LEGAL REVIEW:
ANTI-CORRUPTION TOOLS IN SOUTH AFRICA

Presented at the Black Management Forum Conference, October 2012
“Why should we care?
Because corruption kills. Misappropriation of public funds steal money that is so badly needed to establish and maintain vital public services such as emergency health clinics or clean sanitary infrastructure. Corruption steals money where it is needed to build schools and provide the next generation with choices. And, finally, corruption destroys business competition which in turn hampers economic development.”

Gretta Fenner, The Guardian (UK) 7 September 2012
Initial Observations

• Every person should be involved in combating corruption

• There must be consequences for corruption
  “… the rampant fraud and corruption that seems to be taking place, we want there to be consequences when people do the wrong thing. Without consequences a sense of impunity prevails and then there is anarchy.” Freeman Nomvalo - Accountant-General

• Corruption is a global problem which needs to be addressed on a local level
International Perspective

• OECD
  • OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

• Transparency International
  • Corruption Perceptions Index
  • Country Enforcement of the OECD Anti-Bribery Convention

• Enforcement Trends
The OECD

- The Organization for Economic Co-operation and Development

- 34 Member Countries, including significant European nations, the United Kingdom, Japan and the United States of America, but not South Africa.

- Principle purpose: support sustainable economic growth and contribute to growth in world trade

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
  - Adopted by members and Argentina, Brazil, Bulgaria, Russia, and South Africa
  - Entered into force in 1999, SA adopted in 2007
  - Also, OECD Guidelines for Multi-National Enterprises
“South Africa should step up its efforts to detect, investigate and prosecute cases of bribery in international business deals”
OECD’s Working Group on Bribery, July 2010

Other Key Recommendations:
• Raise awareness of the fight against bribery;
• Boost existing law enforcement resources and training dedicated to fighting complex economic crimes
• Enhance coordination among the police and prosecution authorities to combat foreign bribery more effectively;
• Ensure that companies engaging in foreign bribery are duly held liable; and
• Ensure that all investigative and prosecutorial decisions are not unduly affected by considerations of national economic interest, relations with another state, and the identity of individuals or companies concerned.

• OECD Bribery Working Group follow-up report Sep 2012.
Corruption Perceptions Index 2011

The perceived levels of public-sector corruption in 183 countries/territories around the world.
## Country Enforcement of the OECD Anti-Bribery Convention, Progress Report for 2012

<table>
<thead>
<tr>
<th>Enforcement Category</th>
<th>Number of countries</th>
<th>Per cent of world exports</th>
<th>Name of countries</th>
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“...OECD reviews have resulted in improved enforcement in countries where there is high level government support. However, they have had limited impact where political support is weak, notwithstanding repeated reviews. To raise the level of enforcement, stronger government support must be developed in countries with inadequate enforcement.”

Transparency International Country Enforcement of the OECD Anti-Bribery Convention, Progress Report for 2012 (8th annual progress report)
International Trends

• Trend towards prosecuting bribe-payers and not only those accepting bribes

• Increased focus on forensic due diligence and the risk of successor liability

• Heavy fines for Corruption under US Foreign Corrupt Practices Act and UK Bribery Act

• Increasing enforcement pressure

• Incentivized whistle-blowing
Domestic Legislative Framework

• Significant South African Legislation relevant to combating corruption includes:
  • The Prevention and Combating of Corrupt Activities Act
  • The Promotion of Access to Information Act
  • The Promotion of Administrative Justice Act
  • The Prevention of Organised Crime Act
  • The Financial Intelligence Centre Act
  • The Protected Disclosures Act
  • The International Cooperation in Criminal matters Act
  • The Criminal Procedure Act
  • The Public Finance Management Act
  • The Municipal Finance Management Act
  • The New Companies Act
  • The Protection of State Information Bill
Overview of Anti-Corruption Tools

- Corruption Busters
- Penalties
- Register for Tender Defaulters & List of Restricted Suppliers
- Reporting Obligations
- Whistle-blowing and Access to Information
- New Companies Act
Corruption Busters

- There is no single specialized corruption investigation agency. Agencies whose mandate includes the investigation of Corruption include:

  - The Police (including specialised units such as the Commercial Crimes Unit and Organised Crime Unit)
  - The Directorate for Priority Crime Investigation (“The Hawks”) also a specialised police unit
  - The National Prosecuting Authority
  - The Public Protector
  - The Asset Forfeiture Unit
  - The Special Investigations Unit (“SIU”)
  - The Financial Intelligence Centre
  - The National Anti-Corruption task team (“ACTT”)

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Corruption Busters

Hugh Glenister v President of the Republic of South Africa and Others

- The provisions of the South African Police Service Act which create the Hawks is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Hawks;

- Criteria identified for effective anti-corruption bodies:
  - Specialisation;
  - Adequate Training;
  - Independence from political influence, interference and manipulation;
  - Resources that are guaranteed;
  - Security of tenure of office for staff.

“Corruption is a scourge that must be rooted out of our society. It has the potential to undermine the ability of the state to deliver on many of its obligations in the Bill of Rights, notably those relating to social and economic rights.”

Moseneko DCJ and Cameron J – Glenister Judgment
Penalties

• Section 26 of PACCA: Sentences for corruption offences – High Court may impose sentences up to imprisonment for life.

• In addition, court may also impose a second fine of five times the value of the gratification involved.

• Criminal law Amendment Act 105 of 1997: Mandatory minimum sentences
  • 15 years for corruption involving more than R500 000.00
  • Substantial and compelling reasons

• Effective policing is a better deterrent than harsher penalties
Registers and Lists

Register for Tender Defaulters

• Established by Section 28 of PACCA

• Persons convicted of corruption relating to contracts or tenders

• Endorsed for a period of between five and 10 years, and are excluded from all state work.

• Only two individuals have had their details endorsed in the register to date.

List of restricted Suppliers

• Public accounting officers/authorities are empowered to restrict companies or persons from doing business with the public sector for a period not exceeding 10 years.

Both the Register and the List are maintained by National Treasury
Reporting obligations

Section 34 of PACCA

• Obliges all persons in a position of authority to report corruption to the police.

• Any person who holds a position of authority knows or ought reasonably to have known or suspected that any other person has committed fraud, theft, corruption, forgery or uttering involving an amount of R100 000.00 Rand or more must report that knowledge or suspicion to the Hawks.

The Financial Intelligence Centre Act

• A person involved in a business either knows or ought reasonably to have known or suspected that a transaction, amongst other things, has no apparent business or lawful purpose or that the business is being used for money laundering.

• It is an offence not to make reports under PACCA and FICA
Whistleblowing and Access to Information

- The Protected Disclosures Act
  - Adequate Protection?
  - Incentivised whistle-blowing in other jurisdictions

- The Promotion of Access to Information Act

- The Protection of State Information Bill
The New Companies Act

Section 72 of The Companies Act 71 of 2008

• Obliges certain South African Companies to establish a Social and Ethics Committee;

• The Social and Ethics Committee must, amongst other things, monitor a companies’ progress in respect of adhering to the OECD recommendations on reducing corruption.
Conclusion

- Corruption is a serious threat to constitutional democracy, job creation, and economic stability
- Corruption impacts on the country’s ability to address triple threats of poverty, unemployment and inequality
- South Africa has the necessary legislative tools to address corruption
- Requires renewed and sustained enforcement efforts and broader engagement by government, business and private individuals
Thank you
## Commercial Crime

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<th>Year</th>
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![Graph showing the trend of Commercial Crime from 2004 to 2012.](image-url)