APSAC Conference 2011 Paper
Fremantle, Western Australia
15 – 17 November 2011

Corruption of Public Officials – Foreign Corrupt Practices Legislation and the impact on Private Sector organisations in Australia and globally

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1. INTRODUCTION

The question that introduces this topic is whether common ground between the private and public sectors is possible on corruption?

Just as the management of corruption is an enormous challenge for the public sector, I hope I will convince you that combating corruption in the private sector is at least equally a major issue and my view is, based on my experience of looking at corruption across all sectors, that there is substantial common ground between the private and public sectors on this subject.

I propose to give you an insight into the impact in the private sector of foreign corrupt practices legislation around the world and the way that private sector organisations are responding, both domestically and internationally.

For this purpose, I will be covering the following topics:

- Corruption around the world in the context of different cultures
- Bribery and corruption – a definition
- The international response to corruption
- Identification of corruption and bribery in different cultures and industries
- Corporate and NGO approaches to management of corruption risk
- Mapping a path towards effective compliance with international and local legislation
- A strategic model for fraud and corruption control program development

2. DISCLAIMER

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.

3. CORRUPTION AROUND THE WORLD IN THE CONTEXT OF DIFFERENT CULTURES

The Transparency International Corruption Perceptions Index ranks 180 countries in terms of the degree to which corruption is perceived amongst public officials and politicians.

The focus in this survey is on corruption in the public sector and corruption is defined as the abuse of public office for private gain.

The 2010 Corruption Perceptions Index, which measures 178 countries around the world, is represented by different colours, with the darkest red being those countries that are assessed as being the most corrupt, and the light yellow colours representing those countries that are perceived to be least corrupt.

As you will see, the most corrupt countries tend to be in Africa and the Middle East. Corruption is seen to be widespread in the Asia Pacific Region, the region where our companies and public sector organisations are commonly doing business. The work we do when requested by our clients to look at corruption take us into many of our well known Asia Pacific neighbours including China, Indonesia, the Philippines, Malaysia, Thailand to name a few. I should say that our clients in respect of this work include organisations that are both public and private sector.

The ability of our organisations to combat corruption is not necessarily assisted by the particular circumstances in some of these countries and China is a good example of a jurisdiction that imposes capital punishment, consequently has few extradition treaties with other countries, including the United States and accordingly, accused officials who leave the country face little chance of being sent home to face their punishment.

4. BRIBERY AND CORRUPTION – A DEFINITION

An example is a good way to illustrate the lack of clarity around events that may constitute bribery and corruption.

Consider yourself in the position of a senior executive who has travelled to a foreign destination for the purpose of reviewing a major project.

Whilst looking over some expenditure records, you see a monthly expense of USD 2,000 listed as motor vehicle licensing fees and you note that it is paid in cash.

Further enquiries indicate:

- There is no documentation to substantiate or evidence the payments.
- The fee is paid to a local office of the Police.
- You are advised that the payment relates to approvals to operate motor vehicles.
- You are further advised that without making these payments you are unable to import vehicles and you are unable to have the vehicles registered for use on the roads of the country in which you are operating.

Having uncovered the information outlined above, your thought process might be approximately as follows:

- Do these payments constitute bribery?
- Are they merely facilitation?
- Does it make any difference whether the payments constitute bribery or are merely facilitation?
- You have been advised that "this is the way the system operates" in this country – is it ok for these payments to be made?
- Are you sitting there thinking "*I wish we'd known about this before we'd started this project*".

Corruption is defined by Transparency International as "the abuse of public office for private gain".

5. THE INTERNATIONAL RESPONSE TO CORRUPTION

For the moment, we will move away from the detailed on-the-ground experience of a senior executive of your organisation and look at aspects of the regulatory environment and government initiatives in relation to corruption.

Over a period of time, there have been a range of government initiatives designed to impact and reduce the cost of corruption particularly in emerging societies and these include:

- The United Nations Convention against Corruption to which there is approximately 140 signatories.
- The organisation for Economic Cooperation and Development Convention to which there are 36 countries who are signatories.
- There are a number of regional conventions against corruption. For example, The Asian Pacific Economic Cooperation Convention.
- There are local jurisdictional requirements or legislation in many of the countries in Asia Pacific.
- Debarment is being increasingly looked at by governments, NGOs, organisations such as the World Bank and International Monetary Fund, etc.

Australia has also recently strengthened its legislative framework by providing for higher penalties and criminal law sanctions in its anti-cartel legislation, changes to its foreign corruption legislation by substantially increasing penalties to both individuals and corporations and providing for corporate

penalties to be more directly related to the value of any benefits derived by the corporation that is reasonably attributable to the conduct constituting the offence.
The US Foreign Corrupt Practices Act contains two key categories of offences. The first being a prohibition on anti-bribery, by making payments to a foreign official for the purpose of obtaining or retaining a business advantage a criminal offence. Secondly, a books and records provision that requires the maintenance of accurate books and records in order to ensure that an adequate system of internal accounting controls exists so that bribes cannot be concealed or disguised, they must be properly described and recorded in the accounting system.

This second provision has been very effective particularly in the early years when the US authorities were investigating allegations of bribery and corruption but were finding it difficult to meet the standard of proof required for the first category, i.e. the criminal offence.

The evidentiary requirements to succeed on a books and records offence is of course much less than that required for a criminal offence, although the penalties are similar.

The UK Bribery Act was enacted in 2010 and came into effect from 1 July this year, 2011. It is a very wide reaching law that applies to UK organisations, UK citizens and certain overseas organisations who have any business relationship within the United Kingdom.

For example, Australian businesses that carry on a business or part of a business in the United Kingdom will be generally exposed to the provisions of the UK Bribery Act, notwithstanding that the act took place in a foreign jurisdiction and involved citizens of countries other than the UK.

The principal offence is one of “failure of a commercial organisation to prevent bribery”.

As you would expect, there is a defence and it is to have in place “adequate procedures”.

There has been much debate about the nature and extent of adequate procedures required as a defence in any prosecution under the UK Bribery Act and the UK Ministry of Justice only provided high level guidance to these in March 2011.

The new corporate offence of failure of a commercial organisation to prevent bribery means that an organisation may be criminally liable for bribery committed in connection with its business by those working for that organisation or on its behalf. This would include people working for other corporate group entities other than those located in the United Kingdom and agents and others acting on behalf of the commercial organisation.

Apart from the normal fines and provision for up to 10 years imprisonment, a corporate conviction in the United Kingdom will mean immediate disqualification from any public sector work within the European Union.

Regulatory action has dramatically increased over the last few years specifically in the number and magnitude of the Foreign Corrupt Practices Act cases and investigations by the US Department of Justice and the Securities and Exchange Commission.

As a consequence of increasing the size and complexity of the investigations, tougher penalties are being determined. There has been an increase in voluntary disclosures to law enforcement, more use is being made of other related laws for the purpose of making it easier to prove offences (e.g. Securities legislation) and there is increasing international cooperation between different countries.

The regulators in the United States in particular, as well as increasing their investigation and enforcement activities, have performed sweeps of businesses looking for high-risk activities within the organisations, they have focused on the relationship between an organisation and its related third parties, e.g. corporate within a group, agents, lawyers, etc and penalties have substantially increased. Eight of the 10 largest fines were within the 2010 year.
Organisations that have been affected by anti-bribery and corruption investigations or enforcement during the last five years include some very high profile names including:

Bank of America	Johnson & Johnson
Rio Tinto	Haliburton
Daimler	BAE System
Morgan Stanley	Siemens
BHP Billiton	Reserve Bank of Australia

In calculating the penalties, the United States authorities apply sentencing guidelines that provide weightings for different factors, e.g.

- A base offence
- A loss of more than $400 million
- The number of victims
- The level of sophistication and whether the conduct is outside the United States
- An assessed pervasive tolerance to bribery and corruption
- The extent of cooperation and acceptance of responsibility by the organisation

These factors are the basis of a “culpability score” which then factors into an assessment of the range of the fine and penalty.

As noted earlier, the number of FCPA investigations by the United States Department of Justice and the SEC has increased substantially over the last 6 or 7 years and penalties, at the top end, have ranged up to $800 million in the case of Siemens.

Recent Australian and international examples include:

- Alcatel-Lucent SA
- Australian Wheat Board
- Aon
- Reserve Bank of Australia Securency
- JP Morgan

6. IDENTIFICATION OF CORRUPTION AND BRIBERY IN DIFFERENT CULTURES AND INDUSTRIES

The context of the need to identify corruption and bribery within an organisation either within or across cultures and jurisdictions may be an investigation of whistleblower or other allegations of inappropriate conduct, or for the purpose of planning a risk management approach to anti-bribery and corruption in the context of the legislative frameworks that we have previously discussed.

A general approach to a due diligence review or in the context of allegations of bribery and corruption would be as follows:

- It is important to understand the regulatory environment of the organisation under examination. For example, the key legislative and regulatory impact on the business such as import or export licences, registrations and insurances, labour laws, etc.
- A review of media and corporate publications issued by and about the organisation can provide a wealth of information on the operations of the organisation to some extent independent of the normal public relations material issued by the subject.
- These steps will enable the identification of government agencies that are relevant to the conduct of the activities of the organisation and with whom dealings may be expected.
- An analysis of major suppliers and business partners can provide a wealth of information. For example, joint venture partners, major sources of raw material or services used in the operations, service providers such as law firms, accounting firms, etc.
- Audit rights in key contractual arrangements should be reviewed and if possible used. For example, audit and due diligence provisions in joint venture agreements are common in the resources industry and becoming increasingly common in the context of the need to comply with foreign corrupt practices legislation. Such provisions are also common in intellectual property licensing agreements.
- Confirmation from agents for the organisation that they have complied with the terms of agency agreements and, more specifically, that they have not taken any actions that may be in breach of foreign corrupt practices legislation is important.
- If in doubt, seek legal advice where transactions in a grey area are being encountered.

7. CORPORATE AND NGO APPROACHES TO MANAGEMENT OF CORRUPTION RISK

For the purpose of examining the different approaches to management of corruption risk, I have had particular regard to two surveys performed by KPMG Forensic. The first is in relation to anti-bribery and corruption and the second into anti-money laundering, particularly in the financial services industry.

Our global anti-bribery survey was released in 2011 and in particular it compared the results between 2008 and 2010.

The UK Bribery Act came into force effective 1 July 2011 after a considerable period of public exposure and debate about the effects of this legislation which went significantly further in some respects than the US Foreign Corrupt Practices Legislation.

Some of the key findings of our survey of clients in relation to anti-bribery and corruption include:

- 80% of respondents had an anti-bribery and communication programme.
- A majority said AB&C training was now mandatory for all staff.
- More than 60% did not have a full-time AB&C compliance officer. This function is often filled by an AML compliance officer or the officer responsible for fraud and misconduct.
- The majority of organisations surveyed do undertake bribery and corruption risk assessments.
- 60% of organisations had distributed anti-bribery and corruption policies to agents, distributors, suppliers and other third parties with whom they deal.
- The majority believe that their AB&C compliance process complies with local laws in their home jurisdiction but only about 55% said they complied with overseas AB&C laws, specifically UK Bribery Act and Foreign Corrupt Practices Legislation.
- Performing effective due diligence of third parties for compliance purposes are two of the most challenging issues for corporations, and we have seen a few recent possible mergers fall over because of an inability by a UK or US based buyer to satisfy themselves about these risks.
- In relation to the six principles relevant to "adequate procedures", 83% of respondents have written anti-bribery and corruption policies and procedures.
- The majority had roles and responsibilities clarity over responsibility for AB&C.
- A majority had performed AB&C risk assessments or had provided for them.
- 73% found the required due diligence somewhat or very challenging.
- 77% had communication and training programmes and also whistle blowing arrangements.
- 63% found it very or somewhat challenging to maintenance of appropriate AB&C compliance.
- High risk areas in anti-bribery and corruption for corporations or NGOs include:
    - Agents, intermediaries and other third parties
    - Investments
    - Sourcing, selection and appointment of suppliers

8. A PATH TOWARDS EFFECTIVE COMPLIANCE

The following quotation from Lanny A. Breuer, Assistant Attorney General, Criminal Division in the US Department of Justice, made in 2010 sums up the US regulators' view of an effective compliance and ethics programme.

> *Ultimately, from our perspective, an effective compliance and ethics program is one that prevents fraud and corruption in the first place and, when it can't, has in place clear policies to quickly detect, fix, and report the violations. Likewise, an effective compliance program is dynamic and ever-evolving; it cannot exist only on paper.*
>
> *(Strategies include) "tone from the top" support, encouragement of a culture of compliance that rewards ethical behaviour and establishes whistle-blowing mechanisms, senior-level oversight and direct reporting lines, periodic reviews and re-evaluations to test and ensure program effectiveness, appropriate disciplinary mechanisms, and extension of anti-corruption policies to third-party agents and business partners, to name a few.*

Of course, even the best compliance program may not stop fraud or corruption from occurring. So, what should a corporation do when a problem has been discovered?

Audit committees are now taking far more interest than they have in the past in relation to anti-bribery and corruption compliance and, amongst other significant issues of an audit committee, now one issue on their agenda is about whistle blower and anti-bribery processes.

The six principles in "adequate procedures" in compliance are:

1. Proportionality
2. Top level commitment
3. Risk assessment
4. Due diligence
5. Communication and training
6. Monitor and review

9. A STRATEGIC MODEL FOR FRAUD AND CORRUPTION CONTROL PROGRAMME DEVELOPMENT

KPMG Forensic developed globally a strategic model for the control of fraud and corruption in organisations around the three key elements of:

- Prevention
- Detection
- Response

It is important that these three elements are managed in a process of continual review and development that takes account of organisational changes and changing risk profiles over time. Major events in an organisation's existence that can significantly impact the risk factors in relation to fraud and bribery include a major acquisition or divestment, new IT system implementation, a new or dominating CEO, amongst others. In this context, any assessment of risk of corruption needs to be subject to continual evaluation, assessment, design and, where necessary, reimplementation.

The three elements are:

Prevention, i.e. preventative controls that are designed to reduce the risk of fraud and misconduct from occurring within the organisation in the first place;

Detective controls are designed to uncover fraud and misconduct when it occurs; and

Responsive controls are designed to take corrective action and remedy the harm caused by fraud and misconduct.

Many of you may have seen such models implemented in public sector organisations as this model is equally applicable to any type of organisation.