



ETHICS REFERENCE BROCHURE

The **Ethics Network Australian Defence Industry (ENADI)** is a joint Industry and Government network, founded by its members to promote and preserve the integrity and ethical conduct of the Australian Defence Industry for the benefit of the Industry, its companies, its shareholders, its customers, and its employees ●

ENADI members work with integrity – making the right decisions and doing things the right way. This Ethics Reference Brochure has been developed to help Industry navigate the complicated legislative landscape by providing points of reference about relevant aspects of Australian and international laws, and where to get more information ●



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Criminal Code Act 1995

The Crimes Act is a piece of Australian federal legislation which prevails in any conflict with State laws dealing with the subject of crime. There are several aspects which are relevant to ethical best practice, including:

- Section 141.1(1) provides that it is an offence for a person to dishonestly provide, offer or promise a benefit to a Commonwealth public official with the intention of influencing the public official in the performance of the official's duty as a public official.
- Section 142.1 provides that it is an offence to dishonestly provide, offer or promise a benefit to a Commonwealth public official where the receipt or expectation of the receipt of the benefit would tend to influence the public official in the performance of their duties. Acceptance of such a gift by the public official in these circumstances is also an offence.
- Similarly, Section 70.2 provides that it is an offence to bribe or dishonestly influence a foreign public official. Section 70.4 provides that it is not an offence against Section 70.2 for providing a benefit of a minor nature for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature (subject to the prompt making of a record of such conduct).
- Section 70.4 is very similar to the exemption provided under Section 78dd-3(b) of the U.S. Foreign Corrupt Practices Act.

At times, payments to foreign government officials are referred to as "facilitation payments". The Australian Government advises:

- These payments are a market access issue and are not condoned or encouraged. The Government can raise this issue on behalf of affected companies.
- Facilitation payments should be seen as a business RISK, not a nuisance. Such payments leave the payer vulnerable to corruption charges in country and should be avoided.

Crimes Act 1914

An Australian Federal law that under Section 70(2) states that a person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse, any fact or document which came to his knowledge, or into his possession, by virtue of having been a Commonwealth officer, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence. Penalty: Imprisonment for 2 years.

Corporations Act 2001

An Australian Federal law that under Section 184 proscribes criminal offences with extraterritorial application relating to bad faith or other dishonest conduct of directors, officers or employees of corporations:

- Good faith – directors and other officers;
- Use of position – directors, other officers and employees; and
- Use of information – directors, other officers and employees.

Trade Practices Act 1974

This Act (TPA) is the most important piece of legislation covering commerce in Australia. Most of the competition law, which is aimed at prohibiting a number of anti-competitive practices is found in Part IV. The consumer protection parts of the TPA cover unconscionable conduct (Part IVA), various practices such as misleading conduct, false claims and statements.

Other parts of the TPA provide a wide range of remedies to persons who are adversely affected by breaches of competition law or consumer protection provisions and other enforcement mechanisms to be used by the regulators, such as fines or corrective advertising. Section 52 provides a very powerful weapon in any commercial encounter and it is possible for Defence to use this powerful provision against a supplier who has misled Defence -

" a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

Public Service Act 1999

Australian Federal Government employees are required under Section 13 which outlines the Australian Public Service Code of Conduct not to make improper use of inside information, or the employee's duties, status, power or authority in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person. Under this section these employees are also required to disclose, and take reasonable steps to avoid any conflicts of interest (real or apparent) in connection with their employment and not to make improper use of inside information, or the employee's duties, status, power or authority in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

Financial Management and Accountability Act 1997

This Act provides the framework for the expenditure and proper management of public money and property by the Commonwealth and should inform the day-to-day work of all Commonwealth officials and employees.

Section 44 of the Act requires the Chief Executive of the Agency to manage the Agency's affairs in a way that promotes 'proper use' of Commonwealth resources for which the Chief Executive is responsible. 'Proper use' is defined to mean the efficient, effective and ethical use that is not inconsistent with the policies of the Commonwealth.

The basic requirements of ensuring value for money, ethics and fair dealing and other requirements found applies to all Defence procurements.

Commonwealth Procurement Guidelines

Section 6 of these Guidelines covering the Efficient, Effective and Ethical Use of Resources require Government agencies to ensure that officials involved in procurement, particularly those dealing directly with suppliers and potential suppliers:

- recognise and deal with any conflicts of interests, including perceived conflicts of interests;
- deal with suppliers and potential suppliers even-handedly;
- consider seeking advice where probity issues arise; and
- do not compromise the Australian Government's standing by accepting inappropriate gifts or hospitality.

Defence Procurement Policy Manual

Chapter 3.13 outlines the Defence policy on ethics and fair dealing in the context of the procurement process including the acceptance of gifts and hospitality from suppliers.

Defence and Industry: An Ethical Relationship with the Private Sector

This Defence statement, developed in consultation with the Australian Defence Industry, provides clear guidelines for ethical behaviour appropriate to business dealings between the employees of Defence and industry including the offer and acceptance of gifts and hospitality.

Foreign Corrupt Practices Act

A U.S. Federal statute that criminalises certain conduct by or on behalf of U.S. companies doing business abroad. This statute has two basic elements: anti-bribery provisions that prohibit the payment of bribes to foreign officials to obtain business; and accounting provisions that require public companies to maintain accurate books and records reflecting all business transactions and an adequate internal accounting control system.

Anti-Kickback Act

A U.S. Federal statute that prohibits the payment of any fee, credit, gift, gratuity, thing of value, or compensation of any kind, directly or indirectly, to an employee of a prime contractor (or higher tier subcontractor) of the U.S. Government for the purpose of improperly obtaining or rewarding favourable treatment in connection with the prime contract or a subcontract. The Act provides criminal penalties for making or receiving any prohibited payment.

Federal Acquisition Regulation

The Federal Acquisition Regulations System was established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies, and consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR requires most U.S. Government contractors to establish codes of ethics and business conduct, business ethics awareness training, and compliance programs. After December 12, 2008, all new prime contracts and subcontracts expected to exceed \$5 million and a 120 day or greater performance period are required to include a new FAR clause requiring disclosure of certain conduct (FAR 52.203-13).

BILATERAL AND MULTILATERAL ARRANGEMENTS

ASIC – SEC Mutual recognition arrangement

A framework ratified on 25 August 2008 to permit the U.S. Securities and Exchange Commission (SEC) and the Australian Securities and Investments Commission (ASIC) to consider regulatory exemptions that would permit U.S. and eligible Australian stock exchanges and broker-dealers to operate in both jurisdictions, without the need for these entities (in certain aspects) to be separately regulated in both countries.

OECD Convention

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.

It is the first and only international anti-corruption instrument focused on the 'supply side' of the bribery transaction. The 33 OECD member countries (including Australia) and five non-member countries have adopted this Convention.

The Australian Government, and specifically the Department of Defence, produce several policy documents which may provide guidance during procurement activities.

LINKS

Fairness and Transparency in Purchasing Decisions. Probity in Australian Government Procurement, ANAO BPG, 27 August 2007

<http://www.anao.gov.au/director/publications/betterpracguides>

The Government and Industry Principles of Engagement on ICT, DoFD, 25 May 2010

<http://www.finance.gov.au/procurement/ict-procurement/index.html>

For Customers and Suppliers The Government Procurement Code of Good Practice, OGC, 2002

http://www.ogc.gov.uk/documents/cp0080_Gov_Procurement_Code_Good_Practice.pdf

This brochure is not designed to provide an exhaustive list. It has been developed for information purposes only, and you should consider seeking professional legal advice.



FOR FURTHER INFORMATION PLEASE VISIT

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