

# AAMIG

Australia-Africa Mining Industry Group



## A PRACTICAL APPROACH TO ANTI-BRIBERY & CORRUPTION

Perth, Wednesday 7 May 2014



Supporting the Australian Mining Industry in Africa

Disclaimer: This presentation is for the purposes of creating awareness only and should not be relied upon as professional or legal advice.



# Recent Developments in Anti-Bribery & Corruption Enforcement

## **Global network**

A global network of anti-bribery regimes is being developed with vigour and being enforced rigorously.

## **Extra-territorial reach**

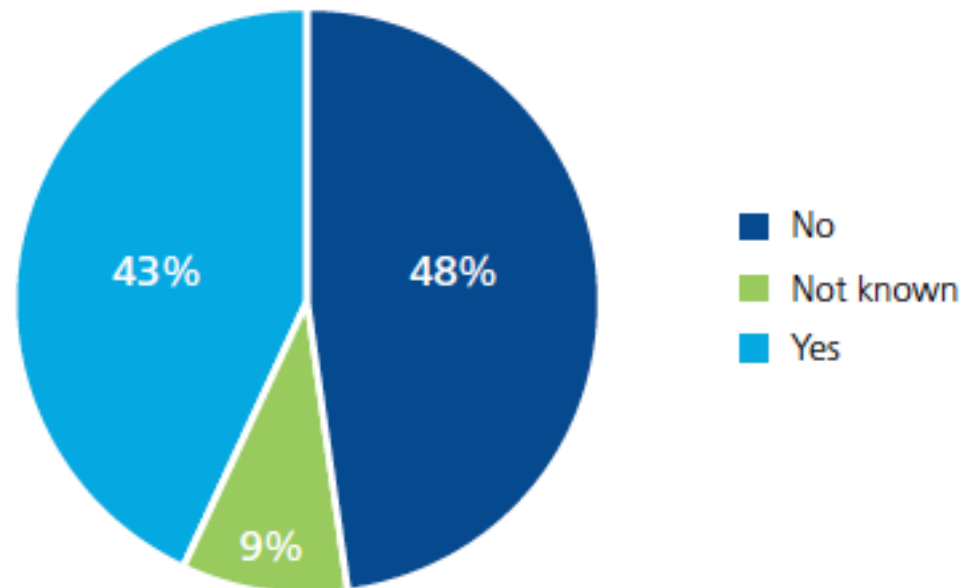
Companies operating in high-risk jurisdictions need to be aware of domestic regimes and risk of being captured by extra-territorial application of regimes in Australia, USA, Canada and UK.

## **“Mind the Gap”**

Wide gap between established corporate procedures and emerging, increasingly tough legal requirements.

# Deloitte Bribery & Corruption Survey 2012

Does your organisation have a formal foreign bribery and corruption policy/compliance program in place (organisations with offshore operations)?





## Legal Professional Privilege

- Materials created for the dominant purpose of obtaining legal advice are protected from production by legal professional privilege.
- Privilege applies only to confidential materials / communications.
- It is a critical protection that allows companies to:
  - Conduct investigations & obtain compliance advice with full and frank consideration of potentially sensitive information; and
  - Maintain control over disclosure of privileged information (including to resist production in litigation / regulatory investigations).

## HISTORICAL CONTEXT

- 1977**      Enactment of Foreign Corrupt Practices Act (FCPA) in USA  
**For two decades, USA was the only country to adopt extraterritorial anti-bribery laws**
- 1997**      OECD adoption of Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions
- 1999**      Australia becomes a party to OECD Convention
- 1999**      Cwl Criminal Code Amendment (Bribery of Foreign Public Officials) Act  
**OECD Convention ratified by 34 member countries plus Argentina, Brazil, Bulgaria & South Africa**
- 1999**      Canadian Corruption of Foreign Public Officials Act (CFPOA)
- 2004**      UN Convention Against Corruption developed
- 2005**      Australia ratifies UN Convention Against Corruption (does not recognise Facilitation Payments)
- 2008**      OECD Phase 2 Report critical of Australia, UK and Japan

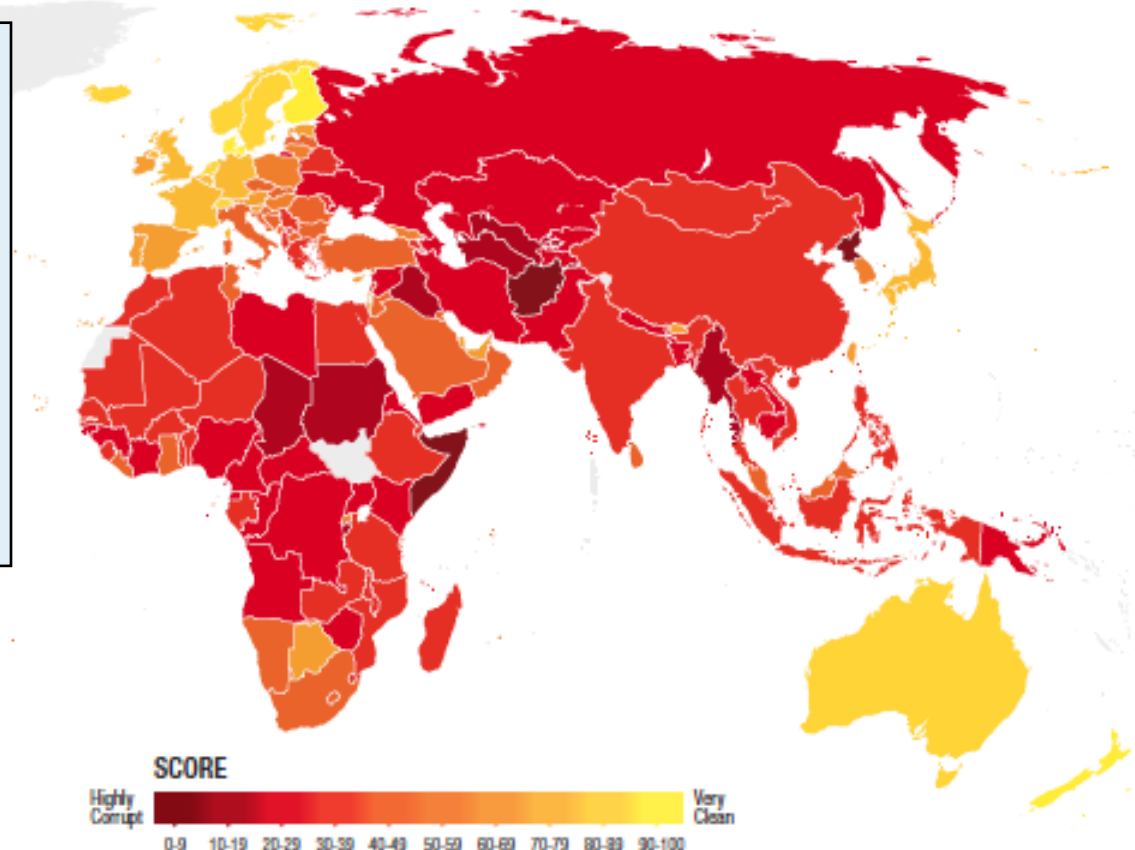
## **HISTORICAL CONTEXT - 2**

- 2010**      **Tightening of Aust. bribery defences and increase in penalties**
- 2011**      **UK Bribery Act prohibits Facilitation Payments**
- 2011**      **UN and OECD criticism of Australia and Japan re ineffective enforcement measures**
- 2011**      **Public Comment Call: Assessing the “facilitation payments defence” to the Foreign Bribery offence and other measures**
- 2011**      **AAMIG Submission to Federal Attorney-General regarding facilitation payments defence and other measures**
- 2012**      **OECD Phase 3 Report (Oct 2012) on Australia critical of AFP & ASIC enforcement measures and coordination efforts**
- 2012**      **AFP establishes a Foreign Bribery Panel to advise AFP investigation teams & strengthen enforcement efforts**
- 2012**      **Further tightening of Australian Bribery penalties (Dec 2012)**
- 2013**      **Canada “books & records” & removes of “facilitation payments defence”**

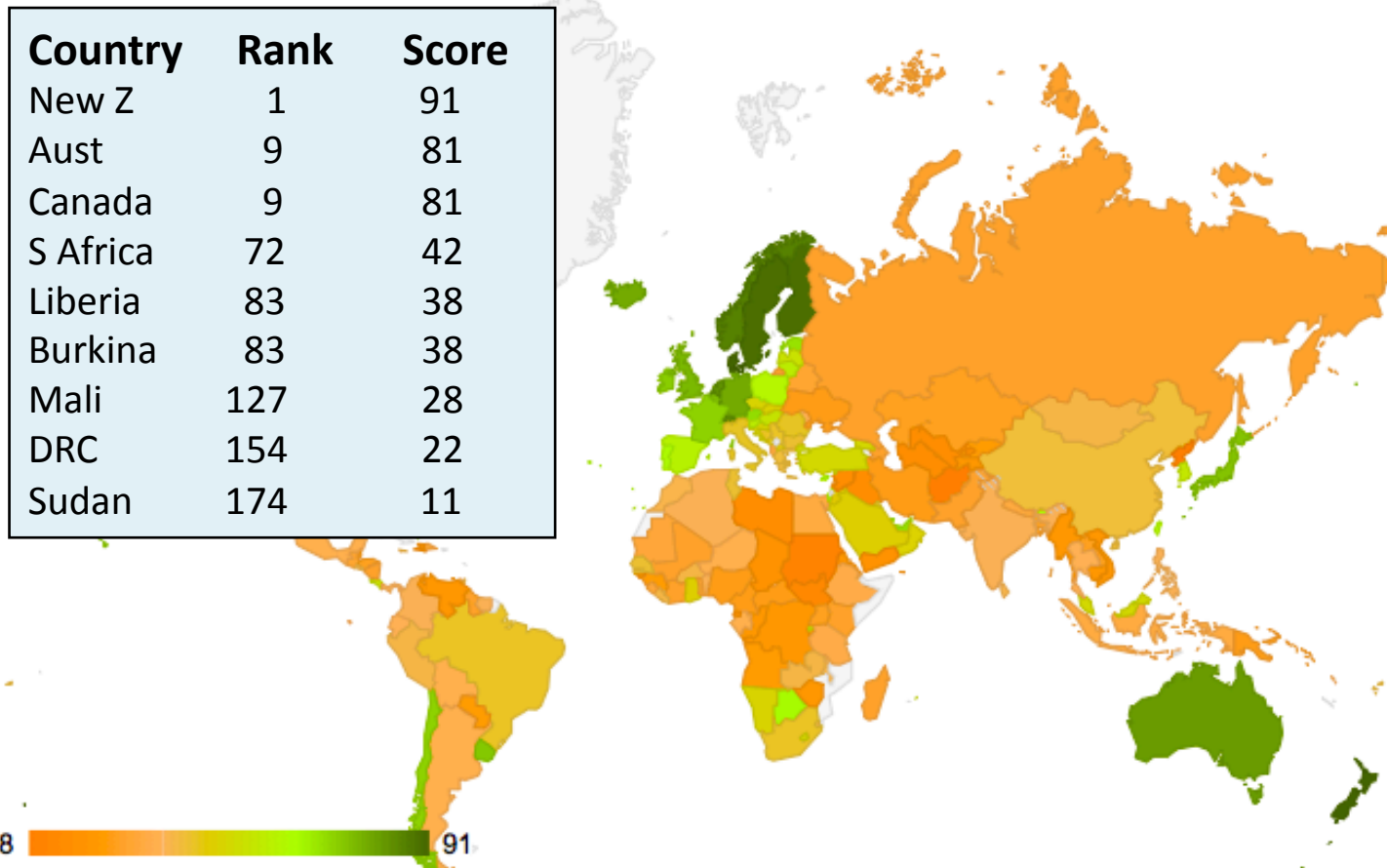


# Transparency International Corruption Perception Index 2012

Country	Rank	Score
New Z	1	90
Aust	7	85
Canada	9	84
S Africa	69	43
Liberia	75	41
Burkina	83	38
Mali	105	34
DRC	160	21
Sudan	173	13



# Transparency International Corruption Perception Index 2013





## OBJECTIVES of AAMIG ABC WORKSHOPS

Position AAMIG Members so that they are able to comply with key provisions of relevant Anti-Bribery and Corruption legislation by:

- Developing an appropriate **Corporate Culture** through policy development and training, including adaptive learning.
- Establishing appropriate and credible **Systems and Processes** and communicating procedures required to employees.
- Developing effective third-party, risk-based due diligence to control and minimise **Contractor** and **Successor Liability**.
- Establishing effective internal **Whistle-blower** and investigation procedures.
- Using an **Ethical Corporate Culture** to develop a competitive advantage; to attract funds, and to attract and keep the best employees.

**Appreciate the Value Creating & Value Protecting aspects of good governance.**

**Empower Directors and Officers deliver more fully on their “duty of care” responsibilities to employees.**

# **AAMIG Guiding Documentation**

**(around management of non-technical risk)**

**Africa Mining Vision (2009) & Action Plan (2011)**

**A Framework for Social Responsibility in the Mining and Metals Sector in Developing Countries – Australian Government 2011**

**OECD Convention on Combatting Bribery of Foreign Public Officials**

Supported by the authority of 39 member states.

**Voluntary Principles on Security and Human Rights**

Drawn up by 4 governments, NGOs and resource companies.

**Equator Principles**

Signed onto by more than 50 financial institutions.

**United Nations Convention Against Corruption**

Ratified by Australia in 2005

**Guidance Note on Risk Analysis and Appropriate Measures for Compliance for Operating in Developing Countries (2011)**

Developed by AAMIG & Clayton Utz.

**Extractive Industries Transparency Initiative (EITI)**

## Recent Developments - Australia

### Strengthening of Aust. Criminal Code (2010 & 2012)

#### ➤ Personal:

- ✓ Criminal record for the individual,
- ✓ Fines up to \$1.7 million,
- ✓ Gaol terms up to 10 years.

#### ➤ Company:

- ✓ Fines up to \$17 mill,
- ✓ Or 3x value of benefits obtained, or
- ✓ 10% of annual turnover, whichever the greater.

**AAMIG advocating in Canberra on behalf of members on the  
Facilitation Payment Defence**

**AAMIG appeared before OECD Panel in Sydney, May 2012**



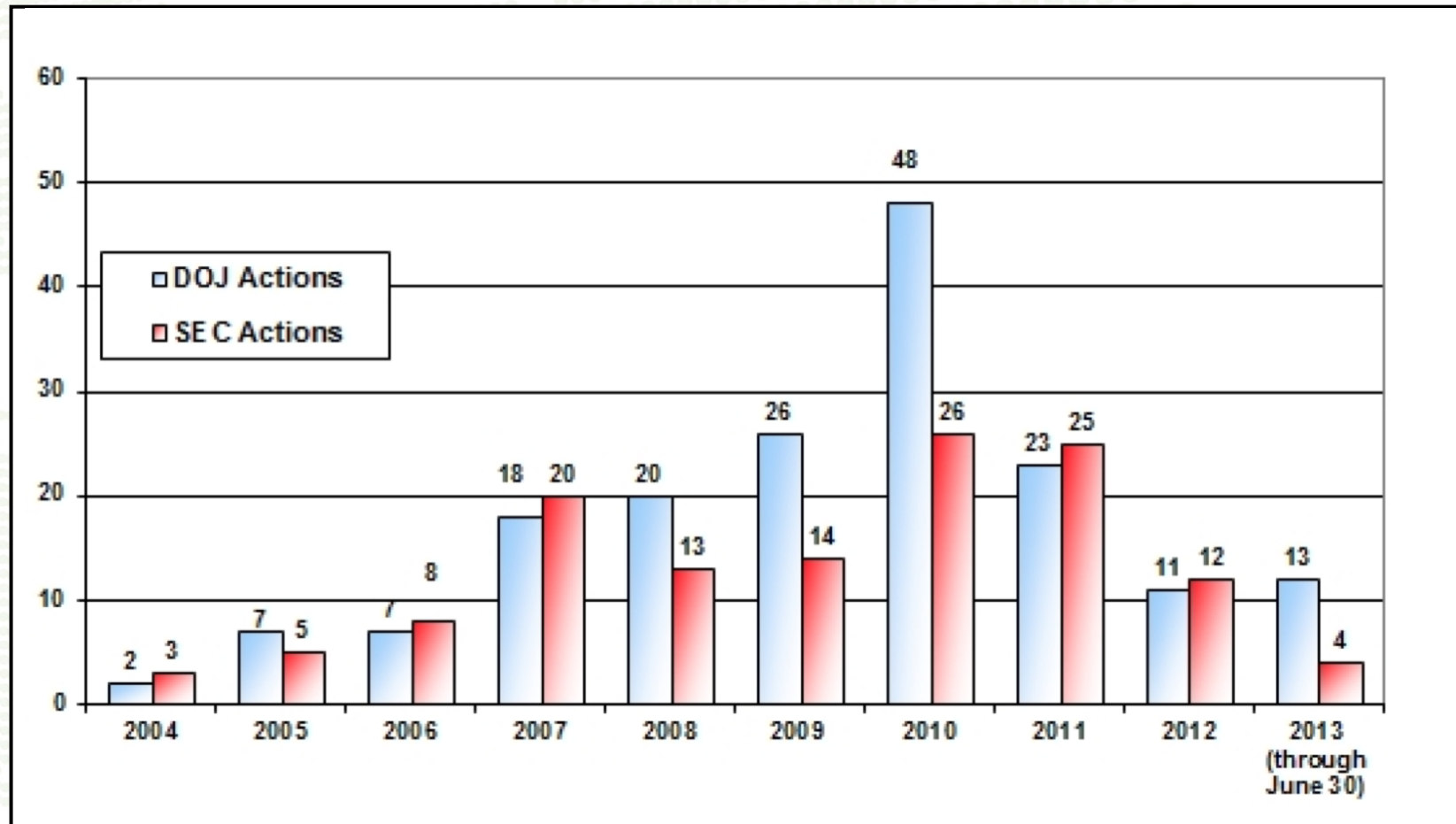
## Recent Developments - UK

- UK Bribery Act (2010) became law on 1 July 2011,
- Broad extra-territorial reach effect,
- New strict liability offence for “failing to prevent bribery”, including in private sector,
- No Facilitation Payment Defence,
- Offence applies to companies carrying on “any part of their business in the UK” with SFO indicating they will adopt an aggressive interpretation of this provision.

## Recent Developments - Canada

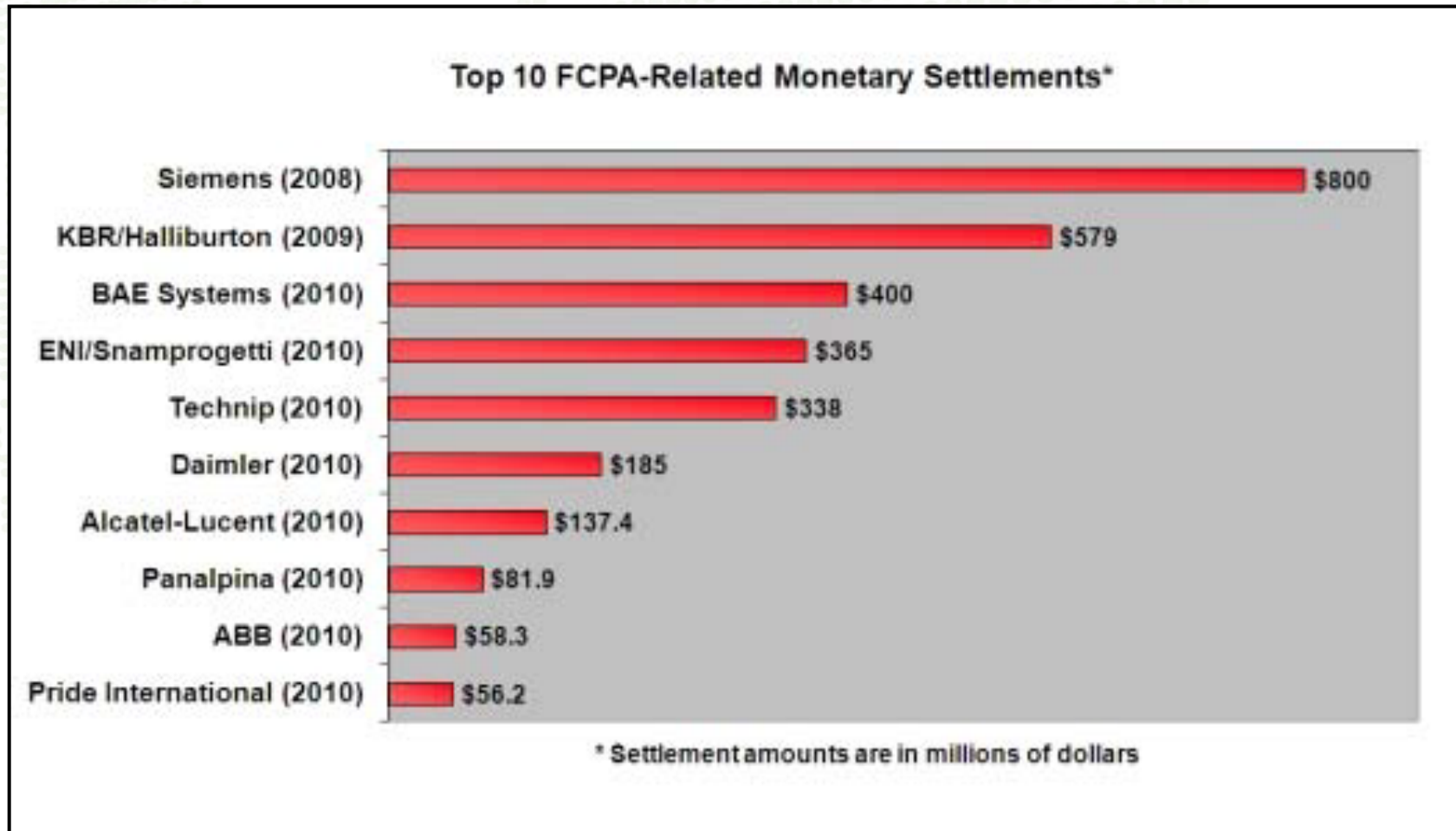
- **Broad amendments to Canada's CFPOA tabled in Senate on Feb 5, 2013 and given royal assent 18 June 2013.**
- **Aimed at bringing Canada's anti-corruption regime more closely into line with:**
  - US FCPA by creating a "books and records" offence,
  - UK Bribery Act by eliminating Facilitation Payments Defence,
  - and**
  - Broadening definition of "business" to include NGOs,
  - Establishing nationality jurisdiction (extra-territorial reach),
  - Increasing maximum sentence (gaol terms 5 to 14 yrs, fines unlimited).
- **Guilty pleas by Niko Resources (June 2011) and Griffiths Energy Internat.(Jan '13) and 35 investigations already underway.**

## US FCPA Enforcement Actions





## Top 10 FCPA-Related Monetary Settlements



## Policy Documents – only the first step

- Having a policy document is not sufficient.
- **Ethical Corporate Culture:** Need to be able to demonstrate the practical application of the policy provisions.
- Staff from CEO to the “coal face” need to be able to convince an outsider they understand the Anti-Bribery & Corruption policy, are implementing the provisions of the policy and in turn are contributing to building an ethical corporate culture.
- Appropriate training must be undertaken, appropriately documented. Duly acknowledged by recipients and discussed and recorded at Board level.
- **Proportionate procedures with appropriate monitoring and review to ensure traction, compliance and value creation.**

## Corporate Liability

**Corporate liability established when an offence committed by an employee, agent or officer of the company and the company “expressly, tacitly or impliedly” authorised or permitted the commission of an offence,**

**“Authorisation or Permission” by the company can be established by showing:**

- The board of directors or a high managerial agent intentionally, knowingly or recklessly carried out the conduct or expressly, tacitly or impliedly permitted the commission of an offence,
- A corporate culture existed that directed, encouraged, tolerated or led to an offence, or
- The company failed to create and maintain a corporate culture that required compliance with the relevant laws.

**Not knowing is no defence, if in a position to know.**



## Director Liability

**Anti-Bribery Laws expose directors to criminal and personal liability,**

- Criminal liability does not require direct involvement,
- Failure to ensure company has a sufficiently strong corporate culture of compliance with foreign anti-bribery & corruption legislation can suffice.

**Following OECD criticism on lack of enforcement, AFP expected to work more aggressively and more closely with ASIC to pursue individuals and companies.**

**ASIC expectations of directors:**

- Must understand the business and how company is run,
- Must apply an enquiring mind and be constructively sceptical,
- Individual responsibilities not limited to field of expertise.

**D&O insurance will not cover penalties for a foreign bribery offence.**

## Beyond Anti-Bribery Law

**Directors may face ASIC prosecution & civil penalties under Corporations Law:**

- Civil penalties up to \$200,000, or
- Up to 5 year's gaol in cases of recklessness or dishonesty.

**Directors may face shareholder reaction:**

- “Board of directors failed to implement proper anti-corruption controls, exposing the company to significant criminal and civil liability by allowing company personnel to make improper payments to government officials.”
- “Company’s share price dropped substantially as a result of bribery allegations being made.” (eg Leighton, Oct 2013)

**Anti-bribery & corruption compliance needs to be a top-down-driven initiative.**

## Definition of what constitutes bribery

- Providing or offering (or causing someone to provide or offer) a benefit to another person,
- that is not legitimately due,
- with the intention of influencing a foreign public official or any other person in the exercise of their duties,
- to obtain or retain business or a business advantage that is not legitimately due.

**Inducing a public official to circumvent the law and deliver an illegal benefit.**



# Wording in Contracts

## Employees / Consultants / Contractors

- The Company, through its 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, the Canadian Corruption of Foreign Public Officials Act, the US FCPA and with any 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, organisation or other representatives associated with the Consultant.

## DEFENCES

- **Lawful if written into law of country in which payment is made.**
- **As a Facilitation Payment:**
  - Minor unofficial payment to public official,
  - to secure the timely delivery or execution of routine govt service,
  - to which you are legally entitled.
- **But not permitted under UK law (2011), or under Canadian law (18 June '13).**
- **Defences recently reviewed:**
  - In Australia (Nov 2011).

## **AAMIG support for use of Fac. Payments.**

- Poverty and lack of government resources in fragile and emerging countries drives this behaviour.
- Clear distinction between the “underlying intent” surrounding Facilitation Payments versus acts of Bribery.
- Removing the Facilitation Payment defence will eliminate current transparency, blur the boundary, drive it underground and ultimately increase bribery activity.
- Any change to the legislation in Canberra would be a blunt instrument approach to addressing bribery issue in Africa.
- A “Team Approach” is required involving industry, bilateral capacity-building, multilateral agencies, NGOs and academia.



## Parallel Situation in WA

- WA Govt finds difficulty in keeping Mines Safety & Inspection personnel at existing pay levels,
- Companies asked to **make up salary difference** - a special purpose levy,
- Levy Regulation introduced on 24 April 2010,
  - Companies required to pay levy if total hours worked exceeds 5,000 hours per quarter,
  - Levy Rate for 2011/12 financial year was \$0.18 per hour (expected to amount to \$27 million),
- Funds collected are held in a Special Purpose Account, and spent administering the **Mines Safety and Inspection Act 1994** only.
- **Difference in WA:** Single issue and it is legislated.
- **In Africa:** Multiple and diverse issues + generally weak institutions.

## OECD Report Card on Australia – Oct 2012

### **Overall enforcement “extremely low”:**

- 28 foreign bribery referrals received by AFP since 2005,
- 21 without charge,
- 1 has led to prosecutions,
- 7 remain ongoing.

### **Investigation and enforcement stats do not match:**

- Size of Australian economy,
- Its level of exports, and
- Risk profile for Australian businesses given countries of operation.

### **Recommendations:**

- Raise awareness of distinction between facilitation payments and acts of bribery and corruption, and actively move to eliminate,
- Increase sanctions and enforcement, and
- Improve whistle-blower provisions.

## **Team Approach to Anti-Bribery & Corruption Issues**

- Juniors predominate in fragile and emerging countries, and cannot be expected to have a large degree of influence on host government behaviour,
- Majors are present in only a few, more advanced African countries,
- Addressing the Bribery Issue needs a “Team Approach” involving:
  - Companies large and small,
  - Governments (Aid programs & capacity building),
  - Multilaterals (funding to improve capacities & work environment),
  - Bilateral agencies (scholarships, admin. functioning, training)
  - NGOs (EITI, Transparency International, The Africa Panel), and
  - Academia (University and vocational training)



## **Ethical Corporate Culture**

Companies must develop an appropriate Corporate Culture supported by comprehensive policies and compliance programs, effective training, due diligence risk mitigation procedures and appropriate review and monitoring – documented appropriately.

**Such an approach creates value and protects value.**

**It also delivers on Duty of Care responsibilities to employees.**

## References...

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**Source Acknowledgements:** Clayton Utz, Deloitte, McCarthy Tetrault, MinterEllison, Allens<Linklaters, Veracity Worldwide, Gibson Dunn, McGrathNicol, Transparency International.



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