Anti-bribery Strategy for Australians doing business in India

Presented by David Tonkin
Chief Legal Counsel, Austrade
June 2017
Key Messages

1. Bribery is a business risk
2. The Laws and approach to foreign bribery is changing
3. The Australian Government can help business
4. Australian business can help itself
WHY IS THIS IMPORTANT FOR AUSTRADE CLIENTS?

The Australian Government expects Australian companies to conduct their business ethically and with integrity both in Australia and overseas.

All countries have laws that prohibit the offering or giving a benefit to government officials to improperly influence their official actions.

Individuals and companies need to know how to protect their reputations and interests – commercially, socially and legally.

As an arm of Australian Government, Austrade protects its reputation and that of Australian business: supporting business do the right thing.
Source: Transparency International
‘Corruption Perception Index 2016’
ASIA PACIFIC RANKINGS

Source: Transparency International
‘Corruption Perception Index 2016’
PERCEPTIONS OF BUSINESS PRACTICES IN INDIA

80%
Bribery/corrupt practices happen widely

59%
Companies often report financial performance better than it is

52%
Offering gifts to win business justifiable to help a business survive

27%
Cash payments to win business are justifiable to help a business survive

Source: EY ‘Fraud and corruption – the easy option for growth? Europe Middle East, India and Africa Fraud Survey 2015’
### Recent Developments in India

#### India at a glance
- 1% of India’s population currently pay taxes
- Structural reforms are changing India’s regulatory environment

#### Demonetization
- High value banknotes banned
- Push toward cashless society

#### Tax reform
- New GST regime unites country’s tax structure
- Expected to make India an easier place to do business

#### Other
- US review of H1-B visa
- Investment in affordable housing
- Internet and telecommunications
- Foreign investment initiatives
**REGULATION OF FOREIGN BRIBERY IN INDIA**

**International standing**
- Ratified the UN Convention against Corruption in 2011
- Ranked 79th on the CPI 2016

**Bribery is a crime**
- Prosecution for abetting or attempting to abet a public official to accept a bribe.
- Penalty of up to 7 years imprisonment and/or fine (Prevention of Corruption Act 1988)
- If involving a public official, can be prosecuted under Australian law.

**Facilitation payments are illegal**
- No defense under Indian law for facilitation payments

**Improved regulation**
- The Companies Act 2013 – corruption and bribery involving a company
- Whistleblowers’ Protection (Amendment) Bill 2015 - enhanced protections for individuals that disclose corruption
- The Lokpal and Lokayukta (Amendment) Act 2016 - enabling ombudsman investigations
- Prevention of Corruption (Amendment) Bill 2013 – introduction of a new corporate offence. Still under consideration

** Enforcement on the rise**
- Central Vigilance Commission own motion investigations
- Serious Fraud Investigation Office investigations
- Supreme Court of India
RECENT CASES

- **Anheuser Busch**
  Third party sales promoters used to make improper payments to government officials

- **Cadbury India**
  Bribes paid to obtain licenses and approvals for a chocolate factory

- **CryptoMetrics**
  Payment of bribes to government officials to obtain contract for facial recognition security system

- **Pride International**
  Improper payments to Customs Tribunal using third parties

- **AgustaWestland**
  Payments to win contract for sale of luxury helicopters to government

- **Walmart**
  Payments to customs officials to facilitate the movement of goods through customers and to secure real estate approvals.
FOREIGN BRIBERY OFFENCES
UNDER AUSTRALIAN LAW
Providing, offering or arranging a benefit

The benefit is **not** legitimately due

With an intention to **influence** a Foreign Public Official in their official duties

With the motive to **gain or retain** business or a business advantage
AGENTS & INTERMEDIARIES
AND WHY USING THEM CAN BE RISKY
**AGENTS AND INTERMEDIARIES**

- **Vet, select and manage local staff as your own**
  - A business is responsible for the integrity of its *whole supply chain*. Cannot outsource bribery

- **The best agents often have (corrupt) connections to Government**

- **Excessive commissions**
  - Commissions can be a source of funds to bribe

- **Consider if these agents are **really** ever working for you, given their connections with Government**

- **OECD specifically warn on use of agents – Austrade has produced a guide**

- **Austrade’s policy**
  - Referral of 3 ‘un-blemished’ agents
FACILITATION PAYMENTS
AND WHY YOU SHOULD AVOID THEM
Facilitation payments are a **business risk**, not just a nuisance or part of the costs of doing business.

- Small payments to speed a usual process
- Banned in all but 4 OECD countries
- Can be mistaken as bribes
- Illegal in local jurisdiction & other jurisdictions (e.g. US and UK)
- A risky practice at best.
- Often perceived as acceptable
- Loss of Australian Government support in foreign markets
PRINCIPLES AND PRACTICAL GUIDANCE
FOR COUNTERING FOREIGN BRIBERY
OBVIOUS WARNING SIGNS

• Operating in a corrupt market. No reliable law
• Large contracts/tenders in state run economies
• All levels of FPO’s & Middle men
• Excessive commissions to agents, distributors, consultants
• Questionable payments, cash, offshore accounts, irregular requests for money, 3rd party
• Excessive hospitality/entertainment/Gifts
• Lack of proper documentation/phoney receipts
• Secrecy - no public record. Nothing in writing
• Business done based on relationships
HOW TO PREPARE YOUR BUSINESS

1. A clear anti-corruption message from the top
2. An effective internal compliance system
3. Effective training and monitoring practices (esp. agents)
4. Oversight and reporting mechanisms (incl. financials)
5. Awareness of laws (local and international) & market
6. Policies: agents/gifts/facilitation payments/hospitality
7. Financial controls
8. Job monitoring and rotation
9. Testing and recording knowledge
10. Professional advice & external audit
11. A willingness to engage, not avoid or outsource
### AUSTRADE OBSERVATIONS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Be ‘export ready’</td>
<td>• Know and address the market environment</td>
</tr>
<tr>
<td>Prioritize compliance</td>
<td>• ‘I may be caught bribing but I will get fired if I don’t get this business’</td>
</tr>
<tr>
<td>Use collective market power</td>
<td>• SMEs (even competitors) band together; engage officials Communicate. Use market power</td>
</tr>
<tr>
<td>Extra-territorial reach</td>
<td>• Web of international laws (FCPA, UK laws) – hard to avoid. Money movement requires approval from the top</td>
</tr>
<tr>
<td>Long term Risk</td>
<td>• Putting future of company in corrupt hands</td>
</tr>
</tbody>
</table>
**AUSTRADE OBSERVATIONS**

<table>
<thead>
<tr>
<th>Category</th>
<th>Observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Willingness to confront</td>
<td>• E.g. ‘Trucks drivers in India’ / ‘Pallets in China’ (harder for SME’s)</td>
</tr>
</tbody>
</table>
| Reputation                | • Loss of face and ongoing public suspicion.  
                              • Do shareholders accept this risk?                                                                                                       |
| Quality of Business       | • Bribes are indicative of other failures e.g. poor goods/services                                                                           |
| Staff                     | • Train staff early and often  
                              • Staff and managers like certainty, so be strict  
                              • Staff are owed a level of protection                                                                                                    |
| Many fronts               | • Laws are changing. Senate Inquires. OECD etc.  
                              • Detection better (big Data)  
                              • Willingness to pursue (extra funding)                                                                                                  |
Conviction rates: The AFP have 27 current investigations for foreign bribery.

Social/economic/legal changes: Coalescence of forces force companies to act

Judicial guidance: Convictions will provide judicial guidance on key legal issues (relationship building; lobbying)

OECD -pressure to improve regulation of bribery & corruption.

Deferred prosecution agreements.

Whistle-blower bounties and money laundering laws.

New corporate failure to prevent bribery offence.

Facilitation payments defence remains unchanged.
### CHANGES TO AUSTRALIAN LAW

<table>
<thead>
<tr>
<th>Australian Law is about to change</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extend definition of foreign public official – incl. ‘candidates’</td>
<td></td>
</tr>
<tr>
<td>Replace ‘not legitimately due’ for ‘improperly influence’</td>
<td></td>
</tr>
<tr>
<td>Extend ‘business advantage’ to ‘personal advantage’</td>
<td></td>
</tr>
<tr>
<td>Add offence to bribe ‘recklessly’</td>
<td></td>
</tr>
<tr>
<td>New offence of ‘failure to prevent’ foreign bribery</td>
<td></td>
</tr>
<tr>
<td>Add offence to bribe a foreign official when not in ‘their official capacity’</td>
<td></td>
</tr>
<tr>
<td>State of mind. No <em>specific</em> advantage or person advantaged in mind</td>
<td></td>
</tr>
<tr>
<td>Deferred Prosecution Agreements (DPA) &amp; False accounting offences</td>
<td></td>
</tr>
<tr>
<td>Facilitation payment defense – A debate for some industries</td>
<td></td>
</tr>
</tbody>
</table>
# PRACTICAL ASSISTANCE FROM GOVERNMENT

## The role of AUSTRADE

- Leverage the ‘Badge of Government’
- Trade commissions can spot an opportunity and a threat
- Intelligence on the ground – business conditions / economic diplomacy
- In person representation, negotiation and support
- Guidance on agents and facilitation payments
- Referral to lawyers, auditors, investigators
- A suite of free anti-bribery materials on website
- Escalate as a market access issue with Government
- Assist international initiatives to strengthen anti-corruption efforts in key Australian markets
<table>
<thead>
<tr>
<th><strong>GLOBAL CHANGES</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Changing attitudes – prosecuting corruption is popular. Keeps business in line. Shows the system is working</td>
</tr>
<tr>
<td>Public officials are a good starting point</td>
</tr>
<tr>
<td>Reporting indicates detection (not necessarily an increase in rates of bribery)</td>
</tr>
<tr>
<td>Trump &amp; Sessions – No fan of FCPA or to be World cop. But Attorney Gen. is hard on white collar crime. Protectionism is temporary</td>
</tr>
<tr>
<td>Competition will price out bribers (indicative of other failings). Short term fix.</td>
</tr>
<tr>
<td>Global impatience with entrenched (state sponsored) corruption</td>
</tr>
<tr>
<td>Discouragement of trade and investment [do ‘too harsh’ laws prevent overseas investment]?</td>
</tr>
<tr>
<td>Companies requiring ‘ethical partner’ undertakings</td>
</tr>
</tbody>
</table>
KEY TAKEAWAYS

1. Bribery is a **business risk**
2. Bribery leaves the **payer vulnerable** to prosecution and extortion
3. Business must set an **ethical tone from the top**
4. Business must adapt to more a complex risk environment.
5. Implement an **effective compliance system**
6. Be **alert** to warning signs
7. Companies should **never pay a bribe**
THANK YOU

For further information, please contact
David Tonkin
Chief Counsel, Legal Procurement & Fraud
Australian Trade and Investment Commission
david.tonkin@Austrade.gov.au
+61 2 93902807
+ 0419297018