TI Australia News

December 2015 - No. 83

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Welcoming Phil Newman, the new Chief Executive Officer of TI Australia

Phil has over 20 years corporate experience in the Financial Services and Banking sectors in Australia, including roles in senior management and compliance, specialising in financial & investment advice. This enables Phil to bring real-world concepts and experience into his current work in the field of anti-corruption.

Phil has lived and worked in Vietnam since mid-2009, working with Towards Transparency, the National Contact of Transparency International in Vietnam, since 2013. Initially, he focused upon the successful development of a business integrity program, conducting activities with individual companies, groups of companies in collective action, and providing input into legislative and regulatory reform. Recently Phil's role expanded to include a wider responsibility for the strategic direction of Towards Transparency. Phil also coordinated the development of and fundraising for the 2016-2020 TI Vietnam Strategy.

Phil holds a Diploma in Financial Planning from Deakin University, Australia, and a Bachelor of Arts (Social Anthropology) from Massey University in New Zealand. Phil will formally commence with TIA on 4 January 2016 and will be based in Melbourne.

Bribery of Foreign Officials - the US, the UK & Australia

Why is the US ban on the bribery of foreign officials so much more respected than that of any other OECD Country? It is no longer just the way that the FCPA law is written or the heavy enforcement resources at the command of the officials in the Department of Justice (DoJ) or the size of the corporate penalties exacted.

When Canberra does contemplate a proper reform program in this area, it will need to consider how best to formalise a basis on which a Deferred Prosecution Agreement (DPA) or other plea bargain or penalty compromise with defendant companies is arrived at.

This should include the significant new emphasis in the DoJ approach announced in September 2015 by Deputy US Attorney General Sally Yates. She said:

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behaviour, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

(cont'd on page 4)

Fraud Against the Commonwealth

In a presentation to the Corruption Prevention Conference in Sydney in October, Andrew Lawrence of the Criminal Justice Division of the Attorney-General's Department commented on the fact that in the 2013-4 year, the reported fraud against the federal public purse was almost $700 million.

This figure is more than treble that in each of the previous 3 years. Even more striking is the assumption made from surveys by firms like KPMG and PwC that the true fraud figure in that year is likely to be up to three times higher! This is certainly not, as the presenter said, an insignificant impact.

It may however mean that the reporting and discovery techniques are getting a lot stronger.

The sheer scale certainly justifies strong action against perpetrators, whether external or insider threats (that is where staff have been found to be involved).

As Andrew Lawrence told us, while tax and welfare fraud are the major categories of fraud, there are a host of others: grants, procurement, avoiding regulatory obligations, licensing, payroll, disposal of assets, time sheet and credit card use. These are all recognised types of fraud.

Information and online transactions are recognised as growing risks.

Because it is so important that safeguards are vigorously mounted to protect the Commonwealth against all these threats - to say nothing of possible depredations by organised crime - the Commonwealth Fraud Control Framework is vital.

Sound 'Tone at the Top' is Often Not Enough

...good people as leaders is not an insurance policy against corruption

Excerpt from a paper presented to the APSACC in Brisbane on 19 November 2015 by Michael Griffin AM, Integrity Commissioner.

'It is worth noting that having good people as leaders is **not** an insurance policy against corruption. The high integrity of leaders **is** a necessary precondition, but insufficient of itself to prevent corruption in organisations. Indeed, the larger and more dispersed an organisation, the more likely will be the formation of sub-cultures and breakdowns in standards. We are talking about public sector corruption risk today, but the same insight might apply to other areas of professional practice and business.

The more incentive there is for corruption to occur, the more likely that it will occur. For instance, the presence of actors who might try to compromise your staff, or the prevalence of under-controlled or uncontrollable assets that present opportunities for corrupt profit, will translate to corruption incidents. This proposition is not just an integrity question - it is a mathematical probability.

So, high-integrity leadership is important, but what do you do with it? How do you use it to create a high-integrity and high-performing organisation?

My experience is that successful leaders recognise that their role is to take responsibility for the integrity of their organisation. They know that people are their key asset and that shaping culture is possibly their most effective tool. They understand that they can - indeed, they must - devolve power, but that they still retain responsibility at all times.

For this reason, leaders must be supported by a strong cohort of managers and they must strike a delicate but necessary balance between empowerment and monitoring.

China Takes Anti-Corruption Policy Abroad

Great interest will be shown in the detailed terms of a planned agreement between China and Pakistan authorities aimed at banning corruption in the implementation of massive energy and infrastructure projects under the China-Pakistan Economic Corridor (CPEC).

The most important projects to be completed under the CEPC initiative include Gwadar Port, the second phase of the upgrading project of the Karakoram Highway project between Karachi and Lahore, Thakot Havelian Motorway, Gwadar Port Expressway, Gwadar International Airport and Karachi-Sukkur Motorway. (cont'd bottom of page 4)

High Court on Political Donations

McCloy's case is an important statement on corruption and potential corruption by the High Court. At issue was the validity of new laws surrounding the electoral process. The NSW Parliament had enacted laws capping donations for state elections and restricting indirect campaign contributions. Secondly, it had outlawed donations by property developers in both state and local government elections.

Mr McCloy and his associated entities (by definition property developers) had made (and intended to make) political donations exceeding the cap imposed by Div 2A of Part 6 of the Election Funding, Expenditure and Disclosures Act (EFED Act). In addition, Mr McCloy's company made an 'indirect campaign contribution' by way of payment towards the remuneration of a member of the campaign staff of an electoral candidate.

The argument put by Mr McCloy was this: these provisions operated as an impermissible burden on the implied freedom of communication on government and political matters. In addition, prohibition on donations by property developers was inappropriately discriminatory. He argued that he was entitled 'to build and assert power' and that paying money to a political or candidate was 'one way of acquiring political influence'.

There were four separate judgements published. All agreed (with the exception of Nettle J.) on the property developer point that the legislation under attack was valid. The history of corruption in NSW powerfully pointed to the potential link between developers and undue influence on those who have the obligation to exercise statutory discretions.

There should be a level playing field and no voice is to be overwhelmed by another.

It was accepted by all judges that there was a burden imposed by the legislation on the implied freedom in the Constitution. However, all the judges accepted that the purposes of the laws – the prevention of corruption and undue influence surrounding the electoral process – were enhanced by the legislation.

A majority said that these laws did not adversely impinge upon functions of the system of representative government. Moreover, they held that the laws were reasonably appropriate and adapted to advance the legitimate object intended to be secured. They said the laws satisfied the 'proportionality test'. Thus, the burden imposed on the implied freedom was justified as a 'proportionate' means of achieving their intended purpose.

The joint judgement dismissed Mr McCloy's argument ('the right to build and assert power'). It pointed out that there was no private right implied by the Constitution. Moreover, the suggestion that the law should guarantee the ability of a few to secure access to politicians by a large donation was antithetical to the important concept that the rights of individuals were secured by ensuring each individual an equal share in political power. There should be a level playing field and no voice is to be overwhelmed by another.

In relation to this principal argument by Mr McCloy, the judgement of Gageler J. is a powerful rejection of it. He described it as 'brazen but perceptive'. It identified the very mischief targeted by the legislation. The all too human tendency towards reciprocity…payments tend to (and are intended to) result in favours. The new laws eliminated equal access based on money.

Anthony Whealy QC, Chair, TI Australia

The TI Australia
2015 Annual Report and Accounts
are available
on the TIA website
www.transparency.org.au

Bribery of Foreign Officials - the US, the UK & Australia

(cont'd from page 1)

Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation. When allegations of foreign bribery go under scrutiny the miscreants will no longer be permitted to get a free pass in exchange for a large corporate fine. Cooperation does not mean that the executives be labelled as 'culpable' or that their legal professional privilege be stripped away. But the message is clear and strong.

One can envisage a few side-effects. The timing of voluntary disclosure of suspected wrongdoing to the DoJ by the company head, which is already often a vexed issue when the internal investigation is still in progress, may become even more difficult. Even the very prospect of a DPA or other compromise being sought from the DoJ will often be so much harder- especially if the executives anywhere near the firing line are at senior level and are still holding onto their positions.

United Kingdom Developments

In the UK the counterpart investigative agency in relation to bribery of foreign officials, the Serious Fraud Office (SFO) is now pointedly warning companies and their professional advisors that they should advise the SFO promptly of their suspicions of breaches if they want to keep open the eventual prospect of a DPA or negotiated deal with government prosecutors in relation to corrupt situations.

Of course the UK legislation in question has only been in force since 2013. In pursuance of it, the exercise path has now finally been trodden but is not worn. It differs from the US scheme as oversight of the process by the courts is stronger and more clearly laid down.

At present, invitations have reportedly been sent by the SFO to a few companies. Of these the first application for a DPA approved by the Court has just been announced. Under the UK deferred prosecution agreement, ICBC Standard Bank agreed to pay a fine of US$25.2m and a further $7m in compensation to the government of Tanzania.

The $25.2m penalty consisted of a US$16.8m fine and $8.4m in disgorgement of profits.

The SFO said it was also the first use by any prosecutor of Section 7 of the Bribery Act 2010 – the failure of commercial organisations to prevent bribery. It has described the orders made by the judge in the approval proceedings as a 'template' for other cases.

In Australia only a few cases of voluntary corporate reporting of foreign bribery to the AFP have been announced. It is time that a formal framework for DPA's along the UK lines is put into place and a leniency program established for those that: report first, fully cooperate with the AFP and remediate the deficiencies which led to the wrongdoing. The present incentives for such voluntary reporting are far too uncertain.

TIA Policy Position: this is included in a Paper on foreign bribery, one of a series recently approved by the TIA Board.

Michael Ahrens, Executive Director, TI Australia

China Takes Anti-Corruption Policy Abroad (cont'd from page 2)

The Chinese Minister, Liu Jianchao, called corruption a great threat to security, peace and socio-economic development. His country, he said, had adopted a policy of zero tolerance against corruption and the China-Pakistan Economic Corridor would be a symbol of good governance, as it would be clean and transparent.

It was forbidden, he said, for any Chinese business to get itself involved in corruption, while carrying out development projects. Thousands of Chinese found committing corruption had been punished. There were over 150 top government officials who had faced serious punishment for corrupt practices.

Support and Thanks

TI Australia is a voluntary organisation. We are pleased to acknowledge support from many sources including:

AECOM; Allens Linklaters; Anglican Board of Mission - Australia; ANZ Banking Group; Ashurst; Austrade; Australia China Business Council; Baker & McKenzie; Australia China Business Council; Beam Suntory (Australia) Pty Ltd; BHP Billiton; Chevron; CIMIC; Control Risks; Corruption Prevention Network (CPN); Deloitte; Echo Entertainment Group Ltd; Export, Finance & Insurance Corporation (EFIC); Ernst & Young; FTI Consulting; Global Compact Network Australia; Holding Redlich; HSBC; Insurance Australia Group; Jackson PR; King & Wood Mallesons; KordaMentha; KPMG; McGrath Nicol; MMG; Norton Rose Fulbright Australia; Orica; Pricewaterhouse Coopers; Readify; Standards Australia; SUEZ Australia; Telstra; Justice & International Mission Unit - UCA; UNDP; URS Australia; Woodside; World Vision Australia; Worley Parsons.

We are also grateful to many individuals who give generously of their time and expertise to assist TI Australia.