



Senate Standing Committee on Economics  
PO Box 6100  
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Canberra ACT 2600

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## SENATE INQUIRY INTO FOREIGN BRIBERY

### PRINCIPAL MEMBERS



The GRC Institute (GRCI) would like to thank the Senate Standing Committee on Economics for the opportunity to provide input into its inquiry into foreign bribery. The GRCI is the peak industry body for the practice of compliance, risk and governance in the Asia Pacific region. Our members are compliance, risk and governance professionals who are actively engaged in the private, professional services and Government sectors.

The terms of reference that have been established by the Senate Standing Committee raise a number of issues. The GRC Institute will only make comments on those elements it believes it has expertise in.

- a) *the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, with specific reference to the effectiveness of, and any possible improvements to, Australia's implementation of its obligations under:*
- I. *the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and*
  - II. *the United Nations Convention against Corruption (UNCAC);*

While the OECD convention and UNCAC represent significant international protocols designed to eliminate the bribery of public officials, the terms of reference of the Senate Inquiry should be expanded to include the impact the soon to be released ISO standard on Anti-bribery (ISO/CD 37001 Anti-Bribery Management Systems) will have on Australian businesses operating both domestically and internationally.

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ISO/CD 37001 has been in development since 2014. It has its origins in the British Anti-Bribery Management Standard (BS 10500) that was first published in November 2011 as a tool to support the UK Anti-Bribery Act.

ISO/CD37001 is a certifiable management system standard that is being developed by more than 80 anti-bribery experts from 44 countries around the world. It is anticipated that the standard will be published at the end of 2016.

The new anti-bribery standard has been designed to assist large, medium and small organisations from both the private and public sectors, from any international jurisdiction manage their anti-bribery obligations.

The first thing to note is that while use of the standard is voluntary, it does allow organisations who employ the standard in the design of their anti-bribery framework to be "certified" that they meet the requirements of ISO 37001. The certification process will give organisations up and down the supply chain certainty that they are dealing with organisations that have robust anti-bribery systems in place.

This will become a significant issue for Australian organisations operating in the international marketplace. Especially those firms with exposure to the US as the US Department of Justice (DOJ) already seek certainty around the bribery practices of not only US regulated entities but also their suppliers and third parties.

There is a very real possibility that this standard when published will have a significant impact upon those Australian entities that operate internationally. The Australian perspective on this standard is being represented by Martin Tolar who is the current chair of the Australian Mirror Committee responsible for consulting with Australian organisations to ensure ISO 37001 meets local requirements while not placing an undue burden upon Australian firms while still ensuring international obligations are being met.

In broad terms ISO/CD37001 covers the following issues:

- How organisations can adopt and effectively communicate an anti-bribery policy
- Getting buy-in and ensure responsibility from top management

- Designate a manager or function responsible for management of the anti-bribery framework
- How to effectively train personnel
- Undertake periodic bribery risk assessments and appropriate due diligence on projects and business associates (clients, contractors, subcontractors, suppliers, consultants, joint venture partners, agents, etc.)
- Implement vetting and controls over personnel to prevent bribery
- Controlling gifts, hospitality, donations and similar benefits to ensure that they are not used for corrupt purposes
- How to request and obtain anti-bribery commitments from business associates.
- Implementation of financial controls to reduce bribery risk (e.g. two signatures on payments, restricting use of cash, etc.)
- Implementation of procurement, commercial and other non-financial controls (e.g. competitive tendering, two signatures on work approvals and variations, etc.)
- Provision of confidential reporting procedures (whistle-blowing)
- Establishment of investigative processes to manage and deal with suspected or actual bribery

***b) the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including: the range of offences, for example:***

***B. increased focus on the offence of failure to create a corporate culture of compliance',***

***C. liability of directors and senior managers who do not implement a corporate culture of compliance,***

A significant portion of ISO/CD37001 is devoted to establishing the requirements necessary to create a strong culture of compliance. Like the broader ISO standard on Compliance Management Systems (ISO 19600) which was born out of the Australian Standard AS3806, an organisation's culture will determine the success of any compliance framework. By definition a compliance culture is made up of the "values, ethics and beliefs that exist throughout and organisation and interact with the organisation's structures and control systems to produce behavioural norms that are conducive to [good] compliance outcomes."

Ultimately a plethora of the safeguards and systems will not prevent bribery from taking place if there is a weak culture in place and bribery is condoned by the leadership of the organisation.

From a regulatory prospective however, culture can sometimes be difficult to measure and therefore be difficult to take action against if it is found wanting. However strong compliance cultures have successfully demonstrated that breeches that have taken place were one off indiscretions rather than being indicative of deeper systemic problems. In these instances organisational culture was used as a mitigating factor in a defense to reduce the size of penalties handed down (see ACCC V George Western Foods and ASIC V Citibank). In attempting the measure the strength of an organisation's compliance culture, the focus should be placed upon examining the actions taken by the organisation's 'leadership, being the Directors, CEO of other key executives. The decisions and behaviours exhibited by these individuals will shape organisational culture. Additionally, holding these individuals to account will ensure the desired behaviours are promulgated throughout the organisation.

Specifically leadership in respect to an anti-bribery program can be demonstrated and measured as follows:

- Ensuring that the anti-bribery policy and anti-bribery objectives are established and are compatible with the strategic direction of the organization;
- Ensuring the integration of the anti-bribery management system requirements into the organisation's business processes;
- Ensuring that the resources needed for the anti-bribery management system are available;
- Communicating both internally and externally the anti-bribery policy, and the importance of effective anti-bribery management and of conforming to the anti-bribery management system requirements;
- 4Ensuring that the anti-bribery management system achieves its intended outcome(s);
- Directing and supporting persons to contribute to the effectiveness of the anti-bribery management system;
- Promoting continual improvement;
- Supporting other relevant management roles to demonstrate their leadership in preventing and detecting bribery as it applies to their areas of responsibility.

A focus upon these aforementioned individuals will not only ensure that from a regulatory perspective, stronger compliance cultures will be achieved, but direct accountability will be more easily established making regulatory performance more effective.

***b) viii official guidance to corporations and others as to what is a culture of compliance' and a good anti-bribery compliance program,***

The compliance or anti-bribery culture of an organisation as stated above, rests with its leadership. The tone or culture of any organisations starts at the top. A significant amount of work has been published on the impact executive leadership has on an organisation;s compliance culture. However, in terms of general guidance on how this is best achieved and demonstrated, we refer the committee again to ISO 19600 Compliance Management Systems.

“The development of a compliance culture requires the active, visible, consistent and sustained commitment of the governing body, top management and management towards a common, published standard of behaviour that is required throughout every area of the organisation.

Examples of factors that will support the development of a compliance culture include:

- A clear set of published values
- Management actively seen to be implementing and abiding by the values;
- Consistency in the treatment of similar actions, regardless of position;
- Mentoring, coaching and leading by example;
- Appropriate pre-employment assessment of potential employees;
- An induction or orientation program that emphasises compliance and the organisation’s values;
- On-going compliance training, including updates to the training;
- On-going communication on compliance issues;
- Performance appraisal systems that consider assessment of compliance behaviour and take into account performance pay to achieve compliance key performance measures and outcomes;
- Visible recognition of achievements in compliance management and outcomes;
- Prompt and proportionate disciplining in the case of wilful or negligent breaches of compliance obligations;

- A clear link between the organisation's strategy and individual roles, reflecting compliance as essential to achieving organisational outcomes;
- Open and appropriate communication about compliance.
- Evidence of a compliance culture is indicated by the degree to which:
  - The items above are implemented;
  - Stakeholders (particularly employees) believe that the items above have been implemented;
- Employees understand the relevance of the compliance obligations related to their own activities and to the those of their business unit;
  - Remediation of noncompliance is 'owned' and actioned at all appropriate levels of the organisation as required;
  - The role of the compliance function and its objectives are valued;
  - Employees are enabled and encouraged to raise compliance concerns to the appropriate level of management."

***b) x facilitation payment defence***

While some jurisdictions around the world still allow for the facilitations payment defense, notably the United States of America and Australian, ISO/CD37001 specifically addresses this issue. Its states in section A.2.2.1 of the document; "[A] Facilitation payment is the term sometimes given to an illegal or unofficial payment made in return for services which the payer is legally entitled to receive without making such payment. It is normally a relatively minor payment made to a public official or person with a certifying function in order to secure or expedite the performance of a routine or necessary action, such as the issuing of a visa, work permit, customs clearance or installation of a telephone. Although facilitation payments are often regarded as different in nature to, for example, a bribe paid to win business, they are illegal in most locations, and are treated as bribes for the purpose of this International Standard, and therefore should be prohibited by the organization's anti-bribery policy."

The standard goes on to say organisations should "provide specific guidance to any personnel who may be faced with requests or demands for such payments on how to avoid them and deal with them. Such guidance could include, for example:

- a) specifying action to be taken by any personnel faced with a demand for payment, such as: in the case of a facilitation payment, asking for proof that the payment is legitimate, and an official receipt for

payment and, if no satisfactory proof is available, refusing to make the payment;

b) specifying action to be taken by personnel who have made a facilitation payment such as;

- making a record of the event;
- reporting the event to an appropriate manager or the compliance function;

c) specifying action to be taken by the organization when personnel have made a facilitation payment such as:

- appointing an appropriate manager to investigate the event (preferably the compliance function or a manager who is independent from the personnel's department or function);
- correctly recording the payment in the organization's accounts;
- if appropriate, or if required by law, reporting the payment to the relevant authorities."

***b) xiii the economic impact, including compliance and reporting costs, of foreign bribery***

The financial impact that reporting on foreign bribery will have upon an organisation will largely depend upon its size, complexity and exposure to public officials in international markets. Having said this, an anti-bribery compliance program should represent only a single element of an overall compliance and risk management framework, so therefore in this context the economic impact should be marginal.

Additionally, if the organisation was to take a position that it does not engage in any form of bribery, including the payment of facilitation fees, then the reporting requirements and subsequent costs would be zero.

Once organisations engage in the provision of facilitation payments they need to keep accurate records to ensure they do not fall foul of aggressive regulatory enforcement, especially if their operations come into the preveue of the USA. This is significant as most of the FCPA prosecutions that have been made by the DOJ and the SEC to date have been focused upon the improper keeping of books and records and not the actual act of bribery itself.

In short, the least risky and cost effective approach is an organisational stance that sees employees prohibited from engaging in bribery in all its forms, however defined.

Once again GRCI would like to thank the Senate Standing Committee on Economics for providing an opportunity for us to make comment as part of its inquiry. Should any of the committee members require any additional information or require clarification on the comments that appear in this submission please do not hesitate to contact GRCI on [REDACTED] and we would be happy to do so either in person or in writing.

Yours sincerely,

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**Managing Director**