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Committee Secretary

Senate Economics Legislation Committee
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Parliament House
Canberra ACT 2600

By Email: economics.sen@aph.gov.au

Dear Secretary

I refer to your letter the President of the Law Society of South Australia dated 14 July 2015 which was in turn passed to me as a person interested in making a contribution.

It appears that Australia attracted significant criticism from the OECD in its last round Country evaluation. Whether or not that criticism was warranted it is apparent to me that in many respects Australia has gone further in addressing issues related to bribery of foreign officials than is required by its OECD obligations.

Diaspora Legal

Diaspora legal is a law practice which focuses on cross border issues and advice to entities doing business internationally. Its principle also provides inbound representation to foreign businesses doing business in the Republic of Indonesia.

An Economic Impact

The OECD treaty seeks to address the long term economic impact of bribery on economic activity by imposing equal standards on its members such that no member may obtain a 'free rider' advantage by not sharing the short term economic cost of its entities refraining from gaining the advantage of business obtained through bribery of foreign officials.

Any country which exceeds the standards set will economically penalise its own business entities and set them at a comparative disadvantage to the entities of other member states.

Australian entities conducting business, increasingly including Small Medium sized Enterprises, face a number of additional considerations when dealing internationally. Additional uncertainties arising from the application of Australian law and own govt policy beyond that required by the OECD treaty are an impost upon economic activity and its productivity which are not shared by other OECD member entities.

It is my submission that if Australia views the OECD convention standards as insufficient to address desired policy objectives, then the appropriate course is to seek to amend the treaty



binding upon all members such that all members state entities are on a level playing field and so that the presumptions implicit in extending the proscribed matters may be tested in international diplomacy and policy setting.

The criticisms of Australia levelled by the OECD in its previous country evaluation and Australia's subsequent agency response appear to have proceeded upon the assumption that Australia's response was substandard and we needed to lift our game, whereas I have read no analysis which outlines the gap between OECD convention obligations and the Australian Criminal law which points out that Australia's criminalisation of conduct exceeds that required of it by its treaty obligations.

Australia Exceeds its OECD Convention Obligations

The manner and structure of the legislation in its expression in Australia differs substantially from the structure of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions itself. Accordingly commentary and material directed to the source treaty itself is of limited utility in the Australian context either when seeking to rationalise the underlying policy or provide legal advice.

The conduct to be proscribed by the OECD convention is simply and elegantly expressed at article one, almost as if it were drafted by the South Australian Parliamentary draftsman.

Bribery of a foreign official is "*intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*" Complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.

The Commonwealth of Australia Criminal Code however provides at s70.2 of the Schedule to the Criminal Code Act provides that it will be an offence if :

- "the person: (i) provides a benefit to another person; or (ii) causes a benefit to be provided to another person; or (iii) offers to provide, or promises to provide, a benefit to another person; or (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and (b) the benefit is not legitimately due to the other person; and (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to: (i) obtain or retain business; or (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person)"
- Division 12 of the Criminal Code then establishes a comprehensive scheme for corporate criminal responsibility.



- A body corporate is liable for an offence committed by an employee, agent or officer acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, if the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence. Such authorisation or permission can be established by:
- proving that the board of directors or a high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence
- proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or
- proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

The astute and reasonable reader possessed of commonsense and an appreciation of elegance of expression as all committee members are may begin to get the feeling that there is a Heath Robinson machine in operation.

In several respects the Commonwealth Criminal Code goes beyond what is required by its OECD obligations.

Exercise of Jurisdiction

Article 4 of the OECD convention deals with the jurisdiction which Australia is required to exercise with respect to the offence of bribery of a foreign official. Australia is to exercise criminal jurisdiction:

“when the offence is committed in whole or in part in its territory” (Article 4.1);

“its nationals for offences committed abroad” (Article 4.2);

“When more than one party has jurisdiction...at the request of one of them...the most appropriate jurisdiction for prosecution” (Article 4.3)

the Criminal Code extends jurisdiction when :

“the conduct constituting the alleged offence occurs wholly outside Australia” ...“and at the time of the alleged offence, the person is a resident of Australia” (s70.5(1)(b)(i))

and has no stipulation that Australian jurisdiction will be limited to the situation where it is “the most appropriate jurisdiction for prosecution”.

Submission 1: Australia ought not specifically criminalise the conduct of non-citizens with respect to bribery of foreign officials where that conduct has no territorial connection to Australia.



Submission 2: Australia ought only exercise criminal jurisdiction with respect to bribery of foreign officials where it is “the most appropriate jurisdiction for prosecution”

Context of Conduct

The OECD Convention confines the proscribed conduct to that “in the conduct of international business” (Article 1). The Criminal Code has no such constraint on scope of conduct which is criminalised and could include persons engaged only in foreign domestic business.

Submission 3: Australia limit the offence of bribery of a foreign official to circumstances “in the conduct of international business”.

To a foreign public official

The OECD convention offence requires that the undue pecuniary or other advantage is offered, promised or given, whether directly or through intermediaries *to a foreign public official*.

The Australian Criminal code proscribes conduct where the subject may be *any* person.

Under such a regime, one wonders if the fund for asbestos compensation could have been set up if s70.2 of the Commonwealth Criminal Code applied to an intention to influence a domestic public official.

Many are the cases where a business engages in what is often termed Corporate Social Responsibility. This can involve conferring benefits on entities who are not otherwise legitimately entitled to expect to receive any benefit from a corporation. Well utilised sponsorships, corporate philanthropy and public relations combine to make it easy for a government to act favourably toward a corporation. It is not a criminal offence in Australia to do that domestically, even when a specific decision is in mind.

A sort case study in the context of the criminalisation of third party benefits illustrates some of the vexed questions Australian business and their legal advisors must face under the current extended criminal code regime.

Annexure A to this submission is a corporate release of information through the ASX arising out of Santos extricating itself from the Lapindo mud volcano disaster in Indonesia.

The corporate responsibility angle was well articulated by Santos:

“The Sidoarjo mudflow incident, most particularly the impact on the local community, has been of considerable concern to Santos. Throughout this time, Santos has behaved responsibly to support the relief efforts, now being coordinated by the Indonesian Government,” Mr Knox said. “Indonesia will remain at the core of Santos’ Asian growth strategy. We will continue to focus on building our Indonesian exploration and production operations, and support our various regional community development programs.”

In structuring the deal which involved a \$25m payment to a company associated with Indonesian Cabinet Minister Bakrie and turning over the residual of the Santos Indonesian business to another company so associated the breadth of the Commonwealth Criminal Code provisions must have weighed heavily upon the minds of everyone involved.



Here was a corporate action unashamedly performed in a way to preserve the ability to do business in Indonesia in the future by behaving responsibly toward the community and making payments which it was not obliged to make to people who were not previously entitled to receive them.

It was not a headache which would have been necessarily shared by a Santos competitor from another OECD country.

Submission 4: Australia limit the criminalisation of conduct to that required by the OECD convention in that the undue pecuniary or other advantage be offered promised or given (whether directly or by intermediaries) to a foreign public official.

Each of the above areas where Australia criminalises conduct not within the scope of the OECD obligations creates an economic impost on Australian business entities in excess of that required. The economic rational of maintaining those imposts has not been clearly articulated.

Submission 5: Australia not seek to extend the criminalisation of business conduct overseas unless it is part of a considered economic policy in Australia's national interest.

Presumptions

The criminal code places an evidentiary burden on the accused to show that the conduct was lawful in the territory of the public official. This places a difficult and unfair burden on an accused of attempting to prove a negative.

Submission 5: It out be an element of the offence of bribery of a foreign official that the conduct is unlawful in the territory of the foreign official rather than a defence that it was lawful.

Agency Presentation of the Law

Annexure 2 to this submission is an internal Austrade Training presentation.

Official OECD Commentaries to the Convention (paragraph 9) clarify that "small facilitation" payments do not constitute payments made to obtain or retain business or other improper advantage within the meaning of paragraph 1 and, accordingly, are also not an offence."

Facilitation payments are generally payments to obtain something lawful, in a lawful manner.

They can be lawful or not depending on foreign law but are not required to be criminalised by the OECD convention.

However, Australian agencies such as Austrade are miscategorising facilitation payments as bribes (s23 of Austrade Training presentation) and then implementing a policy of reporting everything they have classified as bribes for investigation and prosecution (25 of Austrade training presentation).

This may lead to prudent legal advice that Australian entities not engage with Austrade in their international dealings lest they be exposed to a misguided prosecution for conduct which is lawful.



Submission 6: Australian Agencies obtain training in the law as it stands so that they may understand clearly the difference between a facilitation payment and a bribe and be able to articulate that a facilitation payment is lawful under Australian law and a bribe is not.

Submission 7: Agencies refer business entities to providers of legal advice rather than seek to provide advice to entities themselves.

Training and Corporate Culture

Diaspora Legal is licensed to practice law and provide training directed at creating and maintaining a culture of corporate compliance with anti-bribery legislation.

We have observed a lack of understanding of what it requires to create and maintain a corporate culture of compliance and have developed our own programme.

Our programme includes the following topics:

Tone at the Top - A commitment from senior management and a clearly articulated policy against corruption.

Code of Conduct and Compliance Policies - The code of conduct is the foundation of an effective compliance programme. Policies and procedures detailing proper internal controls, auditing practices, documentation policies and disciplinary measures should be in place.

Oversight – Autonomy and Resources: Individuals in charge of oversight should be autonomous from management and should have sufficient resources to ensure the programme is implemented correctly.

Risk Assessment - Companies should analyse and address the particular risk it faces.

Training - Companies should take the appropriate steps to ensure that the policies and procedures have been communicated throughout the organisation.

Incentives and Disciplinary Measures - Clear disciplinary procedures should be in place and the adherence to compliance policies and procedures should be incentivised throughout the company.

Third Party Due Diligence and Payments - Third-parties should be assessed regularly and should be informed of the company's compliance programme and code of conduct.

Reporting - Employees should be able to report violations without fear of retaliation through a whistleblowing mechanism based on confidentiality. The compliance programme and internal controls should be updated after an internal investigation.

Testing and Review - As a company's business and environment in which it operates changes over time, a good compliance programme should be reviewed and constantly evolve over time.



Submission 8: Agencies draw the attention of their clients to firms such as Diaspora Legal who are licensed to provide specific legal advice and capable of providing training targeted at ensuring the creation of a corporate culture of compliance with the law in this area.

Thank you for your invitation to make these submissions.

yours faithfully

Diaspora Legal

Anti-Bribery Workshop

A workshop for Austrade staff on the laws against bribery: how they affect you and how to respond

This instructional anti-bribery presentation is provided as guidance only, not advice and Austrade denies liability for any loss arising from reliance on this material. In any matter regarding legal or commercial decisions, professional advice should be obtained



Australian Government
Australian Trade Commission



IMPORTANT NOTICE

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What will I learn today?



Main forms of bribery and its consequences

Austrade's Anti-Bribery Policy

Anti-bribery laws

How to identify a Foreign Public Official

Risks related to Austrade services

Risks related to working with clients and agents

When and how to advise clients on risks related to bribery

How to report bribery

My obligations

Bribery and its consequences

“...the price of integrity is insignificant compared to the huge cost of a failure of integrity. A failure of integrity in public administration can result in damage to individual reputations and careers, financial loss, court action, long-term damage to agency reputations that would have taken years to build, and ultimately to a loss of confidence in the processes of governance of the state.”

- *Commissioner the Hon. Len Roberts-Smith, RFD, QC, Corruption and Crime Commission of Western Australia, 2010*

“There is no defence for corruption. Corrupt payments destroy business opportunities and drag down economic growth...Corruption undermines both free politics and free markets.”

- *Financial Times editorial, 2009*

“Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.”

- *Foreword to UK Bribery Act 2010*

Bribery and its consequences, *continued*

For organisations and individuals

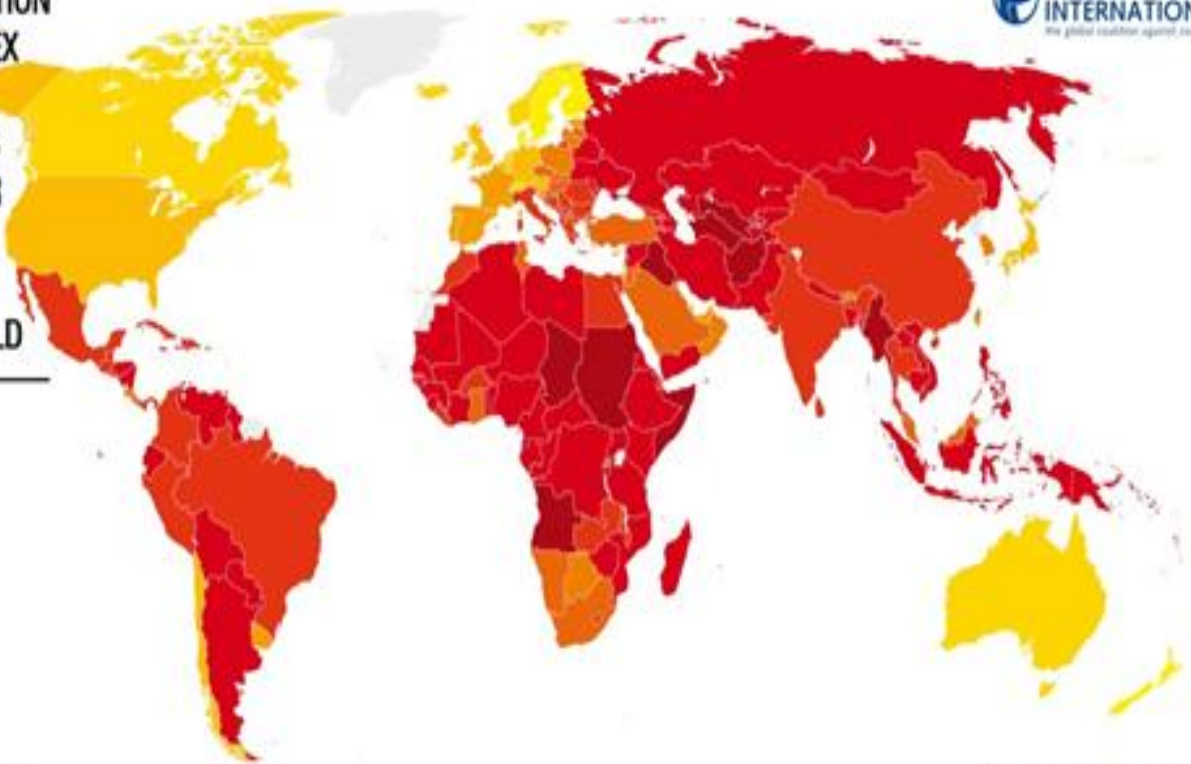
- Fines for organisation
- Fines and prison for employees and officers
- Incurring substantial legal and professional fees
- Reputational damage

For countries and communities

- Lack of money for communities and on-going poverty
- Destruction of industry
- Reduced Foreign Direct Investment
- Loss of faith in public officials and institutions
- Civil unrest and political instability

Global corruption risks

THE 2010 CORRUPTION PERCEPTIONS INDEX MEASURES THE PERCEIVED LEVELS OF PUBLIC-SECTOR CORRUPTION IN 178 COUNTRIES AROUND THE WORLD



www.transparency.org

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Bribery takes many forms



The benefit may not only be money....

Other forms of Bribery

- Gifts
- Hospitality
- Lavish entertainment
- Travel
- Supporting a favoured cause
- Employment
- Donation to a political party
- Education for family members
- Tangible assets

Why must Austrade have a strict anti-bribery policy?

Our activities can have significant potential risks:

- Austrade services can involve activities that may unknowingly facilitate bribery.
- We advise Australian companies on business practices. Ethical conduct and countering bribery is a part of this advice.
- We introduce Australian companies to potential buyers and investors and arrange activities such as trade visits, hospitality, promotion and may pass on gifts.
- We and our clients often deal with foreign public officials (FPOs). There are significant risks attached to seeking to influence the decisions of FPOs.
- We identify agents, distributors and third party intermediaries for Australian companies entering new markets. Agents and intermediaries can be a means of facilitating bribery.

Austrade's Anti-Bribery Policy



- Defines what is considered a bribe
- Outlines Austrade's policy on facilitation payments
- States the responsibilities of *all* Austrade staff based on APS standards of ethical behaviour
- Specifies what must be reported
- Provides reporting procedures depending on whom and what the report involves
- Provides procedures for allegations made against an Austrade client, a foreign company, a Foreign Public Official or an Austrade officer
- Encourages employees to make others aware of their anti-bribery obligations under the law and to make clear to clients that Austrade staff will not assist, carry out, condone or ignore any act of bribery

Austrade and countering bribery

We must:

- maintain Australia's reputation for commercial integrity
- assist Australian companies avoid bribery risks in their activities in overseas markets
- assist clients to work ethically and have strong anti-bribery policies and systems that prevent bribery
- support our employees to work with integrity and to know how to counter bribery risks
- avoid bribery in all its forms, whether it is encountered directly or indirectly



The Legal Environment

- Legal risks from bribery are increasing significantly as a result of international conventions
- **Australia – Section 70 of the Criminal Code 1995 Amendment (Bribery of Foreign Public Officials) Act 1999**
- **2010 UK Bribery Act 1 July 2011**
 - includes obligations to prevent bribery
- **US Foreign Corrupt Practices Act (FCPA) 1987**
 - US authorities are active in prosecuting companies and individuals



Key provisions of laws

- **US Foreign Corrupt Practices Act (FCPA):** this can extend to any company with substantial ties to the US, including subsidiary operations in the USA, a US stock-exchange listing or even using a correspondent bank. The Department of Justice has also successfully prevailed on other countries to extradite the accused to the US, where the courts often impose long terms in prison for such crimes.
- **The UK Bribery Act:** this can be applied to any Australian company carrying on a business or part of a business in the UK.

Key provisions of laws, *continued*

The Australian, UK and US laws have 2 very important aspects:

- **The definitions of bribery are similar. It is an offence to provide anyone an undue benefit with the intention to influence a Foreign Public Official (FPO) to obtain or retain business or business advantage.**
- **The laws are extra-territorial and can apply even if the act of bribery takes place abroad.**

Australian law

Australian **citizens, residents and companies** who bribe or attempt to bribe a Foreign Public Official can be prosecuted **under Australian** law even though the actions happen outside Australia.

Elements of Bribery under Australian law

Under Section 70 of the Criminal Code 1995
Amendment (Bribery of Foreign Public Officials) Act 1999

Bribery involves:

- Providing, offering or arranging a **benefit**
- The benefit is **not legitimately due**
- With an intention to **influence a Foreign Public Official (FPO)** in their **official duties**
- With the motive to **gain or retain business or a business advantage**



Application of Australian law

It is also an offence to:

- Attempt to offer a bribe
- Help any person to offer a bribe
- Get another person to offer a bribe
- Encourage/urge another person to offer a bribe
- Conspire/secretly plan with another person to offer a bribe

Australian and Local laws

Australian laws

- In all cases it is illegal to bribe, attempt to bribe or arrange a bribe.
- The law of Australia applies to Australian citizens, residents and Australian companies.
- Anti-bribery laws (section 70) make acts of bribery overseas by Australian citizens a crime that can be prosecuted in Australia.
- The same standards apply to overseas Austrade staff through work agreements and APS standards.
- Working closely with clients or agents may mean Austrade staff may assist the making of a bribe without knowing the risk.

Local laws

In whatever country you work for Austrade:

- The country probably has laws prohibiting bribery of individuals and companies and especially public officials of that country.

Who is a Foreign Public Official (FPO)?

A Foreign Public Official (FPO) can include:

- An employee/official/contractor of a foreign government body
- A person who holds a position/performs duties under a law/custom of a foreign country
- A member of parliament/legislature
- A member/officer of the courts of a foreign country
- An individual in the service of a foreign government (e.g. police/military)
- An employee/contractor of a state owned or part owned corporation or nationalised organisation (e.g. hospitals, universities and schools)
- An employee/official/contractor of a public international organisation (e.g. United Nations)
- A person who is authorised, or behaves as if they are authorised, to act as an intermediary of FPO



What is an 'undue benefit'?

- A benefit that is not legitimately due to the person who received it
- Includes benefits given to any person, not just to an FPO
- The 'benefit' may go to a person closely related to the FPO
- 'Undue' means it is not an official part of doing the job
- The benefit is undue when it is intended as a personal offering rather than being a necessary or customary part of an official's official duties
- A benefit is not legitimate because it is usual, customary or officially tolerated

To gain or retain business or a business advantage?

- The object of the bribe must be to win or keep existing business
- The FPO must have some influence in deciding who gets that business



What is a bribe?

Fred gains a business advantage

Fred is a briber



**Amy is a Foreign
Public Official**



**Fred offers Amy an
undue benefit**



Tom is a facilitator

**He could be a local agent or may be
an Austrade staff member**



Current penalties

Individuals:

- maximum 10 years imprisonment and/or
- maximum \$1.1 million in fines



Companies:

Fines the greater of :

- \$11 million
- or
- 3 times the value of the benefit
- or
- 10% of annual turnover if a value cannot be determined

The appropriate penalty is determined by a court

Facilitation payments

These payments are common in many countries. We need to know how to resist demands.

Facilitation payments are:

- Small unofficial payments made to secure or speed up a routine government action which an official would normally provide
- Not made to win or retain business
- No foreign country allows this sort of payment to its officials
- Common practice in many countries despite being a form of bribe



These payments are bribes

- **Austrade policy is that officials and employees should not make, arrange or be involved in the making of any facilitation payments**
- Any payments must be documented and reported to your Senior Manager/STC and Manager, Legal Services
- **These are different from demands made that threaten your personal safety or a form of blackmail**

Example – Resisting a facilitation payment

You get a call from a client late on Friday. His furniture is on the docks. He cannot get his items to an Austrade arranged trade show the next morning without paying a \$200 facilitation payment to a local Customs officer to speed up this clearance.

Issues

- Can Austrade advise the client to make this payment?
- Can Austrade make this payment? What is Austrade's policy?
- Is this a bribe or a facilitation payment?
- Is the amount being charged important?
- What if a receipt is given?



Your obligation to report any incidents of bribery

- Refer to Austrade's **Reporting Foreign Bribery Policy** on Austin.
- A file note is required when there is reliable evidence of bribery.
- When you have information relating to an incident of bribery:
 - Advise your Senior Manager
 - Report all information by email to Legal Services at anti-bribery@austrade.gov.au
- Encourage the informant to **report directly** to the Australian Federal Police (AFP). There is guidance on their website.
- STC should advise HoM if in an Embassy or High Commission.
- HR is advised if an Austrade staff member is involved.

Austrade Corporate is the key point of reference.



Austrade's services

We will look at the following:

- Market analysis and advice on market entry
- Identifying potential agents
- Visits for product demonstrations
- Hospitality
- Gifts
- Assistance with visas
- Business Club Australia
- Sponsorship
- EMDG



Client preparation

When dealing with a client:

- Check their approach to anti-bribery
- Do they have an anti-bribery policy and systems in place for detecting and resisting bribery?
- Are they aware of bribery laws and risks?
- Provide them with Austrade's guidance materials and references on anti-bribery
- Make them aware of Austrade's position on reporting bribery

Market analysis and advice to clients

Austrade provides advice to clients on:

- Market environment and characteristics
- Market entry strategies – especially representation options
- Distribution channels
- Practical advice that cannot involve breaking the law

Risks

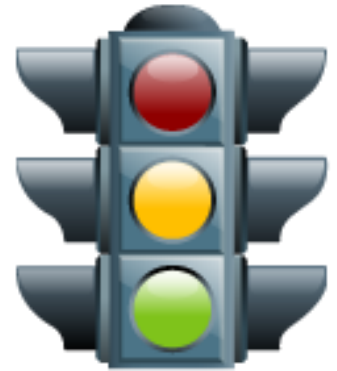
- The client may be unaware of or choose to ignore bribery laws
- The client may have inadequate anti-bribery policies and prevention systems presenting a risk when they enter overseas markets
- The client may not know Austrade's zero-tolerance for bribery and its policy to report any breach to the authorities

Market analysis and advice to clients

Watch points

Always give useful but lawful advice

- Remind the client of their obligation to comply with anti-bribery laws
- Make sure the client knows our legal obligations (we do not tolerate and our policy is to report bribery)
- If corruption is common in the market, mention it carefully
 - Use the TI Corruption Perceptions Index as a reference
 - Also use TI National Integrity Studies and OECD Convention Reviews if available
 - Make sure the client knows Austrade will not make facilitation payments as they are indistinguishable from bribes



Market analysis and advice to clients

Watch points, *continued*

- Advice on use of agents, commissions and mark-ups requires careful wording. Make sure your information clearly informs clients that bribery is a crime and will be reported.
- Make sure you inform clients that facilitation payments should not be offered.
- Make sure you put any advice in writing. This is very important if a bribery incident or accusation of bribery occurs.
- Suggest client uses OECD Risk Awareness Tool for Weak Governance Zones to inform themselves of the local business environment.

Example – Advising clients about a market

An Australian client is bidding for a cleaning tender for prisons. They seek your advice on market entry.

This market sector has a reputation for corruption. All agents recommended by Austrade demand upfront payments of up to 25% to represent the client. No breakdown of the commission is given.

Issues

- Is this demand evidence of corruption?
- Is it Austrade's role to tell a client there are no 'clean' (not corrupt) local agents?
- What other references can the client check?
- If the client pays the money, is Austrade liable for the referral if the payment is judged to be bribery later?



Identifying potential agents

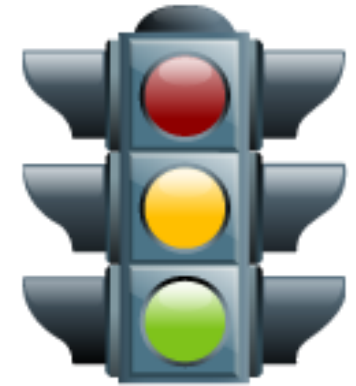
Austrade identifies and suggests potential agents and distributors to its clients

- We provide background information including:
 - Information Austrade has on past experience of the agent
 - Commercial standing
 - Representation capabilities - marketing, business development, distribution, servicing etc
 - Known affiliations
 - Publicly available information (including media)

Risks

- The agent has links to the buyer and/or to an FPO
- The agent has a history of paying bribes or corrupt practices
- The referral is mistaken as endorsement by Austrade

Identifying potential agents



Watch points

- Provide a list of 3 or more potential agents wherever possible. The selection must be made by the client.
- Avoid using agents who have (or are suspected of having) a business involvement with an FPO.
- Avoid agents known to engage in other 'red flags' or signs such as close connections with FPOs or side businesses.
- Avoid becoming a frequent channel of communication between the client and the agent.
- We provide background checks, **not due diligence.**
- **Make sure that our legal disclaimer is given in every written communication.**

Example – Agents and FPOs

A state power company is tendering for transformers. A client asks Austrade to recommend local agents to bid for them. You prepare a list of companies. One of the proposed agents is related to the Minister deciding the tender.

The client appoints this agent's company and wins the tender.

The agent demands a success fee which raises his commission to 40%. The exporter is shocked.

Issues

- Is this a bribe? Why wasn't a success fee written as part of the agent's contract?
- Could the client complain about Austrade's referral?
- Should Austrade be careful in referring known associates of decision makers?



Visits for product demonstrations or site visits

Austrade facilitates visits to Australia by potential buyers and investors

- The visit may include:
 - site visits
 - product demonstrations
 - ceremonial contract signing
 - VIP introductions
- Hospitality is usually associated with these events
- Austrade's client will usually meet the cost so it can be easy to attempt to influence a decision maker by providing benefits in the course of a visit
- Austrade may provide logistical support (e.g. travel arrangements, hotel bookings, visas, presence of dignitaries etc.) but should not be involved in providing excessive benefits in the form of hospitality

Visits for product demonstrations or site visits

Risks

- Lavish hospitality (including travel costs)
- Expensive gifts
- Insufficient business purpose
- Cost and duration of the trip is not proportional to the business that is meant to be conducted



Watch points

- Assess and document the proposed event to show a valid business case for visit and the itinerary.
- Recreational and shopping stopovers cannot be part of Austrade's support
- Austrade will not pay for accompanying family members
- Accommodation, meals, entertainment, visits (and associated 'benefits') must reasonably relate to the purpose of the trip

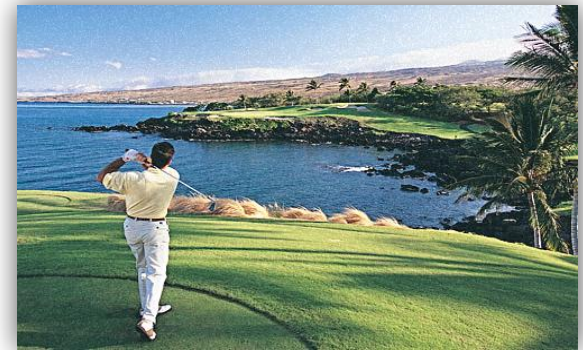
Example – Visits for product demonstrations

A client asks you to organise a demonstration of software for a group of government officials at an island resort.

Golf is a major attraction. They plan to fly first class and stay in 5 star accommodation.

The product demonstration takes an hour.

Golf and shopping are planned for the rest of the week.



Issues

- Should Austrade help arrange any part of this trip?
- Is an undue benefit involved?
- Do the activities and standard of facilities matter?
- Is the work/play balance reasonable?
- What risks should Austrade advise the client of?
- What if the official's employer agreed to the itinerary?

Hospitality

Hospitality is a common element in business interactions. It is used to initiate or develop relationships and a normal part of business dealings.

We want clients to use hospitality but always to be cautious with the standard and extent of hospitality.

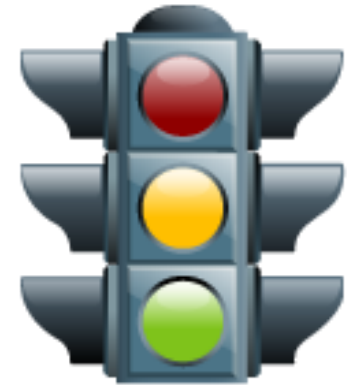
Risks

- Lavish, disproportionate or over frequent hospitality can be used to gain an advantage
- Can place the recipient under obligation and attempt to influence their decisions
- Excessive hospitality can be a way to buy influence and not proportionate/reasonable to the work being done

Hospitality

Watch points

- Distinguish between ‘reasonable’ and ‘lavish’ hospitality, particularly where it is not reasonable or appropriate to the business purpose
- Anti-bribery laws recognise hospitality can be a form of bribery
- Hospitality at Austrade events or personal entertaining by Austraders should be given responsibly and not be excessive
- Make sure anything provided to an FPO is only necessary for them to carry out their job
- Carefully follow procedures and document the purpose of the hospitality
- Be aware of how hospitality may be seen by others



Example - Providing lavish hospitality for a FPO

An Australian client wants to meet with a foreign Minister responsible for deciding a business deal that the client wants to win.

The Minister agrees and suggests dinner in a private room at an exclusive, very expensive restaurant with a live performance by a world renown singer. Austrade is asked to arrange.



The hospitality could breach bribery laws as well as Austrade policy.

Issues

- Is the venue reasonable or proportionate to the business purpose?
- If this is a common/customary style of entertainment, does that make this ok?
- If it is excessive in your assessment, how can you make sure Austrade is not at risk? What can you advise your client?
- If Austrade is not involved in the arrangements, is it ok to attend anyway?

Assistance with visas

- Austrade may be requested by Australian businesses, overseas customers or potential investors to assist them in seeking Australian visas for overseas business contacts.
- Austrade can assist by:
 - providing details of the application processes
 - providing referral details if requested by DIAC
 - checking with DIAC officials that paperwork has been received
 - seeking DIAC advice on whether further information is required
- Those applying for visas can include business people and FPOs
- Clients or overseas visitors may offer bribes to attempt to obtain Austraders' support in gaining a visa
- An FPO may be judged to have received a benefit by the granting of a visa related to the awarding or retaining of a business contract

Assistance with visas



Watch points

- Follow the official visa application procedure.
- Do not provide individual favours or variations unsubstantiated by the purpose of the visit.
- Ensure the visit has a genuine purpose and has relevant business content.
- Provide objective advice if asked by DIAC on the applicant (use existing forms). Do not vouch for the applicant.
- If relatives, personal staff etc are involved, ask for details and document them.
- Ask no favours of DIAC staff.
- Do not comment to clients on outcome or timing.

Example – Assisting with visas

You are approached by a senior aide of a Foreign Minister. He requests urgent assistance to visit Australia including multi-entry visas for the Minister's wife and 2 staff members. Your assistance may help an Australian company win a tender the Minister is deciding.

Issues

- By supporting a multiple entry visa to the Minister and his wife and staff would Austrade be providing a benefit to an FPO? Might this break bribery laws?
- What is the aim of the visit?
- Is the visit a benefit or just a part of the Ministers' proper functions?
- Is there a valid reason for all those in the group to visit?
- What can you tell DIAC?
- What can you do for the Minister without breaking the law?



Sponsorships

- Austrade sponsored events may be used by Australian companies to seek to influence FPOs
- Government 'endorsement' can be persuasive
- Be aware of benefits provided to FPOs through Austrade sponsored events (e.g. at trade displays) which may be in breach of bribery laws

Watch points

- Show great care with single company events (i.e. if agent is known to be suspect).
- Be aware of the possibilities of benefits to FPOs under the outside appearance of sponsorship.
- There are new rules on use of sponsorship benefits when not part of original sponsorship, especially sponsored tickets.



EMDG (Export Market Development Grants)

An Australian exporter of mining equipment claims EMDG reimbursement for the cost of maintaining an overseas representative. The representative is related to the Minister for Gas, Mining and Energy. Also some of the 'free samples' appear to incorporate diamonds.

Issues

- When assessing the claim, can an auditor report these as possible bribes?
- What is Austrade's position if there is a reimbursement of these suspect expenses?
- What if this appears to be an arrangement to share the grant with the overseas representative?



What have I learnt today?

Remember

- Bribery is a crime. People go to jail, and/or get fined, companies get fined.
- Document all understandings when providing services.
- Ensure the client gets the disclaimer and knows Austrade's position on reporting bribery.
- Be alert for warning/danger signs.
- If in any doubt, seek advice from the Manager of Legal Services.

What have I learnt today?



Remember

- Document all advice to clients
- Be alert for warning/danger signs
- If in any doubt, seek advice from the Manager of Legal Services