

Embedding resilience

Anti-bribery and corruption briefing



Anti-bribery and corruption briefing 2016

Overview

The risks posed by bribery and corruption have never been higher.

Recent legal reforms and institutional developments in Australia have greatly increased the corporate and individual risks posed by bribery and corruption, particularly in foreign jurisdictions. Within the last 12 months, Australia has witnessed:

- new criminal offences for false accounting records which carry severe penalties
- an additional \$15 million funding for the AFP to enhance its foreign bribery investigative capability
- proposed introduction of Deferred Prosecution Agreements to enable voluntary settlement with the prosecutor.

In October and November 2016, PwC hosted Anti-Bribery and Corruption Briefings in Melbourne and Sydney where leading experts discussed the risks and mitigation strategies with an audience from industry, academia and law enforcement.

Quotes

28% of Australian organisations continue to experience bribery and corruption, with an even higher likelihood of incidents predicted over the next two years.

Source: PwC's Global Economic Crime Survey 2016

68% of countries worldwide have a serious corruption problem: half of the G20 are among them and Australia's corruption profile continues to deteriorate.

Source: Transparency International's 2015 Corruption Perception Index.

Presenters

- Commander Peter Crozier, Head of the AFP's Fraud and Anti-Corruption Centre
- Murray Deakin, PwC Legal Partner
- Jean Roux, PwC Forensics Partner

Enforcement framework: the AFP's Fraud and Anti-Corruption Centre

Commander Peter Crozier, Fraud and Anti-Corruption Centre, AFP

PwC was privileged to have Commander Peter Crozier of the AFP share his insights on the current criminal enforcement framework in Australia.

The Fraud and Anti-Corruption Centre (FAC) was established in 2013 to better address:

- serious and complex fraud against the Commonwealth
- corruption involving Commonwealth officials
- foreign bribery
- complex identity crime involving the manufacture and abuse of credentials.

Developing relationships to draw on existing experience

Commander Crozier believes there is significant value in working with other agencies and organisations in a preventative role, to help companies understand where they may be vulnerable to the risks of bribery and corruption and how they can change their behaviours.

He noted the value in drawing on the experiences of others, including those involved in the briefing, who have been working in overseas jurisdictions, and are therefore ideally placed to advise new entrants of potential risks and pitfalls.

Why investigate bribery and corruption?

Commander Crozier emphasised the importance of investigating allegations of foreign bribery for Australia – and the AFP specifically. In addition to Australia's international obligations under OECD and United Nations Conventions, foreign bribery is also an offence according to Australian law, under the *Criminal Code 1995* (Cth).

Bribery and corruption can also impact Australia's international competitiveness – failure to take action against bribery and corruption diminishes our international reputation, impacting all of Australia. It is also critical to eliminate the perception that foreign bribery is a 'victimless crime'.

Commander Crozier noted that what actually constitutes bribery and corruption is not always clear. Under existing legislation some actions, such as providing facilitation payments, may not be in breach of Australian legislation under certain circumstances, but may be in another jurisdiction.

Awareness of these differences is key, as in some jurisdictions a person is committing an offence by accepting a facilitation payment that would otherwise be deemed legal under Australian law.

Self-reporting and cooperation with law enforcement

Self-reporting is another area of focus for the AFP, and Commander Crozier stated that they have been working closely with the Commonwealth Director of Public Prosecutions in this regard. He emphasised that there is no point where self-reporting could not occur.

Commander Crozier cited the Australian Government's recently released discussion paper on Deferred Prosecution Agreements, which draws on models from the UK and US, both of which have been very effective. He hoped the current public consultation process will contribute to the development of a model that can be applied to Australia.

Challenges for the AFP

Commander Crozier provided an appraisal of some key challenges faced by the AFP in conducting investigations into foreign bribery and corruption, which included:

- Legal Professional Privilege (LPP) processes and timeframes relative to resolving LPP claims
- processes in obtaining evidence from foreign jurisdictions
- cultural differences
- the sensitivity of these matters (high level of scrutiny by the media and the public)
- the length of time required for an investigation to be resolved.

The future: prevention verses prosecution

Commander Crozier sees numerous benefits in taking a proactive approach to combat bribery and corruption through preventative measures, although he acknowledged that there will always be pressure to justify the AFP's work based on quantitative measures such as the number of prosecutions initiated or concluded.

The counterpoint to this argument, as Commander Crozier noted, is that the AFP may quite rightly face criticism if it failed to act when it could have disrupted activities in an earlier phase, and prevented a crime from occurring in the first instance.

“If you are looking to develop a business, reach out to those who have worked over there before. Consider those challenges and build them into your frameworks.”

Corporate culture in criminal law

Murray Deakin, PwC Legal Partner

The Australian legislation relating to foreign bribery and corruption has recently been expanded, with significant implications for Australian corporations operating in international jurisdictions.

Murray Deakin provided attendees with a broad overview of the risks corporations faced under the Criminal Code, where failings by directors, officers and even the underlying corporate culture may expose an organisation to the risk of prosecution. He focused on two key offences under the Criminal Code:

- **Bribery of foreign public officials**
- **False accounting.**

Bribery of foreign public officials

Definition

The core offence involves providing a benefit not legitimately due with the intention of influencing a foreign public official in the exercise of their official duties in order to obtain or retain business or a business advantage.

Key elements

- Providing a benefit or causing a benefit to be provided or offered
- The benefit is not legitimately due
- Intended to influence a foreign official in the exercise of their official duties
- Intended to obtain or retain business or business advantage.

Extra-territoriality

The offence may apply where the conduct occurs:

- wholly or partly in Australia
- wholly outside Australia by Australian citizens, residents or body corporates.

Penalties

- Individuals:
 - <10 Years Imprisonment; and/or
 - <\$1.8 million
- Companies:
 - <\$18 million; or
 - 3 times the value of benefit derived; or
 - 10% of annual turnover

False accounting records

Definition

The core offence involves intentional or reckless making (or failing to make) records to facilitate, conceal or disguise giving or receiving a benefit not legitimately due.

Two offences

There are two offences involving either:

- an **intention** to facilitate, conceal or disguise
- **recklessness** as to whether conduct facilitates, conceals or disguises,

a benefit not legitimately due or loss not legitimately incurred.

Extra-territoriality

- The offence may be committed inside or outside Australia by any Australian or foreign corporation, or its employees
- The accounting document can be inside or outside Australia, or kept under Commonwealth law or for use of Australian currency.

Penalties

	Intentional	Reckless
Individuals	<10 Years Imprisonment	<5 Years Imprisonment
	<\$1.8 million	<\$900,000
	<\$18 million	<\$9 million
Companies	3 times the value of benefit derived	1.5 times the value of benefit derived
	10% of annual turnover	5% of annual turnover

Risks of poor corporate culture

One important implication of the Criminal Code is the risk posed to organisations through a poor corporate culture. In extreme circumstances, directors, officers and high managerial agents might be exposed to personal criminal liability. If a corporation is found to have committed a criminal offence, it is possible that responsibility may be attributed to the people in executive and management roles who failed to ensure these types of crimes were not committed.

“Directors and senior management need to ensure that their corporations are implementing and regularly reviewing sound policies and procedures to combat bribery and corruption risks.”

Offshore anti-corruption risk – Spotlight on business in China

Jean Roux, PwC Forensics Partner

As a Forensic Partner with PwC who has spent 11 years working in China, Jean was able to provide attendees with an insider's perspective of what it is like to do business in South-East Asia, and some of the issues that might be encountered.

Jean highlighted some of the traps and pitfalls that Australian businesses looking to expand into this market should be aware of, summarised by ten factors as pictured below. He pointed out the various layers of legal complexity that companies must navigate, including Australian laws, the UK Bribery Act, OECD conventions and, depending on the structure of the business, possibly also the US Foreign Corrupt Practices Act.

Jean noted that bribery and corruption were now at the top of the agenda for many governments in South-East Asia.

Ten factors about China to keep in mind

1. Dealings with foreign government officials



Includes everything from dealing with customs officials to seeking permission to advertise. Be aware of the extent of your interaction with parties meeting US regulators' definition of 'foreign government officials'.

2. Fake supporting documents



The most popular means to extract cash from MNCs to support false expense claims, which are then used to fund bribes.

3. Complex contractual arrangements



Requiring payments to parties which are not principals in the transaction, especially to BVI, HK or other off-shore locations.

4. Cultural challenges



Be alert to inappropriate gift giving and personal relationships (or 'guanxi').

5. Cash-based economy



Prevalence of large cash transactions can be a challenge to compliance.

“In China the new regime is really stepping down very hard on the corruption – they are seeing that as a way to ensure that they stay competitive in the market.”

6. General lack of business transparency



Use of third parties, opaque distribution channels and large sales teams. While point-in-time due diligence procedures are a must here, ongoing monitoring is also crucial.

7. Accounting practices



These typically don't meet FCPA (or UK Bribery Act) standards of transparency. Ensure you have a contractual right to audit partners and subsidiaries – and then make sure it is exercised.

8. Culture of deference



Junior staff will rarely ever challenge superiors, even over matters they suspect could be very serious.

9. US regulators



The DoJ and SEC are mindful of China's economic significance and opaque business practices.

10. Size and complexity



China has 22 provinces, 4 municipalities, 5 autonomous regions, 2 special administrative regions and 1.3 billion people. Investment in compliance by an MNC in one province, does not always mean it will be compliant nationwide.

Discussion

The briefing concluded with a question and answer session between the audience and a panel comprising Commander Crozier, Murray Deakin, Jean Roux, Malcolm Shackell, Mark Rigby and Sadie Lees.

Five from the floor – Key Talking Points

- *To what degree are companies liable for the actions of companies or subcontractors they have contracts with in other countries?*
- *What is the expectation for companies working in other jurisdictions to do due diligence on the local companies they may engage?*
- *When is the self-reporting protocol that is currently under development likely to be finalised?*
- *In the interests of developing a more collaborative approach with industry and moving away from a purely enforcement-based approach, what consideration is currently being given to compliance programs in enforcement decisions?*
- *Given their obligations to shareholders, are companies likely to feel pressure to protect their reputation by defending criminality, or investigate it themselves to potentially expose individuals responsible?*

Continue the discussion



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