedness and corporate defence perspective. A well-designed compliance program should involve risk assessment, company policies and procedures, training and communications, confidential

^I https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s1108

^{II} <https://www.austrade.gov.au/.../Austrade%20-%20Resource%20Sheet%20-%20Anti-B...>

^{III} The oversight of Clayton Utz in the finalisation of this AAMEG Comment is acknowledged.

reporting structure and investigation process, and third-party management. Effective implementation of a compliance program involves assessing the commitment of senior and middle management, balancing oversight and controls with appropriate support for independent managerial autonomy and whether or not adequate resources, incentives and disciplinary measures are in place.

Dedicating a role to focus on compliance with anti-bribery obligations – companies should appoint a person (or team) to assume the anti-bribery compliance role, even if the company is small. That person (or team) should have ready access to the highest levels in the company and be authorised to engage outside counsel when needed.

Record keeping – companies should keep contemporaneous records of all steps that have been taken to meet their anti-bribery compliance obligations. Whether a compliance program is working effectively involves evaluating the program’s capacity for continuous improvement, periodic testing and review, investigation of misconduct, and analysis and remediation of underlying misconduct, all appropriately documented.

Recognition of higher risks in some jurisdictions – companies should have completed sufficient periodic due diligence to have an appreciation of the level of bribery and corruption risk in their current operating environment, and to have factored these findings into their anti-bribery approach.

Subsidiaries – both parent and subsidiary companies need to take responsibility for their own anti-bribery policies, procedures and strategy, though parent companies should note that in some circumstances they may be liable for bribery-related actions of their subsidiaries.

Independent reports – companies are advised to engage an appropriately experienced independent third party to review its policies, procedures, training and overall compliance with its anti-bribery obligations, and to take appropriate action when “red flags” are identified. Again, contemporaneous documentation of remedial actions taken is very important.

The above-factors should be considered when companies operating in high-risk regions implement procedures to prevent foreign bribery, in order to demonstrate a company has “adequate procedures” in place.

Beyond the adequate-procedures obligations relating to anti-bribery issues, directors and senior officers of companies have a legal **Duty of Care** to their employees, to assess their employees’ capabilities to manage what is often a wide range of risks encountered during deployment to countries in Africa and to adequately prepare them in advance. Amongst other things this requires directors and senior officers to have completed appropriate due diligence in order to have identified the risks in the first place. Furthermore, there is a duty to continually monitor operating situations and refresh the training, particularly as circumstances change.

The degree to which a company focuses appropriate attention on Anti-bribery & Compliance and Duty of Care issues will affect the people it can employ, and importantly, the experienced people it will be able to retain. It is simply good business for directors and senior company personnel to comply with their anti-bribery obligations and deliver on their Duty of Care to employees, agents, consultants and contractors. It is also the right thing to do.

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