

## Article Information

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# Webinar Q&As: Navigating the New Australian Anti-Bribery Laws | What You Need to Know

**Piper Alderman provides answers in response to the questions received during our 2024 Navigating the New Australian Anti-Bribery Laws | What You Need to Know on 9 October.**

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Thank you to everyone who participated in our webinar on Australia's New Anti-Bribery Laws. There were a number of questions that we didn't have time to answer, so we have included the answers here.

**Question: We have had anti-bribery training for some years. It is now standardised online for relevant employees. With these new laws, do you recommend a hybrid approach with some tailored face-to-face training for high-risk areas?**

Yes. The AG's guidelines recommend that training be designed to reflect the risks identified by the organisation, and in particular that there be tailored training for those employees in high risk areas. There isn't a "mandate" for a particular form of training, but a recommendation that it be offered in different formats so that it is integrated into the way the employee goes about their responsibilities. If the employees in question are in different locations, then hosting online training where people are required to have their cameras on (so that you know they're really engaging) would be an alternate approach to bringing everyone together face-to-face.

**Question: Do you recommend a separate Code of Conduct? Would it be adequate if other policies already properly address this topic?**

What matters is that employees, and others who need to comply with the policy in question, know what it is, where to find it (somewhere easy to access) and that it contains the company's expectations on standards of ethical behaviour.

**Question: Who is responsible for expressing judgment if a company's processes and procedures are meeting the standard? Or is that only determined by a Court when the matter proceeds to Court?**

This is a reference to section 70.5A(5) of the Criminal Code which provides that a corporation will not be found to have failed to prevent the bribery of a foreign official if the company proves that it had in place adequate procedures designed to prevent the Commission of a foreign bribery offence by any associate of that company. There is a note in that section that the defendant bears a "legal burden" in relation to this matter. This means that the defendant needs to prove on the balance of probability that they had adequate procedures in place.

**Question: It would be helpful to have more information on charitable giving and why it is a grey area - a lot of corporates pride themselves on donating a percentage of profits to charity as a "good corporate citizen"**

The key principles to consider are whether the donation is reasonable, transparent, proportionate and bona fide and that there is no likelihood that the charitable donation will influence a public official, someone acting as an agent or fiduciary, or someone else with whom your organisation is doing business. Key matters to consider would be :

- whether the charity is registered with the ACNC and that a reasonable proportion of donations ends up going to the causes in question and not being applied to internal administration;
- that the choice of charity is made by the company for reasons independent of any perception that, for example, that charity might be favoured by a public official, that charity might employ a relative of a public official or that charity might benefit the family of a public official.

It is also important to provide guidelines as to who within your organisation could authorise charitable donations so that there is appropriate oversight as to those decisions and they are not being made by a single individual where the risk of a decision for an improper motive is higher.

**Question: Does a whistleblowing program for a global company need to extend to all of its workers around the world - ie. not just an Australian whistleblowing program?**

The Corporations Act requirements on whistle blowers provides that an eligible whistle blower is an individual who is an officer, or employee, of a 'regulated entity' (an Australian entity). Public companies, large proprietary companies and trustees of eligible superannuation entities are required to have compliant policies.

Within an international group of companies, the requirement attaches to the local company, and applies to their employees, officers and suppliers, whether those individuals are based in Australia or elsewhere. However it does not govern the whistle blower policies of, for example, an overseas parent company.

**Question: Does the definition of 'associate' [in the context of a company failing to prevent the Commission of an offence by an associate] cover workers who are not located in Australia?**

The territoriality requirements are that either the offence occurs wholly or partly in Australia or, where the offence occurs outside Australia, the individual is an Australian citizen or Australian resident or the person is a body corporate incorporated under Australian law.

**Question: Is the benefit relative to the individual? For example is giving \$100,000 to someone who has \$10 billion a benefit?**

The benefit that is given to a foreign official which may be considered to be a bribe is not determined by a consideration of the wealth of the foreign official. Just because the foreign official is wealthy and the benefit is relatively small compared to that wealth, it does not mean that a bribe has not been attempted. What is important is that the benefit can enable a person to influence the foreign official - no matter how small it is.

**Question: I used to work in travel and one of the issues there was airlines or hotels offering to upgrade executives during their personal travel. Is this kind of activity a concern?**

The activity may be a concern. The benefit of an upgrade at a hotel or on an airline seat may be very substantial. For example, consider an upgrade from a standard room costing \$300 a night to a presidential room costing \$3,000 per night. If the benefit is given to a foreign official to gain influence it will likely be considered a bribe.

**Question: If companies that contract with the Government are deemed to be 'public officials' as well, are they also then subject to the jurisdiction of the authorities responsible for auditing Government conduct?**

The answer to this question very much depends on the particular legislation in the state or territory in which the company conducts business and also the type of Government that the company is conducting business with. Generally, companies should assume that if they are doing business with a Government that they will be open to public scrutiny and that this may involve some form of audit. That obligation is usually also imposed on companies when they contract with government. When in doubt, assume that you could be audited and act appropriately as a result.

**Question: It is common in Asian culture that local community groups and semi government organisations solicit donations from companies to support community and provide quasi security services to ensure order and safety in the community. How is this considered and how can it be managed?**

The activity may be a concern. Again, it all depends on the situation.

Consider whether the payment is reasonable, transparent, proportionate and bona fide.

If the payments are a payment for services or a genuine charitable donation, they are likely to be acceptable. But if the payments are being made to influence a public official in the present or future performance of their duties then the payments should ring alarm bells.

The best way to manage the activities is to first set clear guidelines for staff when dealing with these situations. Training, policies and procedures all help. When in doubt we recommend that external advice is sought before you commit to making any payments, so that you can ensure that the payments do not fall foul of the Australian Anti-bribery laws.



We look forward to connecting in future webinars.

Meanwhile, please reach out to us if you would like to explore our training for your organisation that is tailored to your particular context and risk environment.