

Assessing the risk of bribery and corruption to your business

2016





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Based on results from PwC's 2016 Global Economic Crime Survey (GECS), bribery and corruption continues to rate in the top four economic crimes experienced by organisations globally, and looking ahead Australian organisations are predicting a higher likelihood of bribery and corruption over the next two years when compared with the global average. We also know from PwC's 19th Annual Global CEO Survey that the percentage of chief executives naming bribery and corruption as one of the top risks facing their organisation has experienced a significant increase recently, from 51% to 56%.

These results come off the back of highly publicised allegations and enforcement action reported in Australian media, as Australia continues to slide down Transparency International's Corruption Perception Index (now ranking 13th globally). To combat this emerging concern, Boards and company executives are increasingly looking to their internal teams to take greater responsibility for both preventing incidents of bribery and corruption and strengthening organisational resilience. A pragmatic first step in that process is conducting a bribery and corruption risk assessment, and this document has been prepared to provide high level guidance for organisations starting down that path.

Please don't hesitate to contact me on 02 82662993 or Mark Rigby on 02 82661774 if you would like to discuss further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Malcolm Shackell', written in a cursive style.

Malcolm Shackell
Partner
Forensic Services

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1 Introduction

Background

Bribery and corruption are by their nature deceptive and each act or instance of bribery or corruption can taint not only the individuals involved but an entire organisation or process, sometimes long into the future. Global regulations have long sought to negate the impacts of bribery and corruption in distorting markets, and the Australian government, regulators and business community have endeavoured to keep pace with trends and developments in order keep ahead of the “risk curve”. In recent years we have seen the first real enforcement actions under Australian law and heard rumours of other enforcement action by the Australian Federal Police (AFP), which have occurred alongside major international legislative changes, such as the introduction of the United Kingdom Bribery Act (UKBA). The growth of anti-corruption and corporate responsibility movements has also heightened business awareness of the obligations and risks posed, and made it imperative for organisations to question what they are doing to minimise their exposure to the risk of bribery and corruption.

The impacts of bribery and corruption

Within the context of expanding markets, broader legislation and global financial pressures, the potential impacts of bribery and corruption are wide reaching and can include:

- Convictions, fines and prison sentences for employees and officers
- Incurring substantial legal and professional fees, including increased cost of compliance through potential regulatory response
- Significant reputational damage at a corporate, personal and governmental level
- Damage to the share price and loss of shareholder and other stakeholder confidence
- Distortion of the market

Implementing a framework

In reaction to this evolving landscape, Australian organisations have started to recognise the need to demonstrate that they have developed the key elements of a comprehensive program to minimise or reduce the risk of bribery and corruption, and have undertaken an appropriate risk assessment.



Most organisations have a Code of Conduct and some form of training for new employees, along with policies and procedures for managing important functions such as procurement and marketing. However, it is crucial to bring these elements together in order to implement a comprehensive bribery and corruption framework that communicates to staff the importance of the organisation’s stance against bribery and corruption and document how the organisation will mitigate the risks it faces.

Identifying the risks to your organisation

A key component of an effective bribery and corruption framework is conducting a comprehensive risk assessment to identify the specific risks the organisation is exposed to, or sometimes down to individual operating units in the case of large businesses operating offshore.

Detailed risk assessment results

Risk #	Procurement risk	Potential risk exposure	Inherent risk	Internal controls	Control risk	Residual risk
1	Unapproved supplier	Inferior quality	M	Approved supplier listing	L	L
2						
3						

Key questions that organisations need to ask themselves include:

- How do we manage our third party service providers?
- Are we using third parties to help expand into new markets?
- Do we deal with government officials?
- Are we facing business decisions where facilitation payments or bribes are expected?
- Do we do business overseas or are we considering overseas expansion?

This document outlines key elements of the legislative landscape, the importance of having an anti-bribery and corruption framework and how to approach conducting an effective risk assessment, including an example work plan to follow.

2 The legislative landscape

Key provisions

The activities of Australian organisations are covered by the Bribery of Foreign Public Officials Act and may be further impacted by the Foreign Corrupt Practices Act (FCPA) and the UKBA if operating overseas. Each of these separate pieces of legislation contain slightly different provisions, as detailed in the table below:

Key considerations	Australia Bribery of Foreign Public Officials (1999)	United Kingdom UK Bribery Act (2010)	United States Foreign Corrupt Practices Act (1977)
Bribery of foreign public officials covered?	Yes	Yes	Yes
Private-to-private bribery covered?	No	Yes	No
Receipt of a bribe covered?	No	Yes	No
Proof of intent required?	Yes	Mixed	Yes
Facilitation payments permitted?	Yes	No	Yes
Promotional expenses permitted?	Yes	No	Yes
Extra territorial application?	Yes	Yes	Yes
Bribes through third parties covered?	Yes	Yes	Yes
Failure to keep accurate books and records covered?	Yes	Yes	Yes
Is failure to prevent bribery an offence?	No	Yes	No
Criminal penalties for individuals	10,000 penalty units, 10 year sentence or both	Up to 10 year sentence and unlimited fines	Up to \$250,000 per violation and sentence for up to 5 years
Criminal penalties for companies	100,000 penalty units, 3 times the benefit or 10% of the turnover	Unlimited fines	Up to \$2,000,000 per violation

The UK Bribery Act goes further

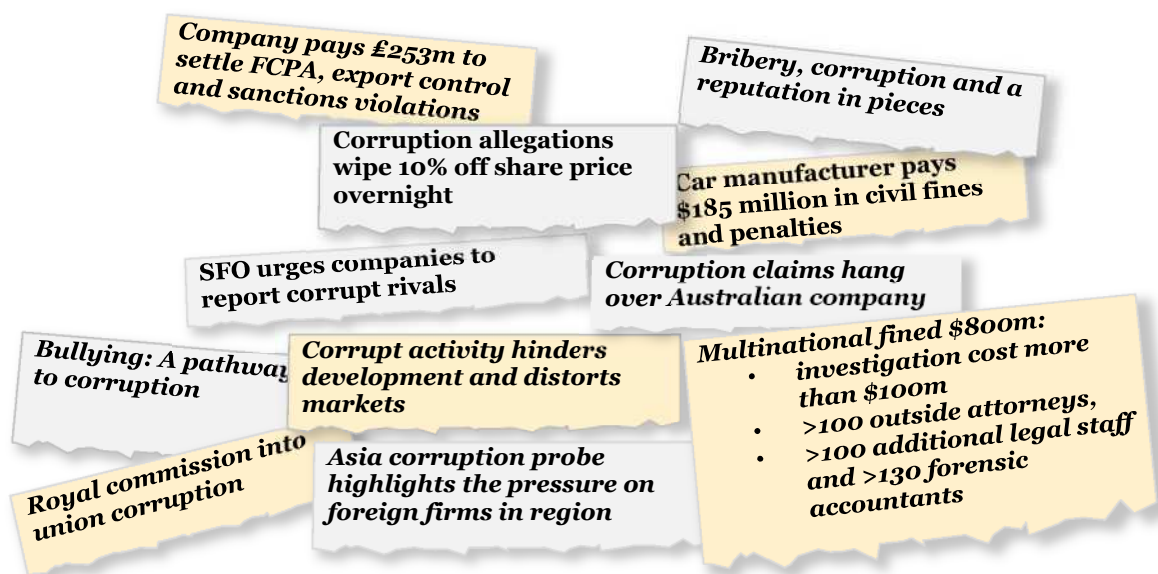
The UKBA criminalises bribery of both foreign public officials and individuals or companies, and has further potential implications for organisations when compared with other existing legislation. The UKBA covers private-to-private bribery, facilitation payments and critically, introduces failure to prevent active bribery for or on behalf of the corporate body by its employees, agents or subsidiaries as an offence. It does however outline that a defence to the failure to prevent offence exists if it can be shown that “adequate procedures” were in place.

Implementing the OECD Anti-bribery Convention

The Phase 3 report on Australia by the Organisation for Economic Cooperation and Development (OECD) Working Group on Bribery was issued in October 2012. The report evaluates and makes recommendations on Australia’s implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Working Group recommends that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials, which includes:

- Enhancing the usage of the corporate liability provisions, and where appropriate those on corporate culture, and providing on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases.
- Increasing the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive with the OECD convention.
- Developing a clear framework that addresses matters such as the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company’s co-operation; measures to monitor the company’s compliance with a plea agreement; and the prosecution of natural persons related to the company.
- Continuing to raise awareness of the distinction between facilitation payments and bribes, and encouraging companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies’ books and financial records.

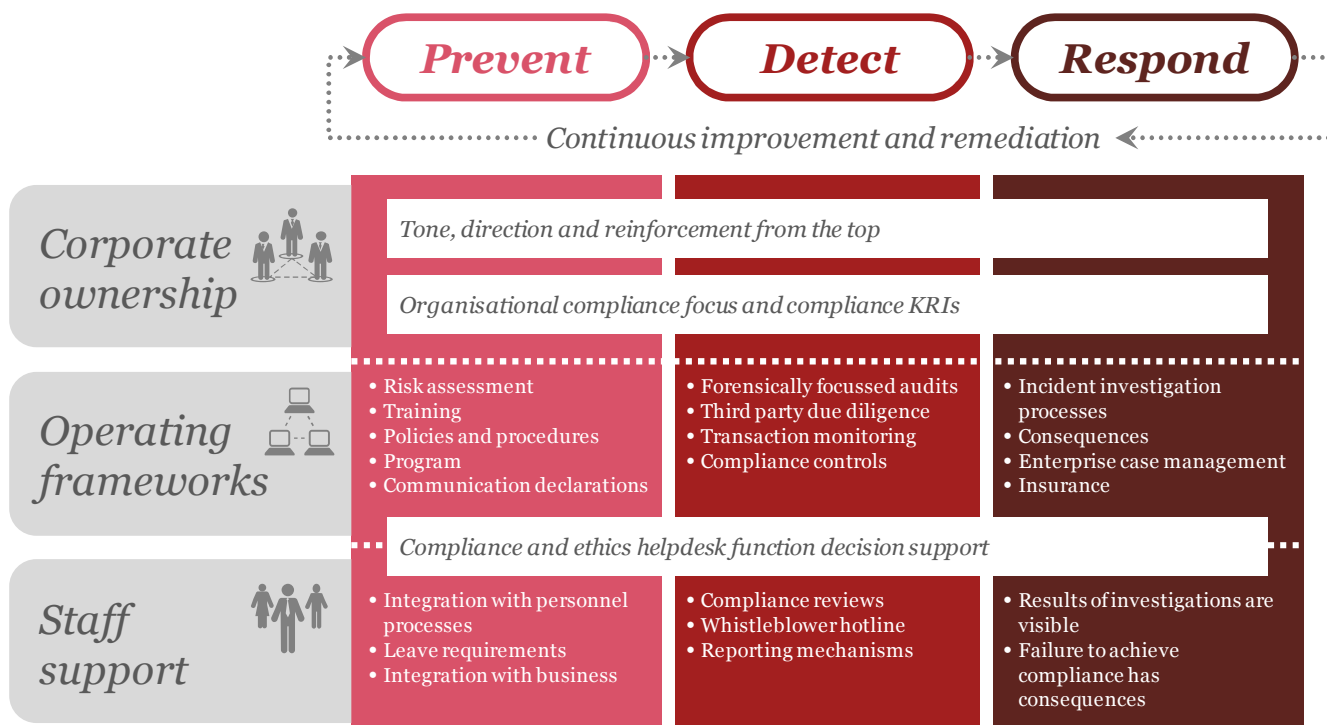
Identifying and managing bribery and corruption risk should not be left until it’s too late to avoid significant consequences:



3 An effective anti-bribery and corruption framework

A properly implemented and monitored anti-bribery framework broadly consists of three elements involving the need to prevent, detect and respond to incidents of bribery. It should also recognise that whilst employees may be tempted to pay bribes in order to win contracts (outbound bribery), the same employees may be subject to attempts to bribe them in order to hand out contracts (inbound bribery).

A typical anti-bribery framework is depicted below:



Appendix A provides further detail regarding the development of an anti-bribery and corruption framework.

Key principles

Guidance issued by the UK’s Serious Fraud Office (SFO) to accompany the UKBA outlines 6 key principles to help guide organisations in developing an anti-bribery and corruption framework, as outlined below:

1. Proportionate Procedures
 - o Procedures to prevent bribery and corruption are proportionate to the risks an organisation faces and its level of complexity
2. Top level commitment – the “tone from the top”
 - o Foster a culture of integrity
 - o Consistent framework and awareness
 - o Board and Senior Executives involved and committed to combating bribery and corruption
3. Risk assessment
 - o Assess nature and extent of internal and external risks, including jurisdictional risk, transaction risk and business risk

- Customers, suppliers, employees, products, transactions (payments for sales agents, high value corporate entertainment)
- 4. Due diligence
 - Third parties, vendors
 - Customers
 - Employees
- 5. Communication (including training)
 - Training (how often, to whom)
 - Internal and external communication
 - Strong corporate culture
 - Awareness throughout the organisation (policies, procedures)
- 6. Monitoring and review
 - Systems set up to prevent, detect and respond
 - Evaluate the effectiveness of prevention procedures
 - Data analytics, forensic technology assistance
 - Investigate – incident management
 - Whistleblower hotlines
 - Escalation procedures
 - Use learning's to improve policies and processes

4 Conducting a risk assessment



Ownership and focus

An important first step in conducting a risk assessment to identify areas of risk in terms of potential exposure to bribery and corruption is allocating responsibility for the task and assigning sufficient resources. Questions like who will take ownership – legal, audit or governance and compliance – need to be addressed earlier in order to achieve sufficient “buy in” and ensure timelines are met.

The risk assessment should examine a variety of factors including:

- Whether the business model includes large scale projects, tenders or long term contracts
- The degree to which intermediaries are used to do business
- Whether the company has interactions with government officials
- If a new business acquisition or joint venture is planned
- The gifts, hospitality and entertainment activities employed
- Are there any high risk locations in which the company operates?

These are some of the most vulnerable areas for businesses which need to be carefully considered and then prioritised; however, this list is by no means exhaustive.

Scope and objectives

A detailed risk assessment should aim to identify areas of highest risk within an organisation so it is crucial that the scope of the assessment is clearly articulated, including scope exclusions, from the outset. Key questions that a risk assessment should seek to address are:

- Is the tone from the top right and how do you know if it has the desired impact on your people?
- Do you perform an annual assessment to determine where the exposure to bribery and corruption exists?
- Is there an independent challenge when it comes to balancing commercial decisions with anti-corruption requirements?
- Are you comfortable that the typical employee will make the right ethical judgements in difficult situations and will know when and where to get support?
- How many intermediaries do you use, what services do they provide and do you have formal contracts?
- Does staff performance management embed anti-bribery and corruption requirements?
- Do you have the right balance between sanctions and support?

An effective work plan

A risk assessment work plan should include the following tasks and activities:

- Identify all the regions and locations in which the organisation operates, and conduct a preliminary country risk assessment based on external reports and findings such as the PwC Global Economic Crime Survey and Corruption Perception Index by Transparency International.
- Meet with and interview key stakeholders, either individually or as a group, to understand their roles and business units, as well as their understanding and concerns in relation to bribery and corruption. Key stakeholders should include legal, compliance, internal audit, human resources, finance and management.
- Collate and prepare an inventory of all the relevant internal policies and procedures, and report on any gaps or inconsistency, e.g. missing policies or documents. Key criteria to assess include:
 - Location of the documentation
 - Owner of the policies
 - The form of documentation
 - Comprehensiveness of the documents
- Identify and prepare an inventory of all existing anti-bribery controls, and document understanding of consequence of non-compliance with requirements. Identify any need for substantive testing. Evaluate the design and operating effectiveness of the controls in place, and report on any control weaknesses and gaps.
- Based on the understanding of the organisation's existing culture, systems and processes as well as the results from the above exercises, conduct a risk assessment workshop with key stakeholders and management to assist in the development of an effective anti-bribery and corruption framework. The workshop should include the following:
 - Consolidate the preliminary country risk assessment results and findings from stakeholder interviews
 - Identify process improvements and refinements
 - Advise on the appropriate policies, procedures, controls and systems to ensure compliance is achieved

Embedding the risk assessment

It is important that organisations consider bribery and corruption risk as part of its business as usual. Hence, organisations should plan for the management of this risk on an ongoing basis through regular risk assessment and process improvement and refinement.

Appendices

Appendix A Developing and embedding an anti-bribery and corruption framework

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Appendix A Developing and embedding an anti-bribery and corruption framework

Key steps in the process for developing an anti-bribery framework are summarised below.

Establish governance structures

The anti-bribery and corruption framework should involve a number of functions who act as corporate gatekeepers. These could include a specific compliance function (in larger organisations), legal department, internal audit, finance and Human Resources (HR). Their roles and relationships in terms of the anti-bribery and corruption framework need to be clearly specified. One individual needs to be given specific responsibility for the anti-bribery and corruption framework. This individual should be designated as the chief compliance officer. The individual should ideally have not only sufficient knowledge and expertise in anti-bribery and corruption compliance, but also experience in running framework implementation. Oversight arrangements also need to be established, for example, involving a non-executive committee with a compliance remit - this may be the audit committee, the risk committee, or a specific compliance committee. The committee's membership and powers need to be defined, together with its relationships with other non-executive committees, the Board and staff who report to it.

Establish a values and rules hierarchy

If the organisation does not already have a code of ethics or code of conduct, this needs to be created. Such codes should address bribery and corruption, as well as other issues related to general business ethics. Existing codes need to be reviewed and upgraded as necessary to ensure that anti-bribery and corruption aspects are adequately covered. All codes should have Board level approval and reflect the core values the organisation seeks to operate by. Codes are supported by policies which give more detailed statements designed to give management and staff specific guidance to ensure the aspirations of the code of conduct are related directly to the operational business. There will typically be a number of policies relevant to anti-bribery and corruption compliance, including:

- Third party intermediaries and other business partners
- Gifts, hospitality and entertainment
- Facilitation payments
- Political and charitable donations and lobbying activities
- Sponsorships
- Conflicts of interest
- Bank accounts, cash and petty cash

In our view it is not necessary or realistic that codes and policies should attempt to address every possible situation in which a potential bribe or other corrupt act could occur. It is preferable to develop and embed clear values which employees then apply to guide ethical decision-making in any specific situation they may face.

Policies are supported by operating procedures and internal controls

These anti-bribery and corruption procedures and controls need to be embedded in the company's regular operational framework, including where applicable the internal controls over the financial reporting framework. Implementing these procedures and controls - and testing their effectiveness - throughout all business locations could involve substantial work.

Embed the anti-bribery framework in the business

Embedding the anti-bribery and corruption framework begins with the communication of the code of ethics or conduct, the company's core values and its supporting policies. Employees need training to help them understand how bribery and corruption can arise and to identify situations when they and the business may be at risk. Face-to-face training is necessary to supplement e-learning modules for people in critical positions because of the often subjective nature of the material, and training must be tailored to reflect realistic dilemmas staff may face. Individuals do not all need to be experts in the legal detail, but to be able to spot a possible issue and know how to go about making the right decision, including where to go for help and advice. This advice should be provided through an appropriate decision support mechanism, such as a compliance helpline (distinct from whistleblower facilities).

Provide appropriate whistleblower facilities

Best practice guidelines for countering bribery and corruption typically require provision of whistleblower facilities. This involves establishing a mechanism whereby individuals can report any suspicions of corrupt behaviour confidentially and, if they wish, anonymously. Companies with international operations must ensure the facility is available to individuals in appropriate languages and time zones. The processes need to be robust to instil employee confidence in them.

They should also establish how matters should be addressed, including their escalation to senior levels, avoidance of actual and perceived conflicts of interest, and follow-up and investigation processes.

Whistleblowing facilities should be recognised as an important source of information for the company in its anti-bribery and corruption framework, both to identify individual issues and to enhance the anti-bribery and corruption framework.

Review disciplinary and other HR procedures

Companies need to ensure they have appropriate disciplinary procedures and processes in place and that these are always followed correctly. Employees themselves need to understand how the disciplinary process works.

HR should be conducting background checks on potential employees, particularly those in senior or sensitive positions, looking out for evidence of involvement in illegal activity or other question marks regarding integrity.

Performance management systems should be reviewed to ensure they support anti-bribery and corruption policies and aims. In particular, appropriate and specific compliance-related performance targets should be set in management objectives (including Board members) and then assessed as part of the variable remuneration decision process.

Manage third party compliance risks

Many bribes are paid indirectly, via third party agents, including sales representatives, logistics agents and bogus or disreputable small law firms and marketing consultancies, with or without the commissioning organisation's consent and knowledge. It is essential to ensure that risk-based compliance due diligence checks are carried out on third parties that the organisation plans to employ. Formal contracts with these third parties should require them to behave in an ethical way and in compliance with all relevant legislation, including specifically anti-bribery and corruption legislation. Approval and monitoring procedures need to be established to check that payments made to the third party appear reasonable in relation to the service performed.

When a large organisation engages smaller third parties, it should take steps to support those smaller business partners in achieving compliance with anti-bribery and corruption laws and regulations. This support could include, for example, providing training in the organisation's expectations of what constitutes compliant

behaviour. Third parties should also be given details of how to make use of whistleblower facilities, so that they can report any behaviour that raises suspicions of corruption.

Ensure adequacy of monitoring and reporting procedures

Where employees identify queries relating to anti-bribery and corruption legislation, resolution of those issues should be documented. Given there will be many grey areas, clear documentation is necessary to demonstrate to regulators why a particular decision was reached. Monitoring should also cover other aspects of the anti-bribery and corruption framework, such as the coverage of personnel who have completed anti-bribery and corruption training, the gifts and entertainment provided by the company, or performance in large-scale tenders. Clear review responsibilities should be established, whether by line management or Board committees, and formal guidance as to when issues need to be escalated to the highest levels.

Committing time and resources

The need for organisations to commit sufficient time and resources to the development and embedding of an appropriate anti-bribery and corruption framework has already been highlighted, but it is worth emphasising again.

Experience shows that, particularly for organisations operating in multiple jurisdictions, the work involved in implementing an anti-bribery and corruption framework across all areas of the business - and reviewing its effectiveness - is considerable. It can take several years to complete the framework, and involve many hours of internal and external expert time.

