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Sophie Dunstone
Legal and Constitutional Committee
Department of the Senate
PO Box 6100, Parliament House
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Via email: legcon.sen@aph.gov.au

18 July 2023

Dear Committee Secretary,

The present global environment carries risks of a declining commitment to foreign bribery enforcement. Yet the need for enforcement is stronger than ever to avoid a race to the bottom in the use of bribery in the contest for foreign markets, including in the Indo-Pacific region.

Foreign bribery has huge costs and consequences for people around the globe. It undermines democracy and human rights, and thwarts achievement of the Sustainable Development Goals. It's also a major reputational risk for companies, and Australian trade and investment. As recent examples, involving Australian government initiatives and contractors in PNG and Nauru show, it can also harm Australia's reputation in the region whilst enriching local elites.

As outlined by the OECD Working Group on Bribery, there are concerns about Australia's low level of enforcement given the high-risk regions and sectors in which Australian companies operate. Australian companies involved in mining and infrastructure are particularly exposed to corruption risks, and are particularly exposed by gaps in our foreign bribery framework.

As such, we welcome these proposed amendments which seek to strengthen Australia's implementation and enforcement of the Anti-Bribery Convention by strengthening Australia's legal framework for investigating and prosecuting foreign bribery. Transparency International Australia has called for, and been in support of, updates to the Criminal Code for some time. Our position has been put on the record in our 2015 submission to the Senate Economics References Committee Inquiry into Foreign Bribery, our 2018 submission to the Attorney Generals Department Consultation into Deferred Prosecution Agreements Scheme, and our 2019

submission to the Public Consultation: Review of the 2009 OECD Revised Anti-Bribery Recommendation. In examining the period, 2018-2021, Australia opened eight foreign bribery investigations, commenced seven cases and concluded five cases with sanctions. In 2022, Transparency International assessed Australia's enforcement of foreign bribery as 'moderate' and needing improvement[1].

Recommendations

In addition to passing the proposed amendments to the Criminal Code, the Australian government should:

- Publish statistics on foreign bribery investigations, prosecutions and case outcomes.
- Develop a database of foreign bribery investigations and enforcement outcomes.
- Introduce a Deferred Prosecution Agreement scheme as per previous versions of the proposed Bill. However, ensure it includes the requirement of an admission of criminal liability as part of a DPA.
- Abolish the facilitation payments defence.
- Introduce a debarment regime to grant agencies the power to preclude companies found guilty of foreign bribery offences from being awarded contracts.
- Ensure the Bill makes it a criminal act to pay bribes to third parties to win government contracts in foreign jurisdictions, such as bribing a competitor to put in an uncompetitive bid for the contract.

We would welcome the opportunity to discuss our position with you further should you require.

Yours sincerely,

Clancy Moore

Chief Executive Officer, Transparency International Australia

[1] Transparency International, Exporting Corruption, 2022, https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_English.pdf

Streamlined and simplified bribery offence

Transparency International Australia welcomes the changes to Sections 70.1 and 70.2 of the Criminal Code Act, which we believe will strengthen the legal framework for prosecuting Australian companies for foreign bribery offences. These long overdue reforms will help overcome some of what the explanatory memorandum to the amendment says are the 'limitations of the current foreign bribery offence which has proven to be overly prescriptive and difficult to use'.[2]

Specifically, Transparency International Australia support the proposed amendments that:

- Extends the foreign bribery offence to include the bribery of candidates for public office (not just current holders of public office);
- Extends the foreign bribery offence to include bribery conducted to obtain a personal advantage (the current offence is restricted to bribery conducted to obtain or retain a business advantage);
- Removes the existing requirement that the benefit or business advantage be 'not legitimately due' and replaces it with the concept of 'improperly influencing' a foreign public official;
- Removes the existing requirement that the foreign public official be influenced in the exercise of their official duties; and
- Makes it clear that the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else.

We also welcome the creation of a new offence for corporations that fail to prevent foreign bribery, which carries a maximum penalty of $27.5 million or higher.

[2] Explanatory memorandum Crimes Legislation Amendment (combatting foreign bribery) Bill 2023, https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7055_ems_f4929a53-6cf5-4ea3-95b7-3689e6c81df9/upload_pdf/JC010044.pdf;fileType=application%2Fpdf, p2.

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Case study: examples of investigations that have not progressed

Tabcorp: In 2016 TAB made a payment of $200,000 AUD to the family of Cambodian Prime Minister Hun Sen - a transaction that was investigated by Australian and overseas anti-bribery agencies. The $200,000 payment was allegedly made as part of a strategy to secure a lucrative online gaming licence in Cambodia. The payment was made to a consulting company connected to the sister of Hun Sen. The investigation has now been dropped.

Sinclair Knight Mertz & CEO: In 2018 the former chief executive of a major foreign aid contractor was charged (and later acquitted) with conspiring to bribe foreign officials in the Philippines and Vietnam over almost a decade to win lucrative infrastructure development contracts, disguising them as marketing. The company pleaded guilty and was fined more than $1.4 million in the NSW Supreme Court in 2021. The company's former chief executive and four other executives were also charged, took the case to trial and were acquitted. It was the first time a foreign bribery case had gone to trial.

Rio Tinto executive, Sam Walsh was the iron ore boss at Rio Tinto in 2011 when the company was alleged to have committed acts of foreign bribery. It was alleged that $10.5 million in payments were made to a consultant providing advisory services to smooth the relationship with Guinean President Alpha Conde. Leaked emails showed that Sam Walsh and the then chief executive Tom Albanese were aware the payments had been proposed. The investigation was later dropped.

Snowy Mountain Engineering Corporation (SMEC): In October 2022, the Australian Federal Police charged two former senior managers at the Snowy Mountain Engineering Corporation (SMEC) for allegedly bribing Sri Lankan government officials. They are accused of making corrupt payments to win two infrastructure projects in Sri Lanka worth more than $14 million. The AFP alleges that between 2009 and 2016, the two conspired to pay bribes worth more than $304,000. If convicted, the men could have faced up to 10 years in jail. The AFP's investigation into SMEC had gone for almost a decade, with recent information suggesting the CDPP dropped the charges.

Absolute liability for failure to prevent bribery of foreign public officials

We support the inclusion of section 70.5A into the Code which makes it an indictable offence for a body corporate to fail to prevent bribery of a foreign public official as well as making it an absolute liability offence. This will encourage companies to take proactive measures to identify foreign bribery risk and implement policies and procedures to proactively prevent foreign bribery. Encouraging companies to develop a 'culture of compliance' to prevent foreign bribery is a necessary approach to tackle the problem.

As noted in the Minister's second reading speech in Parliament, the UK Bribery Act 2010 contains a similar offence which has been used in the prosecution of several foreign bribery cases.[3] The Minister has said that the UK guidance for this offence will be relied on to draft his guidance on what will constitute 'adequate procedures'.[4]

The Bribery Act 2010 (UK) Guidance section seven contains information on what Australian companies should expect to consider. Clear principles that can be identified from guidance are that measures to prevent should be proportionate to the risk that a business face. It would include things like: risk audits, proactive due diligence, careful engagement of third parties, and extensive training and compliance communications.[5]

Any guidance developed by the Minister should require a company to implement a robust compliance system of internal controls and procedures to assist companies in grasping the notion of, and developing a positive "culture of compliance." TIA supports an approach that includes the principle of proportionality and takes into consideration that companies of different size and complexity are subject to Australia's foreign bribery regime.[6]

Facilitation payments

Foreign bribery is illegal in Australia, but our law makes an exception for bribes paid as facilitation payments. These are usually minor bribes made to foreign public officials in order to hasten minor routine government processes. However, in practice it can be difficult to differentiate between an exempt bribe paid as facilitation

[3] Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, Second Reading
[4] Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, Second Reading
[5] Abigail Gill, Foreign bribery reform back on the table, https://www.corrs.com.au/insights/foreign-bribery-reform-back-on-the-table
[6] Transparency International Australia submission to Senate Economics References Committee Inquiry into Foreign Bribery, 2015, p5.

payment and an illegal bribe. Bribes paid as facilitation payments are almost always illegal in the countries they are paid. Bribes paid as facilitation payments in Australia are illegal.

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 and it is disappointing to see that this has not been included in the proposed amendment. TIA's position is that this defence to prosecution should be removed, and guidance given to companies to help them avoid making such payments.

Deferred Prosecution Agreements

"*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.*"

We note the proposed Bill does not include a Deferred Prosecution Agreement (DPA) scheme. This reduces the incentives for companies to self-report examples of foreign bribery involving their operations and will continue to undermine Australia's foreign bribery laws. DPAs are used in jurisdictions including Canada, France, the UK, the US and Singapore.

TIA has previously supported the creation of deferred prosecution agreements (DPA) but only if they are not viewed as a 'get- out-of-jail free' card by offending corporates. DPAs should still result in prosecutions of the individuals who authorised or paid the bribe. Under a DPA, a company may be required to cooperate in any investigation, pay a financial penalty, admit responsibility and implement a program to improve compliance in the future. Importantly, without appropriate constraints, DPAs may not achieve their desired result and thus would require DPAs to include an admission of liability. It is our strong view that corporations should be required to make a formal admission of criminal liability. The company's formal admission of criminal liability is absolutely essential to the success of the scheme.

In the previous proposed amendment, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 intended to introduce a deferred prosecution agreement scheme. The then Minister in his speech accompanying the second reading of the bill, noted that 'the existing foreign bribery offences in the Criminal

Code are grossly inadequate' and 'the introduction of such a scheme (deferred prosecution agreements) should only be entertained after the measures in this bill have been enacted and given time to work.'

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. The experience of the US and UK is that a DPA scheme increases detection and results in more prosecutions of foreign bribery and other criminal offences. In the US, there had been over 300 DPAs since 2019.[7] This includes in 2021, a DPA with Deutsche Bank AG paying US $124,796,046 in fines.[8] Another example from the UK involved a DPA between the SFO and ICBC Standard Bank where under the DPA, for three years ICBC Standard Bank had to a) co-operate with law enforcement agencies in the prosecution of individuals; b) pay $6 million in compensation to the government of Tanzania, plus $1.04 million in interest; c) pay $8.4 million disgorgement of profits and pay a penalty of $16.8 million and other remedial action.[9]

Greater transparency needed

The AFP and the Commonwealth Director of Public Prosecutions (CDPP) do not publish statistics on investigations, prosecutions or case outcomes. The Attorney-General's Department publishes annual statistics on requests for mutual legal assistance (MLA) made and received in relation to criminal matters but does not distinguish foreign bribery related requests. The AFP may issue media releases when filing charges and ASIC issues releases when a case concludes. Worryingly, there have been no public updates about reports of several investigations. These include the AFP's reported 2017 examination of the possible liability of Iluka Resources in relation to allegations against a London-based firm it acquired that was accused of bribing high-ranking Sierra Leone officials to win mining licences. The AFP was also reported in 2016 to be conducting an investigation into allegations against Sundance Resources of possible bribery to win permits for an iron ore project in the Republic of Congo (Congo-Brazzaville) though no public updates could be located.[10]

[7] Gibson Dunn, '2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements', 8 January 2020.
[8] United States District Court Eastern District of New York, 2021, Deferred Prosecution Agreement,. No. 20-00584 (RPK) (RML), https://www.gibsondunn.com/wp-content/uploads/2021/07/Deutsche-Bank-DPA.pdf
[9] UK Government, Serious Fraud Office, 2018, https://www.sfo.gov.uk/2018/11/30/uks-first-deferred-prosecution-agreement-between-the-sfo-and-standard-bank-successfully-ends/
[10] Reuters, Australian police probe Sundance over Congo corruption allegations, 2016, https://www.reuters.com/article/us-sundance-rsc-congorepublic-idUSKCN110019

Having no central public register of beneficial ownership of companies and trusts continues to be a weakness in the legal framework. Public registers of beneficial ownership are critical for detecting and enforcing against foreign bribery and other forms of corruption, including money laundering.[11] A central, freely accessible register of beneficial ownership for companies and trusts has been a position of TIA for some time and while we note the current work of the Department of Treasury to develop a register, this needs to be implemented as a matter of urgency.

Whistleblowers are crucial for the detection of foreign bribery and other crimes and their effective protection must be part of any enforcement framework.[12] In Transparency International's 'Exporting Corruption Report, 2022,' inadequate whistleblower protection was identified as a key weakness of Australia's legal framework. We note there are also no debarment guidelines for procurement agencies in relation to companies or individuals convicted of foreign bribery offences.

Recommendations

- Publish statistics on foreign bribery investigations, prosecutions and case outcomes.
- Develop a database of foreign bribery investigations and enforcement outcomes.
- Introduce a Deferred Prosecution Agreement scheme as per previous versions of the proposed Bill, however ensure it includes the requirement of an admission of criminal liability as part of a DPA.
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[11] Transparency International, Exporting Corruption Report 2022, https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_English.pdf, p 22.
[12] Transparency International, Exporting Corruption Report 2022, https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_English.pdf, p 23.