



Alarming Events in an Election Year

The last two weeks have seen a significant range of alarming events in the anti-corruption field: the Tabcorp investigation into bribery allegations; the Unaoil foreign bribery story; the Panama Papers and the twin evils of possible tax evasion and concealment of beneficial ownership; and, most recently, allegations surrounding Thiess in relation to bribery in India. Indeed the last allegation carried with it the issue

of whistleblower maltreatment and possible failure to report.

All these matters are precisely within the range of important issues in TIA's remit as an anti-corruption advocacy and educational body.

They have special importance in this election year, as does the emerging need for a federal anti-corruption body.

Some of these issues are touched on in this newsletter. We commend them for your attention. There could not be issues more important than these for the preservation of integrity and good governance in corporate Australia and the life of its citizens.

The Hon. Anthony Whealy QC
Chair, TI Australia

Reporting Suspected Bribery — an Australian DPA Scheme Soon?

It is encouraging to read the latest statement by Minister Keenan (and a valuable discussion paper) on the introduction of a formal scheme for Deferred Prosecution Agreements (DPAs) which encourage self-reporting of corruption and fraud to enforcement agencies.

DPAs are **not** a sentence or a conviction against an organisation, and they are distinct from a plea bargain where a party agrees to plead guilty in return for a sentence reduction. DPAs take many forms.

It is in our national interest to have a more robust, efficient and flexible enforcement

process in place for Australian companies suspected of being caught by the 'white collar' laws relating to corruption and fraud offences, here and abroad.

The main issues raised by the discussion paper include:

- Should such a scheme be confined to serious corporate crimes such as fraud and corruption as in the UK model? If so, what other offence should it embrace at the outset?
- Should only corporates have the privilege of being offered such a scheme, as in the

UK? What are the arguments for extending DPAs to individuals? Conversely, isn't there a risk that culpable executives may escape penalties under such scheme? What pressure would ensure this does not happen?

As in the UK model, should not the courts have clear oversight of any DPAs proposed by prosecutors as this would increase confidence in the outcome as well as comply with the constitutional preserves of the judiciary — recently confirmed by the High Court?

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Victoria's Corruption Watchdog's Teeth Making Marks

No government entity in Victoria has been under more intense scrutiny for corruption in the last year than the Department of Education and Training (DET). The IBAC (Independent Broad-Based Anti-Corruption Commission) has brought to light serious misconduct and potential criminal acts by former DET staff.

Two major investigations, with three months of public hearings, have revealed: allocation of funds to schools for goods and services that were not provided and misuse of funds; inappropriate family and business connections between staff (or their associates), school principals and business managers, and the suppliers of goods and services; and weakness in systems and practices around procurement, financial management, allocation of funding and the awarding of contracts.

In response, DET's Secretary, Gill Callister has established a new leadership team, restructured the operating model and is overhauling the integrity framework. The changes have introduced greater transparency, better awareness of potential misconduct and stronger willingness to



report wrong-doing. The introduction of an independently run 'Speak-Up' program has given employees the ability to report issues of concern with protection against retaliation and greater confidence that action will be taken to investigate issues as appropriate.

Integrity appears to be increasingly a priority across the Victorian Government. The Victorian Secretaries Board (VSB) recently announced a series of reforms to be in place by late 2016 committing to strengthen integrity culture across the Victorian Public Sector. They plan to re-write rules on gifts and conflict of interest, and overhaul tendering and procurement systems.

In addition, legislation to strengthen IBAC (entitled 'A Stronger System') passed in the Parliament in March 2016. Its purpose was to remove some of the fetters from the controversially narrow definition of corruption that IBAC could investigate.

But more is needed. Even with this legislation, significant weaknesses remain. The Department of Premier and Cabinet released a discussion paper in March prompting debate on key issues including: when IBAC should open a compulsory examination to the public; the balance between exposing corrupt conduct and protecting individual rights; and, ensuring that IBAC public examinations enable IBAC to establish the facts, yet are fair to individuals.

TIA is working on a submission about how IBAC could be strengthened. If you would like to give input, please contact hlindsay@transparency.org.au

Holly Lindsay

Board Member, TI Australia
Holly is also a member of
DET's Integrity Committee

Mining for Sustainable Development: the dawn of a new era for TI Australia

'Mining offers the opportunity to catalyse broad-based economic development, reduce poverty and assist countries in meeting internationally agreed development goals.'

(UN General Assembly, Res. 66/288, July 2012)

TI Australia is implementing Phase 1 of a five year global programme, *Mining for Sustainable Development*, jointly funded by BHP Billiton Foundation and the Australian Department for Foreign Affairs & Trade (DFAT). The aim is to build greater understanding of the impact of corruption on the permits, licensing and contracts stage of the mining value chain. This is a critical first step in tackling the 'resource curse'.

Change in government and company policies and behaviour has great potential

for a sustainable impact: enabling governments to make their country's economic, social and environmental development more sustainable; creating a level playing field for business through better governance and corruption control systems; enhancing relations between companies, and their stakeholders and beneficiaries; and strengthening civil society and community organisations to demand people's rights and improve development outcomes.

One of the most exciting aspects is that up to twenty TI Chapters in the Americas, Africa, Indo-Pacific and Central Europe will work together. This will give a truly global picture of the issues and develop country-specific recommendations for change.

Mining for Sustainable Development also delivers a boost to TI Australia's growth

and development. Recruitment for a number of key roles will enable TI Australia to build capacity and become a leading TI Chapter.

By the middle of 2016, TIA's aim is to appoint a *Programme Manager*, a *Research & Policy Coordinator*, a *Country Projects Coordinator* and a *Finance & Administration Coordinator*. Additional roles may be available in late 2016 and early 2017. See the TIA website or follow us on Twitter @TIAustralia to stay informed. TI Australia recently established a presence at Hub Australia in Melbourne. I look forward to introducing the new team to you in the next newsletter.

Phil Newman
CEO, TI Australia

Bribery of Foreign Public Officials — False Accounting Ban

The Australian Government is responding to pressure to enact reforms which fulfil Australia's commitments under the OECD Convention. This matter is urgent. Foreign bribery cases recently reported in the media highlight the need for Australian companies to be increasingly vigilant in their overseas operations.

In March 2016 the Australian Government took a significant step. A new Accounting Records provision in Part 10.9 of the Criminal Code Act now prohibits making, altering, destroying or concealing an accounting document, either with: the intention to facilitate, conceal or disguise the giving or receipt of a payment not legitimately due to a person; or be reckless to the fact that doing so facilitates, conceals or disguises the giving or receipt of such a payment.

Such reform is necessary. In the US, under the accounting provisions of the Foreign Corrupt Practices Act (FCPA), corporate bribes have been 'mischaracterised' in a number of ways such as 'consulting fees, after-sales service fees, discounts or travel and entertainment expenses.'

The legislation covers executives operating abroad who are Australian residents or have an Australian passport. It applies to the records of Australian companies, but can also apply to false accounting records by a person engaged to supply services to an Australian company. Crucially, it is no longer necessary to prove that a benefit was actually received by another person for an offence to have occurred.

Failure to comply with the legislation could see companies subject to heavy penalties



'Australian companies need to ensure that they have appropriate payment disclosure protocols and monitoring in place to maintain accurate accounting documents.'

and executives facing fines of up to \$1.8 million or 10 years' imprisonment. Australian companies need to ensure that they have appropriate payment disclosure protocols and monitoring in place to maintain accurate accounting documents. Under the legislation, an accounting document is broadly defined as: any account; or any record or document made or required for any accounting purpose; or any register under the Corporations Act 2001; or any financial report or financial records within the meaning of the Act.

While not going as far as the FCPA, where accounting provisions also make it a requirement for companies to devise and maintain a sufficient system of internal accounting controls, the change to the legislation is a step in the right direction.

A key aspect of TIA's position on foreign bribery is for the legislation to be updated to include an offence of 'failure to record accurately the payment of a bribe', with penalties similar to those for bribery. In addition, it should require that financial records be maintained 'accurately and fairly', and in enough detail to make it impossible to hide payment of a bribe.

In the meantime, it remains imperative that the Australian Government devotes sufficient resources to actively and adequately enforce the new legislation.

Jarrod Baker
Board Member, TIA

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- Should the government be asked, as part of a DPA package, to give or renew clear policy guidance about the bribery offences (including foreign bribery) and corruption — and indicate what would constitute reasonable suspicion that such an offence has occurred?
- Should each DPA scheme be published when it is put forward to the courts for judicial confirmation?

- Should the notion of restitution to victims be advanced strongly as part of any DPA scheme, as mentioned in the discussion paper?

While one deduces no present ambition in the government to introduce a scheme having the same width or impact as the US scheme for DPAs, the pressure will be on the government to proceed at least on the same basis as the UK scheme enacted in 2013.

However, recently Transparency International has joined with two other leading organisations to urge greater 'deterrent effect' by way of a series of precautions in DPAs laid out in standard OECD guidelines. *Read the letter at http://transparency.org.au/wp-content/uploads/2016/04/Letter_to_OECD.pdf*

A deadline of 2 May 2016 has been set for comments on the proposal.

2016 Global Anti-Corruption Summit, 12 May 2016, London, England

TI Australia urges the Australian Government to: fully commit to the Global Anti-Corruption Summit's (GACS April 2016) proposed ten-point plan; put in place a monitoring and oversight mechanism that includes civil society representation; and implement a strong anti-corruption plan as part of its Open Government Partnership National Action Plan, due mid-2016.



UK Prime Minister, David Cameron, invited Heads of Government from about 50 countries to this landmark Summit. Australia, along with G20 & Commonwealth nations and world leaders showing leadership on anti-corruption, will gather in London to adopt a high-level ten-point plan with voluntary sub-commitments, outlining a 3-5 year vision for anti-corruption cooperation and action around the world. The UK Prime Minister's key focus for the Summit is:

Prevention: prevent misuse of companies; obtain and make use of beneficial ownership information; tackle professional enablers; and tackle corruption in sport.



End Impunity: law enforcement cooperation; improve the cooperation infrastructure; use new technology for reporting and protecting victims and witnesses; and debarment and denial of entry.

Victims: asset recovery; and scaling up penalties for major cases of corruption.

TI United Kingdom leads TI's global input to the Summit agenda and longer-term outcomes. For the Summit to be successful, leading economies need to work on: eliminating secrecy havens used by money launderers to hold assets in anonymous companies; and cleaning up domestic political corruption risks – including the role of big money and secret lobbying in politics. The recent explosive revelation of extensive networks of shell companies emanating from Panama, which involve numerous Australian companies and individuals, only serves to highlight how critical this issue really is.

To be effective, the Summit needs to encourage effective implementation. Much of the problem with anti-bribery

legislation around the world is poor enforcement of existing powers. The focus must continue to be on flows of corrupt capital into and through Western financial centres, whether it is invested into property or through banks, or assisted by first world lawyers and accountants. TI Australia hopes that the involvement of a wide range of countries (donors, transition economies and developing countries), businesses and civil society will ensure that the Summit truly changes the rules of the game.



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