

Doing business in India

Managing business risks - bribery and corruption



Australian Government
Australian Trade Commission



Introduction

Australia – India bi-lateral trade and investment has been growing rapidly over the last decade. As trade and investment between Australia and India continue to grow and with India emerging as a significant market, Australian companies need to be aware of challenges faced by international firms doing business in India. One of the significant challenges of doing business in India is around the issue of bribery and corruption.

Politicians, bureaucrats, and law enforcement officials often wield significant discretionary power and notable abuses have been brought to light. Several high-profile prosecutions in recent years have demonstrated that the legal framework for fighting corruption exists, although enforcement is often weak and responses vary from State to State.

In India, corruption is often cited as a barrier to the effective development of the private sector. Procurement practices lack transparency and are coupled with a significant bureaucratic burden. According to the business community, regulations are frequently changed without prior consultation or communication and their application can be inconsistent and non-transparent.

Facilitation payments also known as ‘speed money’ are a common practice in India for obtaining licences, permits, sanctions, approvals, infrastructure and facilities from government departments and agencies. In some instances, third parties are used by businesses in order to avoid exposing their companies to direct involvement in negotiating bribes with government officials.

This business environment poses risks that require proactive management in the form of regular due diligence reviews. The development of risk management strategies are needed to successfully navigate through these challenges and capture the significant opportunities in the Indian market.

This overview covers some of the key risks commonly encountered when doing business in India, provides insights from companies operating in the market to help guide new market entrants, and outlines the main anti-bribery and anti-corruption initiatives undertaken by the Indian Government.

Managing business risks posed by bribery and corruption

Operational bribes

In a 2013 International Attitudes to Corruption survey conducted by Control Risks, 76 per cent of Indian businesses regard demands for operational bribes as one of their two ‘greatest concerns’. This reflects the challenge of getting things done in the Indian market. Operational bribes are usually small bribes or facilitation payments associated with supporting the smooth running of the business. Examples include demands from tax inspectors and handling agents, officials processing licence applications, customs officers offering to expedite the clearance of goods through customs, and police officers threatening bogus fines. These payments often carry the implicit threat that non-payment may result in problems for the business.

International attitudes to facilitation payments are changing, with companies coming under increased scrutiny from the US Corrupt Practices Act (FCPA), the UK Bribery Act and Australia’s anti-bribery legislation. While facilitation payments may not be a criminal offence in some jurisdictions, there is an increasing crackdown on these behaviours. India also has an agenda of legislative reform around bribery and corruption which includes the Companies Act (2013) which will impose higher standards of corporate governance. In addition there is the pending Prevention of Corruption (Amendment) Bill 2013 which will make it easier to convict companies who pay bribes, as well as the recipients of the bribes.

Companies need to have a clear policy to address this issue. Companies also need to include clauses in contracts with consultants and subcontractors stating that they will not pay bribes on behalf of the company. But this can be difficult. Expert advice from specialists such as customs house agents may be part of the answer, as long as these do not operate as bribe-paying third parties.

According to a report on “International Business Attitudes to Corruption: Focus on India – Survey 2013” published by Control Risks, companies may have to accept delays – rather than bribes – as a cost of business, hoping that introducing a policy of resistance will over time reduce the likelihood of demands for bribes. The Control Risks’ report sees resisting such ‘systemic’ bribery demands as possible.

Payments to commercial agents and other intermediaries

Many businesses are told on entering the Indian market that they will need to use the services of a commercial agent and are expected to pay a commission of 10 per cent of the contract value. This remains a challenge, especially for companies that may be working with a large number of third parties across different parts of the business. There is no absolute rule to decide what level of commission is appropriate. The key question to address is whether the remuneration is appropriate for the level of services provided. For example, on a large multi-million dollar contract a commission of 10 per cent is likely to be considered excessive.

Ensuring the company has strong due diligence procedures in place for all third parties it works with, standard clauses regarding anti-bribery in all contracts and regular monitoring of relationships to ensure compliance are some of the tactics which can be used to mitigate risk in this area.

The risk of being asked directly for a bribe to secure business has lessened in India thanks to some major corruption prosecutions. Companies do need to be aware of more subtle variations of bribery including being asked to make a charitable donation to a specific cause or sponsor a particular activity supported by the decision maker awarding a contract. To ensure high standards of corporate governance are maintained, the company needs at a minimum to ensure that all donations and sponsorships are made public and that the recipients have a legitimate social purpose and publish their accounts. There should be no expectation of future business deriving from the donation or sponsorship.

Resolution of legal issues

In those jurisdictions where there is a record of bribery within the legal system in order to influence the outcome of commercial disputes companies are recommended to address this issue upfront in their legal contracts. By specifying an external court of arbitration in contracts and agreements, Australian companies can minimise the legal risks involved. Companies do need to be aware that resolution of legal issues in India can take time and consider arbitration outside of the court system as an option.

Prevention is better than cure

Only 27 per cent of companies have anti-corruption training for all (Control Risks 2013 Survey). Clear policies on bribery and corruption need to be reinforced through regular training for all staff. In addition, staff working in high risk areas such as sales and senior management need to have more intensive training which outlines specific scenarios and how to address them. The importance of training should be reinforced from the top down so all staff understand the seriousness with which bribery and corruption issues are taken by the company.

A whistle-blower system which allows staff to confidentially raise concerns about bribery and corruption is another powerful tool that can be used by companies to help prevent problems before they occur.

Indian Government initiatives to help combat bribery and corruption

Prevention of money laundering

Respective Indian Governments have promulgated the Prevention of Money Laundering Act, 2002, Right to Information Act, 2005, Central Vigilance Act, 2003 etc. as a deterrent to persons who may intend to indulge in acts of bribery. The Prevention of Money Laundering Act, 2002 applies to all persons and may lead to prosecution under the Indian Penal Code, 1860. Apart from these central legislations, various States Legislatures have established anti-

corruption ombudsman organisations, known as Lokayukts and Uplokayukts, for investigation of administrative action taken by or on behalf of the state governments or certain local and public authorities.

The Supreme Court of India

The Supreme Court of India is the highest judicial forum of India. The Supreme Court is the federal court and the guardian of the Constitution of India

The Second Generation (2G) telecom spectrum case is an example of the Supreme Court of India's role in reducing corruption in India.

The case involved the Government using a 'first come first served' approach, rather than a competitive tender. This approach resulted in billions of dollars being awarded to successful companies and led to charges of fraud and corruption against the minister and other officials.

The Supreme Court struck down all licences granted under this policy and held that an auction/competitive tender system is the best method for the state to adopt when allocating public or natural resources. As a result of the cancellation of licenses, large Indian corporates and their foreign JV partners have suffered significant losses.

The judgment has sent a strong message to foreign investors regarding the legal environment in India and should lead to greater probity and a higher degree of integrity in the coming years.

The Central Bureau of Investigation

The Central Bureau of Investigation (CBI) is the premier investigating police agency in India. The CBI plays a significant role in the prevention of corruption.

The Anti-Corruption Division of the CBI has handled cases against chief ministers, ministers, secretaries to government, officers of the All India services, senior executives of banks, financial institutions and public sector undertakings in various cases of corruption.

CBI also handles cases of corruption and fraud committed by public servants of all Central Government Departments, Central Public Sector Undertakings and Central Financial Institutions. The Supreme Court of India and various High Courts have been directing the CBI to investigate into various corrupt practices. The Supreme Court of India has recently directed the CBI to investigate matters such as the coal tenement allocation and the Commonwealth Games project financing and has been monitoring the progress of these high profile cases on a regular basis.

Australian and international legislative initiatives

In 2011, after India ratified the United Nations Convention against Corruption, the Indian Government moved to implement a strong anti-corruption legal framework. This involved the introduction of a series of new bills, including (i) the Public Procurement Bill 2012, (ii) the Whistle blowers Protection Bill 2011, (iii) the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 and (iv) Lok Pal Bill 2012 as well as the amendment to existing laws to include bribery in the private sector as a punishable offence.

Australian Anti-Bribery Legislation

For Australians and Australian organisations intending to do business in India, it is important to note that bribery is a crime: both within India and, if involving a foreign public official, a crime that can be prosecuted in Australia under Australia's extra-territorial laws.

Australian businesses need to be aware of the anti-bribery laws of other countries and its impact on them, including differing laws around facilitation payments. Facilitation payments (small payments to facilitate a legal action) may be widely accepted but are banned in most jurisdictions. Austrade does not support or assist Australian organisations to

make any such payments. For more information including in relation to facilitation payments please see the Attorney General's Department statement's in relation to bribery of foreign public officials.

Integrity pact

The Integrity Pact (IP) is a tool developed by Transparency International to help governments, businesses and civil society to fight corruption in the field of public procurement/contracting. IP establishes mutual contractual rights and obligations to reduce the high cost and distortionary effects of corruption in public contracting.

Most Indian government authorities (Central and the State level) are required to adopt the IP recommended by Transparency International while contracting with private parties. IP is also adopted and recommended by the Central Vigilance Commission. It is estimated that approximately 50 central Public Sector Undertakings (PSUs) have adopted the IP in their procurement process. IP has created a mechanism to bring in transparency to eliminate corruption in public contracting in the coming years. Australian companies looking at doing business in India can use IP to identify projects and partners which are complying with its standards as one risk mitigation strategy.

Summary

Ways to mitigate risk for Australian companies

Australian companies intending to do business in India might wish to consider the strategies used by international companies in the market to mitigate their risk. These include:

- Setting the tone from the top. Company management leads by example; by setting and actively supporting a "zero tolerance policy".
- Adopting clear policies and procedures that set out the behaviour expected from employees and third party contractors. The policies should prescribe escalation processes, conflicts of interest, expenses, gifts and hospitality, the use of third parties to win business, whistle-blowing, monitoring and review mechanisms and disciplinary sanctions for any breaches.
- Gift and hospitality standards often pose challenges due to varying cultural practices. In India business hospitality and gifting is widely accepted and even expected. Company policies need to define the policy, develop an approval process and the limits applicable to gifts, entertainment, travel and hospitality. There should be processes in place to record all gifts, entertainment, travel and hospitality by employee and/or client.
- Development of a policy for staff that defines and prohibits facilitation payments.
- Reinforcing the policies through regular training and communication.
- Designing and implementing robust financial controls with adequate checks and balances by multiple stakeholders including compliance or legal teams. Such systems should address cash dealings and regulate political and charitable donations.
- Undertaking periodic risk assessment. Compliance risk should form an integral part of such evaluation. The risk assessment should inform the development of monitoring programmes, policies and procedures, training and operational processes.
- Conducting a gap analysis of existing policies against applicable legislation, regulations and guidance and make necessary enhancements.
- Establishing a whistleblowers system whereby staff can make confidential reports on concerns regarding bribery and corruption.
- Minimising dependence on third party contractors and ensuring that standard clauses regarding to the payment of bribes are included in all contracts. All third parties should be subject to thorough due diligence and should be reviewed regularly.
- Ensuring detailed due diligence is undertaken on all joint venture partners before entering into any relationship.

- Have an established system in place for investigating suspected acts of bribery and corruption by staff. This might include guidelines on information gathering, ensuring all relevant documents and electronic data are preserved, self-reporting and dismissal procedures.
- Engagement of specialist advice.

Further information

Australian Government's Foreign Bribery Information -

www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx

KPMG India Fraud Survey Report -

www.kpmg.com/in/en/services/advisory/risk-compliance/forensic/pages/fraudsurvey.aspx

Control Risks International Business Attitudes to Corruption: Focus on India – Survey 2013 -

www.controlrisks.com/OurThinking/SitePages/Reports.aspx

The Australian Trade Commission

The Australian Trade Commission – Austrade – is the Australian Government's trade, investment and education promotion agency.

Through a global network of offices, Austrade assists Australian companies to grow their international business, attracts productive foreign direct investment into Australia and promotes Australia's education sector internationally.

Austrade provides information and advice that can help Australian companies reduce the time, cost and risk of exporting. We also provide a range of services to Australian exporters looking to expand their business in growth and emerging markets, including:

- information and advice on doing business in international markets
- help with overseas market selection
- identification of relevant overseas contacts
- assistance with market entry and expansion
- identification and follow-up of specific international business opportunities.

We also administer the Export Market Development Grant (EMDG) scheme – the Australian Government's financial assistance program for aspiring and current exporters.

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