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Do you know your ABC?

Get ready for changes to Australia's foreign bribery laws

Parliament has passed significant reforms to Australia's foreign bribery laws. The measures will come into effect in the second half of 2024. Here is what you need to know and what you should be doing to prepare.

The corporate offence of failing to prevent foreign bribery by an associate

Under the new law, a company will be criminally liable if an associate commits foreign bribery for the company's profit or gain.

An **associate** is any officer, employee, agent, contractor or subsidiary of the company, or anyone controlled by the company or who otherwise performs services for or on behalf of the company.

The new offence is one of **absolute liability**, meaning the prosecution does not need to prove that the company knew about, authorised or condoned the associate's conduct.

However, the company will have a complete defence if it can prove that it had in place **adequate procedures** designed to prevent associates committing foreign bribery.

The maximum penalty for failing to prevent bribery is the greater of \$31.3m, three times the value of the benefit obtained by the company or 10% of the company's annual turnover.

A similar corporate offence has existed in the UK since 2010 and has become a preferred enforcement tool of the UK Serious Fraud Office. We expect the new law to be similarly favoured by prosecutors in Australia.

The new law applies to any Australian company, regardless of its size. However, the law will be particularly relevant for companies that have operations, suppliers, customers or investments in other countries.

What are adequate procedures?

The law does not define what are 'adequate procedures'. The Attorney-General is required to publish guidance on the steps that a company can take to prevent associates from bribing foreign public officials. This guidance will be instructive, but not binding.

Importantly, the guidance is likely to be principles-based, not prescriptive, with no 'one size fits all' approach to preventing bribery. A company's anti-bribery procedures will always need to be tailored and **proportionate** to the company's size, operations and risk exposure.

A clear anti-bribery and corruption policy is a necessary, but not sufficient, condition. Any policy must be operationalised through procedures that are actually applied and regularly reviewed. Robust anti-bribery procedures typically include risk assessment and due diligence processes, whistleblowing mechanisms and investigation procedures, regular communication and training, and contractual controls.

This information is intended to be a summary guide of the proposed law and should not be treated or relied on as legal advice.

For specific advice, please get in touch with any of the contacts listed on the other side.

How will you know if your procedures are adequate?

There is no bright line test for determining the adequacy of anti-bribery procedures. Based on international experience and previous consultation by the Attorney-General, we expect the guidance will describe indicators for measuring the **effectiveness** of a company's procedures.

Although not definitive, the following are indicators of an effectively implemented compliance program:



Indicator of effectiveness



As demonstrated by...

A robust culture of integrity	A high degree of awareness and understanding of ABC controls; a focus (through words and actions) on compliance by senior leaders; regular risk assessments and review; accountability, including appropriate disciplinary and remediation action
Pro-compliance conduct by top level management and the board of directors	Use of compliance expertise; appropriate reporting and engagement with, and adequate resourcing of, the compliance function
A strong anti-bribery compliance function	Autonomy, independence and access to all necessary information; adequate resourcing; involvement in training; direct reporting to senior management and the board
Effective risk assessment and due diligence procedures	Well-understood procedures that are applied when engaging third parties and in M&A; senior management endorsement and responsibility
Careful and proper use of third parties	A clear business rationale for using third parties; senior management oversight; appropriate contractual controls, including audit rights; proportionate consideration and appropriate payment terms



What should you be doing?

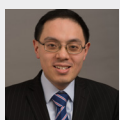
The law will take effect in the second half of 2024. Companies have 6 months to 'get their house in order'. In our experience, this is a relatively short period to review, update and implement procedures of this kind.

Companies should be using this time to carefully consider their risk-exposure, assess the effectiveness of their existing ABC procedures, and make necessary changes. Companies should also be considering their use of third parties, such as agents, channel partners and lobbyists, and whether existing contractual arrangements are adequate.

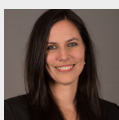
How can we help?

We are consistently recognised as Australia's leading anti-bribery and corruption firm, with leading practitioners in each of our Australian offices. We have a wealth of experience helping global companies comply with complex ABC laws. We would be glad to speak with you about how we can assist you to ensure you are ready for these changes.

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