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Corporate and Commercial Lawyers

***ANTI-BRIBERY AND CORRUPTION
THE AUSTRALIAN REGIME***

***Presentation
29 August 2016***

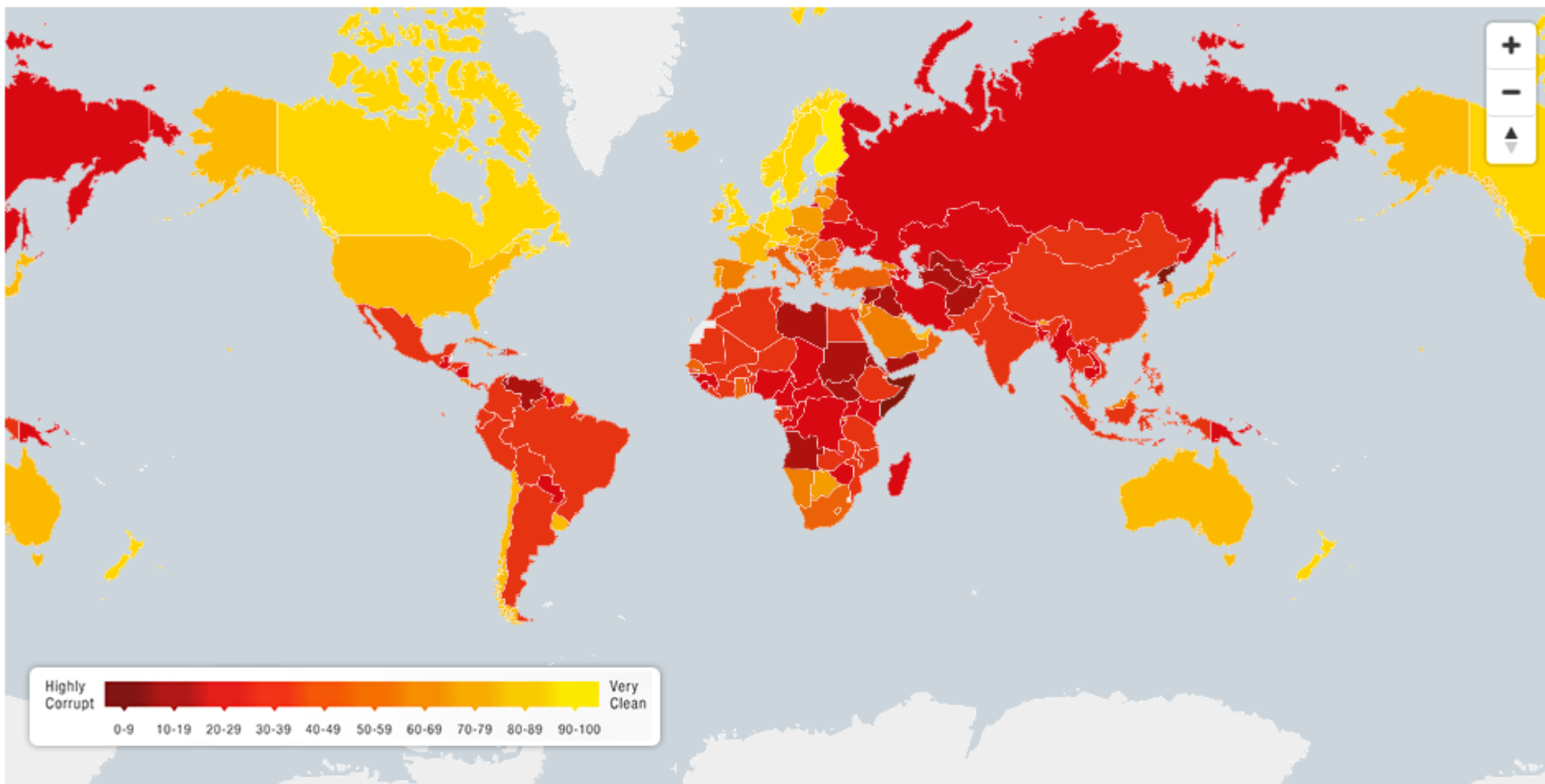
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TRANSPARENCY CORRUPTION INDEX



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www.transparency.org – for further information

BRIBERY OFFENCES



- 1. Bribery of Foreign Public Officials (Worldwide)**
- 2. Bribery of Commonwealth Public Official (Worldwide)**
- 3. Bribery of Public Officer (WA)**
- 4. Corruption of Public Officer (WA)**
- 5. Bribery as a common law offence (Australia)**

BRIBERY OF FOREIGN PUBLIC OFFICIALS



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- **Offence is committed if a person:**
 - (a) provides or causes to provide a benefit; and
 - (b) the benefit is not legitimately due; and
 - (c) does so with the intention of influencing a foreign public official to:
 - (i) obtain or retain business; or
 - (ii) obtain or retain a business advantage.

- **Maximum Imprisonment 10 years**
- **Maximum Financial Penalty**
 - \$1.8m (individual)
 - 3x Value of Benefit (Company) (if assessed)
 - or - 10% of Annual Turnover (Company) (inc. related companies)



What is a Foreign Public Official?

Foreign Government Body (FGB)

- (i) employees
- (ii) officials
- (iii) contractors
- (iv) appointees and officeholders by law
- (v) appointees and officeholders by custom or convention
- (vi) those in the service
of the FGB

Foreign Country (FC)

- (i) members of the executive
- (ii) judges
- (iii) magistrates
- (iv) members or officers of the legislature
of the FC

Note: The offence includes “causes” a benefit to be given. Benefits advanced via third parties, relatives, associates are prohibited.

FOREIGN PUBLIC OFFICIAL

Public International Organisations (PIO)

- (i) employees**
- (ii) contractors**
- (iii) appointees and officeholders**
- (iv) servants**

Intermediary

- (i) any authorised intermediary of the above**
- (ii) any person holding themselves out as an intermediary of the above**

Note: Public International Organisation means an organisation with representatives of 2 or more countries.

TWO DEFENCES AVAILABLE

Note: Extremely limited application for both.

First Defence

Permitted by law in that country (note: bribery not lawful in any country):

- (a) Written law must be in place (not “custom”);**
- (b) Foreign public official is in their country;**
- (c) Conduct is wholly in the foreign country.**

Burden of Proof rests with the defendant.

Second Defence

Facilitation Payments

A payment of a minor nature to a foreign public official with the intention of facilitating the performance of a Routine Government Action of a minor nature.

Note: Defence only available to facilitation payments to foreign public officials.

Routine Government Action includes, for example, processing a visa application.

SOME IMPORTANT POINTS



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- **“Custom” is not a Defence**
- **“Official Tolerance” is not a Defence**
- **Austrade recommends no Facilitation Payments**
- **Burden of Proof with the Payer**
- **Strict Recording Requirements for Facilitation Payments**
 - (a) **Record made as soon as possible after conduct occurred;**
 - (b) **Record retained by payer;**
 - (c) **Reasonable steps taken to protect record.**



FALSE ACCOUNTING OFFENCES

- **New False Accounting Offences – 1 March 2016**
- **Designed to aid enforcement of anti-bribery and corruption.**
- **Introduced to combat bribery. May be easier to prove rather than the actual offence of bribery.**



FALSE ACCOUNTING



- Making, altering, destroying or concealing an accounting document; or
- Fail to make or alter an accounting document required by law for the purpose of disguising or concealing:
 - (a) a benefit to or from a person that is not legitimate;
 - (b) a benefit to or from another person that is not legitimate; or
 - (c) a loss to another person that is not legitimate.
- Applies to companies and its officers both inside and outside of Australia.

Penalties

Individuals	-	10 years maximum
	-	\$1.8m
Corporations	-	3x value of benefit <u>or</u>
	-	10% of annual turnover



WARNING SIGNS



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- **Foreign public officials (family relatives or associates)**
- **Businesses unexpectedly winning tenders**
- **Incomplete documentation or phoney invoices**
- **Meetings in luxury holiday locations**
- **Political donations**
- **Agents**



WARNING SIGNS (cont'd)



- **Cash payments**
- **Urgent payments**
- **Requests for secrecy/lack of media/”off the record”**
- **Excessive payments for hospitality/entertainment/gifts**



SOME INSTANCES



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- **AWB – CEO guilty of failing to act with due care and diligence in Oil for Food program administered by the UN (nineteen months imprisonment)**
- **Securrency – CFO and Company Secretary sentenced following charge of fake accounting (six months imprisonment)**
- **BHP - \$25 million fine relating to hospitality during 2008 Beijing Olympics (US regulations)**
- **Allegations (reported in the media on 24 August 2016):**
 - **Sundance Resources - Bribes in the Republic of Congo to secure iron ore project**
 - **Snowy Mountains Engineering Company – Bribes in Sri Lanka and Bangladesh to secure projects**



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THANK YOU

