Australian anti-bribery laws. Implications for Australian business and foreign investment.

Presented by David Tonkin
Chief Legal Counsel, Austrade
Perceptions of business practices in Asia Pacific:

- 32% do not conduct any audits or reviews on their third parties.
- 25% do not have confidence in their organisation to protect whistleblowers.
- 32% believe it is justified to offer cash payments to win and retain business.
- 85% want their organisation's anti-bribery and anti-corruption (ABAC) policies to be simplified and localised.

Source: EY 'How should over-burdened compliance functions respond?', APAC Fraud Survey 2017

Corruption perceptions index, 2017:
- Very clean = 100
- Average score: 43

Countries with the highest corruption perceptions:
- Somalia
- Iraq
- Russia

Countries with the lowest corruption perceptions:
- New Zealand
- Singapore
- Britain
- United States
- Israel
- Rwanda
- Saudi Arabia
- Jamaica
- Bahrain

Rank out of 180 countries:
- Worst
- Best

Source: Transparency International
AUSTRALIA’S EXTRA-TERRITORIAL ANTI-BRIBERY LAWS

› International obligations:
  – OECD Anti-Bribery Convention
  – UN Convention against Corruption

› Domestic laws enacted in 1999:
  – Foreign bribery offences under s.70 Criminal Code Act 1995:
    – Applies in/outside Australia to Australians & Australian companies

- 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
Australian Wheat Board (AWB) 2007 - 2018

- AWB made significant payments to the Iraq government, allegedly in contravention of international law (UN Wheat-for-oil program).
- No criminal proceedings brought because anti-bribery laws were inadequate
- Civil proceedings brought against AWB executives were unsuccessful.

Securency International Pty Ltd 2011 - 2018

- First anti-bribery, criminal prosecuted in Australia.
- Charged with bribing foreign government officials to secure polymer bank note.
- Former executives were also charged.
- 8 years later, trials abandoned.

Lack of detection or reliable evidence fails to get convictions. Laws and methods to change
Vietnam’s Anti-Corruption Law 55/205 is amongst the best anti-corruption legal frameworks in Asia but implementation is difficult.

Laws in Vietnam criminalises:

- Taking, offering and brokerage of bribes (article 3)
- Advantaging upon the exchange of a bribe (article 40)

The new (2018) Penal Code No 100/2015/QH13 establishes anti-corruption legislation and sanctions for:

- Receiving or giving bribes
- Acting as an intermediary for bribes
- Public official or not

Penalties

Life imprisonment or capital punishment, significant fines, confiscation of property.
Ranked 171 out of 180 countries on Transparency International’s Corruptions Perception Index 2018.

- Scored 33/100 (0 = highly corrupt 100 = very clean).
- Fell 10 places compared to 2017 when it scored 35 points.

2018 Mekong Development Research Institute survey showed corruption (16%) was the third leading concern of the respondents, after employment (24%) and air pollution (17%).

Over two thirds of respondents believe that corruption will fall in the next five years due to the country’s anti-corruption crackdown.
In January 2018 Đinh La Thăng, former Minister for Transport and Communist Party Secretary became the first top Party official in several decades to be tried and sentenced to prison for corruption.

In February 2019, two former communications ministers were arrested for “violation of regulations on the management and use of public capital causing serious consequences” over their alleged roles overseeing the proposed purchase of a loss-making TV firm which would have resulted in a loss of over $300m in state funds.

In December 2018 the Vietnamese Government’s Ministry of Public Security launched a hotline for the reporting of alleged police corruption.
<table>
<thead>
<tr>
<th></th>
<th><strong>Australia</strong></th>
<th><strong>Vietnam</strong></th>
<th><strong>China</strong></th>
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<tbody>
<tr>
<td><strong>Australia</strong></td>
<td>Criminal Code Act</td>
<td>Anti-corruption Law and Penal Code</td>
<td>PRC Anti-Unfair Competition Law</td>
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<tr>
<td><strong>Intention</strong></td>
<td>The offence applies regardless of intent to bribe the FPO.</td>
<td>Intended to “knowingly” influence the FPO – irrelevant if conduct culturally acceptable</td>
<td>Some offences require intent, but some do not</td>
</tr>
<tr>
<td><strong>Benefit</strong></td>
<td>Can be any advantage, not limited to property or cash.</td>
<td>Broad - ‘anything of value’</td>
<td>Broad – “improper benefits” includes money, property, interests, intangible benefits</td>
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<tr>
<td><strong>Facilitation payments</strong></td>
<td>Defence available – documented 7 years</td>
<td>Partial permission for “routine government action”</td>
<td>No exception for facilitation payments</td>
</tr>
<tr>
<td><strong>Hospitality/ gifts</strong></td>
<td>No specific exemption or defence</td>
<td>Only if reasonable bona fide expenses; cultural</td>
<td>Specific criteria distinguishes bribe from gift</td>
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<td>No exception for hospitality</td>
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<tr>
<td><strong>Failure to prevent bribery</strong></td>
<td>Due diligence and corporate culture defence for companies</td>
<td>Liable for employees, officers, agents and distributors</td>
<td>Compliance programs are considered in practice but are not a defence</td>
</tr>
<tr>
<td><strong>Penalties</strong></td>
<td>Individual:10yrs jail+$1.8m Company:$18m/10% turnover/3xbenefits</td>
<td>Individual: life imprisonment or capital punishment Company: Criminal charges, fines</td>
<td>Individual: RMB 10,000 – more than RMB 5m + up to 10yrs imprisonment Company: RMB 200,000 or more.</td>
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<tr>
<td>UK Bribery Act</td>
<td>USA Foreign Corrupt Practices Act</td>
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<td>Not permitted</td>
<td>Partial permission for “routine governmental action”</td>
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<td>Hospitality/gifts</td>
<td>Can amount to a bribe if lavish or disproportionate</td>
<td>Certain categories/value of gifts permitted; Hospitality only if reasonable</td>
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<tr>
<td>Failure to prevent bribery</td>
<td>Strict liability – “adequate procedures” defence only</td>
<td>No specific offence under this Act but liability under companies legislation.</td>
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<td>Penalties</td>
<td>10 yrs imprisonment Unlimited fines for individuals and companies, confiscation of proceeds</td>
<td>5-20 yrs imprisonment USD $5m individual USD $2.5 - $25m (or 3x bribe value) company + civil fines, disgorgement etc</td>
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**AUSTRALIA’S NEW APPROACH**

*Combatting Corporate Crime Bill 2017 - likely to be law 2020.*

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<th>Will change Australian law</th>
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<td>Extend definition of foreign public official – incl. ‘candidates’</td>
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<td>Replace ‘not legitimately due’ for ‘improperly influence’</td>
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<td>Extend ‘business advantage’ to ‘personal advantage’</td>
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<td>Add offence to bribe ‘recklessly’ – no exact outcome</td>
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<td>New offence; ‘failure to prevent’ bribery</td>
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<td>Effective ‘adequate procedures’ as a defence</td>
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<td>Liable for ‘associate’ in whole of supply chain</td>
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<td>DPA’s Deferred Prosecution Agreements</td>
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<td>Facilitation payment defence – likely to remain</td>
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» DPAs will allow Australian prosecutors to negotiate and enter into an agreement with a company caught bribing

» Benefits:
  • Encourages self reporting as companies can avoid prosecution
  • Provides greater certainty than a trial (and cheaper, faster)
  • Companies can negotiate discounts on penalties if they comply
  • Publicised and monitored
  • Better than fines at the expense of the shareholder
  • Discourages ‘lawyering up’ when bribery detected
Company directors are liable for bribery by any associates in any part of their operation – unless it has taken adequate procedures

Principle 1: proportionate procedures
Principle 2: top-level commitment
Principle 3: risk assessment
Principle 4: due diligence
Principle 5: communication (+ training/policies)
Principle 6: monitoring and review
Drawn from UK Bribery Act, the Bill defines “Associate” very broadly:

an officer, employee, agent, contractor, subsidiary or controlled entity of the body corporate or a person who otherwise performs services for the body corporate. This person can be an individual, or an incorporated or unincorporated body.

- The definition includes a subsidiary that is incorporated outside of Australia.
- Reverses the onus of proof
- In its absence, assume tolerance or ignorance of bribery as a business practice
- Untested in Australia but UK Bribery Act 2015 as guidance

The difference between the rotten apple and the rotten tree
Serious Fraud Office v Rolls-Royce plc

- Rolls-Royce engaged in a bribery between 1989 - 2013 spanning 7 countries.
- Foreign Officials bribed with money and cars in order to secure orders, often for aeroplane engines.
- Rolls-Royce had a comprehensive anti-bribery codes and policies in place, and implemented more comprehensive policies following an audit in 2009.
- The Court found:
  - the bribery prevention measures were inadequate in the context of this type of organisation and the countries in which they were operating.
  - there were several aggravating features, including that Rolls Royce’ conduct was persistent and involved senior employees.
  - the lack of anti-bribery training provided to employees resulted in a culture of non-compliance.
  - Rolls-Royce entered into a DPA and fined £671 million.
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 3 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
- Australian Government will not support these payments in foreign markets
- How to report requests?
- Is it fair on business?
240 mining companies, including our biggest exporters, work in the most corrupt markets

Pushback on facilitation payment:

‘When these payments are made, it's important to understand the real intent of the payments, and the underlying intent of a facilitation payment is just to get a job done. There are many countries in Africa that are emerging from conflict situations and have a lot of challenges - a lack of foreign investment, a lack of industry and a lack of tax collection, a lack of capacity in government to pay the public service and to pay public servants to do the job they should be doing.’

- Bill Turner, Chairman of the Australia-Africa Mining Industry Group
Agents

• A risk of bribery – know local scene. Use excessive commissions
• OECD focus after Securency – see Guide to engaging agents
• Austrade can refer 3 ‘clean’ agents.
• Company does due diligence and training - like staff
• Vicarious liability for agents – cannot outsource corruption

Reporting

• Self reporting encouraged
• Difficult decision - report or first seek internal investigation
• Encourage reporting to AFP (not Austrade)
• Reporting has fallen away since 2011
• Automate and protect reporting for whistle-blowers
Gifts

• Published policy on what is acceptable, what must be reported
• Austrade policy is return without offence or keep and record under $AUD 100 – refuse anything over $AUD500
• Creeps into transactions, tenders, seminar samples, money or like in value, to third parties. Used to establish a practice.

Entertainment

› No guidance on what’s reasonable
› Either refuse all (US standard) or seek approval and document (Australia) and have adequate procedures (Aust & UK)
› Business will always be done over a meal – needs mutual understanding
Increase in Vietnamese companies on the Australian Stock Exchange – compliance requirements:
• Anti-bribery laws
• Directors duties
• Company reporting requirements

Foreign investment regulation:
• Financial Investment Review Board (FIRB)
• Restrictions on foreign real estate purchases
• Money transfers and laundering (AUSTRAC)

IMPACT ON VIETNAMESE INVESTORS
FIRB approvals required for
commercial real estate
(regardless of value) or 20% or more of any type of
business valued at >$1,134 million.

Approval unlikely to be given to foreign companies that engage in corrupt or illegal behaviour.

Listed companies must comply with the ASX Listing Rules:

- **Continuous disclosure** - obligation to immediately disclose any information that may have a material effect on the entity’s securities.
- **Transactions** with persons in a position of influence - including the obligation to notify shareholders of transactions with related parties.
- **Documentary requirements** – provision of documents to the ASX.
ISSUES FOR AUSTRALIAN BUSINESS

• Must have adequate procedures - nothing in place presumes acceptance.
• Responsibility for all associates in a global supply chain
• Many SME’s remain unprepared. We are focussed on raising awareness
• More companies are confronting and mitigating as a business risk
• More likely to have trouble with regional government than central
• Not all jurisdictions have the same type or level of corruption risk
• Refusing a bribe – short term loss, long term profit – future-proofing
• Companies (even competitors) can exercise collective market power
• Bribes indicative of other failings - illegal activities or poor goods/services
• Failure to self report looks like a cover-up when eventually discovered
• Increasing reliance on advice - government, professionals, civil society
• Whistle-blowers better protected – best source of evidence
• Subject to web of laws by other countries – jurisdiction and co-ordination
GLOBAL issues

Anti-corruption campaigns are popular in growing economies. Increased reporting means more detection (not corruption). Self-reporting vs. fines (UK vs. US) approach.

Industrial scale bribery (Unaoil) - stamp out or go professional.

Outlaw countries lose other benefits (trade/investment).

Shareholder demand for ethical investment/behavior will extend to partner undertakings.

Globalism: Increased responsibility for global supply chain e.g. money-laundering, funding terrorism, proceeds of crime, modern slavery laws. Outlaw countries miss the benefits of trade/invest.

AFP: better resources & detection methods – more prosecutions.

OECD maintains pressure for convictions and awareness of law.

Can business cope without facilitation payments defence?

Social/economic changes will force government to act.

Joint ventures require you look after your side.

Business will be judged by its response to these risks.
The Introduction to Country Guides summarise the risk of bribery and corruption posed by each Austrade jurisdiction. They consider, with respect to each jurisdiction:

1. **rankings in key international corruption ranking tools** (including Transparency International’s Corruption Perceptions Index)
2. **recent efforts made to combat bribery and corruption** (including any ‘crack downs’ announced by government)
3. **anti-bribery and corruption laws**, including types of offences
4. **level of enforcement** of those laws
5. **penalties** available under those laws
6. the **degree of risk posed by a range of industries and institutions** (e.g., public services, police and land administration)
7. any **international treaties and memberships** to which the jurisdiction is party
PRACTICAL ASSISTANCE FROM GOVERNMENT

- Use of the Badge of Government
- Representation, negotiation and support
- Accompany to meetings/negotiations
- Referral to lawyers and investigators
- Download our suite of policies, disclaimers, training for staff, ‘red flag’ warnings, compliance guides [anti-bribery@austrade.gov.au](mailto:anti-bribery@austrade.gov.au)
- Use Austrade’s ‘welcome to country’ guide and bribery index.
- **Use Austrade materials** – at a minimum, it is insurance in the absence of any other ‘adequate procedures’
- Government to government approach if a market access issue
- We work to **facilitate your trade not advise how to break the law**
- The Commonwealth’s **reputation** counts – and we have zero tolerance for illegal behaviour. We regularly suspend service if clients breach
- Exporters are subject to local, Australian and foreign laws
WHAT CAN BUSINESS DO?

• Corporate Governance
  › Publish clear anti-bribery policies
  › Issue a statement of intent – business ethics
  › Ensure relevant people are trained to recognise and deal with corruption
  › Establish internal controls over expenditure and ban facilitation payments
  › Conduct due-diligence checks on third-party agents and ban corrupt ones
  › Ensure the basis and calculation of any payments such as commissions are properly recorded, transparent, explainable and relate legitimately to the services provided.
  › Ensure all interactions are recorded and include anti-bribery provisions in contracts, e-mail disclaimers.
  › Publish clear policies esp. gifts and entertainment for staff to follow
• Seek independent legal advice
Business must embrace active compliance, culture driven from the top. Video the CEO

Be aware of laws (local and international) and read widely on risks in certain government controlled industries

Vet all associates in whole supply chain in all locations – cannot outsource bribery

Have policy guidance on agents/gifts/facilitation payments/hospitality policy/sponsored travel – staff like guidance

Training & Communication Systems with active reporting

Financial controls tested

Rotation and oversight of roles

Seek business references and complete business partner questionnaire
Key Messages

• Bribery is a crime. Fines and jail time.
• The onus is on business to show adequate procedures are taken to prevent bribery in every part of its global supply chain.
• Foreign bribery is a business risk; be alert to the signs.
• If in doubt, seek professional advice.
• The Australian Government can help.
RESOURCES AND MATERIALS

Australian Trade Commission
www.austrade.gov.au


Attorney-General’s Department Crime Prevention
THANK YOU

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