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Submission by Transparency International Australia

Public consultation: Foreign bribery amendments

Criminal Law Policy Branch Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

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*Combatting Bribery of foreign public officials
Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*

Dear Sirs

We are pleased to respond to the matters announced in the Press Release of the Minister the Hon. Michael Keenan MP of 4 April 2017 and to the Foreign Bribery Consultation Paper of your Department ('The Paper'), which describes and details a number of specific current proposals for further reform of the law in relation to it.

BACKGROUND

This response is supplementary to the TI Australia submission of 14 September 2015 to the Senate Economics Legislation Committee Inquiry into Foreign Bribery. That is, submission No. 31 of the 43 useful submissions made so far to that Committee and published. A copy is attached for ease of reference.

After reviewing the several factors involved in necessary law reform in this area, that submission concludes:

"TI Australia's overall position with 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.*

“Australian companies that take compliance with foreign bribery laws seriously should not be at a disadvantage to those that do not. Accordingly, 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.”

In particular, we considered then as we do now that Australian companies that comply with the standard set by the relevant provisions of US and UK law should not be at a disadvantage for doing so. In referring to encouragement by the government we would of course mean and include all agencies such as EFIC and AUSTRADE interacting with the private sector.

In making this response we would also draw attention to our Position Paper on the same topic of January 2016 published at www.transparency.org.au , copy attached, which in turn refers to a relevant part of the report of the *2015 Exporting Corruption Report* of Transparency International submitted to the OECD that year.

We must of course acknowledge the enactment since that date of an important measure to implement reform in relation to bribe payments, that is, making it a criminal offence, punishable by significant penalties, to intentionally or recklessly falsify accounting documents. As noted in the Paper, this is an important recent development which has come into force.

POSSIBLE FURTHER REFORMS

We appreciate the opportunities you have provided both in the draft and in the roundtable you recently convened in Sydney, to consider the seven further important possible law reform measures carefully explained and discussed in the Paper. We highly commend them for this part of the necessary law reform program in relation to the issue.

They are in accord with and take forward our published position in relation to the ban of foreign bribery.

Once enacted, these measures would, we believe, together serve as a sound law reform basis to enhance Australia’s progress in enforcement of such ban in accordance with the relevant OECD Convention. They would valuably serve to prevent impunity in relation to bribery of foreign officials and better hold those on the supply side of such bribery to account within the reach of our law.

We would draw specific attention again in this context to the publication of Transparency International’s UK affiliate entitled *How to Bribe: a typology of bribe-paying and how to stop it*¹, which provides useful examples of how bribes are paid in practice.

As stated in our 2015 submission to the Senate Economics Legislation Committee Inquiry into Foreign Bribery cited above

“combatting this type of bribery is a dynamic, ever-changing struggle because the practices tend to become more sophisticated. It can severely impinge on the dedicated resources and ethical standards of even the best international organisation to avoid getting entangled.”

¹ www.transparency.org.uk/publications/15-publications/833-how-to-bribe-a-typology-of-bribe-paying-and-how-to-stop-it

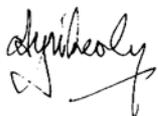
To emphasise this point in relation to accountability, the fact that often secretive and complex offshore arrangements, with direct links or via intermediaries, can be involved and sometimes foreign government connections are reluctant to co-operate, can make difficult the task of evidence gathering for purposes of enforcement by Australian authorities. That particular feature does, in our view, justify the amendments flagged in the Paper.

We appreciated the opportunity to participate in the consultation forum in Sydney recently and here would make these brief specific comments on the draft Bill:

- The proposed extension of corporate obligations in relation to actions of ‘associates’ in draft section 70.5A - as being aligned to the corresponding provision in the UK Bribery Act - is very important.
- We look forward to seeing a draft of a comprehensive and robust set of guidance provisions as contemplated in draft Section 70.5B which in our view should include provision for the designation of a responsible government agency to supervise and enforce compliance with the guidance.
- Such a document being released, or even a draft of it, would be expected to have much practical utility. Even though such guidance would not have the status of a legislative instrument, we consider it would be useful to also make express cross-reference to it under the relevant part of draft Sect. 70.2B (3). Such a set of principles ought to be relevant to items such as the extent of due diligence. They might thereby become a standard for corporates doing business in risky countries as well as usefully promoting prevention and deterrence.
- After considering the arguments in the Paper as to the alternative merit of introducing a test of ‘dishonesty’ into certain provisions, we would concur that this is not the preferable course to adopt.

Of course this critical part of law reform in the area necessarily takes its place in conjunction with pursuit of ongoing reform of related matters, such as protection of whistleblowers in the private sector as referred to in the Paper, the matters noted in the TI Australia position paper mentioned above, in the Cross-agency submission and in other submissions to the Senate Standing Committee on Economics inquiry noted above.

We have lodged, in conjunction with this, a submission to your consultation paper on the related matter of preferred options for Deferred Prosecution agreements.



The Hon. Anthony Whealy QC
Chair, TI Australia

cc Serena Lilywhite CEO, TI Australia; Michael Ahrens Director, TI Australia