



Summary of
Australian Anti-Bribery and Corruption Compliance Obligations

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Purpose

1. Many mining and services industry companies operating in Africa are likely to be confronted with difficult social issues such as extreme poverty, malnutrition, low levels of literacy and unstable government with limited resources. The associated investment environment presents unique challenges with potentially significant legal and social implications. Chief among these is the high risk of bribery and corruption, which can expose companies and their directors to potential criminal liability if they have not implemented an appropriate regime to comply with their legal obligations.
2. This document introduces a summary of the key aspects of the relevant compliance obligations in relation to this issue. It also provides an overview of the ways a company can act to conduct its business in the international arena, in a transparent and legal manner, for the longer-term benefit of all stakeholders.

Background

3. The offence of bribing a foreign public official is at the forefront of international corporate regulation and there is a significant risk of major personal and company penalties, including imprisonment, if an appropriate anti-bribery and corruption regime is not put in place.
4. Under the Australian anti-bribery and corruption legislation, contained in the Commonwealth Criminal Code, the maximum penalty for an individual is imprisonment for 10 years and/or a fine of up to \$1,100,000. The individual will also face automatic disqualification for managing corporations. For a corporation, the penalty is a fine the greater of \$11,000,000; three times the value of the benefit reasonably attributable to the conduct; or ten percent of the annual turnover of the company during the relevant period. A corporation may also face penalties or forfeiture of profits under Proceeds of Crime Act 2002 (Cth).
5. As well as being subject to Australian anti-bribery and corruption legislation, Australian companies and directors must also have regard to the obligations of legislation in other jurisdictions, most relevantly the US and UK which contain particularly onerous provisions and strong enforcement and prosecution cultures.
6. Under the Commonwealth Criminal Code, companies and responsible individuals can be held liable for the activities of employees, agents or officers acting within the actual or apparent scope of their employment or authority where a company expressly, tacitly or impliedly authorised or permitted the commission of the offence.
7. 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, for example if the company and/or responsible individuals were wilfully blind to, or deliberately ignorant of, the corrupt behaviour.

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8. Companies must establish and maintain an appropriate anti-bribery and corruption corporate culture because authorisation or permission of corrupt practices, in breach on the Commonwealth Criminal Code, can be inferred from:
 - (a) the existence of a corporate culture that directed, encouraged, tolerated or lead to an offence; or
 - (b) a company's failure to create and maintain a corporate culture that required compliance.
 9. It is important that anti-bribery and corruption compliance must be a top down driven initiative. The Board of Directors should be overtly engaged on this issue and, with the assistance of a legal expert in this area, companies need to demonstrably implement appropriate anti-corruption policies and procedures.
 10. Useful publicly available background information on the offence of bribing a foreign public official can be obtained from the Australian Attorney General's Department (<http://www.ag.gov.au/foreignbribery>). Transparency International (a non-governmental organization that monitors and publicises corporate and political corruption) also publishes information regarding global trends in enforcement (<http://www.transparency.org>).

Anti-bribery and corruption compliance regime

11. The specific policies and procedures of a company's compliance regime must be aligned with the individual circumstances and resources of the company. Legal advice is important to help appropriately tailor and monitor compliance regimes to a company's individual circumstances.
12. Anti-bribery and corruption compliance is generally achieved by a combination of at least the following:
 - (a) Policy & procedure: Implementation of up-to-date internal policy documents appropriately targeted at anti-corruption issues, including:
 - (i) Code of Business Conduct;
 - (ii) Compliance Guide, including relevant illustrative hypotheticals or real world examples;
 - (iii) Record Keeping Policy;
 - (iv) Whistleblower Policy; and
 - (v) Appropriately trained dedicated Compliance Officer and Ethics Committee to test and monitor the compliance regime.
 - (b) Other materials:
 - (i) Open letter from the Managing Director to all employees, agents and third parties advising of the company's obligations and absolute commitment to compliance;
 - (ii) Guide for employees, agents and third parties to complying with anti-corruption obligations;

- (iii) Standard certification documentation whereby third parties agree to act in accordance with anti-corruption principles in their dealings with the company; and
 - (iv) Appropriate clauses for inclusion in contracts with third parties, agents and joint venture partners, including evidence that such clauses have been utilised.
- (c) Record keeping: It is critical to implement robust and comprehensive record keeping practices on relevant issues, such as:
- (i) facilitation payments (particularly given the legal obligation to maintain accurate / detailed records of such payments and the often difficult / fine line between an acceptable payment and a bribe);
 - (ii) cash or unusual payments;
 - (iii) per diems; and
 - (iv) any payments to government officials or related entities.

It is also critical to obtain legal advice on the nature of any suspect payments to ensure that only acceptable payments are authorised and that the company has appropriate procedures for forward planning and hazard assessment.

- (d) Training & education: Implement appropriate anti-corruption training materials for Board members and select staff that would normally include:
- (i) presentations to the Board and senior management; and
 - (ii) ongoing training of management and staff, which may be conducted by an internal compliance officer appointed and trained to manage the process, but should be routinely reviewed and updated by external legal advisers.
- (e) Verification: Systems to test and monitor the compliance regime, such as:
- (i) internal audit protocols to pick up "red flags", usually conducted by either a dedicated Compliance Officer and/or Ethics Committee;
 - (ii) independent expert analysis of discrete issues (e.g. forensic accounting analysis) under the guidance of legal advisors with relevant anti-bribery and corruption expertise;
 - (iii) external legal audits, where appropriate;
 - (iv) well documented procedures to identify and institute appropriate remedial actions for possible corrupt practices; and
 - (v) regular formal compliance reports to the Board, typically prepared by the Compliance Officer.

(f) Due Diligence:

- (i) Careful due diligence on all agents and joint venture partners is critical; and
- (ii) If the company were to acquire an interest in or take over another company, due diligence may also be required on the target company's compliance to avoid "successor liability" (legally inheriting liability for the target company's prior breaches of anti-corruption laws).

Conclusion

13. An anti-bribery and corruption compliance regime is critical to the success of companies, particularly those operating in areas where there is a high risk of corruption. The complexity of the compliance regime required will depend on the circumstances. Companies should obtain independent legal advice on this issue so that they understand what is appropriate for their stage of development.

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