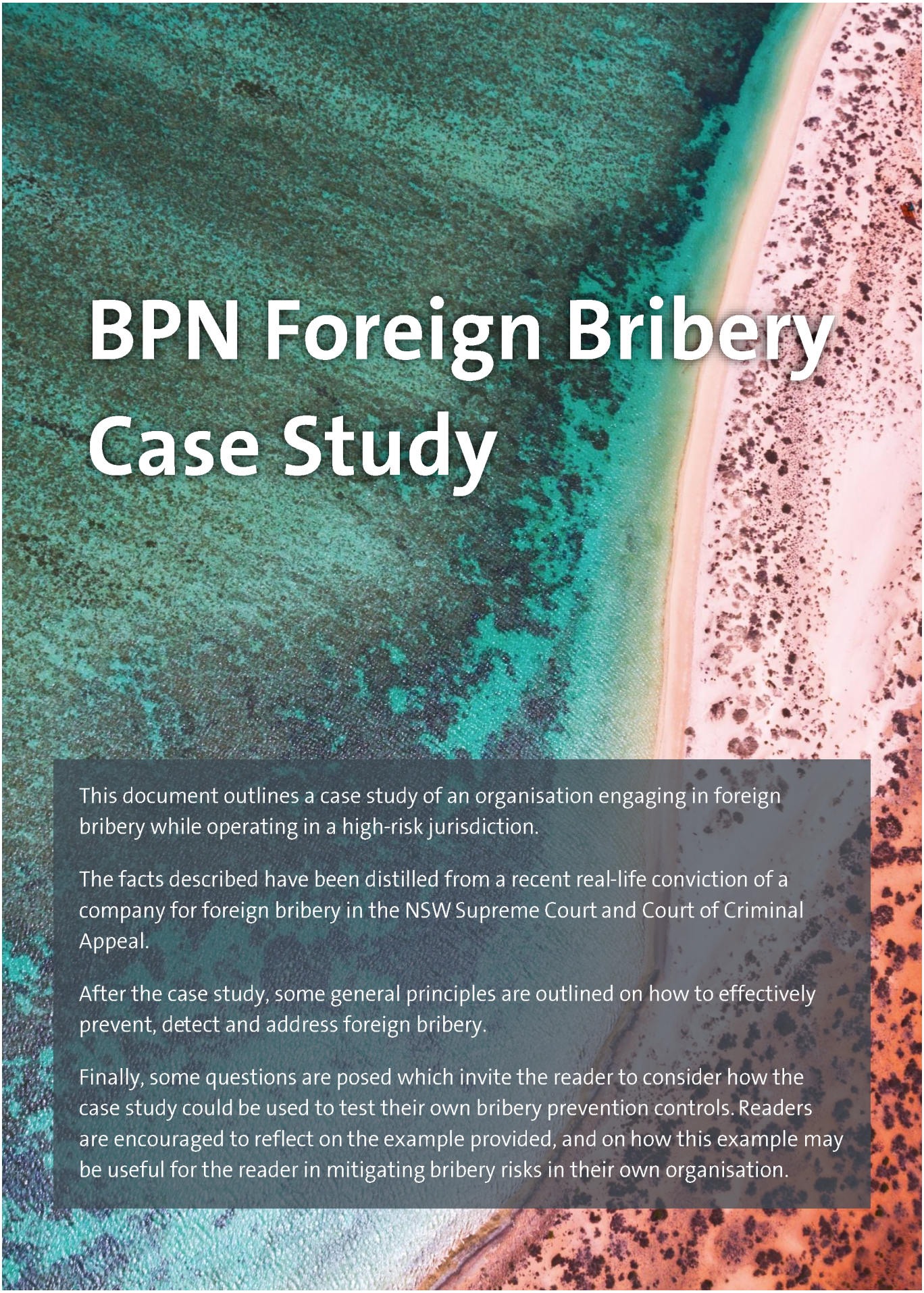
Bribery Prevention Network

Allens Linklaters 200



BPN Foreign Bribery Case Study

This document outlines a case study of an organisation engaging in foreign bribery while operating in a high-risk jurisdiction.

The facts described have been distilled from a recent real-life conviction of a company for foreign bribery in the NSW Supreme Court and Court of Criminal Appeal.

After the case study, some general principles are outlined on how to effectively prevent, detect and address foreign bribery.

Finally, some questions are posed which invite the reader to consider how the case study could be used to test their own bribery prevention controls. Readers are encouraged to reflect on the example provided, and on how this example may be useful for the reader in mitigating bribery risks in their own organisation.

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1 Case study – timeline of events

Dates	Event
Background	• The Company was a private company, part of a group of companies that provided professional services in Australia and overseas. The Company had several specialised operational areas of business and more than 40 offices globally divided into five specialised business areas. • One of the Company's smaller specialised business units, generating less than 1% of group revenue (the SBU) was involved in tendering for public works contracts funded by international organisations such as the World Bank and the Asian Development Bank. • The SBU was awarded public works contracts, relevantly, in the Philippines and Vietnam.
2000 – 2005	• On the advice of a local employee who advised that this was necessary to win contracts in the Philippines, Company employees allegedly bribed public officials in the Philippines to gain contracts on a number of World Bank and Asian Development Bank-funded projects. • The existence of the relevant payments was kept to a small circle within the Company. The payments were made to a local shell company created by an employee and disguised as payments for 'external marketing'.
2006 – 2012	• Company employees allegedly bribed Vietnamese government officials between 2006 and 2011 to obtain work on a number of World Bank-funded infrastructure projects. • Similarly, the payments were kept to a small circle within the Company and were paid to a third party agent under the guise of being payments for logistics and delivery of training.
2011	• Following enactment of the UK Bribery Act, the Company undertook a review of its compliance with anti-bribery laws, adopted an anti-bribery policy and implemented an anti-bribery training program.
2012	• In 2012, the Company engaged a law firm to assist with its proposed merger with a potential Parent Company, likely to be from the US or UK, including to undertake enquiries in relation to the firm's anti-bribery and corruption compliance. • The Company General Counsel suggested that the law firm look at the SBU because it operated in higher-risk jurisdictions. During an interview, an employee of the SBU stated that the company had been paying bribes which were disguised as payments for delivery of training. • The Company launched an investigation. As a result of the investigation, the Company self-reported corruption allegations to the Australian Federal Police, the World Bank and the Asian Development Bank.
July 2013 to 2018	• The AFP launched an investigation into the bribery allegations. The Company cooperated extensively with the investigation. • A Parent Company announced a merger with the Company. • The World Bank and Asian Development Bank entered into conditional non-debarment agreements with the Company.
May 2018	• The Company and a number of former executives were issued with court attendance notices.
2018 – 2022	• The Company continued to provide extensive cooperation with the AFP investigation and ultimately entered an early guilty plea. The case proceeded to formal sentencing against the Company. • In the assessment of penalties, the Court decided to give a substantial discount on penalties (25% reduction for an early guilty plea and a further 40% reduction for self-reporting and cooperation). The Court also outlined how the self-report and cooperation were so significant in identifying the issues that they could have persuaded the CDPP to decline to bring charges at all.

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2 Principles of Good ABC Programs

Overarching principles

Proportionality

Corporations should develop and implement anti-bribery and corruption (***ABC***) policies and procedures. These should be tailored to *the size and structure of the corporation* and to the *nature and scale of its activities*. This means the specific policies and procedures a corporation adopts will need to address its particular risk profile and circumstances.

Effectiveness

The steps a body corporate takes to prevent, detect and address bribery of foreign public officials must in practice, result in an effective compliance program. Some indicators of an effective compliance program include:

- A culture of integrity and best practice;
- Pro-compliance conduct by top level managers and the Board of Directors;
- An effective anti-bribery compliance function;
- Effective risk assessment and due diligence procedures; and
- Careful and proper use of third parties, including checks for politically exposed persons (PEPs) and Ultimate Beneficial Owners (UBOs).

1 – Prevent

Management and culture:

Examples of steps management can take to promote a culture against bribery and corruption include:

- Communicating an anti-bribery stance;
- Selecting senior managers to lead and be accountable and incentivised for anti-bribery work;
- Maintaining oversight and assurance of anti-bribery risk assessments and preventative measures.

Policies & Procedures:

Companies should create and make readily available easily digestible and transparent, risk-based policies regarding ABC.

Risk assessment:

When preparing ABC compliance programs, companies should (1) conduct a proper risk assessment; (2) rate the risks and mitigating controls; and (3) document the process and findings. A proportionate and effective ABC program must be risk-based.

Due diligence:

Companies should apply due diligence procedures proportionate to the risks they face. These may include due diligence: (1) before entering new geographic regions or business sectors; (2) on customers, suppliers, subcontractors and joint-venture partners; and (3) before significant transactions.

Training and communication:

Communication and training should be carried out to ensure that all employees understand anti-bribery policies their practical application.

Red flags:

Companies should understand the red flags for corruption and training should include examples of common red flags.

2 – Detect

Monitoring:

Companies should monitor their business to seek to identify corruption and to evaluate the effectiveness of their ABC policies and practices. This might include monitoring (1) payments (including to agents, for gifts and hospitality, use of cash, expenses in higher-risk jurisdictions); (2) employee attitudes and engagement; (3) training completion rates; and (4) outcomes of investigations into any bribery allegations.

Whistleblowing:

Corporations should consider establishing a confidential whistle-blowing channel to which anonymous reports about foreign bribery and other ethical issues can be made. Whistle-blowing channels should be promoted internally. Whistle-blowers should be protected and supported (as required by law). Credible reports or concerns should be properly investigated.

Audit:

Companies should audit their ABC risks and should independently review the design and effectiveness of their ABC program.

3 – Address

Investigating:

Following a report or identification of a potential issue, companies should investigate. Investigations should be properly scoped, objective, timely, appropriately conducted and properly documented. Investigations should be independent from the individuals and businesses concerned and should seek to understand root causes of issues identified. Companies should properly consider any findings and take appropriate action to address issues.

Reporting:

Companies should have appropriate guidance or seek advice (where necessary) to determine whether self-reporting to an appropriate agency (e.g. AFP) should be considered.

Remediating:

In addressing any misconduct identified, a corporation should identify root causes and comprehensively uplift its ABC compliance programs. It may also consider what remedies are appropriate, including: (1) imposing consequences on individuals concerned; and (2) understanding impacts on communities affected and whether and to whom reparations could be made.

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3 Questions to consider

1 – Prevent	2 – Detect	3 – Address
Policies, procedures and due diligence • Do policies clearly articulate a prohibition on bribery? • How could the Company have ensured its anti-bribery policy was being properly understood and implemented by its employees and managers on the ground? • Are there robust procedures requiring heightened due diligence for a higher risk country (eg Vietnam/Philippines)? Were there special requirements for government contracts in those counties? Or the engagement of third parties or agents?	**Monitoring and audit:** • Was this monitoring adequate before 2012? Was it risk-based? • What was the outcome of using risk factors to inform the scope of the review in 2012? • With the benefit of hindsight, what 'footprints' might the conduct have left that could inform data analytics (eg, proportion of third-party payments, payments to shell companies)?	**Investigating:** • Once the bribery was discovered, did the Company do a good job in expediently investigating and reporting the issue? • Once the issue had been investigated, did the steps taken by the Company adequately address the bribery problem?
Management and culture • How could senior management have better demonstrated to staff a commitment against foreign bribery and what their expectations are if the company is faced with a request to pay a bribe? • Do the Board and senior management understand bribery risk factors and where they might be present in the business? • Should bribery risk factors have triggered higher-level review or sign-off?		
Risk assessment: • Can the company evidence that it has properly assessed bribery risks across its business? That is, can the company show that it has canvassed all potential dealings with government and associated entities to identify how bribery risks can arise and manifest across its business and operations? • Is there sufficient senior-level involvement and awareness of bribery risks? • How does the bribery risk assessment drive policies, procedures, due diligence, monitoring etc so that those measures and controls are risk-based? • How well do you know business partners and suppliers? What about their track record of integrity and compliance? Are any of them politically exposed persons (PEPs)?	**Whistleblowing:** • The bribery was originally discovered through an interview with an employee performed during a due diligence review of the Company. How could the Company have better facilitated its employees speaking up earlier? • Was there any internal or external whistleblowing system in place? • Would an internal system for reporting suspicious activity have likely revealed the bribery to senior management sooner?	**Reporting:** • What were the benefits of self-reporting the bribery to the AFP? • What were the benefits of self-reporting the bribery to the World Bank and Asian Development Bank?
Red Flag: • What red flags were there for an elevated bribery risk for the SBU? • Did these red flags include the countries of operation, the fact that the contracts were with government entities, and the fact that payments were made to third parties and the nature of the 'services' paid for? • How could the Company have better responded to these red flags? For example, how could the Company have ensured that any third party 'services' in high risk areas are paid for at fair market value and in fact delivered.		
Training and communication: • Were the steps taken in 2011 to implement a bribery prevention policy adequate? • How could the risks of bribery to the Company, and to employees themselves, have been better communicated? • How could employees have been better educated about the particular bribery risks for their specific roles?		

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