



Enforcement

This case study demonstrates the types of enforcement actions and penalties that might apply if a company, its officers or employees are found guilty of bribery and corruption offences.

Scenario

This is a continuation of the scenario in the **Investigating an internal complaint** and **Responding to contact by an authority** case studies.

Sarah's macadamia nut business was rocked by a discovery that her senior employee, Andy, entered into a contract with an offshore intermediary that reportedly facilitates access to local markets in exchange for bribes disguised as inflated service fees. It now also appears that Andy personally benefitted from these arrangements, receiving a kick-back payment for each 'service fee' paid to the intermediary by Sarah's business.

Sarah acted quickly and took the matter seriously but her company's lack of appropriate policies and procedures to prevent the conduct has cost it dearly. Following both an internal investigation, and an investigation by an authority that lasted five years, Sarah's business is now facing possible prosecution in Australia by the Commonwealth Director of Public Prosecution (CDPP) for foreign bribery offences. In addition, Andy will likely face charges. Sarah is hoping the steps she took to address the situation may influence the CDPP's decision on whether to prosecute her business.

Possible enforcement actions that could be taken

The maximum penalties in Australia for individuals and corporations found to have bribed a foreign official are:

- For an individual, a term of imprisonment for up to 10 years, a fine of up to \$2,220,000, or both;
- For a corporation, the larger of:
 - \$22,200,000;
 - If the value of the benefit to the corporation obtained can be determined, then three times the value of that benefit; or
 - If the value of the benefit to the corporation obtained cannot be determined, then 10 per cent of the annual turnover of the corporation and any related corporations during the preceding 12 month period.



There are several well-publicised cases of Australian courts implementing significant penalties for foreign bribery offences. Read more [here](#) and [here](#).

In addition to being prosecuted for the bribery of foreign officials, there are associated actions that can be taken against a business and key individuals. For example:

- If Sarah was alerted to the red flags and did not take steps to investigate them, she could be found to have breached her duties as a director or officer of the company. Read more [here](#).
- If Andy knew that the nature of the payments was falsely described in contracts, he might also face charges for false accounting offences. Read more [here](#).

In addition to potential criminal penalties, there may also be serious reputational costs to a business.

Potential mitigating factors available to Sarah and the business

Conduct and response to concerns

A business should take ongoing compliance seriously – not only for the goal of preventing bribery and corruption risks, but also for mitigating serious legal, financial and reputational consequences.

The CDPP will likely take into account the steps Sarah and the business took in addressing the concerns, including the following:

- The implementation and active enforcement of an anti-bribery and corruption policy, including what risk assessments and due diligence were undertaken in relation to the relevant contractual arrangements.
- The steps taken by the business and Sarah since becoming aware of the concerns, including the decision to terminate the contract, cooperation with authorities and any steps taken since the issues came to light to strengthen the anti-bribery and corruption compliance program.

There are cases abroad where such factors have been taken into account by law enforcement authorities in determining not to prosecute a business or executives for foreign bribery offences. If a prosecution is commenced, then such factors can also be considered in determining whether a reduced penalty is appropriate.

Prevention is the best way to avoid liability

The best way to avoid liability under Australian and foreign anti-bribery laws is to ensure appropriate preventative steps are implemented in the first place. This includes:

- Implementing an effective anti-bribery and corruption policy. See the [Implementing an anti-bribery and corruption policy](#) case study.
- Implementing a whistleblower policy. See the [Implementing a whistleblower policy](#) case study.



- Undertaking and regularly updating the business's anti-bribery and corruption risk assessment.
- Undertaking due diligence of third parties you are doing business with. See the **Conducting thorough due diligence** case study.
- Ensuring the business's policies are understood and that there is compliance with relevant requirements. For instance, see the **Facilitation payments** case study.
- Ensuring the business responds to red flags or reports about improper conduct. See the **Investigating an internal complaint** and **Responding to contact by an authority** case studies.
- Undertaking monitoring and regular audits to ensure your compliance program is appropriate for your business's anti-bribery and corruption risk profile.

The Bribery Prevention Network acknowledges the pro-bono contribution of Corrs Chambers Westgarth in developing this case study.