



Corporate Corruption:

How well do you fare?

“Corruption” is a term that is subject to different cultural and ethical interpretations, depending upon which country and continent you are in. Against this backdrop, global legislative frameworks continue to evolve and strengthen to deal with this issue.

Facilitation payments are one key issue that is currently attracting significant discussion. Two international conventions – The OECD Anti-Bribery Convention and the UN Convention Against Corruption (UNCAC) - broadly define these payments as 'small' sums paid to government officials personally in order to obtain or expedite routine services to which the payer is legally entitled.

In practice, the following distinction is sometimes made between bribes and facilitation payments. A bribe is regarded as being a payment made to someone to encourage them to act in a way in which he should not act (for example, by wrongly awarding a contract, or wrongly releasing a party from a legal obligation) whereas a facilitation payment is regarded as being a payment (other than the fee required by law) made to a person to do something which he should already be doing (for example, issuing a visa or customs clearance that is properly due).

However, although there may be this distinction, some treat the payment and receipt of facilitation payments as a form of bribery. The law has a very specific definition of what constitutes a facilitation payment. Unfortunately, some opinion makers have tried to stretch this definition to include acts of bribery.

The OECD recognises the use of facilitation payments but encourages companies to move away from the practice of using them. Following the lead of the United Kingdom, Canada has legislated that facilitation payments should be treated as illegal and punishable by fines or imprisonment. Australia mandates that facilitation payments are to be recorded in the company's statutory accounts. This obligation is aimed to ensure transparency and indicates a clear distinction between the treatment of bribes and facilitation payments. In the United States, the use of facilitation payments is accepted.

Up until about 15 years ago, bribery and corruption were an accepted part of doing business in Africa. Rapid growth in the continent over the past decade has seen more and more multinationals choose to have their operations there.

The continent's growing middle classes are also beginning to question the validity and relevance of bribes and facilitation payments and are showing commitment to operating in a more transparent manner. Throughout Africa, individual countries are beginning to develop their own anti-corruption laws.

Africa, as many will be aware, is characterised by extreme poverty, malnutrition, and some unstable governments with limited resources. This environment presents remarkable challenges with significant legal and social implications. Approximately 200 Australian mining and exploration companies are operating in Africa on more than 750 resource projects. Many of them rely on the use of facilitation payments.



Australian corporations operating in foreign countries are frequently presented with the challenges of managing business processes that are not transparent. This is particularly the case in developing countries. However, they need be aware that the companies and their officers are subject to both:

1. Australian anti-bribery and corruption legislation; and,
2. Legislative obligations in external jurisdictions.

Australian companies and their directors, may be held liable for the actions of their employees, partners or agents overseas.

This important development presents a cultural challenge for Australian companies. Accordingly, they may find themselves held accountable for things which have occurred in a cultural and social environment which management in Australia does not fully understand or control.

Companies need to carefully balance their commercial motives for doing business in Africa with their obligations to comply with relevant anti-bribery and corruption laws. Failure to properly manage their response to the bribery and corruption climate in Africa can disrupt production, have an impact on competitiveness and erode their 'social licence' to operate. It also now has the potential to expose companies and their directors to potential criminal liability.

Development of appropriate bribery and anti-corruption systems and procedures is an essential step in managing ongoing compliance with legal obligations and building an ethical corporate culture that will be attractive to investors.

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