



Export Council of Australia

The Voice for Australia's Exporters

10 September, 2015

The Committee Secretariat
Senate Economics References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Sent by Email to: economics.sen@aph.gov.au

Export Council of Australia Submission to the Senate Economics References Committee Inquiry on foreign bribery.

The Export Council of Australia (**ECA**) would like to thank you for the opportunity to make a submission to the Inquiry.

1. Background on the ECA

A not-for-profit, membership based organisation, the ECA is the peak industry body representing Australia's exporters and importers, particularly SMEs. With a membership base of 1,000 and a reach of 15,000, the ECA represents companies of all sizes and across a wide range of industry sectors, including services exporters. The ECA's core activities include research, advocacy, skills development and events. Some details on the ECA's work are below.

- 1.1. The ECA works collaboratively with a number of Federal and State Government Departments to advance the interests of its members and the broader business community. These include Efic, the Department of Foreign Affairs and Trade (DFAT), Austrade, the Department of Immigration and Border Protection (DIBP), the Department of Industry and Science, and the Department of Agriculture.
- 1.2. The ECA regularly provides submissions to government and its agencies on various reviews, as well as to parliamentary inquiries. These have included submissions relating to the Korea-Australia Free Trade Agreement (KAFTA) and the KAFTA Customs Bills, the Japan-Australia Economic Partnership Agreement (JAEPA) and the JAEPA Customs Bills, the Trade in Services Agreement (TiSA), and more recently the EMDG Review, the Inquiry into Australia's Treaty Making Process, the Inquiry into the Business Experience in Utilising Australia's Free Trade Agreements, the Inquiry

into Third Party Certification of goods and the JSCOT and FADT Inquiries into the proposed China-Australia Free Trade Agreement.

- 1.3. The ECA also releases annual Trade Policy Recommendations (TPR), and the latest document, TPR 2014/15, includes commentary and recommendations regarding the Government's Free Trade Agreement (FTA) agenda and ways in which Government should work with industry to raise the level of understanding of FTAs.
- 1.4. In 2014 the ECA launched a longitudinal survey, Australia's International Business Survey (AIBS), with Austrade, Efic and the University of Sydney, designed to capture data on the international business activity of Australian companies. The first survey captured data from over 1,600 Australian exporters, making it the most comprehensive investigation into Australia's international business activity in more than 15 years.
- 1.5. AIBS 2015 (which was released on 30 July 2015) resulted from the collection of fully completed and validated responses from 1,237 companies involved in international business. The findings of this report are distinctive and significant because they provide key insights into the nature, needs, concerns and future plans of the overall Australian international business community from the company perspective.
- 1.6. The ECA recently also released its "Advancing Trade Development" report, which examines the trade promotion activities offered by 10 of Australia's key export competitors including the United States, United Kingdom, New Zealand, and Singapore in a bid to encourage government to take a long-term, strategic approach to developing Australia's international trade.

2. Background on the ECA position

As with other parties who have made submission to the Inquiry, the ECA is supports that steps are being taken to reduce and ultimately eliminate the incidence of bribery (or attempted bribery). The ECA shares the views of the other parties regarding the adverse consequences of a commercial culture that includes and requires bribery and corruption. However in addition to the observations to the other parties who have made submissions, the ECA wishes to draw the attention of the Committee to the unique position of SME exporters and importers (SMEs). Those SMEs may be disproportionately exposed to problems compared to larger companies due to;

- 2.1. Lack of knowledge causing inadvertent breaches of complex and often unknown legislation regarding bribery; and
- 2.2. Being subject to more pressure to engage in conduct which may constitute bribery or corruption than large companies and who do not have the resources or market position to reject or deflect those pressures.

At the outset, the ECA believes that when considering or recommending changes to the current state of regulation and practice, the potential specific disadvantage to SMEs should be taken into account, both in terms of what is practical and reasonable for those SMEs and what will lead to increased costs and complexities for those SMEs which those SMEs would not be in a position to accommodate. Setting absolute requirements which are practically unattainable creates yet another barrier to SMEs. Appropriate regulatory change could manifest itself in ensuring that changes are not implemented rapidly, are adopted in a way

that takes into account the size and, resources of an SME and are implemented by Government together with a comprehensive outreach programme including education, training, and provision of resources and other support. This could also include additional considerations to be taken into account by prosecuting authorities as to the disadvantageous position which SMEs experience in their business environment, including the relative negotiating positions between the affected SME and the party with which it is dealing (including where it is dealing with a government authority in an overseas market)

3. Assistance with education and training

The ECA would be pleased to provide additional specific commentary and recommendations regarding education and training given ECA's existing expertise in delivering training which addresses, in part, these issues.

4. Responses and recommendations following other submissions

The ECA has been fortunate to have had the benefit of accessing and reviewing the submission of other parties to the Inquiry. The ECA believed it may be useful to the Committee to provide a summary of its views in relations to those submissions and recommendations by other parties.

The ECA requests that the Committee be mindful that here views are based on the position and perspective of SMEs.

- 4.1. The ECA endorses the recommendation in the submission by the Engineers Australia as to the development and adoption of an anti-bribery standard ISO37001.

The ECA believes that a new standard;

- a) would represent a clear set of directions as to appropriate actions regarding anti-bribery controls;
- b) provides a standard of independent certification to enable third parties to have confidence that appropriate steps are being taken; and
- c) would be flexible in its application to SMEs as it could set out reasonable and proportionate policies, procedures and control to be adopted.

However, while supporting this development, the ECA would not support making compliance with that standard as mandatory.

- 4.2. The ECA does not support the recommendation for the immediate abolition of the "facilitation payments" defence under section 70.4 of the *Criminal Code Act 1995* (and as appearing in related legislation). Although that abolition may be consistent to the *UK Bribery Act 2010* ("**Bribery Act**"), the retention of the facilitation defence would still leave Australia as having legislation and practice consistent to the *United States Foreign Corrupt Practices Act 1977* ("**FCPA**").

The ECA believes that the abolition of the facilitation payment defence would have a disproportionately adverse effect on SMEs and their service providers who are at a specific disadvantage when called upon to make such facilitation payments.

- 4.3. The ECA believes that in making determinations or recommendations, the Committee should also take into account the specific position of service providers to exporters and importers, such as licenced customs brokers and freight forwarders. In many cases those service providers make payments or adopt procedures based on direction from government agencies or from parties without whose consent services cannot be provided. For example, such service providers are regularly requested by local Customs' authorities or other parties to undertake separate procedures and pay additional amounts to shipping lines, airlines or port authorities to ensure that "space" is provided at times of peak demand for the passage of freight. In those circumstances, both the relevant service provider and the SME are subjected to significant pressure in circumstances in which recourse to external assistance cannot be secured at short notice. If a relevant service provider undertakes action in accordance with those directions and makes the best effort possible to ensure that the payments are validly made or other procedures are followed as directed, then both the SME and the service provider should not be subject to further adverse action by the authorities.
- 4.4. The ECA does not support a specific corporate offence of "failing to prevent bribery" as found under the Bribery Act. The ECA believes that this provision in the Bribery Act is largely untested and there are significant uncertainties associated with what is actually required by this provision. Further, there will be different outcomes for different companies and different parties to accommodate these requirements.
- 4.5. As set out in many of the submissions the ECA also endorses the recommendations that Government should provide official guidelines as to what constitutes and adequate of "cultural compliance" and what it expects in an "expected anti-bribery programme". It would be unrealistic for Government to merely dictate by way of policy or legislation a general expectation without then providing specifics as to what is expected. Failing such guidance, a well-meaning and considered approach by an exporter or importer or its service provider (or other party) could be deemed unacceptable by Government.
- 4.6. Further to the comment in paragraph 4.5, the ECA also endorses the recommendation that the investigating and prosecuting authorities provide clear guidance as to their approach to compliance and enforcement of the anti-bribery legislation. In these cases, the ECA also recommends that the prosecuting authorities must take into account the relative negotiating points of the parties and the complexity and uncertainty of the issue for the party under review.
- 4.7. The ECA endorses the concept of "structured settlements" of alleged breaches and the way in which they are proposed to be effected as set out, for example, in the submission by the International Bar Association.
- 4.8. The ECA endorses the comments in the various submissions regarding the need for ready availability for practical "whistle blower" procedures and an associated defence.
- 4.9. The ECA endorses the concept as appearing in the UK and in many submissions that a party can seek "an opinion" as to the scenario being faced by an SME (or other

party) and a proposed response to address the scenario. However, any such procedure should be able to be sourced on a confidential and "no liability" basis.

- 4.10. As with other submissions, the ECA is concerned as to the lack of transparency regarding many prosecution actions relating to Australia's anti-bribery regime. In particular, there seems to have been a disproportionate number of suppression orders granted to parties involved in an anti-bribery prosecution which is not made available in other prosecutions. That lack of transparency affects the willingness of parties to comply.
- 4.11. As in other submissions (in particular the submission by the ANZ Bank), the ECA recommends that a procedure should be adopted to encourage parties to "self-report" instances of bribery with an associated reduction in potential liability. Indeed, there should be no liability associated with a voluntary disclosure of conduct which could have contravened the anti-bribery provisions. This would be consistent to the approach to "whistle blowers" and also to the approach to voluntary disclosure in other legislation such as the *Customs Act 1901*.

5. Additional recommendations

In addition to the comments in the preceding paragraphs, the ECA would wish to make the following addition recommendations.

- 5.1. The ECA does not recommend increase in the use of strict and absolute liability offences and does recommend that the authorities have recourse to warnings and direction on practice improvement when dealing with inadvertent breaches rather than penalties.
- 5.2. In the event of change being proposed, the ECA recommend that it be adopted in a considered manner over a period of time to accommodate the development of better practices. The ECA is unaware of particular situations which would dictate immediate action on any of these recommendations. For these purposes, the ECA considers that a period of at least two (2) years would be appropriate or such longer period as necessary to develop and implement standard ISO 37001 referred to in paragraph 4.1 above.
- 5.3. The ECA recommend that in developing any new procedures, Government should engage and consult extensively with stakeholders and other potentially affected parties both through direct engagement with those parties and engagement in conjunction with relevant industry associations. That should be supported by provision of education, training and other appropriate resources.

The ECA would be pleased to make further submissions or provide further information as requested by the Committee.

Yours Sincerely

Andrew Hudson

A handwritten signature in blue ink, consisting of a stylized 'A' followed by a horizontal line that tapers to the right.

Director and Chair of the Trade Policy Committee
Export Council of Australia