



Australian Government
Attorney-General's Department

Commonwealth
Attorney-General's Department

ASX Corporate Governance Council

*Review of the ASX Corporate Governance Council's
Principles and Recommendations*

The Attorney-General's Department (the department) thanks the ASX Corporate Governance Council (the Council) for the opportunity to make a submission on the proposed fourth edition of the Corporate Governance Principles and Recommendations.

This submission focuses on proposed recommendation 3.4, which would require a listed entity to:

- have and disclose an anti-bribery and corruption policy; and
- ensure that the board is informed of any material breaches of that policy.

The department supports the inclusion of this recommendation in the Corporate Governance Principles and Recommendations.

The department's role

The department supports the Attorney-General as the minister with whole-of-government policy responsibility for preventing bribery of foreign public officials (foreign bribery) and Commonwealth public officials. Key aspects of this role include maintaining an effective legal and policy regime, ensuring outreach to raise businesses' awareness of foreign bribery laws, and leading Australia's engagement with the OECD Working Group on Bribery on our implementation of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

Bribery legislation

Foreign bribery is a challenging crime to investigate. There is often no identifiable victim, evidence is typically offshore, and offending can be concealed in legitimate business transactions. The Government is committed to ensuring that our foreign bribery laws are suited to address these challenges while affording businesses sufficient certainty of their obligations in conducting business overseas.

On 6 December 2017, the Government introduced into Parliament the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017. This Bill seeks to address challenges associated with detecting and addressing serious corporate crime, which is estimated to cost Australia \$8.5 billion every year. The Bill is currently before the Parliament.

Schedule 1 of the Bill would:

- amend the offence of bribery of a foreign public official contained in Division 70 of the Criminal Code and
- introduce a new corporate offence of failing to prevent bribery.

The new corporate offence of failing to prevent bribery would apply where an associate of a body corporate has committed bribery for the profit or gain of the body corporate. The offence would not apply if the body corporate was able to demonstrate that it had 'adequate procedures' in place to prevent the commission of foreign bribery by its associates (which includes employees, agents and subsidiaries of a company). The Australian Government considers it is reasonable to expect companies of all sizes to have in place an anti-bribery policy, accompanied by appropriate and proportionate procedures to prevent bribery from occurring

within their business. The new corporate offence would create an incentive for corporations to implement measures to prevent bribery, because the only way for them to avoid liability for the new offence is to show they had adequate compliance procedures in place.

A similar offence has been successfully implemented in the United Kingdom (section 7 of the UK *Bribery Act 2010*), and has reportedly had a significant positive influence on the adoption of effective corporate compliance programs to prevent bribery.

The Bill would require the Attorney-General to publish guidance on the types of measures that are likely to constitute 'adequate procedures' (adequate procedures guidance). The Government will release a draft version of this guidance for public consultation in due course. This guidance will help corporations understand the types of steps that can be taken to prevent bribery of a foreign public official. Rather than a checklist of compliance, it will be designed to be of general application to corporations of all sizes and in all sectors.

Consistent with the preference expressed by Australian industry, the guidance will be broadly consistent with that issued by the United Kingdom Ministry of Justice under section 9 of the *Bribery Act 2010* (UK), to allow companies that have already framed their anti-bribery policies on international guidelines to easily incorporate additional policies relevant to the Australian context.

The department's view on proposed recommendation 3.4

Corruption, including bribery, has a significant negative impact on business and a corrosive effect on our economy. On a macro scale, it creates an uneven playing field and distorts markets. For individual businesses, corruption can increase costs and create exposure to legal and reputational risks. Combatting corruption is a shared responsibility, and it is in the mutual interests of Government and business to take steps to address its negative effects. The department supports the inclusion of recommendation 3.4 in the Corporate Governance Principles and Recommendations.

The department notes the suggestion in the Council's consultation paper entitled 'Review of the ASX Corporate Governance Council's Principles and Recommendations' that some commentators 'might say that the Council should not be introducing any new recommendations in these areas that might potentially conflict with these new laws or impose additional compliance burdens on listed entities'. The department supports the Council's comments in response to this suggestion. The department considers proposed recommendation 3.4 would enhance and complement, rather than conflict with, any new anti-bribery legal requirements.

In line with the requirements under the new corporate offence of failing to prevent foreign bribery (outlined above), the department recommends the Council clarify that 'bribery' includes foreign bribery. The department also invites the Council to consider the Government's draft adequate procedures guidance once it has been released for public consultation.