BRIBERY OF FOREIGN PUBLIC OFFICIALS

PURPOSE

To ensure that Australia:

- has the laws and legal processes to implement fully its commitments under the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention")[1], and
- devotes sufficient resources to more actively enforce those laws.

THE PROBLEM

Bribery of public officials – or the giving or promise of any valuable consideration to an official, in order to influence or corrupt their performance of an official or public duty – is well recognized as one of the most direct and damaging forms of corruption, worldwide.

Fighting the bribery of foreign officials by companies and businesses seeking to do business in that country, is a particularly important way to counter corruption, both domestically and internationally. As recognized by the Australian Attorney-General's Department, foreign bribery results in '*inefficient allocation of resources and economic distortions'* and '*is a threat to democracy and the rule of law, corrosive of good governance and an impediment to economic development*'.[2]

Australia, like other developed countries, has both a self-interest and an obligation to tackle the problem of cross-border bribery. This is recognised by G20 leaders, for whom combating bribery remains an important priority in the G20 growth agenda. Effective action to prevent, investigate and prosecute bribery helps level the playing field for business and gives the private sector the confidence to invest in infrastructure and other growth-producing projects.

HISTORY AND PREVIOUS RECOMMENDATIONS

OECD Convention: Australia ratified the OECD Convention on 19 October 1999. Since then, the involvement of Australian companies in bribery has been confirmed as a real and pressing problem. Notorious examples remain the Australian Wheat Board's bribery of officials to secure contracts under the Iraq Oil for Food program, as confirmed by the Cole Royal Commission; and bribery to secure banknote printing contracts in a range of countries by partly or wholly owned subsidiaries of the Reserve Bank of Australia – Securency Ltd and Note Printing Australia.

In 2012, the OECD Working Group on Bribery[3] criticised Australia for its lack of commitment in implementing the Convention, making a number of recommendations. Its follow up report of April 2015[4] assessed Australia as having made good progress in addressing some recommendations, especially by establishing, in 2014, the inter-agency Fraud and Anti-Corruption Centre hosted by the Australian Federal Police, and positive steps in awareness-raising. However, it noted that Australia had still not addressed eight recommendations at all, and only partly addressed nine. These include the need to extend whistleblower protection legislation in the private sector, and

increase enforcement efforts. There remains only one successful prosecution under the foreign bribery provisions of Australia's Criminal Code (Securency and Note Printing Australia).

In November 2105, the Australian Government also introduced amendments to the Criminal Code aimed at cracking down on false accounting, making it an offence when a person "facilitates, conceals or disguises" payments or benefits which are not "legitimately due", in accounting documents. The approach covers any kind of illegitimate payments, including bribes.[5]

At time of writing, the inadequate state of Australia' foreign bribery laws and enforcement is undergoing welcome scrutiny by an Inquiry by the Senate Economics References Committee. TI Australia provided a detailed submission to this inquiry in September 2015.[6]

UK Bribery Act 2010: By contrast, in 2010 the United Kingdom *Bribery Act* introduced an offence of corporate failure to prevent bribery. The defence for a company against this liability is to prove that it has 'adequate procedures' in place to prevent bribery; and Transparency International UK has developed an *Adequate Procedures Guide* to assist companies by providing clear advice on good practice anti-bribery systems which represent adequate procedures under the Act.

Transparency International's 2015 *Exporting Corruption* report[7] called on Australia to:

- Fully implement all the recommendations of the OECD Working Group on Bribery
- 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
- Provide clearer guidance to organisations on what is expected in compliance systems
- Ensure that where there is credible evidence that a company has bribed a foreign official, the onus is on the company to demonstrate a corporate culture of compliance, and
- Maintain a sufficient cohort of active investigators skilled in this type of offence.

TI AUSTRALIA'S POSITION

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.

In particular, the Australian Government should fully enact the following **law reforms** to the foreign bribery sections of the Criminal Code:

- *False accounting & books and records* – Australia should introduce an offence of 'failure to record accurately the payment of a bribe', with similar penalties as for bribery itself, as well as consider requirements for financial records to be maintained 'accurately and fairly' in enough detail to make it impossible to hide payment of a bribe.
- *Offence of 'failure to create a corporate culture of compliance'* – Clarification that on proof of bribery of a foreign official by an agent, employee or associate, the organisation itself will also be guilty of an offence unless it can show it has an adequate 'culture of compliance' and has not condoned such bribes, even implicitly, in a manner consistent with the UK Bribery Act (including the requirement for an organisation to implement a robust compliance system of internal controls and procedures).
- *Clearer liability* – Amendments to provide that when an organisation is guilty of a bribery offence, its directors will be liable where they approved what was happening or cannot show the organisation had an adequate culture of compliance; and extending this responsibility to actions of the company's subsidiaries and intermediaries.

- *Removal of facilitation payment defence* – This defence to prosecution should be removed, and guidance given to companies to help them avoid making such payments.

The Australian Government should also take **more positive enforcement action** by:

- *Encouraging self-reporting and negotiated settlements* – Australian regulation and regulators should:
  a. establish a leniency program that enables those who first report bribery to regulators to receive reduction in penalties, provided they fully cooperate, and proactively remediate their deficient processes and procedures that led to the bribery;
  b. introduce a deferred prosecution system similar to the UK;
  c. give improved guidance on what constitutes a corporate culture of compliance.
- *Barring deficient companies from government work* – All organisations seeking government contracts or inclusion in government programs should be required to set out their anti-bribery compliance programs, and their contracts made contingent on a high level of implementation. Debarment of companies from seeking government contracts where convicted of integrity offences, including bribery of overseas officials, should be provided for in Australian legislation and regulations, with very limited exceptions for public interest (as Canadian and US approaches) and for self-reported breaches.
- *Ensuring sufficient resources to enforce the laws on bribery of foreign officials* – To help enforce and raise awareness, the government should institute a formal review of enforcement resourcing by Australian regulators, particularly to ensure the appropriate mix of skillsets for investigating allegations, including qualified lawyers and forensic accountants, on a day-to-day basis and throughout the duration of each case.

Removal of suppression orders from prosecutions – The Australian Government should issue strong guidelines, and where necessary legislate, to ensure that court proceedings in foreign bribery cases remain public, except in extreme and genuine national security circumstances. In particular, it should be made clear that suppression orders are not justified by simple international 'embarrassment' of Australia or of the foreign country or officials involved, or the possibility of disruption of trade.

TI Australia support – When Australia has an adequate legal regime for combatting foreign bribery, TI Australia looks forward to assisting companies and regulators by publishing guidance on how a company can establish a corporate culture of compliance (similar to Transparency International UK); and looks forward to publicly responding to prosecutions by congratulating regulators on increased enforcement and helping promote good compliance programs.

[1] www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf
[2] www.ag.gov.au/CrimeAndCorruption/Foreignbribery/Pages/default.aspx
[3] OECD 2012, Phase 3 Report: www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf
[4] www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf
[5] See 'Bribery, false accounting and corruption in Government's crosshairs as anti-corruption laws proposed' http://www.abc.net.au/news/2015-12-22/proposed-laws-crack-down-on-bribery-corruption/7046230.
[6] www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions
[7] www.transparency.org/exporting_corruption/Australia