April 2019

MITIGATING FOREIGN BRIBERY & CORRUPTION RISK

An ABC Toolkit

with particular reference to the use of Facilitation Payments

Introduction

Resource industry companies operating in emerging/ developing country environments often face new and unfamiliar risks, such as extreme poverty, weak institutions, local communities lacking opportunity, and host governments that do not have the capacity to provide the support for industry to operate efficiently. Such circumstances elevate the risk of bribery and corruption.

The Deloitte Bribery & Corruption Survey of Australia and New Zealand (2015)[i] revealed some disturbing results in that 40% of companies surveyed, that had operations offshore, did not have, or it was not known if they had, a formal compliance programme in place to manage **bribery and corruption risk**. This was in spite of the fact that 27% of the companies surveyed, considered foreign bribery and corruption as one of the **top five risks** to the business in the next five years.

Purpose

The purpose of this Anti-Bribery & Corruption ("ABC") Toolkit[ii] is to provide the employees, contractors and consultants of AAMEG members with an increased level of awareness of the potential impacts of bribery and corruption in emerging/ developing country operations, guidance in mitigating the associated risks, and approaches for bringing greater transparency and accountability to the use of Facilitation Payments.

With respect to Facilitation Payments, this guidance endeavours to provide more-transparent ways of dealing with this challenging issue; helping people to move away from what is often the **one-to-one and discretionary nature** of these payments, and to **broaden the range of people and skills involved in making such decisions, in order to achieve better outcomes.**

Notwithstanding the seemingly onerous obligations associated with endeavouring to comply with a plethora of Anti-Bribery and Corruption legislation, what actually needs to be done should to be in proportion to the size of the company, the stage it is at in its corporate development, and the nature and complexity of the risks likely to be encountered.

Anti-Bribery & Corruption Legislation

For entities that have an international spread of shareholders such as many AAMEG member companies and their partners, the relevant sets of legislation relating to issues of foreign bribery

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[i] The Deloitte survey involved 269 respondents, including ASX-200 and NZX-50 companies, Australian subsidiaries of foreign companies, public sector organisations, and other listed and private companies.
http://www2.deloitte.com/au/en/pages/risk/articles/bribery-corruption-2015-survey.html

[ii] This Toolkit should not be taken as legal advice. It is not comprehensive and is intended only as a general overview on matters of interest and is current as of April 2019. You should seek appropriate legal advice before acting or relying on any part of this document.

and corruption need to include at least the following:

- **USA Foreign Corrupt Practices Act (1977**),
- **Australian Commonwealth Criminal Code Amendment (Bribery of Foreign Public Officials) Act (1999),**
- **Canadian Corruption of Foreign Public Officials Act (1999)**, and
- **UK Bribery Act (2010)**.

Important to note, is that each of these foreign bribery legislative regimes has extraterritorial reach; ie an act committed in a foreign jurisdiction (eg an African country) is considered to have been an act committed in the home country (eg Australia).

It needs to be understood that the simple act of marketing the company's stock to shareholders in the US or having a US dollar bank account, can be all that is needed to invoke the extraterritorial reach of a US regulator. A similar situation applies for other jurisdictions.

Multilateral Conventions

In addition to individual country legislative regimes dealing with foreign bribery and corruption, there are also Multilateral Conventions, which Australia has ratified, which include:

- **UN Convention Against Corruption (2004)** – ratified by Australia in 2005, and
- **OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (2011)** – ratified by Australia in 1999.

It is interesting to note that the use of Facilitation Payments is prohibited under the UN Convention, but not under the OECD Convention, although the latter advises to continue to move away from their use.

Penalties

Progressive strengthening of the Australian ABC legislation in 2011, 2012, 2015 and as proposed in 2017 has resulted in the imposition of the following increased penalties for acts of foreign bribery:

- **Personal**: Fines up from $1.1 mill (2010) to $1.7 million (2012) to $1.8 million (2015), and gaol terms of up to 10 years.
- **Company**: Fines up from $11 million (2010) to $17 million (2012) to $18 million (2015), to a proposed $21 million (2017) or three times the value of benefits obtained, or 10% of annual turnover.

In addition, there is the resulting criminal record on a personal basis, resulting in disqualification for managing a company, and reputation damage to the company; the latter opening up the possibility of a law-firm-driven class action by disaffected shareholders, the impacts of which could be substantial.

A company may also face penalties or forfeiture of profits under the Australian Proceeds of Crime Act 2002 (Cth).

AAMEG Guidance

A brief guidance document entitled **Australian Anti-Bribery and Corruption Compliance**

Obligations[iii] is available on the AAMEG website. This guidance has been put together by Clayton Utz for AAMEG and is periodically updated to take into account changes to legislation.

AAMEG has held Anti-Bribery & Corruption ("ABC") workshops in Perth, Melbourne, Sydney and Brisbane and has presented at various conferences and external workshops on ABC issues.

Difference between a Facilitation Payment and an Act of Bribery

In layman's terms, a facilitation payment is defined as a small payment made to a foreign Public Official for the sole/ dominant purpose of expediting or securing a routine government action (also of a minor nature) to which there is a legal entitlement (i.e. a service for which you have satisfactorily completed all that is legally required of you). In order for the defence to apply, as soon as practicable after the conduct occurs, the person who made the facilitation payment must make a signed record of the circumstances under which the payment was made, including the nature and value of the benefit, the date it occurred, the identity of the foreign public official, or the identity of the ultimate beneficiary, and the particulars of the routine government action.

It expressly excludes services that relate in any way to a decision about whether to award new business or continue existing business. For example, it typically includes things such as the provision of essential services, processing administrative papers such as a visa or work permit, or providing police protection. Accordingly, in certain circumstances avoiding a facilitate payment can cause a threat to health or safety.

When the intent of such payments is to influence a foreign public official to break the law with regard to the awarding or retention of business, it crosses the line and becomes an act of bribery. The "intent" aspect is the key determinant here. While the defence makes no overt reference to "intent", it is this aspect that largely underpins its rationale and operation. The prescriptive factors required to make out the defence support the inference of no intention to improperly obtain an illegitimate business advantage by making the payment.

Whether or not the "intention" element is made out is a question of fact inferred from all the circumstances. The question is whether a benefit can support a reasonable inference of an intention to unduly influence, or create a business obligation, on the part of the recipient. If the objective evidence reasonably supports such an inference, a company may be prosecuted notwithstanding it did not actually intend to influence a public official in the exercise of his/ her duties. Importantly, the risk of a reasonable inference of corrupt intention being drawn is significantly reduced by such things as demonstrably identifying and assessing objective evidence of a company's *bona fides*, having in place adequate procedures and appropriately tailoring a company's compliance processes to the particular operating circumstances.

The current defence under the Australian Criminal Code for facilitation payments reflects this distinction and provides legal clarity by prescribing well-defined and limited criteria that must be met for the defence to apply. This ensures that the defence only captures minor payments that are demonstrably incapable of supporting an adverse inference of intent to bribe a foreign public official.

Contributing Factors to the use of Facilitation Payments

The factors that have led to the practice of making Facilitation Payments in emerging and developing countries are complex and often deeply ingrained in the cultures of many of these societies and their often-fledgling institutions. Many are confronted with difficult social issues such as extreme poverty, malnutrition, low levels of literacy and unstable governments and consequently lack internationally-accepted norms of governance and accountability.

The practice is often an embedded characteristic of impoverished countries where host governments do not have the resources to pay their public servants properly. More often than

[iii] http://aameg.org/wp-content/uploads/2015/07/Australian-ABC-Compliance-Obligations-Summary-for-AAMIG-July-2015.pdf

not, it involves a "down at the-coal-face" company employee dealing with a "purposefully slow-moving" public official.

In some cases, it will be possible to have the host government gazette that such payments are officially required, and have an official government receipt issued, but as is well known, the issues are often far too numerous and often far too complex to deal with in a timely fashion, in this manner, particularly for junior companies that do not have the financial capacity to withstand long delays nor the political capital to correct inappropriate administrative functioning.

Eventually, as the resources industry plays its part in the industrial development of emerging/ developing nations, host governments will receive sufficient revenues by way of regular forms of taxation and mining royalties, to be adequately resourced and in a better position to pay and support their employees properly. This is when resorting to the use of Facilitation Payments will begin to be a thing of the past.

Reasons to retain the Facilitation Payment Defence

In AAMEG's submission of December 2011, provided to the Federal Attorney-General's Department entitled, "Public Consultation Paper: Assessing the 'Facilitation Payment Defence' to the Foreign Bribery Offence and Other Measures", and a follow-up submission in August 2015 to the Senate Standing Committee on Economics entitled: "Public Consultation Paper: Foreign Bribery", a number of reasons for not removing the Facilitation Payment Defence were articulated, as follows:

- Would eliminate a clear system of transparent accounting for such payments and almost certainly be counterproductive to the objectives of Australia's foreign bribery laws. The change would be from a legal framework that encourages open and accountable payments, to one that encourages secrecy and subversion. Rather than accelerating the ultimate desired removal of any need to make such payments, it would drive them underground.

- Removes critical certainty for Australian companies and individuals as to their legal obligations and how such payments can best be managed by companies committed to upholding anti-bribery principles. The prescriptive requirements of the defence would no longer be a complete answer.

- Complicates the assessment of what would suffice to show an absence of corrupt intent. That difficulty is compounded by the judicial uncertainty surrounding the interpretation of "intent" in different criminal contexts.

- Broadens the scope (or prospects) of liability or increases the evidential burden to refute allegations. It would at least mean that the particular circumstances of payments need to be carefully considered to assess whether they might be capable of supporting adverse inferences.

- Ignores the reality that such payments need to be made from time to time and the importance of improved governance to promote necessary change in African countries. The reality, for instance, in many African countries is that after emerging from years of crisis and conflict, the state of the economy and the lack of a clearly articulated tax regime means that many governments are unable or unwilling to provide simple government services, at least in some parts of some countries, in the absence of facilitation payments.

- May have the unintended consequence of preventing companies investing altogether, in circumstances where such payments are often unavoidable to continue doing business.

- Would lead to the loss of many significant local infrastructure, social development and capacity-building programs allied to the mining activities of AAMEG members, if these businesses can not operate.
- Would unfairly restrict AAMEG members' competitiveness due to an inability to make small payments in order to secure routine government services in countries with insufficient resources to provide them, including in circumstances where the public officials involved do not benefit in a personal capacity.

Books & Records

For those countries with legislation that allows the use of Facilitation Payments, it is a legal requirement that such payments be properly recorded in a company's accounts, including to whom the payment was made, who the ultimate beneficiary might be should the recipient not be the ultimate beneficiary, and the circumstances under which the payment was made; all documented contemporaneously. Without full and contemporaneous documentation, such a payment could be misconstrued as an act of bribery or a regulator may seek to impose a "books and records" offence.

The Australian Federal Government introduced a "books and records" offence in March 2016, which aligned with similar changes made in Canada in 2013, which brought Canada into line with this aspect of the US legislation. These new laws were introduced in response to the OECD Working Group's 2012 recommendations and a desire to improve the implementation of the OECD Convention[iv] which Australia ratified in 1999.

As with existing foreign bribery provisions, the laws relating to false-accounting offences also have broad extra-territorial reach. Furthermore, offences can be established even if the actual giving or receiving of a bribe is not proved.

Corporate Responsibilities

- ***Developing an ethical corporate culture***

Companies are required to develop a demonstrably ethical corporate culture through the policies, organizational structure, and systems and processes they put in place. This starts with at least the following: `

- Corporate Code of Conduct Policy or similar policy documentation,
- Record Keeping Policy,
- Compliance Guide or Toolkit for in-house training on Anti-Bribery & Corruption including relevant illustrative hypotheticals and real world examples,
- Appropriately trained dedicated Compliance Officer and Ethics Committee to identify "Red Flags" and to rigorously test and monitor compliance,
- Whistle-blower policy and robust monitoring and investigation procedures,
- Effective third-party, risk-based due diligence to control and minimise successor liability (legally inherited liability for a target company's prior breaches of ABC laws),
- Appropriate authority-level policy documentation, and
- Access to external, expert legal advice when needed.

[iv] OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (2011).

Establishing an ethical corporate culture is value creating and value protecting. Failing to do so can be interpreted by a regulator as turning a blind eye or tacitly, impliedly authorizing or permitting the commissioning of an offence.

- ***Duty of Care responsibilities***

Directors and senior officers of companies have a Duty of Care[v] responsibility towards their employees, to provide appropriate training and guidance on ABC issues, particularly when their employment is off-shore to emerging/developing country environments. This also extends to ensuring that consultants and contractors are "on the same page".

Companies are expected to conduct business in the international arena, in a transparent and legal manner, for the long-term benefit of all stakeholders.

- ***ABC Clauses in Contracts***

All employment contracts for employees deployed overseas and all similar contracts with contractors and consultants should have appropriate clauses relating to foreign bribery and corruption, such as for example:

- The Company, through its Corporate Code of Conduct, demands and expects high standards of behaviour and conduct on the part of its employees when carrying out Company business or representing the Company.
- The Company will not tolerate any attempt by its employees, contractors or consultants to illegitimately influence any foreign public official in the exercise of his or her official duties.
- The Executive/Consultant undertakes and agrees to comply at all times, whilst engaged by the Company, with the anti-bribery provisions in the Australian Criminal Code and with other relevant international laws relating to the corruption of foreign public officials.
- Any breach of this policy on the part of the Consultant will result in the immediate termination of the Consultant's contract and severance of any association with the Consultant's partners, organization or representatives associated with the Consultant.

An appropriate level of ongoing review and monitoring, supported by contemporaneous documentation, including standard certification processes, is also required to ensure traction, compliance and value protection.

- ***Negligence versus Being Wrong***

Regulators are likely to place a significant distinction on the difference between being negligent and being wrong. Having appropriate systems and processes in place in a company to deal with bribery and corruption risk demonstrates credible attention has been paid to this risk issue.

In addition, "not knowing is no defence". In certain circumstances, companies may also be liable for the corrupt behaviour of employees or third party representatives about which it has no actual knowledge, eg if a company and/or responsible individuals were willfully blind to, or deliberately ignorant of, the corrupt behaviour.

[v] Duty of Care refers to the responsibility or legal obligation of a person or a company to avoid acts or omissions (which can be reasonably foreseen), likely to cause harm to others. See AAMEG Opinion Piece: Duty of Care – in Africa, what does it really mean? - Paydirt Magazine, August 2014.

If a person is in a position to know, then he is expected to have asked the right questions and to be in a position to know. Appropriate contemporaneous documentation of such questioning (minutes of meetings) may be extremely important if an issue arises at a later date.**The Australian Federal Government currently has under consideration, the concept of "knowingly concerned",** which if introduced, would extend the accessorial criminal liability provisions by allowing a person or company to be held criminally liable for being knowingly concerned in the commission of an offence, and to be punished as if the person or company had in fact committed the offence.

- ***Third-Party Due Diligence & Ongoing Monitoring***

Enforcement actions demonstrate that third parties, including agents and consultants are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Effective risk-based due diligence on third parties is important element in being able to demonstrate that the company has a credible and defensible compliance program. Companies should:

- Understand the qualifications and associations of their third party partners, including its business reputation, and relationships, if any, with host country officials,
- Understand the role of and need for the third party, and ensure the contract terms specifically describe the services to be performed, and
- Undertake some form of ongoing monitoring of third-party relationships, including periodically renewing due diligence, exercising audit rights, providing periodic training, and requesting annual compliance certifications by third parties.

A company's compliance program be should capable of preventing and detecting corruption without creating unnecessary administrative burden. The risk of bribery and corruption varies according to factors such as the size of the company, the countries and sectors in which the company operates, and the nature, scale and complexity of the company's operations. When it comes to compliance, it is not a "one-size-fits-all" approach.

- ***ASIC expectations of Directors***

ASIC expects directors to be in a position to understand the business and how the company is run, to be capable of applying an enquiring mind, and to be constructively sceptical.

Most importantly, ASIC considers that individual responsibilities are not limited to the individual's field of expertise.

Beyond anti-bribery law, directors may face ASIC prosecution and civil penalties under Australian Corporations Law, with civil penalties of up to $200,000 and gaol terms of up to 5 years in cases of recklessness or dishonesty

OECD position on the Facilitation Payments Issue

The **OECD Phase 3 Report** of October 2012 on Australia's implementation of the **OECD Convention on Combatting Bribery of Foreign Public Officials in International Business** recommended that Australia:

"Continue to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal Company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records."

Some countries that are parties to the OECD Convention have specifically opted to allow Facilitation Payments and others have not; of those taking a firm position, 30% allow payments

and 70% prohibit them.

The countries allowing Facilitation Payments include: **Australia**, Austria, , Greece, South Korea, New Zealand, Slovak Republic, South Africa, Spain, Switzerland, and the **U.S.A**.

The countries that prohibit Facilitation Payments include: Argentina, Belgium, Brazil, Bulgaria, **Canada,** Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Poland, Portugal, Russia, Slovenia, Sweden, Turkey, and the **U.K.**

Transparency International Corruption Perception Index ("CPI")[vi]

A comparison of the average Transparency International CPI rankings of the countries that allow payments and those that prohibit payments provides an interesting pattern.

For those countries listed above that prohibit Facilitation Payments, the average CPI ranking is 33. For those that allow them, the average is better at 33. Among those that allow payments, if the obvious outlier, Greece is removed, the average improves to 26.

Perhaps this ranking suggests that, on average, those countries allowing Facilitation Payments and reporting their use accurately in their companies' books of account, perhaps have greater overall transparency and accountability and less rhetoric?

Australian Government's position on the Facilitation Payments issue

In the Australian Government's response[vii] in April 2015 to the OECD Phase 3 Report, it reported that it **"has continued to raise awareness of the distinction between facilitation payments and bribes through outreach engagements at workshops, forums and training opportunities."** In addition, it reported that the Federal **"Attorney-General's Department has developed an online learning module[viii] on foreign bribery, in consultation with other agencies involved in foreign bribery outreach activities."**

Furthermore, as has been noted in the OECD Phase 4 Report[ix] of December 2017, **"all AFP outreach activities now address the distinction between facilitation payments and bribes, including the criteria for applying the defence, and highlight the obligation on companies to record such payments. Since 2012, AUSTRADE has included the distinction between facilitation payments and bribes in all relevant training for its staff, and in all of its outreach activities to Australian companies."**

The OECD has been critical of the efforts of Australian regulatory authorities in detecting, investigating and prosecuting foreign bribery. This is largely because of the higher levels of convictions of US and UK companies and individuals operating in the same foreign countries as companies from Australia.Australia has been falling in the Transparency International CPI rankings in recent years;

- Australia has fallen from **7** in 2012 (with Norway) to **13** in 2018.

The Australian Federal Government has requested public comment on the bribery and corruption issues on four occasions in recent years; in October 2011, July 2015, March 2017 and April 2017. The AAMEG Submissions to the Federal Government in December 2011[x] and August 2015[xi] and follow-up in Canberra with policy makers has helped to retain the Facilitation

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[vi] http://www.transparency.org/cpi2015

[vii] http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf

[viii] http://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/OnlineModule/index.html

[ix] https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf

[x] http://aameg.org/wp-content/uploads/2012/01/AAMIG-Submission-AG-Facilitation-Payments-15Dec11.pdf

[xi] http://aameg.org/wp-content/uploads/2015/11/Submission-to-Senate-Economics-Committee-24-August-2015.pdf

Payment Defence in the legislation. At the time, it was felt that this issue would continue to attract increasing attention and therefore a need for AAMEG member company employees to be across this issue and for their contractors and consultants to be similarly aligned.

US, Canada & UK positions on the Facilitation Payment issue

The USA and Australia are generally aligned on the issue of Facilitation Payments, provided such payments are properly and accurately recorded in the company's financial accounts. However, Australia's defence is narrower than that of the USA, as the value of the benefit and routine government action must both be of a 'minor nature', whereas in the USA only the routine government action must be of a minor nature.

The UK passed legislation in July 2011 prohibiting the use of Facilitation Payments, however in the seven and a half years since, there has never been a prosecution for a Facilitation Payment. In fact, the Serious Fraud Office has indicated that their focus is on more important issues.

Canada also introduced legislation in June 2013 prohibiting the use of Facilitation Payments, and although the legislation received Royal Assent at the time, the implementing regulations were not put in place until October 2017[xii]. There have been no prosecutions in Canada under the Corruption of Foreign Public Officials Act ("CFPOA") since that time. In effect, one could say that in most of the relevant legislative frameworks, the use of Facilitation Payments is generally accepted.

AFP establishes a Foreign Bribery Unit in Perth

In April 2016, in response to demands for greater public scrutiny, the Australian Federal Government allocated $15 million over a 3-year period to the establishment of an Australian Federal Police ("AFP") **Foreign Bribery Unit** in Perth.

Significantly, the focus of this unit is the resources industry, and presumably that is specifically why it has been established in Perth; the center of gravity of the Australian resources industry.

Given that the electorate of the Federal Minister for Justice at that time, Michael Keenan is Stirling in Western Australia, it was expected that he would be taking a keen interest in how this unit performs.

On 31st March 2017, Minister Keenan's office issued a Public Consultation Paper entitled "A proposed model for a Deferred Prosecution Agreement scheme in Australia", which was followed on 4th April 2017 by a second Public Consultation Paper entitled "Proposed amendments to the foreign bribery offence in the Criminal Code 1995".

Proposal to introduce Deferred Prosecution Agreements in the Criminal Code 1995

The Deferred Prosecution Agreement ("DPA") proposed by the Minister for Justice in March 2017 is a voluntary, negotiated settlement between a prosecutor and a defendant. In essence, it is designed to provide a more effective and efficient way of holding offending companies to account, without the cost and uncertainty of a criminal trial.

Under the proposal, prosecutors engaged by the Commonwealth Director of Public Prosecutions ("CDPP") would have the option to invite (by way of a formal letter of offer) a company engaged in serious corporate crime, to negotiate an agreement to comply with a range of specified conditions. A recent press release by Minister Keenan suggests the scheme is intended to be introduced later this year (subject to upcoming election results).

[xii] See AAMEG Comment on Canadian Government's repeal of the Facilitation Payment defence, Nov 2017.

The DPA would likely require the company to cooperate with any investigation, pay a financial penalty, admit to agreed facts, and implement a program to improve future compliance. As the intention is for DPAs to be made public, any conditions to establish controls to prevent further offending may also provide a model for companies seeking to put procedures in place.

Minister Keenan considers additional conditions may include:

- Compensating victims, and
- Helping investigators to pursue criminal charges against individual company officers,

thus serving a dual aim of punishing companies for wrongdoing, and creating an avenue for companies to provide redress to those affected. However, it is intended that the terms of the DPA will be flexible and adapted to the particular circumstances of the case.

If a company fulfils its obligations under a DPA, it will not be prosecuted for the matters the subject of the DPA.

The Australian Government analysed the DPAs available under USA and UK law, and in particular, the significant success in reaching substantial settlements in the USA (the UK regime being relatively new). The Australian Government has also had regard to the international benefits of allowing DPAs, such as to use DPAs in international settlements where multinational companies have breach numerous foreign bribery laws (such as the recent Rolls-Royce settlements with the US and UK).

It is intended that clear and detailed guidance will be provided (e.g. in the Prosecution Policy of the Commonwealth) on the conditions under which a prosecutor is likely to offer DPA negotiations. This should influence a company's decision on whether they decide to self-report misconduct and initiate DPA discussions. Such guidance may also influence how prosecutors conduct DPA negotiations, and any relevant undertakings entered into by the company.

Proposal to amend the foreign bribery offence in the Criminal Code 1995.

The reforms proposed by the Minister for Justice in April 2017 are intended to improve the Australian Government's effectiveness in addressing foreign bribery, and to remove possible impediments to a successful prosecution. The amendments would:

- extend the definition of foreign public official to include candidates for office;
- remove the requirements that the benefit / business advantage must be 'not legitimately due' and replace with the concept of 'improperly influence' a foreign public official;
- extend the offence to cover bribery to obtain a personal advantage (e.g. personal titles or honours, or the processing of visa / immigration requests);
- create a new foreign bribery offence based on the fault element of recklessness;
- **create a new corporate offence of failing to prevent foreign bribery** (similar to that provided for under the UK Bribery Act 2010);
- remove the requirement of influencing a foreign public official in the exercise of their official capacity; and
- clarify that the offence does not require the accused to have a specific business or advantage in mind, that business or an advantage can be obtained for someone else.

The Public Consultation Paper which was issued by the Minister of Justice in April 2017 regarding the proposed amendments to the foreign bribery offence in the Criminal Code Act 1995, stated very clearly:

- *"It is not proposed that the existing facilitation payment defence be amended. This defence has not presented as an issue in the enforcement of the foreign bribery offence. The Government will continue to review the operation of this defence, as required under the*

OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions 2009."

This position is consistent with the views expressed by AAMEG in its submissions to the Attorney-General of 15th December 2011, and its submission to the Senate Standing Committee on Economics on 24th August 2015.

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

The Australian Government's proposed reforms (of March & April 2017) with minor changes are captured in its Exposure Draft of the Crimes Legislation Amendment Bill 2017 ("Exposure Draft") which was introduced into the Senate in December 2017.

In March 2018, the Senate supported the various proposed amendments to the foreign bribery legislation, including the corporate offence of failing to prevent bribery and the introduction of a DPA scheme. At the same time, the Senate approved substantial reforms to Australia's private sector whistle-blower protection laws. However, recent changes at senior political levels have caused these reforms to languish.

Recent collaboration with Australian Federal Police ("AFP") in CanberraAAMEG and one of its member companies (Clayton Utz) attended an industry-AFP panel session in Canberra in mid-October 2018 in an effort to bring a greater sense of collaboration and learning between the AFP and industry. It became quite clear during this dialogue, that AAMEG's approach to the Facilitation Payment issue is consistent with that of the AFP and that of the Australian Government.

Furthermore, as has been noted in the OECD Phase 4 Report[xiii] of December 2017, *"all AFP outreach activities now address the distinction between facilitation payments and bribes, including the criteria for applying the defence, and highlight the obligation on companies to record such payments. Since 2012, AUSTRADE has included the distinction between facilitation payments and bribes in all relevant training for its staff, and in all of its outreach activities to Australian companies."*

Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative ("EITI") is an international organization which promotes and supports improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas and mining. The EITI Standard has been implemented in 51 countries, a number of them on the African continent.

The Australian Government began a pilot study in 2011 to test the applicability of the EITI rules and principles to Australian conditions and has been one of the largest financial supporters of EITI since 2007.

In May 2013, AAMEG presented[xiv] at the EITI Global Conference in Sydney.

In May 2016, the Australian Government announced[xv] that it would implement the fiscal transparency principles of the EITI. AAMEG members are encouraged to formally commit to the EITI Principles by becoming supporting companies of the EITI Initiative.

[xiii] https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf

[xiv] http://aameg.org/2013/05/aamig-eiti-statement-support/

[xv] http://www.industry.gov.au/resource/Programs/ExtractiveIndustriesTransparencyInitiative/Pages/default.aspx

ESG Research Analysts

Research analysts no longer focus only on technical, financial and management aspects when evaluating the worth resource companies. The last decade has seen the increasing inclusion of Environmental, Social and Governance ("ESG") aspects into the overall evaluation process. Some analysts, particularly in the larger financial groups are focused entirely on ESG issues.

ESG is now considered to be mainstream and one of the most important research sectors for managers of superannuation funds, who are facing more and more pressure from their investors to understand the social and environmental impact, as well as the governance of the companies in which they invest. Many of the largest funds have formally committed to the United Nations Principles for Responsible Investment[xvi]. As of early April 2019, 43 asset owners and 109 fund managers in Australasia had signed up to this UN initiative.

Now that ESG is mainstream and information from remote localities can travel so quickly, it is more important than ever, for resource companies and their investors, to be aware of behaviour that could result in a project becoming contentious and quickly losing value. In the Africa context, the issue of governance ranks high on the ESG risk profile for fund managers.

Recent FCPA & SEC Whistleblower Awards & Enforcement Actions

The first **Foreign Corrupt Practices Act** ("FCPA")-related whistleblower award was reportedly paid in May 2016. A BHP Billiton insider collected $3.75 million in 2016 for information about FCPA offenses during the 2008 Beijing Olympics which cost BHP Billiton of the order of US$25 million.

In 2017, Kinross Gold Corporation paid a civil penalty of $950,000 for violating the FCPA books and records and internal accounting control provisions. The SEC cited "repeated failure" to put in place anti-corruption compliance programs and adequate accounting controls for two African subsidiaries operating in Ghana and Mauritania, acquired from Red Back Mining. The SEC settled the case with an internal administrative order and did not go to court.

In 2018, 16 companies paid a record $2.89 billion to resolve FCPA cases, including resolutions of the DOJ or SEC or both. During 2018, six individuals pleaded guilty to FCPA-related criminal charges, six others were convicted at trial and nine additional individuals were indicted for FCPA crimes, The **US Securities Exchange Commission** ("SEC") in September 2016 awarded a whistleblower more than US$4 million for original information that alerted the agency to a fraud. By law, the SEC protects the confidentiality of whistleblowers and does not disclose information that might reveal a whistleblower's identity.

The SEC has now awarded more than $376 million to 61 individual whistleblowers since the whistleblower program started in 2011. The biggest SEC whistleblower award was $50 million, shared by two former Merrill Lynch employees in March 2018. The agency made its second biggest award of $39 million to a single whistleblower September 2018.

The SEC received 5,282 tips during 2018 (up from about 4,000 tips in 2015) from individuals in all 72 foreign countries and the United States.

Whistleblowers can be eligible for an award when they voluntarily provide the SEC with "unique and useful information" that leads to a successful enforcement action with recoveries of more than $1 million. Awards can range from 10 percent to 30 percent of the money recovered.

Easy access to regulatory authorities via the internet from any remote locality anywhere in the world, makes reporting of such events a "walk in the park" for a disgruntled employee. The financial incentives being offered mean that this activity is likely to continue to increase.

The End of Facilitation Payments

[xvi] https://www.unpri.org

It goes without saying that those in the Australian resources industry would like to be able to conduct business in emerging/developing countries without the need for Facilitation Payments. However, in order to achieve this challenging objective, there must be a gradual reform process that has realistic timeframes and achievable interim milestones, that parallels and is underpinned by economic development.

It is poverty that generally drives this kind of behavior in foreign Public Officials in emerging/developing countries and changes in this behaviour will only occur over time, and will require a great deal of cooperation amongst the various stakeholders. Importantly, it will result only when the general level of economic well-being in emerging/developing countries reaches levels at which poverty is not such an influencing factor.

ISO 37001

A new business tool[xvii] designed to support and broaden the efforts of companies in preventing and detecting bribery and corruption in their own organisations and their global value chains was published on 14 October 2016 by the International Organization for Standardization ("ISO"), a worldwide federation of national standards.

ISO 37001 outlines the minimum standards required to achieve third-party compliance, including the elements of a company's risk-assessment systems and process, anti-bribery policy, as well as recommendations regarding the investigation and remediation of detected bribery and corruption. The standard also dedicates several sections to the performance of third-party due diligence.

The standard has been developed to allow flexible use by companies of all sizes. It is acknowledged that the risk of bribery and corruption varies considerably according to the size of the company, the countries involved, and the nature, scale and complexity of the company's operations. ISO 37001 acknowledges that the policies, procedures and controls implemented to meet the standard, should be reasonable and proportionate to the company's size.

Companies can choose to be certified to ISO 37001 by accredited third parties, to confirm that their anti-bribery and corruption management systems and processes meet the standard's criteria and that the company has implemented all appropriate measures designed to prevent bribery and corruption.

AAMEG Position Statements on the Facilitation Payment issue

As far back as August 2015, AAMEG stated in its submission to the Senate Standing Committee on Economics:

"We would all like to be able to conduct business in Africa without the need for facilitation payments. However, such a situation will not materialise overnight, nor in response to legislative changes imposed by Ottawa, London or Canberra. It will take time to achieve and will occur progressively across the continent as the economic well-being of citizens of host countries improves. It is simply unrealistic to expect practical progress of this scope and nature to occur overnight".

"*The major mining companies work in very few African countries whilst the junior and mid-tier companies are the dominant operators across the African continent. It is simply unrealistic to expect these smaller companies, that do not have the financial resources to withstand being delayed for extended periods of time, or the political capital to influence host country Government officials to carry out their duties in a timely fashion, to carry the responsibility for changing the behaviour of public officials adversely influenced by poverty, or influence government resourcing.*

[xvii] http://www.iso.org/iso/catalogue_detail?csnumber=65034

"AAMEG holds the view that a team approach is required to deal with the issue of facilitation payments, involving:

- *Large companies taking a strong stand against the use of facilitation payments because they have the political clout and financial resources to be able to do so, including the capacity to engage with bilateral agencies to help influence/improve host Government resourcing,*
- *Small and mid-tier companies working with facilitation payments but minimising use where possible and recording transactions appropriately and transparently in their accounts,*
- *Bilateral (eg AusAID) and multilateral (World Bank) agencies helping with capacity building and providing a better working environment for government employees working in areas critical for the future economic development of host countries, and*
- *Where appropriate, encouraging host governments to gazette the requirements for the payment for particular government services.*

"As poverty is the root cause of host government officials pushing for facilitation payments, behavioural change is unlikely to occur until:

- *Sufficient industrial development has occurred (largely through continued flows of Direct Foreign Investment),*
- *Governments collect reasonable levels of taxes from newly established industry and individuals who are gainfully employed,*
- *Host governments have the financial resources and governance structures to ensure their officials are reasonably well paid and provided with the essential tools to do their* jobs effectively."

These statements, which are part of documentation that has been in the public domain for more than three years clearly demonstrate that AAMEG has carried out appropriate analysis and review of the challenges of operating in the countries of Africa, and that AAMEG has a balanced and meaningful approach that is appropriate for the sector of the industry that it best represents.

Scenarios

On the following pages, there are four Scenarios describing situations in which Facilitation Payments have been used. These Scenarios describe the kinds of circumstances under which it was felt that such payments were appropriate, and could stand up to scrutiny. The scenarios included are as follows:

- Allowances paid to foreign Public Officials in order to ensure the timely provision of routine services necessary for the Company to operate efficiently.
- Customs & Immigration Officials at country-entry airport.
- Appointment of an Agent.
- Dealing with Police roadblocks & checkpoints.

The pages beyond the Scenarios contain some key points that have been drawn from field experience in dealing with bribery and corruption risk, with specific reference to the use of Facilitation Payments.

Concluding comments

In operating offshore, members must continue to enhance the systems and processes that will credibly demonstrate that they are appropriately positioned to deal with foreign bribery and corruption risk, especially in emerging/developing countries. Investors in member companies will expect no less and will consider this a significant risk issue.

A Corporate Code of Conduct Policy is a good first step, but as the company grows, that must be supported by other relevant comprehensive policies, compliance programs, effective training, due diligence, risk mitigation procedures and appropriate on-going review and monitoring, all contemporaneously documented.

Furthermore, directors need to be overtly engaged on this issue, with the assistance of external legal expertise in this area, when required. ABC compliance must be a top-down driven initiative.

Finally, the systems and processes that companies need to implement should be proportionate to the size and stage of the company's development, the countries and sectors in which the company operates, as well as the nature, scale and complexity of the situations likely to be encountered.

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AAMEG Documentation on ABC Issues

AAMEG Submissions to Federal Government:

- *Assessing the Facilitation Payments Defence to the Foreign Bribery Offence and Other Measures (2011), 27pp.*
- *Response to Public Consultation Paper: Foreign Bribery (2015), 4pp.*
- *Proposed Amendments to the Foreign Bribery Offence (Deferred Prosecution Agreements) in the Criminal Code Act 1995 (2017), 7pp., and*
- *Proposed Amendments to the Foreign Bribery Offence (Failing to Prevent Bribery) in the Criminal Code Act 1995 (2017), 10pp.*

Clayton Utz guidance:

- *Australian Anti-Bribery and Corruption Compliance Obligations, prepared by* Clayton Utz for AAMEG, Jul 2015, 4pp. (Updated from Oct 2011).
- *New Guidance on the US FCPA, Dec 2012, 2pp.*
- *ASIC shines the spotlight on Africa and other emerging markets, Nov 2013, 3pp.*
- *Directors' duties and foreign bribery obligations, Mar 2013, 4pp.*

AAMEG & Member Company Powerpoint Presentations (2012-2018):

- *Various presentations each comprising around 36 slides.*

AAMEG Toolkit of 13 Scenarios (June 2016)

- *A Toolkit for bringing greater transparency and accountability to the use of Facilitation payments, 19pp.*

AAMEG Toolkit (Oct 2016):

- *Mitigating Foreign Bribery & Corruption Risk - An ABC Toolkit, 17pp.*

AAMEG Comments:

- *AAMEG Comment on the Canadian Government's commitment to appoint an independent Ombudsman and a multi-stakeholder Advisory Board (2017), 2pp.*
- *AAMEG Comment on the Canadian Government's repeal of the Facilitation Payment defence (2017), and*
- *AAMEG Comment on U.S. Legislative Changes relating to SEC Disclosure Obligations for Extractives Companies (2017).*

Opinion Pieces in Paydirt Magazine:

- *Duty of Care in Africa: What does it really mean? ADU Preview, Aug 2014.*
- *Australia and the retention of the Facilitation Payment Defence (Australia's Response to the 2014 OECD Report), Aug 2015.*

AAMEG News Updates:

- *Australia's response to recommendations on Bribery and Corruption in the OECD Phase 3 Report (2015), News Update No. 2, 1p.*

Scenario No. 1

Allowances paid to Public Officials in order to ensure the timely provision of routine services necessary for the Company to operate efficiently

Following a period of frustrating under-performance and serious delays in the delivery of routine government services, the Company decided to initiate a system of paying allowances to Public Officials under certain circumstances to ensure the timely delivery of the services, however only when the Company is legally entitled to receive these services. The justification for this Company's action was that the government was under-resourced to the extent that it could not provide the services required for the industry to operate properly.

In an effort to ensure adequate transparency, the Company engaged with, and took advice from the host government's Salaries and Remuneration Committee ("SRC"), so that any payment of out-of-office allowances would be guided by a relevant government circular.

The SRC is an independent commission set up under the laws of the host country, mandated, amongst other things, to set and regularly review the remuneration and benefits received by all Public Officials.

Out-of-office allowances paid under the guidelines fall into the categories of:

- Field allowances including Sitting Allowances relating to public meetings;
- Subsistence allowances; and
- Travel allowances.

In relation to Company business, such activities and government services are procured primarily in the areas of public consultation, stakeholder engagement, dispute resolution, resettlement and compensation covering:

- Attendance at meetings;
- Standing membership of designated liaison committees;
- Provision of field support, e.g. Wildlife Service and Forest Service officers in wildlife control;
- Agriculture extension support provided by field officers;
- Assistance of relevant Public Officials in dealing with resolution of community grievances;
- Land surveys & Land valuations;
- Crop & Tree valuations; and
- Structures valuations.

Where such services are provided by Public Officials, allowances are paid by the Company in strict adherence to the prevailing rules and schedules issued by the host government, and as have been endorsed by the SRC.

Copies of relevant circulars and the Company's integrity standard are in the possession of Company officers engaged in procuring such services, and these Company officers are well versed in the necessary procedures and Company standards, including the Company's Code of Conduct, its Anti-bribery & Corruption ("ABC") Policy and ABC Guidelines.

The Company's uncompromising position on the procedures to be followed for such payments is communicated widely and directly to all levels of government such that any payments expected by government or government officers must first be supported by a formal government regulation that brings the payment within the SRC framework. As a consequence, all such payments are a requirement under the laws and regulations of the host country.

Scenario No. 2

Customs & Immigration Officials at country-entry airport

During the construction phase of a significant mine development in Africa, the Company was experiencing unreasonable delays in getting its people through Customs and Immigration at the international entry airport in the host country.

It was clear that Customs and Immigration was under-resourced in terms of its ability to provide the services required of the increasingly active resources industry.

The Company decided to approach the Customs and Immigration Office to seek ways of improving the timely delivery of the required services, to enable the companies to move their people in and out of the country in a more reasonable, timely manner. The Customs and Immigration officials complained that with the increased workload associated with so many more planes coming in, they simply did not have the people nor the motivation to do their job to the level expected.

The Company also discussed the issue with the Provincial Governor who was sympathetic to the concerns of both the Company and the Customs and Immigration Officials. The Chamber of Mines was also consulted for their input.

After considerable discussion, the consensus procedure adopted was as follows:

- The Company's administrator with responsibility for meeting the arriving Company personnel at the airport would collect their passports, and provided each had the appropriate visa stamped in their passports, they would be allowed to continue directly onto the construction site 120 km away;
- The Company's administrator would wait until Customs and Immigration officials had processed all other passengers before presenting the Company personnel passports; and
- The Company would enter into a formal agreement to make a monthly payment of $1,000 to the Customs and Immigration office at the airport, reducing each year by 25% and terminating at the end of the fourth year, by which time the increased royalties to the Province would enable the government to fund the provision of the necessary services itself.

A formal agreement was established and signed off by the Company, the Provincial Head of Customs and Immigration, the Provincial Governor and the Chamber of Mines. The agreement was tabled and discussed at a subsequent Company Board Meeting. These actions were considered adequate in order to provide the transparency and accountability needed to meet appropriate standards of governance.

It was understood that this interim step would enable the government to provide the timely Customs and Immigration services required for the nascent mining industry to develop efficiently and that in time, the increasing level of taxes and royalties coming from the development of the mining industry would put the government in a better position to fund the services to a more internationally accepted standard.

The payment would be recorded accurately as a payment to government in the Company's accounts as well as in its EITI[18] report.

Importantly, all Company personnel entering the country would be required to have in their passport, the host-country visa appropriate to their stated working arrangements. At no time would the Company be asking for anyone to be allowed to enter the country without having all his necessary paperwork in order. The Company could clearly demonstrate that it was not asking for something to which it was not legally entitled.

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[18] Extractive Industries Transparency Initiative: https://www.eiti.org

Scenario No. 3

Appointment of an agent

Following a period of repeated challenges and frustration in dealing with host-Government officials in the Ministry of Mines, the Company decided to appoint an agent to help get through what seemed to be an often, unhelpful bureaucracy.

The agent the Company appointed had recently retired from a senior administrative role in the Ministry of Plan and seemed to know many of the actors in Mines and other relevant ministries including Finance and Environment with whom the Company needed to engage.

The Company carried out a significant amount of Due Diligence on the individual to ensure he did not have a track record of inappropriate behavior. Checks were run with an international Know Your Client ("KYC") firm, the Company's local lawyers and the local representatives of the Company's international accounting and audit firm.

Prior to finalizing his contract, the agent was made aware of the Company's Code of Corporate Conduct, the Anti-Bribery & Corruption Policy, the Whistleblower Policy and the functions of the Compliance Officer and the Company's external legal advisors.

The agent was made aware of the Company's position on anti-bribery and corruption compliance, the international laws that related to such issues and was walked through the Company's Guidance Manual on Anti-bribery and Corruption in International Business and was required to acknowledge this in signed documentation. He was made aware of the Company's position on the use of Facilitation Payments including specifically the reporting process to be followed with respect to their use.

His contract was based on hourly rates for himself and for various staff members with a ceiling to be established on the number of hours to be worked on for specific matters. There was provision for a success fee to be paid on success of specific critical matters established from time to time, that would be capped at twice the value of the agreed hours worked.

For the avoidance of any confusion and misunderstanding, the agent was made acutely aware of the absolute need to adhere to the processes and procedures adopted by the Company and that as part of his engagement, the Company would have full inspection and audit rights over his financial statements and books of account. He was informed that at all meetings with Government officials, he would need to be accompanied by one of the Company's employees and that contemporaneous documentation of the substance of the discussions during the meetings would be required.

The agent's Contract included clauses that specifically addressed such matters with provision for immediate termination and reporting to authorities, should he behave in a manner inconsistent with the guidelines provided by the Company.

It was explained that he was being engaged because he had knowledge and understanding of the actors with whom the Company needed to engage. Furthermore, that he would have a better understanding of how to present the value of the Company to the country, both from a technical viewpoint and from a capacity building and social development viewpoint, in order to have the public official support, required to operate efficiently.

It was explained that for the Company, "not knowing" what the agent "got up to" would be no defence; that the Company would not be hiding behind the agent, or turning a blind eye to what he might be doing; that for all intents and purposes, the visibility and monitoring of an agent working for the Company would be no different from that for an employee working for the Company.

Scenario No. 4

Dealing with police roadblocks & checkpoints

The Company had been one of the first-movers to invest in this West African country, which by comparison with its neighbours, had a reasonably high level of political risk. Nevertheless, it appeared to have substantial potential for diamonds and given the previous experience of the CEO elsewhere on the African continent, it was felt that if anyone could manage this kind of risk, then maybe this Company could.

In the early days, the CEO had spent a great deal of time in-country and seemed to have a good understanding of the local dynamics. He had spent around six months each year between 1995 and 1999 dealing with the Ministry of Mines in the capital and travelling on many occasions out to the project area some 350km to the northwest.

In the beginning, there were a few police roadblocks over the poorly maintained 350km of sealed and unsealed road. Each roadblock was manned by poorly-clothed policemen who would check passports, driver's licences and vehicle papers on a regular basis. Occasionally, there were some (unnecessary issues) where a licence was claimed to be faulty or some fault was found with the vehicle, resulting in a half-hour delay or more if the Company personnel argued their case.

Reluctantly, small payments of between US$5 and US$20 were usually eventually made to the policeman-in-charge, after which the driver would be allowed to continue. No receipt was ever presented, even though one was requested, and after several rejections, the CEO stopped asking. However, the CEO did not like making such cash payments and seeing the need that these people had, he began to buy army boots and socks and various "official looking" garments, and began to distribute these to the policemen manning the checkpoints. In the latter years, the number of checkpoints increased in response to an increasingly chaotic political situation, rather than because they were targeting a share in the CEO's "generous" handouts.

Between 1995 and 1999, the CEO spent an average of around US$3,000 a year on these gifts while expending more than US$5.8 million on exploration and normal business expenses. However, the impact on the police officers was amazing. By late 1997 to 1999 and again in 2002, the CEO was being saluted as he was driven up from the capital city to the project site, and the travel time was almost halved. During the "dangerous times" of 2002, he was often stopped to be warned of suspected "illegal" roadblocks and, on several occasions, was accompanied by a policeman to the next police checkpoint – for a small payment. Because he had helped them, they wanted to help him. It was clear that this sentiment went well beyond the anticipated monetary benefit.

The CEO was rightly of the opinion that he had a right to travel from the capital city to the project area, given that his passport was valid, his visa was valid, he had a vehicle that was in roadworthy condition, and given that the Ministry of Mines had awarded his Company exploration tenements. The minor payments he had made to police officials at the checkpoints had been paid to encourage them to do their jobs and to allow the CEO the right to continue to travel; a right that he was legally entitled to.

Poverty and a lack of Government resources were the reasons promoting this kind of behaviour by the policemen. The CEO's approach was considered simply as reasonable pre-emptive risk management. He was not trying to get anyone to break the law to his advantage; only to get the police to do their job according to the law. Today though, he would need to record the payments as Facilitation Payments and document accordingly.

Key Reminders relating to ABC Compliance and the Use of Facilitation Payments

Corporate Culture

Companies are required to develop a demonstrably ethical corporate culture through the policies, organizational structure, and systems and processes they put in place.

Direct payment of expenses

A Company may incur expenses such as travel, accommodation and meals on behalf of a foreign Public Official, as long as those expenses are reasonable and *bona fide* and they relate to matters such as:

- showing off the Company's capabilities,
- demonstrating the value of the Company to the host country, and
- improving the understanding of the industry so that the foreign Public Official is in a better position to support the Company and promote the industry in his home country.

When paying for the expenses of a foreign Public Official, the Company should preferably pay direct to the supplier rather than providing a foreign Public Official an advance or reimbursing in cash.

Foreign Government bank account

Payments required under local legislation should be made by bank transfer direct to a foreign Government account where possible and an official receipt issued.

Ministerial Discretion

Avoid extending hospitality at times when the Company has important documentation in front of the Minister, the approval of which is subject to ministerial discretion.

Contemporaneous documentation

Record minutes of important meetings as soon as possible after the event, not some months later after someone begins to question what happened at the meeting. A culture of contemporaneous documentation when dealing with any payments to government officials is essential. Such documentation does not need to be a burdensome exercise; it simply needs to record the pertinent facts and for this to be demonstrably seen as part of the Company's *modus operandi*.

***Per Diem* payments**

Per diem payments to foreign Public Officials can be justified when:

- The amount of the *per diem* is objectively reasonable,
- It is either written into a Government contract or is gazetted,
- The amount in the contract is clear and unambiguous,
- There is no discretion as to the amount to be paid, and
- The host Government and not the supplier was responsible for the requirement to pay a *per diem* ending up in the contract.

Never be in a position where it is the Company that has initially offered to pay a Facilitation Payment.

Cash Payments (Stipends)

Any stipends should be *bona fide* and a reasonable approximation of the costs likely to be incurred.

Record Keeping

Companies must implement robust and comprehensive record keeping practices on relevant issues relating to any payments to foreign public officials or related entities. Full and contemporaneous documentation should be a routine attribute of the culture of companies.

Verification

Ongoing risk assessment and monitoring of the effectiveness of a company's systems and processes is important. Companies need to have the capacity to identify "Red Flags" before others external to the company can, and to take timely remedial action. An investigation based on a spurious Red Flag can be very disruptive and damaging to reputation.

Companies should seek independent expert analysis of particularly challenging issues (eg forensic accounting analysis and data analytics), and external legal audits and where appropriate, institute appropriate remedial actions.

Regular formal compliance reports need to be made, typically prepared by the Compliance Officer, to the Audit Committee and the Board of the parent Company.

"Not knowing" is no defence

If you are in a position to know by virtue of holding a senior position in a company, then you should have asked the probing questions to be able to know. And if you did not know before something has been uncovered, you will need to have adequate documentation that you have been appropriately diligent and sufficiently constructively skeptical prior to the discovering of the event.

Improper Advantage

For a payment to a foreign public official to violate current ABC legislation, the argument must be made that the payment was for the purpose of encouraging the foreign Public Official to break the law for your benefit, in order that you might secure an improper advantage or an advantage that you are not legally entitled to receive.

Offering a bribe is sufficient grounds for a conviction

Simply offering a bribe is sufficient grounds for a conviction to proceed – a bribe does not necessarily have to be actually given or received. The mere offering of a bribe is a criminal offence.

Alignment

The specific policies and procedures of a Company's compliance regime must be aligned with the individual circumstances and resources of the Company. As a result, a junior company will not be expected to have the full range and depth of policies and procedures that would be appropriate for a major company.
Proposed changes to ABC legislation (Dec 2017) Proposed changes to the ABC legislation include "the offence of failing to prevent bribery" and the introduction of "Deferred Prosecution Agreements". **Hidden value of social development projects**

Never under-estimate the willingness of foreign Public Officials to want to help you and your company, as a result of your having helped someone in their community through one of your social development programs.

An enlightened approach to social development work that incorporates the concept of "shared values", and a focus on "capacity building" and "meaningful engagement of communities in the business activity", can be very influential in mitigating all kinds of political, social and bribery risk.

Such an approach can develop a competitive advantage that empowers foreign Public Officials to want to help a particular company, well beyond the monetary rewards that might result from receiving a small Facilitation Payment. Most importantly, it can empower a foreign Public Official to help a Company for the right reasons.

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