



Submission on introduction of the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 20 July 2023

The Australian Trade and Investment Commission ('Austrade') welcomes the opportunity to comment on the changes proposed under the Crimes Legislation Amendment (Combatting Corporate Crime) Bill ('the Bill') 2023.

A major part of Austrade's role is to work with all levels of Australian business through its network of 80 offices in 60 countries to facilitate foreign trade. Eligibility for Austrade service includes requirements that Australian companies demonstrate adherence to ethical business behaviours and compliance with the law (domestic, extraterritorial, and foreign).

Proposed changes, placing the onus on business to take 'adequate procedures' to avoid a charge of 'failing to prevent' bribery will have a significant impact on the way business considers their supply chain practices and corporate responsibility. Anecdotally, business appears to commonly insulate management from the manner of conducting business in low governance jurisdictions; relying on the in-country expertise of agents, contractors and their employees to navigate the risk of winning business illegally, assuming the risk and punishment lies in the hands of the perpetrators off-shore.

Responding to a recommendation of the OECD in 2015, Austrade published a guide to use of foreign agents. Local agents are often effective because of their inside understanding of conducting business, but also a prime out-source for business to conduct bribery, expanding the definition of 'associate' will make clear the wider responsibility of those (including 'agents') who must comply with Australian anti-bribery law. Austrade supports inclusion of agents as 'associates' in the proposed legislation.

Many issues for business appear to arise from interpretation of what may constitute a 'benefit' under existing law. Habitually, business is concerned as to what constitutes 'lavish entertainment', whether support for a visa is an undue benefit, appropriateness of gifts, charitable or political donations and sponsored travel are all raised with Austrade as questionable examples of undue benefits that may constitute a bribe. Providing an expanded definition of 'advantage' will hopefully make it easier to secure the evidence necessary to support domestic prosecutions.

Judicial interpretation may provide guidance in considering the practical application of strict liability for management all acts of any 'associate' engaged by the business anywhere in the world, connected by supply chains. Case law will support the application of a new standard of corporate responsibility and signal the need for business to address before engaging in trade in a foreign jurisdiction.

Whilst prosecution may be an instructive and inevitable consequence of a broadened interpretation of bribery of a foreign official, business could be encouraged to better engage and self-report, seek guidance and legal advice and find the resources to implement effective risk management of their risk of bribery, if given incentive to comply and co-operate. Suspended sentences, enforceable undertakings, a practical interpretation of responsibilities for the actions of

associates and practical interpretation, not just as to what constitutes improper influence (per s70.2A (3) bust in the same way examine the any procedures that had been implemented and their adequacy in the early introduction of changes to the law.

Clear interpretation of the standards expected of Australian business off-shore, with a real risk of being caught and punished, will help business know the bar to be met and establish Australia's anti-bribery legislation as an international standard for the region especially for other [developing] countries as an example of what is needed to deter bribery.

Concerns expressed by business to Austrade that they cannot compete with companies that do not have to comply with such strict anti-bribery regime or that business cannot be conducted in some jurisdictions without the appropriate undue payment are mistaken and missing the point of safeguarding their business from the consequences of inevitable prosecution, under Australian or laws of other countries as the response to corruption in trade coalesce.

It is the position of the Government that whilst these laws only apply to Australians and Australian companies, Australia will not be a source of corruption to its trade partners with the onus on business of protecting itself.

Business will also benefit from guidance on what procedures are 'adequate'; in the circumstances of their industry, country of trade, size and structure. Many of the steps a company can take to establish a compliant anti-bribery program have been promulgated by Austrade, other government agencies and civil society continuously since the Securrency case in 2009.

Staff training and materials to help identify and report bribery; for top management to set the tone from the top and treat this crime as a business risk, to engage in professional risk assessment and implement a system of due diligence checks are familiar requirements. It would be beneficial to have Guidance Principles accompany the introduction of new laws, similar to that accompanying the UK Bribery Act 2010

Of particular importance, will be providing clear advice on how to effectively implement measures that are practical, cost effective and allow business of all sizes be able to adopt as part of unusual risk management in securing business. Austrade's experience is that often, particularly for small to medium enterprises ('SME's') many often do not have the resources or have failed to consider the risks presented off-shore, opting to navigate local conditions as they arise.

Should legislation be passed criminalising corporate responsibility for acts of 'associates' in the supply chain of any Australian company unless adequate steps have been taken to prevent foreign bribery, Austrade will make company preparedness for this risk a pre-condition of access to its services.

Anecdotal, business often appears to consider extraterritorial laws on foreign bribery as optional due to the way business appears to be conducted in some jurisdiction; a theoretic risk given lack of prosecution and (false) belief that much of the risk can be transferred to agents or left to the discretion of local operators to navigate the laws required for clean business.

In Austrade training, the distinction is made between a lone non-compliant employee and an organisation without any adequate procedures as the difference between a 'bad apple or a bad tree' with the judicial judgement that would be made on the extent to which a business has sought to be compliant.

Whilst extensive advice, training and materials are available from Austrade and other government and civil society organisations dedicated to raising the standards of practice and adherence to the law, more should be done to avoid adoption of generic 'bolt-on' compliance packages designed to

provide the appearance of engagement with this issue with genuine understanding and mitigation of the risk.

The proposed amendments again miss the opportunity to out-law ‘facilitation’ payments, making Australia one of the few OECD countries that maintain the artificial difference between a legal facilitation payment and an illegal bribe. It is also confusing for business conducting business in a jurisdiction where such payments are a common part of everyday commerce and difficult to distinguish from a breach of Australian law. As a matter of policy, Austrade will not provide or advise business to make such payments.

The proposed change to the law will mean companies that already have compliance programs in place will re-evaluate these for “adequacy,” of their anti-corruption policies and procedures, and those companies that have none will need to seriously re-consider their heightened risk.



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