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Australian Government
Department of Foreign Affairs and Trade



INVESTING IN AFRICA: 2018 SEMINAR SERIES KNOW YOUR ABC'S (ANTI-BRIBERY AND CORRUPTION) IN AFRICA

14 JUNE 2018

WELCOME AND INTRODUCTION

TODAY'S PRESENTERS

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OVERVIEW FOR TODAY

TOPICS TO BE COVERED TODAY

Australian and International Laws

- Domestic laws
- Extraterritorial reach
- International obligations

DFAT

- Role of DFAT in combating foreign bribery and corruption

AFP

- Functions, limitations and support
- Future developments

Case Study

- Mighty Mining

Panel Discussion

- Questions welcome from the floor

GLOBAL CHALLENGE EVER EXPANSIVE REGIMES

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Australia

- Division 70 of the Criminal Code (Commonwealth) - bribery of foreign public officials
- Applies extraterritorially
- New legislation being introduced
- Proceeds of crime
- Penalties



Global

- US FCPA 1977
- UK Bribery Act 2010
- UN Convention against Corruption
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- Financial Action Task Force



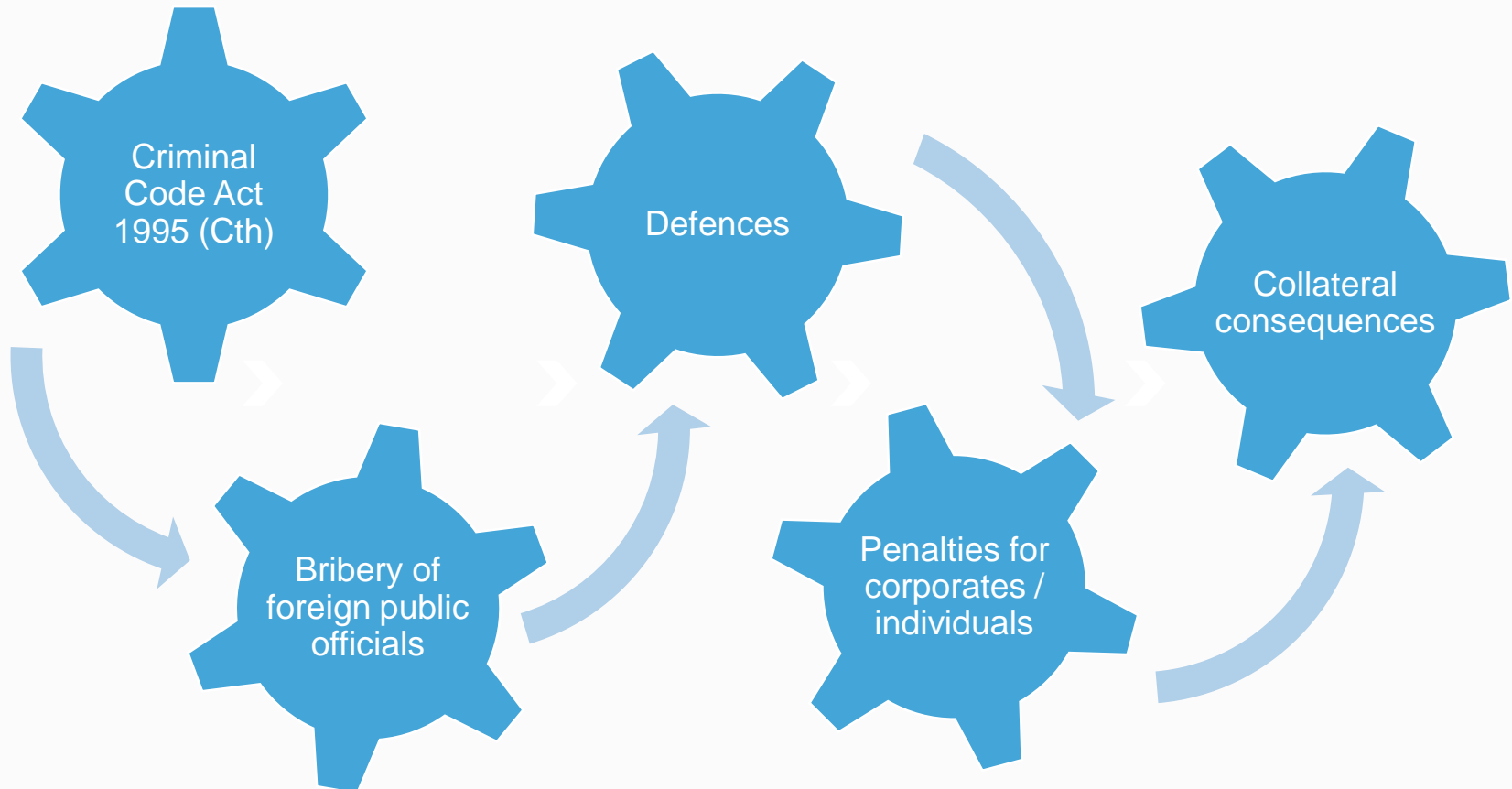
Local

- Country led
- Usually legislation exists
- Rarely enforced in Africa
- Enforcement often motivated by political reasons or initiated by competitors

AUSTRALIAN ABC LEGISLATION

A QUICK WALK THROUGH

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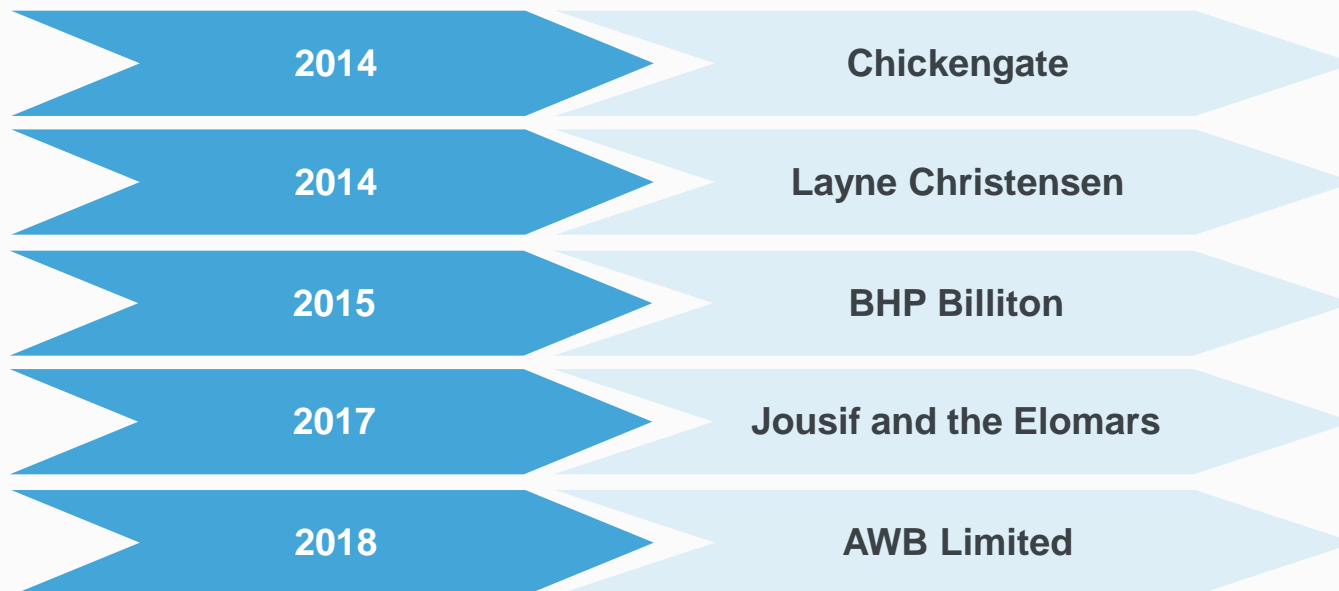


EXTRATERRITORIAL REACH HOME CONSEQUENCES FOR OVERSEAS ACTIONS

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Surely what happens abroad stays abroad?

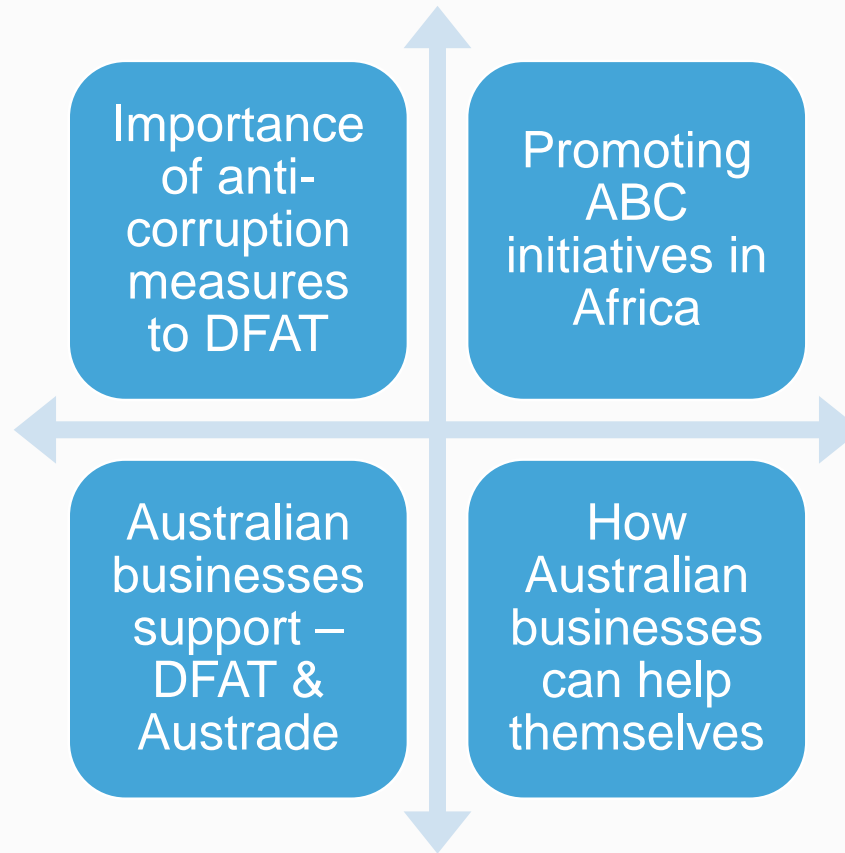


DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

SUPPORT FOR AUSTRALIAN BUSINESSES



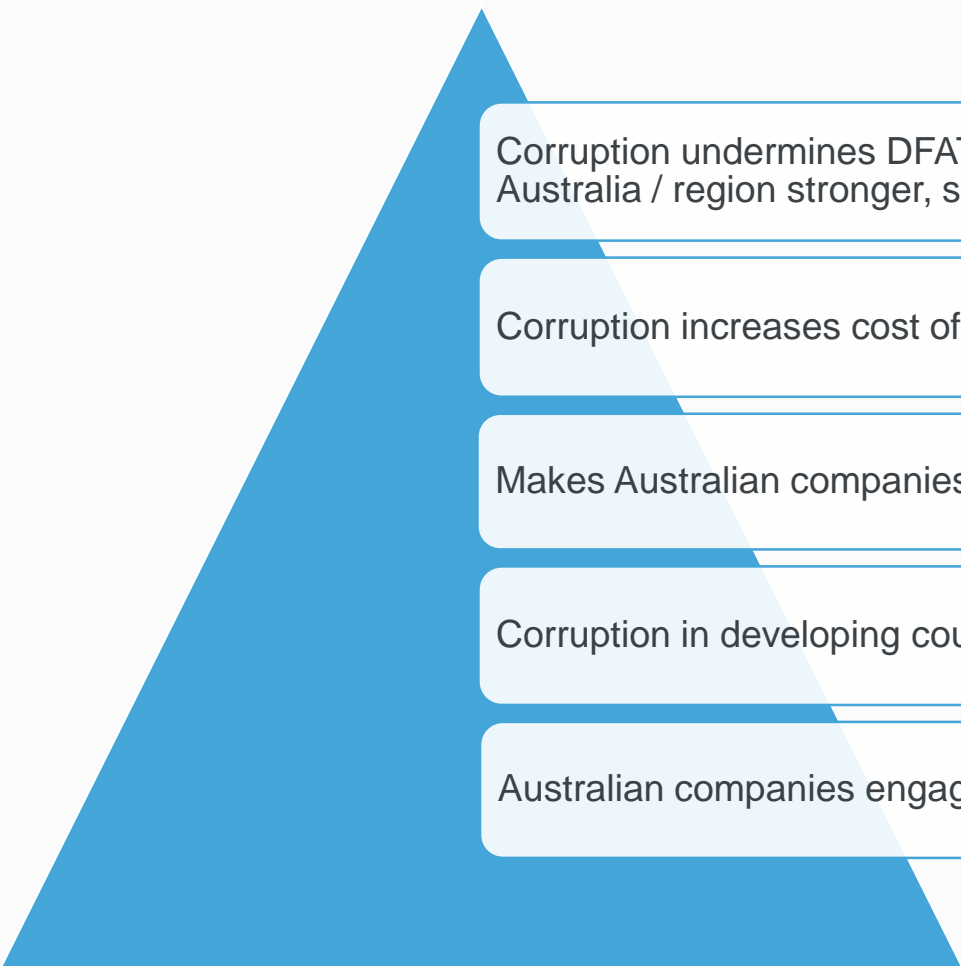
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DEPARTMENT OF FOREIGN AFFAIRS AND TRADE RATIONAL FOR CAMPAIGN



Australian Government
Department of Foreign Affairs and Trade

A large blue triangle is positioned on the left side of the slide, pointing upwards. It serves as a background for a series of five horizontal white boxes with blue borders, which are stacked vertically and partially overlap the triangle.

Corruption undermines DFAT's core purpose – to help make Australia / region stronger, safer, more prosperous

Corruption increases cost of business / distorts market access

Makes Australian companies less competitive

Corruption in developing countries stunts human development

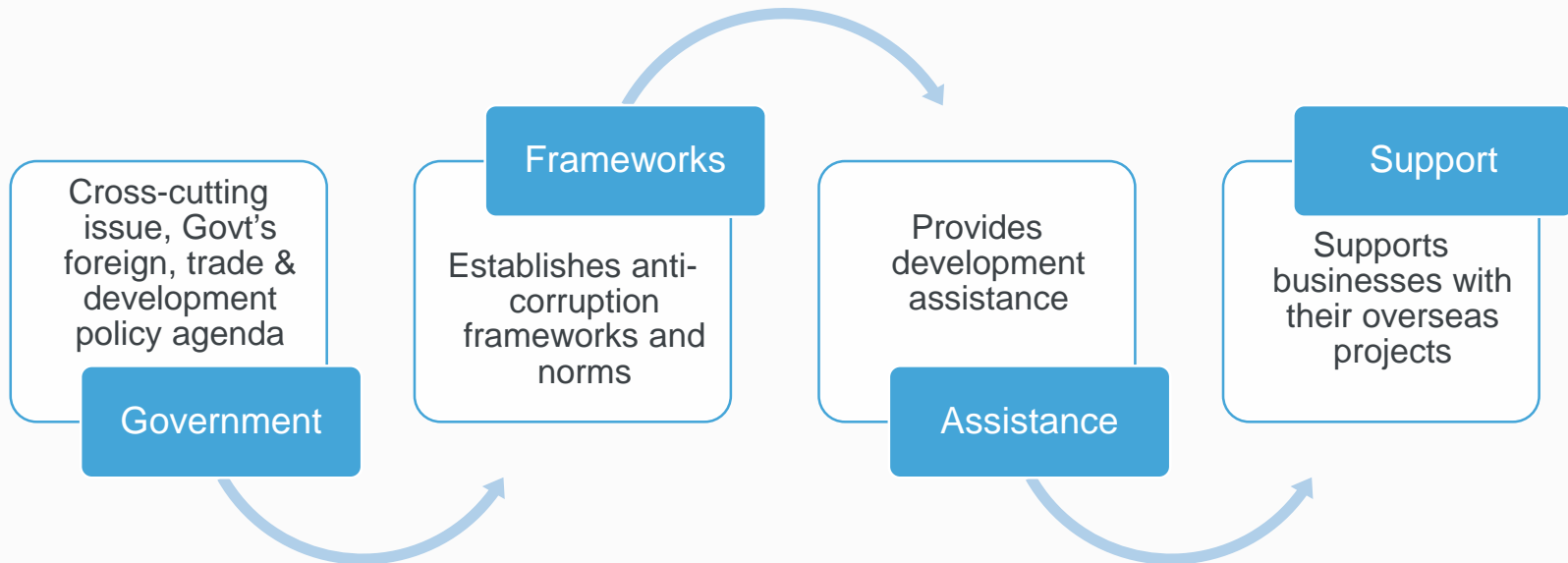
Australian companies engaging in bribery damages our reputation

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ROLE IN ELIMINATING OVERSEAS BRIBERY



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EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE



Australian Government

Department of Foreign Affairs and Trade

Australia –
longstanding
supporter of
EITI and
broader
extractive
governance
assistance

DFAT have
contributed
over AUD 20
million since
2007

Need to ensure
transparency,
accountability &
good
governance
along extractive
industry value
chain

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EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE



Australian Government

Department of Foreign Affairs and Trade



Diplomatic network



Navigating market
access difficulties






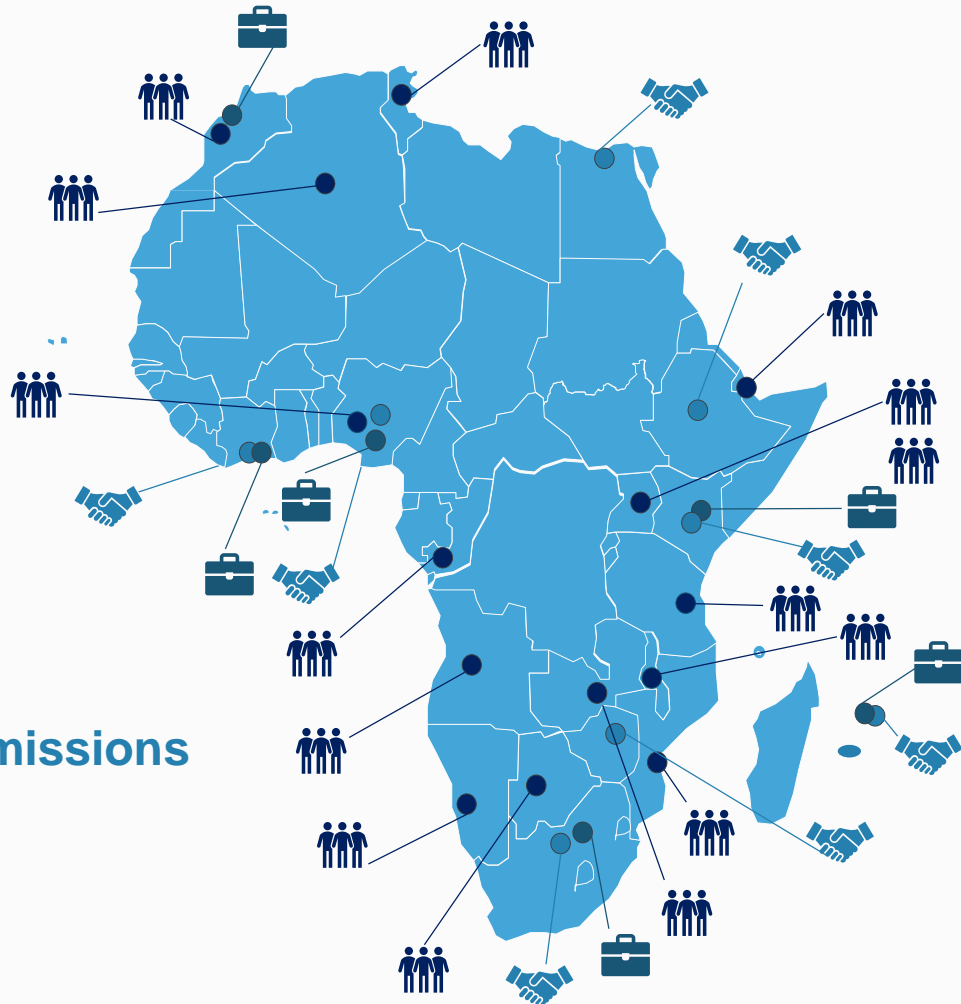
Advocate for foreign
government intervention

AUSTRALIAN GOVERNMENT PRESENCE IN AFRICA



Australian Government
Department of Foreign Affairs and Trade

-  Embassies / High Commissions
-  Austrade Offices
-  Australian Consulates



AUSTRALIAN FEDERAL POLICE

WHERE WE WERE BEFORE 2013



OECD Phase 3 Evaluation

- Not complimentary of WoG response to combat foreign bribery
- Included AFP

Operational model

- How referrals received, accepted and allocated for investigation
- Functional – no dedicated investigative teams
- Scarce resources – competing with National Security priorities
- Nature of investigations / results

Operational challenges

- LPP
- Big data
- Subject matter expertise
- Legislative restrictions

AUSTRALIAN FEDERAL POLICE

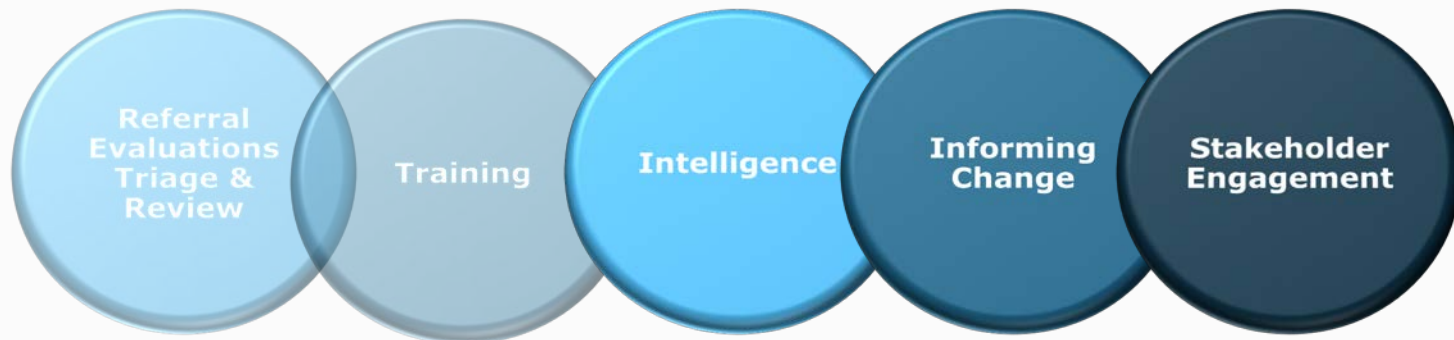
WHERE ARE WE NOW



Establishment of Fraud and Anti Corruption Centre (June 2014)

- Amalgam of 14 Commonwealth agencies
- Focus on strengthening law enforcement capability in response to fraud and corruption issues

Key functions:



AUSTRALIAN FEDERAL POLICE

WHERE ARE WE NOW



2016 –
operational
model

- \$14.7m over 4 years funded from the CAA
- 3 dedicated investigations teams with specialist expertise

Addressing
operational
challenges

- LPP Practice Group
- Foreign Bribery Panel of Experts
- International Foreign Bribery Task Force
- Collaboration with other agencies
- Data Analytics
- Self-reporting guideline

OECD phase
4 evaluation

- Improved performance

AUSTRALIAN FEDERAL POLICE FUTURE STRATEGIES



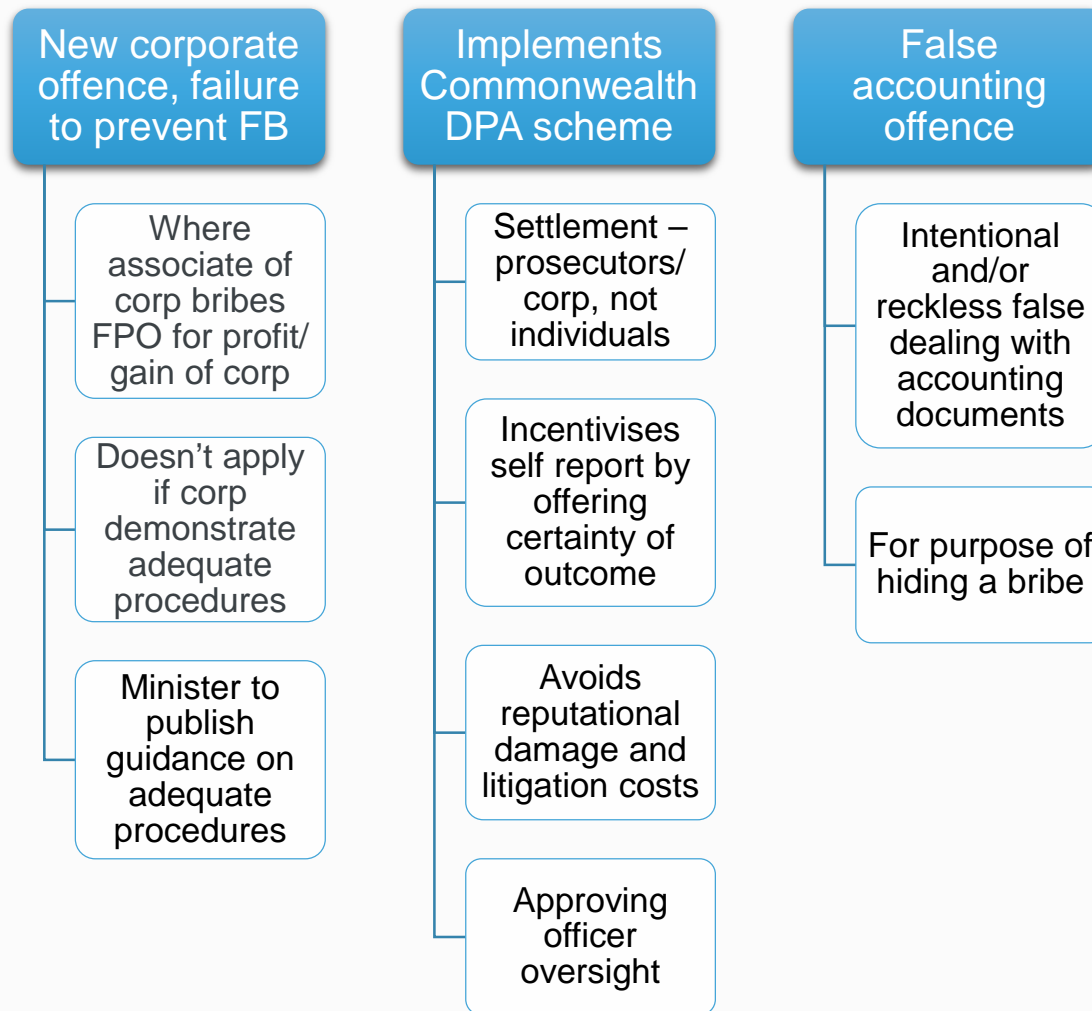
Capability building

- Engagement initiatives with at risk sectors
- Outreach
 - what does it mean
 - what do you want
- Law enforcement objectives

Proposed changes to foreign bribery offence

- Offence extended to include personal advantage
- Replaces 'not legitimately due' with 'improperly influence' FPO
- Encapsulates bribery of candidates for public office
- Removes requirement FPO influenced in exercise of official duties
- Advantage obtained for third party

AUSTRALIAN FEDERAL POLICE CRIMES LEGISLATION AMENDMENT BILL 2017



CASE STUDY MIGHTY MINING

Mighty Mining



- ASX listed holding company
- Mandated to secure investment / explore for new opportunities across sub-Saharan Africa
- New entity in each country to undertake operations
- Local ownership required in all relevant jurisdictions
- Keen to quickly secure mining licences in Africa
- Limited on-the-ground support



What was Mighty Mining's attitude as regards ABC compliance?






ABC compliance alignment

- As a young company, prioritised management time/funds to building business – not "admin"
- Might Mining decided that as there wasn't much activity at the moment, they could 'sort out this ABC thing later'
- Chief executive officer of Mighty Mining (**CEO**) said they would deal with any ABC problems as and when they arose
- Assumed that as operations overseas, no 'real' risk to Mighty Mining and those based in Australia

ABC ASSESSMENT RISKS AND RECOMMENDATIONS









ABC red flags

-  Categorised ABC as "admin" rather than risk to business
-  No proactive approach
-  No ABC policy / framework to actively encourage compliance with ABC regulations
-  No designated person in organisation to receive reports of ABC risk
-  Australian entity / individuals can be liable in certain circumstances for overseas activities



Recommendations

-  Have an ABC policy - see AUSTRADE "Guide for Australians doing business offshore"
-  Implement whistleblowing policy
-  Communicate policies / train employees
-  Translate ABC policy into local language if necessary
-  Publish ABC policy on your website
-  Adopt suite of KYC documents

CASE STUDY

AFRICA LEVEL



How did Mighty Mining approach establishing business in Africa?





Establishing business

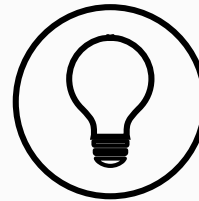
- New subsidiary set up locally to apply for mining licences (**AfricaCo**)
- CEO agreed AfricaCo would satisfy local ownership requirement by including the husband of the niece of the second cousin to Minister for Minerals (**Mr PEP**) as a shareholder
- Mr PEP received \$10,000 per month
- AfricaCo hired an in-country manager (**Manager**) solely on the recommendation of Mr PEP at \$25,000/month
- Mighty Mining undertook no KYC or DD on Mr PEP or Manager

ABC ASSESSMENT RISKS AND RECOMMENDATIONS







ABC red flags

-  Relationship with a PEP introduces risk
-  Contracting with unknown persons introduces risk
-  Challenging to defend actions if most basic of KYC and DD is not undertaken
-  Payment of a monthly consulting fee which is not market adjusted and reflective of work undertaken (particularly if paid to a PEP)



Recommendations

-  Undertake rigorous selection process for employees, consultants, advisors, etc
-  Undertake extra scrutiny of PEPs before engaging
-  Conduct appropriate KYC / DD
-  Ensure fees payable are appropriate and proportionate to work undertaken / value derived

CASE STUDY

REGULATORY LICENCE APPLICATIONS



How did Mighty Mining approach securing licences?






Licence application

- Mighty Mining instructed Mr PEP and Manager to work with Ministry to apply for three prospecting licences in gold, nickel and lithium
- CEO of Mighty Mining decided it would be best if he 'stayed out of it'
- Highlighted need to get licences quickly, told them to 'just get job done'
- Mighty Mining agrees to pay each of Manager and Mr PEP a success fee of \$25,000 on issue of gold prospecting licence
- Mighty Mining sends six cases of Margaret River's finest to Mr PEP for him to hand out to "friends of Mighty Mining and AfricaCo"

ABC ASSESSMENT RISKS AND RECOMMENDATIONS








ABC red flags

-  Delegation to local management without control mechanisms
-  Arguably encouraging taking of ABC risk
-  Payment to employee of success fee in addition to salary
-  Payment of an unsubstantiated, unreceipted amount (particularly as paid to a PEP)
-  Gifts (even of a small amount) may constitute an offence or breach ABC policies



Recommendations

-  Outline reporting / recording keeping mechanisms to on the ground staff
-  Do not encourage employees/agents to take risk
-  Document payments including purpose and required output for payment
-  Understand facilitation payment limitations
-  Adopt a gift policy

CASE STUDY

AWARD OF LICENCE / ENGAGEMENT OF CONSULTANT



What did Mighty Mining do to ensure it received all three licences?

Award of licences





- Mighty Mining was awarded two licences, one for gold prospecting and one for nickel prospecting
- Mr PEP and Manager recommended Mighty Mining engage a local company (affiliated with a company in England, so surely ok) (**Consultant**) to secure the lithium licence for a fixed success fee of \$100,000
- Shortly after contracting with the Consultant, the lithium prospecting licence was issued

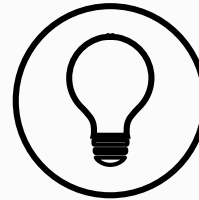
ABC ASSESSMENT

RISKS AND RECOMMENDATIONS







ABC red flags

-  Award of licences on non-transparent terms
-  Payment of a significant success-based fee to a consultant
-  No defence that Consultant affiliated to English firm
-  Payment of a large sum of money by Mighty Mining prior to the issue of a prospecting licence



Recommendations

-  Obtain copies of all documentation relating to licences, with copies provided to Mighty Mining
-  Document payment methods / obtain receipts and invoice for work done
-  Ensure payments to Consultant are for validly provided services, appropriately remunerated
-  Consider EITI

CASE STUDY IN COUNTRY CHALLENGES



How did Mighty Mining respond to in country challenges?

Local challenges





- Local community near gold prospecting area were in an uproar they blocked access to the site, and protested against Mighty Mining
- With a view to protecting Mighty Mining's reputation, CEO told Manager to "fix this, and fix it quickly"
- Manager paid, out of AfricaCo funds, \$15,000 to local commissioner
- Meanwhile a new Australian GM had been hired, and his household goods were stuck in customs
- AfricaCo importer paid \$50,000 for release of goods (unreceipted)

ABC ASSESSMENT

RISKS AND RECOMMENDATIONS







ABC red flags

-  Payment of \$15,000 to an individual rather than community, unclear of his capacity to receive
-  Using an intermediary to pay customs “fee”
-  Unreceipted payments can be viewed as private payment for improper purposes
-  Unreceipted payments of figures as high as this will not be viewed as a minor facilitation payment



Recommendations

-  Adopt a CSR programme
-  Make payments inline with CSR programme
-  Communicate projects to market appropriately
-  Always ensure payments are receipted by a government agency
-  Ensure you know what your agents are doing on your behalf, insist on receipts for disbursements

CASE STUDY

PRESS AND RELYING ON LOCAL ADVICE



How did Mighty Mining respond when allegations of bribery first came out?

Local
press





- Local press ran an article alleging that AfricaCo was awarded the licences improperly
- CEO had an 'off the record' chat telephone with Mr PEP and the Manager, who said "what did you expect? You have your licences now. Don't worry, this will go away – someone else probably wants your licences so they are causing problems"
- CEO assumed allegations of this type were common in Africa
- CEO decided to wait and see

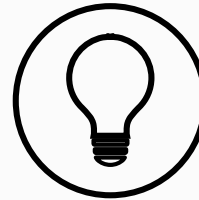
ABC ASSESSMENT

RISKS AND RECOMMENDATIONS








ABC red flags

-  CEO had an 'off the record' discussion and did not take contemporaneous notes
-  CEO did not report statements made by Mr PEP and Manager to ABC Compliance Officer
-  CEO did not notify others in his organisation nor his board of directors
-  CEO was not proactive in pursuing questions around circumstances and relied on a third party's assessment



Recommendations

-  Any allegation as to impropriety should be robustly investigated by external independent advisors
-  Contemporaneous notes should be taken of all conversations
-  Always notify person designated to receive reports of ABC risk
-  Consider surrendering licences/re-applying
-  Secure advice on requirement to notify relevant regulator

CASE STUDY

NEW INFORMATION AND REACTIVE ACTION



New evidence emerged, did Mighty Mining take the right action?




CEO
panic

- On reflection, CEO decided he better get out there to 'sort this out'
- On his arrival, applied for visa, was told by Immigration that he must contribute USD 20 to the 'tea fund' – he paid
- CEO woke in the morning to fresh press – local paper claimed to have a copy of a tape recorded conversation of CEO talking to Mr PEP and Manager
- The West Australian ran the story – front page news!
- On leaving his hotel, CEO was arrested by the local police

ABC ASSESSMENT RISKS AND RECOMMENDATIONS



ABC red flags

-  Paying of a non-receipted amount to a Government official in the performance of his duties
-  Taking action prior to full investigation (to the extent possible)
-  Seeking to leave Australia prior to discussing with authorities



Recommendations

-  Contact local embassy and DFAT
-  Contact Australian lawyers, get recommendations for local lawyers
-  Secure advice on capacity to make any statements to press, taking into consideration that the company / individuals may be under investigation

CASE STUDY

MIGHTY MINING RESPONSE IN AUSTRALIA



Mighty Mining – protection, collaboration and prosecution

CEO
jailed

- CEO was eventually released and returned to Australia
- AFP produced copy of tape recorded conversation, obtained through cross-border collaboration
- CEO asked for immunity from prosecution for cooperation
- CEO and Mighty Mining were convicted of the bribery offence
- Fine of (up to) \$2.1 million and (up to) \$21 million levied against CEO and Company, respectively
- CEO had a first class ticket to jail with a return date of 10 years

KNOW YOUR ABC'S IN AFRICA

TIPTOE CAREFULLY THROUGH THE ISSUES



**Follow both
Australian law
and local law**



**Maintain
policies/good
practice at all
times**



**Ensure
payments are
valid**



**Adopt/deploy
appropriate
ABC standards**



**Ensure
employees/
partners abide
by your ABC
policy**



**Avoid going
directly to jail**

Panel discussion

Questions welcome

INVESTING IN AFRICA SEMINAR SERIES TOPICS

Historic – let us know if you missed out and want a repeat

21 Mar 2018 Investment structuring and your local partner in Africa

6 June 2018 Financing your African project and accessing funding

Upcoming

16 Aug 2018 Your community, local content and social licence

3 Oct 2018 Powering projects with renewable energy

7 Nov 2018 Dispute resolution, BITs and asset tracing

5 Dec 2018 Investment exit strategies

INVESTING IN AFRICA SEMINAR SERIES TOPICS

Thank you

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