Bribery and corruption — identifying and managing the risk

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Recent high profile bribery and corruption cases, along with the recent release of an Organisation for Economic Cooperation and Development (OECD) report on Australia's anti-bribery efforts, have raised awareness of what is an increasingly important business risk area.

While many Australian organisations seem to be aware that the risk exists, particularly in relation to their offshore operations, they don't necessarily understand the why and how. As a result, a very real question needs to be asked — how prepared are they when it comes to their exposure to both the risk and reality of bribery and corruption?

Why now and why the increase in focus?

A combination of economic volatility and a growing focus on offshore investments, alliances, joint ventures and operations have made the risk more real than ever — while the global environment in which organisations may find themselves offers many upsides, it also means they are regulated as much by foreign legislation, such as the US's Foreign Corrupt Practices Act (FCPA) and, more recently, the UK's Bribery Act (UKBA), as they are by Australia's own legislation.

The legislative and enforcement landscape has changed significantly in recent years, as have stakeholder expectations, and they continue to do so. Ethical business dealings across the operational spectrum are not only a legal requirement, but shareholders, customers and business partners, not to mention the broader public, are increasingly demanding the highest standards.

Increasing enforcement by the Australian Federal Police (AFP) of the anti-bribery provisions of our Criminal Code means the activities of wayward individuals and organisations are increasingly under the microscope (the AFP has received 30 foreign bribery referrals in recent years, including six in the last year). Further, the introduction of the UKBA in July 2011, and the growing impact internationally of the long enforced FCPA, have made risk management and proactive measures more important than ever.

So what is bribery and corruption?

In accordance with Australian legislation (Div 70 of the Criminal Code Act), a bribe or corrupt act is committed if an organisation or individual provides or causes to provide a benefit, or offers or promises to provide a benefit to a third party, where the benefit is not legitimately due.

The act of the organisation or individual providing or offering the benefit, must be with the intention of inducing a public official (not necessarily the third party) in the exercise of the official's duties in order to:

- obtain or retain business; or
- obtain or retain a business advantage that is not legitimately due to the recipient or intended recipient.

A benefit can take many forms and, according to the Act, "includes any advantage and is not limited to property". Besides the obvious cash payments, bribes can include the provision of items such as laptop computers or ipads, holidays, excessive hospitality, education opportunities for family members, and political and charitable donations.

Is it applicable to your organisation?

In addition to domestic issues, the risk of foreign bribery and corruption is applicable to all Australian organisations with offshore operations, either wholly or partly outside of Australia. The level of risk faced by organisations operating offshore varies depending on a number of factors including the jurisdiction of operation (particular countries with perceived high levels of corruption), industry, relationship and business opportunity, and type of transaction.

Earlier this year, Deloitte surveyed businesses in Australia and New Zealand on their perceptions of bribery and corruption risk, particularly when it came to operations in offshore locations. The results, which were released in September, were sobering — confirming its experiences that organisations are increasingly encountering bribery and corruption incidents and challenges which many are ill-equipped to identify, manage and, most importantly, prevent.

For example:

- Of the 34% of organisations with operations in high risk jurisdictions, 21% had experienced a known bribery and corruption incident in the last five years, and 61% of these had occurred in the last 12 months.

- While 79% had not experienced a known instance of bribery and corruption in the last five years, 48% of these had never conducted a corruption risk assessment, and 21% did not discuss corruption risk at management or board level.
- When it comes to applicable laws, only 25% of organisations with offshore operations had a "comprehensive" understanding of relevant legislation.
- Bribery and corruption risk management was not the priority it should be — 48% of organisations with offshore operations did not have any formal policy or compliance program in place to manage corruption risk, and 80% either did not regard foreign bribery and corruption as a "top five" business risk or said the risk was not applicable to their organisation.

It is critical that management and directors are not complacent in assuming they have adequate internal controls in place to identify and manage bribery and corruption risk. Often even when controls do exist, they are only given lip service and, as a result, they are failing.

Organisations that do not have a clear policy and compliance program in place also tend to face greater difficulty in relation to remediation and enforcement outcomes, and if an organisation fits the risk profile not having a well-embedded policy and compliance program enhances an already significant exposure.

Identifying and reducing the risk

In our experience, many organisations are caught off guard when an incident comes to light, particularly if they do not have the appropriate measures in place to address the issue and respond accordingly. Where we have seen organisations avoid this pitfall, they have had prevention, detection and incident response measures in place, which were regularly monitored, updated and consistently applied.

A range of principles and measures can help an organisation develop the necessary frameworks and policies to address bribery and corruption risk. These include:

- conducting a risk assessment and considering bribery risk exposure based on key external and internal operating factors, including jurisdiction, sector of operation, transaction type, business partnership and remuneration structure;
- recognising that bribery and corruption is a real business risk;
- obtaining a copy of the Australian Government's Fact Sheets on foreign bribery available from the Federal Attorney-General's Department;
- implementing an effective compliance program to prevent and detect bribery and corruption for the organisation and its subsidiaries and agents;
- training employees and agents on anti-bribery policy and business ethics;
- implementing a whistleblower policy and procedures to enable concerns to be appropriately reported and dealt with; and
- knowing intermediaries and agents by performing adequate background checks and continually monitoring their conduct.

Policy, culture, prevention, detection, response, controls — they all count

A strong and effective bribery and corruption policy is also essential in managing the risk and should include:

- establishing the structure around anti-bribery activities;
- communicating to employees what is expected of them; and
- communicating to other stakeholders that an organisation is aware of the risk and is managing it.

This is important both in mitigating the chance of an event happening in the first place, but also important in the event of an incident, in showing the regulators that it is not a systemic problem.

In addition, an unambiguous culture and tone from the top is critical in terms of setting expectations and creating very clear boundaries based on legal requirements and the highest ethical standards.

Prevention efforts are absolutely essential. Potential reputational impacts aside, organisations waste a lot of time and money responding to incidents they are likely to have spent a lot less on preventing.

A clear and well communicated policy, training, ongoing employee support (especially for those working in high risk operations and/or geographies), a robust internal control framework, and multi-level risk assessments, among other things, play a vital role in preventing or protecting an organisation from an incident.

In the event an incident does occur, having the right information is invaluable in terms of controlling the response, and just as important in minimising the extent of the problem. Whistleblower hotlines, data analysis (particularly over accounts payable and employee expenses), transactional level reviews, and deep dives on a project basis can all secure the information needed to detect, or even better, prevent an incident.

Controls and compliance will also deliver value. A strong program designed to prevent corrupt activities may reduce the potential for reputational damage, business disruption and even deliver a competitive advantage.

All organisations operating offshore, regardless of their risk profile, should have the following basic controls in place to ensure compliance with local and international anti-bribery and corruption laws:

- Risk assessment — consider bribery risk exposure based on key external and internal operating factors.
- Proportionate procedures — adopt procedures that are proportionate to the specific bribery risks faced by the organisation.
- Awareness — raise internal and external awareness of anti-bribery and corruption obligations.
- Clear, effective policies and training — management should outline clearly all relevant policies.
- Management commitment — ensure senior management visibly supports anti-bribery and corruption measures due diligence. Where acquisitions and commercial intermediaries such as consultants and sales agents are concerned, it is vital to conduct due diligence in order to determine who an organisation is dealing with and any potential risks.
- Monitoring — procedures should be continually monitored, reviewed and updated in line with the organisation's bribery risk profile.
- Data analytics — consider running data analytics anomaly testing to detect corruption red flags.
- Whistleblowers — consider whistleblower systems to provide ways for employees to report any concerns over suspicious activities that may indicate corruption.

Red flags

There are also a number of indicators that an organisation can look out for when it comes to the potential existence of bribery and corruption in offshore operations. These include, but are not limited to, the following:

General

- Large petty cash movements.
- Payments in cash that are irregular and/or are not in the normal course of business.
- Payments or transactions made in a country or industry with a history of corruption.
- Inadequate or missing documentation and records.
- Requests for commissions that are substantially higher than the 'going rate' in that country.
- False accounting entries.

Dealings with foreign officials

- Provision of gifts, hospitality, travel and/or entertainment to foreign officials or relatives.
- Representatives or consultants recommended by government officials or customers.
- Payments for schooling the children of foreign officials or to charitable organisations headed by foreign officials.
- A vendor has family or business ties with local government officials or has a bad reputation in properties from foreign officials or their relatives.

Third parties

- The use of foreign commercial intermediaries including business consultants, distributors, sales agents and representatives.
- Preference for certain contractors during a tendering process.
- Lack of independent checks and due diligence of contracting or tendering process.
- Vendors requesting over-invoicing, invoice backdating or cheques to be made out to "bearer" or "cash".
- Unusual or high bonuses/commissions paid to foreign representatives.

Conclusion

The impact of a bribery and corruption incident and investigation, let alone a conviction, represents a serious reputational risk — not just for an organisation, but for the individuals directly involved, and for management and directors who may also be held personally accountable.

A strong and robust governance structure is critical and can also pay dividends in other ways — protecting an organisation from reputational and downside risks, while at the same time allowing it to make informed decisions about entrepreneurial risks.

If management does not promote a sound corporate culture in respect of bribery and corruption, this will permeate through the organisation.

Ultimately, the question for any organisation should be asking is whether it can afford to ignore the risk.

To see an interview on bribery and corruption by Frank O'Toole with ABC's "The Business", visit: http://deloittetv.deloitte.com.au/.

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