TRANSPARENCY INTERNATIONAL AUSTRALIA

TI AUSTRALIA SUBMISSION TO OECD PHASE 4 REVIEW

TI Australia, and others, are deeply concerned with the 'snail's pace' speed of implementation of commitments made to implement a comprehensive Anti-Corruption framework in Australia, suggesting a seeming lack of political will to act on commitments made.

Introduction

TI Australia welcomes the opportunity to participate in the OECD Phase 4 Review of Australia's implementation of its commitment to the **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**- 18 July 2017, Sydney.

TI Australia notes the range of commitments relevant to obligations as a party to the Convention which address some at least of the outstanding recommendations of the OECD Working Group in the 2015 follow up to the Phase 3 Review of 2012.

That follow up includes the commitments made by Australia as a member and Co-Chair in 2014 of the G20 Anti-Corruption Working Group and in line with obligations to FATF standards.

Those commitments were further extended by Anti-Corruption Summit in May 2016, at which Australia joined other participants in a commitment to the Global Declaration Against Corruption. The strength of the outcome of that Summit were linked to the revelations of the Panama Papers, which challenged Australia and other participating countries.

TI Australia welcomes those commitments being addressed in Australia's First Open Government Partnership National Action Plan submitted to the OGP Steering Committee in December 2016. However, more needs to be done to move beyond intent and ensure action. The establishment of the inaugural Open Government Forum, with oversight from Prime Minister and Cabinet, may well assist.

TI Australia brings to your attention progress in implementation of the Convention, with reference to recent TI Australia submissions to Parliamentary Inquiries and Government Consultations, on matters relevant to the OECD Peer Review team. In particular TI Australia's submission to the 2017 Consultation on amendments to Australian Foreign Bribery Legislation urged the adoption of the proposed amendments which are still pending.

Foreign Bribery

The Australian Government needs to address, without delay, the weaknesses in our laws and efforts to ensure Australia joins countries like the United Kingdom, United States and Canada as leaders in combatting bribery; and fully implement its commitments under the OECD Convention, including full implementation of all OECD Working Group recommendations.

TI Australia's overall position with regard to 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.

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.

Australian multinational companies face significant risks when operating in high risk sectors and corruption prone jurisdictions due to a lack of compliance requirements and guidance for the private sector.

The UK Bribery Act provides compliance requirements and guidance for the private sector. Australia has no such framework.

While the **OECD Guidelines for Multinational Enterprises** provide guidance on responsible business conduct, including provisions on corruption, disclosure and taxation, the promotion and implementation of these guidelines through the National Contact Point in Australia, is currently ineffective.

Australian companies operating in high risk sectors, such as mining, construction, and infrastructure, (sectors prone to corruption given the prevalence of intermediaries and third party agents to secure permits, licences and contracts), are particularly exposed by the current inadequacy of the Australian foreign bribery framework.

The continued existence of **facilitation payments** as a defence under the Australian anti-foreign bribery regime is a clear example that Australia is 'out of step' with global best practice to combat bribery and corruption, and at odds with the policy and practice of many of Australia's companies engaged in transboundary business. This defence is long overdue to be removed.

See the TI Australia Position Paper on Foreign Bribery.

Note: TI Australia is leading a global program to identify corruption vulnerabilities in the awarding of mining licences and permits in 20 countries. Information on the Mining for Sustainable Development programme is available on the TI Australia website, including a fact sheet.

Enforcement

Australia lacks the regulatory framework, political will and capacity to follow through on foreign bribery prosecutions and enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Enforcement and prosecution in Australia is hampered by the lack of capacity of the Australian Federal Police (AFP) to investigate and prosecute.

This is believed to be due primarily to the AFP's difficulty in attracting and retaining qualified personnel, and enabling them to specialise in the investigation of complex matters, such as foreign bribery.

In Australia, increasingly action on corruption is diverted to efforts to address terrorism without sufficient recognition of the parallel impacts of terrorism, namely corruption and the role of organised crime, particularly with regard to money laundering and illicit financial flows.

Further, the Australian anti-bribery and anti-corruption framework is overly reliant on private sector self-disclosure. By comparison, **UK system is more efficient in following through on prosecutions**.

To date there has been only one prosecution, the **Securency case**, elements of which will finally go to trial in January 2018, with charges originally made in 2011. Otherwise there has been no real shift, appetite, or capacity to prosecute, except that the AFP has recently secured its first conviction of individuals.

To the best of TI Australia's knowledge, there are currently 37 pending investigations some of which, it appears, have been referred to the Director of Public Prosecutions.

Deferred Prosecution Agreements

The establishment of a Deferred Prosecution Agreement (DPA) scheme in Australia, will only be an effective tool in combating bribery and corruption if it is part of a package of reform measures, and not viewed as a 'get- out-of-jail free' card by offending corporates.

TI Australia has contributed to the Attorney Generals consultation on Improving Enforcement Options for Serious Corporate Crime – Deferred Prosecution Agreements.

TIA supports adopting the UK model, in which a charge is lodged with a court after a DPA is approved, and is finalised through a notice of discontinuance if the terms of the DPA are fulfilled. This will strengthen the integrity of the DPA system, will have a deterrent effect, and can assist prosecutors to commence prosecution more swiftly and efficiently if a material breach occurs.

Unless the use of settlements for foreign bribery can be seen to be delivering real deterrence and effective sanctions, public confidence across the world in the fight against corruption will be undermined.

Anti-Money Laundering

Extending Australia's anti-money laundering regulation to non-financial business and professions, including real estate agents, lawyers, accountants, and legally operated trust accounts, is an urgently needed response to Australia's status as an attractive destination for money laundering.

The Australian **property market** is highly exposed to the risk of money laundering and illicit financial flows potentially gained through criminal activity, as outlined in a recent TI report Doors Wide Open.

The 'gatekeepers' - non-financial entities including real estate agents, accountants, and lawyers, are not required under current regulations to even submit a **suspicious transaction report**.

Imposing a requirement to implement customer **due diligence procedures**, even a risk-based approach, has the potential to enhance visibility of the real owners, including beneficial ownership of trust accounts, and company and trust structures established for both Australian and international clients. The establishment of a public beneficial ownership register in Australia will assist and is overdue.

It is noted that the **AML/CTF Act 'Tranche 2**' may extend coverage to real estate agents and other non-financial entities.

See the TI Australia submission on regulating lawyers, conveyancers, accountants, real estate agents and trust and company service providers.

Beneficial Ownership

Transparency International Australia supports the creation of a central register to record beneficial ownership information. The register should be publicly available (open access) to increase opportunities for the public to verify and provide information, and that access to beneficial ownership information should be free of charge.

It is important to lift the veil of secrecy over those who ultimately owns and controls companies to ensure that wrongdoing is exposed and any illicit financial benefits flowing into, or through the company (including those from corruption and money laundering), are detected and appropriate action taken.

This will assist in preventing the misuse of companies for illicit activities such as money laundering, bribery, corruption, terrorism financing and tax evasion. The web of corporate structures and other complex business arrangements, are currently impenetrable by the Australian government.

See the TI Australia submission on increasing transparency of the beneficial ownership of companies.

Whistle-blower protection

Australia needs an effective whistle-blower protection framework for private and not-for-profit sector employees, as well as improvement of protections in the public sector.

Protecting whistle-blowers promotes a culture of accountability and integrity in both public and private institutions, empowers citizens against corruption, and encourages the reporting of misconduct, fraud and corruption.

The single largest gap in Australia's framework is the lack of comprehensive whistle-blower protection in Australia's business and civil society sectors.

The basis for this reform must be an ambition to combat corruption, tackle bribery and fraud and address tax evasion and avoidance. The Australian Parliament must act quickly to fill the gap in private sector whistle-blower protection to establish a comprehensive, integrated and efficient, enforceable national Australian scheme.

Ensuring whistle-blowers are encouraged to report, and the provision of robust protection, is critical to achieving that ambition.

The OECD assessment of whistle-blower protection frameworks in OECD countries, confirms Australia has been a late entrant in the provision of dedicated whistle-blower protection, and particularly lags in corporate whistle blower protection. Despite some promising commitments, Australia still falls short of the G20 Action Plan on Combating Corruption, the OECD Anti-Bribery Convention and working group recommendations.

Please see the TI Australia submission to the Parliamentary Joint Committee on Corporations and Financial Services - Submission 15 (report expected July 2017) and the TI Australia position paper on whistleblowing.

National Integrity Commission

In Australia, there is growing public support for a well-designed federal anti-corruption agency as part of an enhanced multi-agency strategy to ensure a comprehensive approach to corruption risks beyond the criminal investigation system, and support stronger parliamentary integrity.

It is TI Australia's view that a federal anti-corruption agency needs to be established, and must possess the wide range of coercive and investigative powers commonly found in state agencies, and have the power to investigate, including allegations of foreign bribery, through the use of public hearings.

Mechanisms and resources need to be in place to ensure that when corruption problems are identified, appropriate sanctions or remedies are implemented, and in a timely and visible way. This would greatly assist in investigation of foreign bribery issues.

See TI Australia submission to the Senate Select Committee on the establishment of a national integrity commission. The Senate Select Committee is due to report by August 2017.

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