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14 September 2015

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

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

Dear Committee Secretary,

INQUIRY INTO FOREIGN BRIBERY

We refer to your email of 16 July 2015 inviting Transparency International Australia ('TI Australia') to make a submission to the Senate Economics References Committee Inquiry into Foreign Bribery (the 'Inquiry').

TI Australia is the local accredited affiliate of Transparency International, the non-government and non-partisan coalition against corruption. With a presence in more than 100 countries built from a period of over 20 years, Transparency International's aim is to fight corruption and promote integrity and accountability in government and other organisations. Transparency International believes that corruption is one of the greatest challenges of the contemporary world. Cross-border bribery remains a powerful negative force that has significant detrimental impact on the lives of ordinary people.

Formed in 1995 to raise awareness of international business corruption in Australia and to initiate moves to combat it, TI Australia has a history of supporting legislative developments in the area of foreign bribery. For example, in 1999, TI Australia made submissions to government recommending Australian support for the Organisation for Economic Co-operation and Development ('OECD') recommendations on bribery of foreign public officials, specifically ratifying the 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' ('OECD Convention').[1] Since that time, TI Australia has regularly made submissions and media statements on the issues and supported stronger efforts of the Australian Government in relation to implementing law.

Accordingly, we are pleased to make this submission to the Inquiry.

[1] www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

1. Overview

As per the Attorney-General's website, '*Foreign bribery results in inefficient allocation of resources and economic distortions. It is a threat to democracy and the rule of law, corrosive of good governance and an impediment to economic development*'.[2] The Attorney-General further states that international cooperation, by way of countries adopting common rules, is required to effectively combat foreign bribery.

It is important to acknowledge that Australia, along with other developed countries has both a self-interest and an obligation to devote the necessary resources to tackling the problem of cross-border bribery. This is recognised by the G20 where combating bribery remains an important priority for the G20 growth agenda. Effective action to prevent, investigate and prosecute bribery will help to level the playing field for business and give the private sector the confidence it needs to invest in infrastructure and other growth-producing projects.

The G20 have stated they are well-placed to provide international leadership in the area of anti-bribery, including by ensuring G20 countries, such as Australia, leading by example in comprehensively criminalising and effectively enforcing laws against bribery.

Although every organisation should strive for zero tolerance to bribery, in TI Australia's view top priority should be explicitly directed to cases of what we call 'grand corruption' involving politicians and senior bureaucrats, particularly involving major contracts and permits. Failure to prevent grand corruption has the most corrosive consequences in any country. Transparency International's UK affiliate's publication *How to Bribe: a typology of bribe-paying and how to stop it*[3] provides examples of how bribes are paid in practice.

Combating bribery is a dynamic, ever-changing struggle because the practices tend to become more sophisticated. It can severely impinge on the dedicated resources and ethical standards of even the best international organisation to avoid getting entangled.

TI Australia notes that the Inquiry is also considering 'foreign bribery not involving foreign public officials'. Due to the effects of grand corruption, TI Australia believes that it is more important that the Australian Government improves its legislative regime in relation to bribery of foreign officials first. However, moving towards a legislative regime that also outlaws business-to-business bribery should be an aspiration for the Australian Government.

Sceptics continue to claim that in many places they cannot avoid paying bribes to win projects. Executives wrestling with the problem of bribes being demanded can readily rationalise their conduct. The main excuses are listed in Annexure 1. Without greater implementation of Australia's prohibition on such conduct, those notions will persist and cause a competitive disadvantage to those companies that strive to be compliant with Australia's foreign bribery regime.

For Australia, we note the offence of bribing a foreign public official is contained in section 70.2 of the Criminal Code Act 1995 (Cth) (the 'Criminal Code'). This section is based directly on the OECD Convention and its focus is on the supply side of bribery, that is, the offering or giving something of value in order to secure a business advantage abroad. It applies to any perpetrator that is an Australian resident or citizen or a corporation incorporated in Australia, for conduct both within and outside Australia, as well as any conduct occurring wholly or partly within Australia or on board an Australian ship or aircraft regardless of the nationality of the perpetrators.

[2] www.ag.gov.au/CrimeAndCorruption/Foreignbribery/Pages/default.aspx
[3] www.transparency.org.uk/publications/15-publications/833-how-to-bribe-a-typology-of-bribe-paying-and-how-to-stop-it

Australia is also a party to the United Nations Convention against Corruption ('UNCAC'). The purpose of UNCAC is to enhance international efforts to combat corruption. UNCAC is a significant treaty. It encourages States Parties to adopt anti-corruption measures, provides a standardised approach to criminalisation and ensures States Parties have systems in place to facilitate law enforcement cooperation.

Last month, Transparency International released the 2015 version of its *Exporting Corruption* publication.[4] This annual progress report presents an independent assessment on the status of enforcement in all of the Parties to the OECD Convention and is highly regarded by the OECD. Australia was ranked as one of six countries with moderate enforcement.

In summary, the *Exporting Corruption* report listed the following recommendations for Australia:

- Fully implement all the recommendations of the Working Group on Bribery's Phase 3 Report.
- Hasten the introduction of new legislation on 'false accounting'. This should form part of existing foreign bribery legislation, be enforced by the same regulators and clearly cover false accounting in offshore subsidiaries, even if this is not deemed material for audit purposes.
- Introduce clear rules that prevent a company from tendering for government contracts if it has committed foreign bribery offences and has not self-reported.
- Take further steps to encourage organisations to self-report foreign bribery and formalise such incentives.
- Provide clearer guidance as to what is expected from companies in regard to their compliance systems.
- Where there is credible evidence that a company has bribed a foreign official, the onus should be on the company to demonstrate a corporate culture of compliance in the group.
- Maintain a sufficient cohort of active investigators skilled in this type of offence.

We note that in conjunction with the Inquiry, the Australian Government should strive for Australia to join the US, UK, Germany and Switzerland and be ranked in future versions of the *Exporting Corruption* report as a country with active enforcement not simply 'moderate' efforts.

Australia cannot afford to be complacent, particularly in relation to offshore investment and trading. This submission reinforces the recommendations listed above and considers other areas for improvement in Australia's foreign bribery regime.

2. Assessment of Australia under the OECD Convention

Australia ratified the OECD Convention in 1999. In 2012 the OECD Working Group on Bribery's Phase 3 Report[5] criticised Australia for its lack of commitment to the OECD Convention, and the OECD working group made a number of recommendations to address this.

The OECD Working Group follow up report[6] of April 2015 concluded that Australia has made good progress on addressing a number of important recommendations.[7] In particular, an inter-agency Fraud and Anti-Corruption Centre (FAC Centre) hosted by the Australian Federal Police ('AFP') has been established. The OECD Working Group also recognised positive steps taken in relation to awareness-raising, and recommended that whistleblower protection legislation be extended to the private sector.

[4] www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd
[5] www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf
[6] www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf
[7] www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf

However, significant enforcement is still lacking. There remains only one successful prosecution under Australia's foreign bribery legislation, that in relation to Securency and Note Printing Australia.

The 2015 report also noted that Australia had not addressed eight recommendations at all, and had only partly addressed nine other recommendations. TI Australia strongly recommends the Australian Government should without delay fully address all outstanding recommendations by the OECD Working Group.

3. Recommendations

In addition to fully implementing all the recommendations by the OECD Working Group, set out below are the priority reforms TI Australia believes the Australian Government should now fully endorse and enact:

1) Introduce a specific reform to penalise false accounting

To give full effect to Article 8 of the OECD Convention, Australia should promptly introduce a '*failure to record accurately the payment of a bribe*' provision in the foreign bribery section of the Criminal Code to cover all companies in any Australian corporate group. Penalties should be the same as for general bribery offences.

In Australia, the *Corporations Act 2001* ('Corporations Act') contains requirements for an organisation to keep financial records. In addition, there are various State Crimes Acts. These are not overly relevant to the need within a foreign bribery context and the penalties are inadequate, as noted by the OECD Working Group. TI Australia does not consider that the new offence should be embodied in the Corporations Act.

To look at a global example, many offences under the US Foreign Corrupt Practices Act of 1977 ('FCPA') fall under the accounting provisions, what they call the 'books and records' offence. The accounting provisions need to exist as corporate bribery tends to be concealed through the falsification of corporate books and records. Put simply, bribes are said to be commonly mischaracterised as legitimate business expenses (e.g. commissions or consulting fees).

The US accounting provisions require those companies subject to the FCPA to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. Under the same 'books and records' provision there is no materiality threshold for a payment. Enforcement of this provision by US regulators has involved cases of misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery.

In 2013, the Canadian Government amended its Corruption of Foreign Public Officials Act ('CFPOA'). This included a new offence relating to books and records. Whilst not as strong as the FCPA books and records provision, the Canadian law prohibits a range of illicit conduct such as maintaining accounts that do not appear in any of the books and records that are required to be kept in accordance with Generally Accepted Accounting Principles[8], failing to record or inadequately recording transactions, recording expenditures that did not occur, incorrectly identifying the purpose of a liability, knowingly using false documents, and intentionally destroying books and records earlier than permitted by law.

[8] The common set of accounting principles, standards and procedures that companies use to compile their financial statements.

2) Clarify the offence of 'failure to create a corporate culture of compliance'

The uncertainty in the wording of the existing legislative definition of 'corporate culture' is inimical to the implementation of the foreign bribery offence. This uncertainty is well recognised.[9] The precise way the 'fault' requirement in the Criminal Code works differently for proof of each of the three limbs of the offence is too convoluted to apply as a technical matter and may account in part for the paucity of prosecutions. TI Australia considers that the time has well and truly come for serious reform of this key aspect of the law.

As a contrasting and modernised global example, the UK Bribery Act 2010 (the 'Bribery Act') introduced an offence of corporate failure to prevent bribery. The defence for a company against this liability is to prove affirmatively (on a civil standard) that it has in place 'adequate procedures' to prevent bribery of that nature.

Framed in that way, much of the technical difficulty in enforcing the offence is mitigated. The contrast with the ambiguities and complexity of the counterpart Australian provisions is apparent.

Developing a 'culture of compliance'

A 'culture of compliance' exists when not only the letter of the law is followed, but one where the spirit of why the laws exist is followed in the company. Getting the ethical spirit right will allow the letter of the law to be followed. Put simply, the spirit is getting employees, agents and associates of an organisation to 'do the right thing' and support an organisation's approach of zero tolerance whenever pressured to engage in corrupt activity when conducting business on behalf of the organisation.

This issue is very important in all situations where the bribery can be traced beyond a single rogue individual - or what is known as a 'bad apple' - who flouts company policy and practice, where the conduct is expressly or implicitly endorsed by other executives.

Likewise, it is most important that the company not be free to turn a blind eye to the actions of its agents. A rogue agent that is allowed to operate on behalf of a company without proper due diligence, reporting and safeguards is a common characteristic of offshore bribery. If it is to be effective, the wording of the proposed offence must be framed to both impact on and deter such wrongdoing by agents and intermediaries.

To help people 'do the right thing', the law should require a company to implement a robust compliance system of internal controls and procedures. How should this be framed? We only have to look to the UK and US for guidance on what such internal controls and procedures should be.

In conjunction with the Bribery Act being enacted, the UK Ministry of Justice published official guidance about procedures relevant commercial organisations can put into place to prevent persons associated with them from bribing.[10] Such guidance specified six principles:

1. Proportionate procedures
2. Top-level commitment
3. Risk assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

[9] For example, Peter M Hall, *Investigating Corruption and Misconduct in Public Office* (2004) pp 95-103.
[10] www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

From the two US regulators responsible for enforcing the FCPA, the Department of Justice ('DOJ') and the Securities and Exchange Commission ('SEC'), comes a very significant publication *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.[11] This guidance specified 10 hallmarks of a successful compliance program:

1. Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
2. Code of Conduct and Compliance Policies and Procedures
3. Oversight, Autonomy, and Resources
4. Risk Assessment
5. Training and Continuing Advice
6. Incentives and Disciplinary Measures
7. Third-Party Due Diligence and Payments
8. Confidential Reporting and Internal Investigation
9. Continuous Improvement: Periodic Testing and Review
10. Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration.

Similar to the UK and US, the Australian Government should release more comprehensive and robust guidance to assist companies in grasping the notion of developing a positive 'culture of compliance'. The Australian Government should also serve to clarify the defence to liability as recommended below. The pointers as to the meaning of the term in the suggested training manual issued by the Attorney-General's Department is useful but presumably is not meant to add precision to the legal definition.

It is important also to note the concept of 'proportionality' for the procedures associated with developing an anti-bribery program, and thus part of a 'culture of compliance'. In its official guidance, the Australian Government should recognise that companies of different size and complexity are subject to Australia's foreign bribery regime. TI Australia is not recommending an 'across the board' approach which would unfairly add a burden to SME's as long as they accept their heavier obligations in territories of greater risk.

For reference, under the UK guidance Principle 1, 'Proportionate procedures', specifically means procedures that are proportionate to the bribery risks the organisation faces and to the nature, scale and complexity of the organisation's activities. The US regulators specify in their guide that they have no 'formulaic requirements' regarding an anti-bribery program and they employ a common-sense and pragmatic approach to evaluation including:

- Is the compliance program well designed?
- Is it being applied in good faith?
- How well does it work?

Opinion procedure

To further assist companies in developing a 'culture of compliance', TI Australia suggests that once a set of Official Guidance is issued in this area, the Australian Government considers implementing an opinion procedure, similar to that of the DOJ in the US.

In essence, the DOJ procedure enables those subject to the FCPA to submit information to DOJ, after which DOJ issues an opinion about whether the proposed conduct falls within its enforcement policy. The DOJ has published all of its prior opinions.

[11] www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf

3) Enact clearer laws for the imposition of corporate liability

The Criminal Code presently provides a unique regime that has the potential to significantly extend the scope of corporate culpability from general law principles of attribution. However, because the tests laid down are so complex, including the convoluted way the 'fault' requirement works in relation to each of the different elements of the offence, applying the provision appears to have significant practical difficulties. That may well in TI Australia's view account in part for the paucity of prosecutions. TI Australia considers that a comprehensive review of the law is now fully justified.

To avoid these problems, and building upon the developing of a 'culture of compliance' notion above, the Australian Government should in TI Australia's view amend the relevant part of the Criminal Code to clarify that upon proof of bribery of a foreign official by an agent, employee or an 'associate' of an organisation or providing services to it, it will also be guilty of an offence unless it can show that it has an adequate 'culture of compliance' and has not condoned such bribes, even implicitly.

This shifting of the burden of proof of such a defence is in line with the approach in the Bribery Act referred to above and ought to be no less precise than its 'adequate procedures' defence. It does not amount to strict liability. However in relation to 'culture of compliance', the precision would of course depend on clarification of that term as recommended above.

In the Bribery Act an 'associate' of a company is defined as anyone providing services to the company no matter how the status is described. TI Australia notes that Australian companies with a UK nexus are already subject to that law.

In other contexts, such as workplace safety, the burden of proof of care and of the precautions taken is shifted to the defendant.

Liability of Directors Agents and Intermediaries

On the same basis, TI Australia considers the Criminal Code should also be clarified so that when an organisation is guilty of a bribery offence, its directors understand they will be liable where the organisation does not show that it has and maintains an adequate 'culture of compliance' and knew what was happening.

Realistically, to be an effective remedy, penalties cannot be merely a 'slap on the wrist' like a moderate fine, but should at the top end include jail time.

TI Australia endorses, in this respect, the enlargement of accessory liability to those 'knowingly concerned' proposed by the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 to catch any person who participates in unlawful conduct and knew the essential matters that constituted the offence.

Moreover, for the reasons given above, TI Australia considers it is of particular importance that organisations subject to the provisions in the Criminal Code also be made responsible for the actions of their offshore subsidiaries and intermediaries. This ought not be left to the general principle of attribution, in view of the difficulty of proof of authority given to a direct or indirect intermediary (sometimes there may be tiers of such involved parties) in many situations in risky countries. The 'eyes wide shut' defence should no longer be given credence.

4) The Australian Government needs to ensure that there are sufficient resources available to enforce the laws on bribery of foreign officials

With respect to the enforcement of the laws against bribery of foreign officials, the Australian Government should formally review the resourcing by the Australian regulators to ensure that the resources are sufficient, appropriate and are being applied in an effective and efficient manner.

As previously stated, to date there has only been one successful prosecution under Australia's foreign bribery legislation. As the number of investigations being carried out by the AFP increases, delays may well increase but it is imperative that further cases are submitted for assessment and prosecution on a timely basis. The AFP should be adequately funded and resourced with the appropriate mix of skillsets to assist with this.

The OECD Working Group noted the improved coordination between government agencies like the AFP and Australian Securities & Investments Commission for enforcement. TI Australia urges that in the second half of 2016, the Australian Government institute a formal review of resourcing by the regulators to ensure the adequacy of enforcement for Australia's foreign bribery regime.

TI Australia notes that enforcement agencies of the Bribery Act (UK Serious Fraud Office) and FCPA (DOJ and SEC) are staffed by amongst others, a mix of qualified lawyers and forensic accountants. Accordingly, the question needs to be asked: is the appropriate mix of skillsets for investigating all allegations of foreign bribery, including qualified lawyers and forensic accountants, available to the AFP on a day-to-day basis and assigned to a case throughout the duration of an investigation?

In addition, of course, despite the sensitivity of some cases, the AFP must be free to perform its investigations objectively and without interference by other arms of the Australian Government or by politicians.

5) Debarment of companies from government work

Debarment for breach of integrity offences, including bribery of overseas officials, should be included in legislation in Australia and supported by regulations. They should also be debarred from obtaining incentives, subsidies, grants or loans from government agencies.

Debarment provisions may need to have a very limited exception for public interest, for self-reported breaches but require subsequent full cooperation with the ensuing regulatory investigation.

As an example, a contractor may be debarred from participating in Canadian Government procurements for 10 years from the date when the contractor or its affiliate has been convicted of an 'integrity offence'. Integrity offences include bribery of Canadian and foreign public officials, extortion, tax evasion, bid-rigging, forgery, fraudulent manipulation of stock exchange transactions, insider trading, falsification of books, money laundering and acceptance of secret commissions.

TI Australia also recommends that it be a requirement for any organisation seeking government contracts or to be included in government programs, to set out its anti-bribery program, and this must be given effect in contractual provisions.

6) Encouragement of self-reporting and negotiated settlements

To encourage self-reporting and plea bargaining, Australian regulation and regulators should:

- Establish a leniency program that enables those who first report bribery to the regulators to receive reduction in penalties, provided they fully cooperate and proactively remediate their deficient processes and procedures that led to the bribery;
- Introduce a deferred prosecution system similar to the UK; and
- Give clear guidance on what constitutes a corporate 'culture of compliance' (as discussed above).

The rationale for such measures is clearly set forth in the submission to the Committee lodged on behalf of the International Bar Association for the Inquiry. Reform of criminal procedures to enable proper implementation of the foreign bribery law is an important priority following the lead taken by the UK. The difficulty of obtaining evidence sufficient to satisfy the criminal onus of proof from many overseas jurisdictions has become evident from the experience of the AFP.

TI Australia does not at this time advocate the introduction of civil remedies, such as contained in the Corporations Act, but prefers other measures as set out in this submission.

7) Removal of facilitation payment defence

The facilitation payment defence in the Criminal Code should be removed, and appropriate guidance should be provided to companies to help them avoid such payments. Whilst this submission focuses on grand corruption, removing the facilitation payments defence will reinforce the notion of zero tolerance towards all forms of bribery by a company.

The current conditional freedom to make facilitation payments under Australian law is consistent with the FCPA. However, facilitation payments are expressly prohibited under the Bribery Act. The UK Serious Fraud Office states that a facilitation payment '*is a type of bribe and should be seen as such*'.[12] TI Australia also notes that whilst facilitation payments may be customary in certain parts of the world, it is usually illegal for them to be offered or received under local law.

TI Australia notes that the Australian Government discourages companies from making facilitation payments. However, the Australian Government should go further and follow the lead of the Canadian Government which removed the exception for such payments in the CFPOA.

In removing the facilitation payment defence, the Australian Government could consider a moratorium of 12 – 24 months, provided a company demonstrates its commitment to zero tolerance towards such payments. As an example, this commitment may include the following:

- The company issues a clear policy prohibiting facilitation payments;
- The company's employees and associated persons have access to and are trained on written guidance on the procedure they should follow if they are asked to make a facilitation payment;
- The company assesses whether the employees and associated persons are following the procedures;
- All facilitation payments are recorded in the company's books and records; and
- The company takes proper action (collective or otherwise) to tell the appropriate authorities in the countries concerned that facilitation payments are being demanded.

[12] www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx

8) Prosecutions should not be subject to suppression orders except in extreme national security circumstances

Australian courts all have statutes or rules that permit the suppression or non-publication of certain facts, information or evidence or the whole or part of a proceeding before the Courts.

Relevantly for foreign bribery offences, Annexure A to the Office of the Commonwealth Director of Public Prosecutions ('CDPP') Prosecution Policy states that the Director:

> '*When deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor must not be influenced by:*
>
> *considerations of national; economic interest;*
>
> *the potential effect upon relations with another State; or*
>
> *the identity of the natural or legal persons involved.*'

This statement reflects the terms of Article 5 of the OECD Convention. There is however, no law in Australia giving effect to this 'obligation'. Moreover the policy statement does not go beyond the CDPP and should likewise extend to the AFP. Any suggestion of political interference in relation to criminal investigations must be directly addressed by the Committee as a threat to the independence of the enforcing authorities.

In June 2014, the Australian Government, through the Department of Foreign Affairs and Trade ('DFAT'), secured suppression orders seeking to protect the identity of various Asian political figures from being named as alleged participants in the Securency and Note Printing Australia bribery proceedings in circumstances where those individuals were not charged with any offence. The DFAT notice informing the Court of its application for a suppression order curiously stated that its purpose was '*to prevent damage to Australia's international relations that may be caused by the publication of material that may damage the reputation of specified individuals who are not the subject of charges in these proceedings*.'[13]

The Australian Government should issue strong guidelines indicating that there not be suppression of court proceedings, except in extreme national security circumstances. The guidelines should make it clear that embarrassment on the part of Australia, the foreign country or the foreign official and the possibility of disruption of trade are not factors that would justify suppression.

The OECD Working Group noted that suppression orders have prevented a full discussion to date on the Securency and Note Printing Australia bribery scandal.

Going further, TI Australia recommends that the Australian Government provides timely and sufficient details of cases it is investigating, including industries and areas of focus. This will help demonstrate the active enforcement of Australia's foreign bribery regime and serve as a reminder for companies of the need to be compliant.

9) Protection of whistleblowers

The OECD Working Group noted that protection for employees and others who disclose information regarding foreign bribery within or to their companies or organisations, is presently inadequate in Australia.

[13] Commonwealth DPP v Brady 19 June 2014 and Commonwealth DPP v Brady [2015] VSC 246

Apart from standard, but limited criminal law protections for whistleblowers if they eventually become witnesses in a prosecution, the only protection regime that *may* apply to foreign bribery whistleblowers is that provided by the limited provisions of the Corporations Act.[14] TI Australia supports the previous 2014 recommendations of the Senate Economics Committee (the 'Committee') that these require comprehensive overhaul.[15] Rather than simply 'noting' them (October 2014), the Australian Government must now act to accept and implement these recommendations.

However, TI Australia also emphasises the Committee's assessment that since whistleblower protection must be comprehensive, consistently with OECD, G20 and other guidelines, consideration must be given to an effective regime for the Australian business/private sector which is integrated across all areas of federal law enforcement and business regulation – including, but not limited to foreign bribery. The alternative is to begin creating a system of piecemeal, ad hoc, potentially inconsistent and burdensome regulation such as in the US, where whistleblower protection rules applying to business vary across more than 47 different federal regulatory laws.[16]

In the view of TI Australia, broader private sector whistleblower protection legislation should therefore be developed as a matter of urgency, in which information (reasonable suspicions or concerns) relating to foreign bribery and other corruption related offences are explicitly included within the broader definition of wrongdoing to which comprehensive, three-tiered (i.e. internal, regulatory/law enforcement, and public/third party) public interest disclosure protections apply.

4. Support from TI Australia

Transparency International and its affiliates are active in publishing thought leadership aimed at helping organisations meet their obligations in being compliant with international foreign bribery regimes. This includes the *Business Principles for Countering Bribery*[17] which provides a framework for companies to develop comprehensive anti-bribery programs as well as the publication *Countering Small Bribes*[18] aimed at helping companies address the significant challenges of avoiding small bribes, including facilitation payments.

With the introduction of the Bribery Act, Transparency International's UK affiliate developed a detailed *Adequate Procedures Guide*[19] to assist companies with compliance by providing clear, practical advice on good practice anti-bribery programs that in Transparency International's opinion constitute 'adequate procedures' for compliance with the Bribery Act.

TI Australia is committed to helping Australian companies be compliant with Australia's foreign bribery regime. Similar to the UK guidance, once Australia has an adequate legal regime for combating foreign bribery, TI Australia will publish guidance on how a company can establish and demonstrate a 'corporate culture of compliance'. TI Australia will also:

- Continue to comment publicly on new Australian prosecutions;
- Congratulate Australian regulators on increased enforcement; and
- Note what companies need for a good compliance program.

[14] Part 9.4AAA
[15] Senate Economics Committee (2014). *The Performance of the Australian Securities & Investments Commission: Report of the Senate Economics Committee Inquiry*. Canberra: Parliament House (June 2014).
[16] Devine, T. and T. Massarani, 2011, *The Corporate Whistleblower's Survival Guide,* San Francisco: Berrett-Koehler, p.151.
[17] www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery
[18] www.transparency.org.uk/publications/15-publications/1096-countering-small-bribes/1096-countering-small-bribes
[19] www.transparency.org.uk/publications/15-publications/95-adequate-procedures-guidance-to-the-uk-bribery-act-2010

5. Conclusion

TI Australia's overall position with Australia's foreign bribery regime is to ensure:

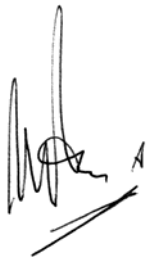
- Australia has laws and legal processes that enable it to implement fully its commitments under the OECD Convention; and
- The Australian Government devotes sufficient resources to actively enforce those laws.

Australian companies that take compliance with foreign bribery laws seriously should not be at a disadvantage to those that do not. Accordingly, the Australian Government needs to actively encourage Australian companies to develop a corporate 'culture of compliance' and be active in adequately enforcing the foreign bribery regime to penalise non-compliant companies and associated individuals.

TI Australia is grateful for the opportunity to provide this submission.

Should you wish to discuss this submission further, please do not hesitate to contact either Michael Ahrens on 0411 360 209 or Jarrod Baker on 0451 949 929.

Yours sincerely



Michael Ahrens
Executive Director
Transparency International Australia

Jarrod Baker
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ANNEXURE 1

Paying a Bribe – How Would You Excuse It?

It is generally acknowledged that the key ingredients of bribery and corruption (and fraud), are opportunity, motivation and rationalisation. These three elements motivate the briber's wrongdoing and each is, more or less, secret. The ability to rationalise enables people to justify and provide false legitimacy to their wrongful actions. Such rationalisation is commonly used to 'shift the blame' in any direction other than on him or herself.

When an executive doing business abroad is confronted with demands for a bribe, they can make at least five excuses or justifications for complying with the request:

'It's just an extra cost of doing business.'
The executive may tell themselves that, 'Paying a bribe has become so prevalent here there is no point in refusing to recognise the situation or in resisting it. The customer is still getting the best price and our agent will guide us on the appropriate amount, who to pay and how to do it discreetly so as not to offend. It is a just a matter of being realistic.'

'In this culture bribe payments have always been the way business is done. Everyone does it.'
'After all we are strangers here and we need to respect their culture.' This excuse is commonly used to justify wrongdoing or breaches of corporate codes. It is particularly prevalent when executives are dealing with a powerful figure in an emerging market.

'I have, after all, a duty to our shareholders.'
'We would be failing our duty to act in the best interests of the company if we do not compete - and we can't compete in that market without paying under the counter. Moreover we know that the boss will support us, despite company policy.' Such rationalisations may have a long company history or even be used as a joint excuse with others in the negotiating team.

'To lose the tender or the opportunity will cost me my bonus.'
Personal incentives and rewards will often run counter to compliance with company policy. There are very few bonus programs which take into account the need not to bid or to walk away when bribes are being demanded. To refuse to pay and conform to the company policy, though moral, may not stand up against the need to maximise one's earnings.

'We will never get caught.'
This is the supposedly 'killer' argument for those in remote locations, especially those with the express or implied support of senior officers. They do not feel exposed. However, this is a less powerful factor nowadays, whether people justify their actions alone or in combination with the rationalisations of others.

Whether such justifications are invoked in the executive's mind or openly with their peer group, cloaked by a veil of secrecy, they will only be vaguely acknowledged.

This means that it must become common practice to recognise and frequently consider bribery as a possible breach of a company's Code of Conduct. This can be done using role plays and other training techniques designed to provide strong moral guidance and to focus on the personal responsibility of each executive.

Giving constant reminders of how an executive can readily rationalise his or her behaviour, and providing effective ways to resist and counteract bribes should be an essential part of all corporate compliance programs.

(*Michael Ahrens, Executive Director, Transparency International Australia*)