THE AUSTRALIAN NATIONAL UNIVERSITY

ANU College of Law

Canberra ACT 0200 Australia

www.anu.edu.au

24 August 2015

The Secretary
Senate Economics Reference Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

Foreign Bribery

It is a pleasure to make a submission to your inquiry on the above matter.

Background

As an Associate Professor at the Australian National University College of Law, I am fortunate to be working in a number of contexts on foreign bribery regulation. Currently, I am the Deputy Director (Law) of the Transnational Research Institute on Corruption at ANU; working with the United Nations Office of Drugs and Crime (UNODC) in its Anti-Corruption Academic Initiative (Vienna and Doha); working with the International Bar Association Anti-Corruption Committee on the drivers of corruption; and assisting with the International Standards Organization (ISO) development of a standard to govern Anti-Corruption Management Compliance Systems. I am also engaged in research on corporate corruption, have provided advice to Transparency International on its Business Integrity Corruption Assessment, and have been a non-residential Fellow at Harvard University's Edmond J Safra Center for Ethics, researching the development of transnational anti-corruption regulation.

Overview of Submission

This is a very important inquiry. By focusing on the effectiveness of Australia's foreign bribery laws, it brings into the spotlight Australia's overall approach to tackling transnational corruption. Corruption is highly damaging to global economic development, foreign investment, fair competition, poverty and inequality, and stable government. At present, Australia lags behind key jurisdictions such as the United States and the United Kingdom, both in terms of the adequacy and enforcement of our anti-corruption laws, and in the strength of our commitment to tackling corruption.

In the absence of legislative reform to our foreign bribery laws, Australia risks being seen by observers both inside and outside of the country as not committed to fighting corruption. Australia's low levels of prosecution and cumbersome bribery laws stand in sharp contrast to the high level of investigations and prosecutions under the US Foreign Corrupt Practices Act (FCPA), and the recent passage of the UK Bribery Act 2010. Both of these actions signal to international

companies that they face a tangible risk of being caught and prosecuted if they pay bribes overseas. They also place emphasis on the need for businesses to create and maintain risk and compliance systems to deal internally with foreign corruption.

Australia now lags visibly behind these jurisdictions. This Senate inquiry presents an important opportunity to respond to this situation by:

- Sending a clear message to Australian businesses that the government is committed to tackling private sector bribery and corruption;
- Recommending the introduction of a new bribery law along the lines of the UK Bribery Act;
- Supporting a greater focus on civil liability in cases of corporate corruption; and
- Recommending the introduction of an effective corporate integrity reporting (or private sector whistleblower) scheme.

Tackling Bribery and Corruption by Australian Businesses

Evidence exists to show that many Australian companies are not taking seriously the risk of liability under Australia's foreign bribery provisions. For example, the *Deloitte Bribery and Corruption Survey 2015 Australia and New Zealand* found that, while 33% of companies operating in Asia, the Middle East and Africa had uncovered an incident of suspected bribery or corruption during the past five years, 23% of those companies remained unconcerned about the risk of liability for corruption. It found that 40% cent of companies with offshore operations did not have or did not know if they had a compliance program in place to deal with the risk of corruption, and 23% of companies admitted to never having conducted a bribery and corruption risk assessment of their off-shore operations. In addition, 53% of executives and board member said they had limited or no working knowledge of Australian foreign bribery laws, 43% had limited or no working knowledge of UK laws, and 54% had limited or no working knowledge of US laws. This is despite the fact that a significant portion of the investment and commercial economic activities of Australian businesses is in high-risk jurisdictions.[1]

Whilst these results are disturbing, they are perhaps not surprising in the context of the Australia's poor enforcement record. To date the only cases prosecuted under Division 70 of the *Criminal Code Act* (against Securency, NPA and its executives) have been surrounded by secrecy and delay. These prosecutions have therefore done little to send a deterrence message to Australian businesses on the risks (financial, reputational and personal) of engaging in corruption or to reduce the perception that the chance of being caught under Australia's foreign bribery provisions is small.

The UK Bribery Act

In this context, one of the clearest and most effective ways Australia can improve its stance on corruption is to reform our foreign bribery laws. The UK Bribery Act now represents global best practice in anti-corruption regulation by prohibiting all bribery (whether private to public or private to private, and including both the giving or receiving of a bribe or other advantages) and creating the offence of failure to prevent bribery. The passage of this Act has been met with a strong response throughout the international business community, and an increased focus on the need for corporations to have in place strong, up-to-date and effective anti-bribery systems. This focus on corporate compliance is supported by the US Sentencing Guidelines, which allow evidence of an internal compliance system focused on responding to bribery and corruption to be presented in

[1] OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (2012), p 8.

THE AUSTRALIAN NATIONAL UNIVERSITY

ANU College of Law Canberra ACT 0200 Australia

www.anu.edu.au

mitigation of a penalty under the FCPA. It has also led to the creation of global compliance standards and principles to assist businesses in meeting global best practice by leading organisations such as the International Standards Organisation, the British Standards Institute and Transparency International.

Civil liability for foreign bribery and corruption

In addition to reforming Australia's bribery laws, a much stronger focus needs to be placed on creating civil liability for corruption. One of the key ways for this to occur is through the introduction of accounting provisions similar to those that exist in the US under the FCPA. These provisions require all listed companies to keep books, records and accounts that honestly and accurately detail company transactions and asset dispositions, and to maintain a system of internal accounting controls sufficient to provide reasonable assurances on the accuracy of that information. The provisions therefore catch not only situations where companies falsify records, but also cases of off-the-book payments and financial records that fail to show the real purpose or nature of a transaction.

The books and records provisions form an integral part of the US Department of Justice and Securities Exchange Commission (SEC) prosecution strategy. Whereas it can be difficult to prove all elements of the bribery provisions under the FCPA, as many aspects take place overseas and in secret, all US corporations have to file accounting documents with the SEC. The SEC can then use the accounting provisions as a prosecution backup in cases where there is evidence of bribery but it is insufficient to support a case under the bribery provisions. Whilst the bribery provisions require proof of intent, this is not required to establish a civil violation under the accounting and recordkeeping provisions. However, if there is proof of corrupt intent via falsified records, that evidence can be used to support a prosecution under the bribery provisions. Moreover, evidence of non-compliance with the accounting and recordkeeping provisions is likely to be under the direct control of a company and therefore subject to compulsion by U.S. enforcement authorities. Finally, individuals, such as officers, directors, employees, and agents of a company, are also subject to the terms of the accounting and recordkeeping provisions.

A second key way to improve executive and director responses to the risk of liability for corruption in Australia is to increase the number of actions taken under the directors' duties provisions of the *Corporations Act 2001*. A recent OECD report noted that in over 50% of the foreign bribery cases taken around the world company directors or senior executives were involved in approving or supporting the payment of bribes. Yet, to date, limited action has been taken under the directors' duties provisions in Australia in cases where there is evidence that company directors authorised, knew about or failed to respond adequately to foreign bribery. This is despite the fact that Australia has a public regulator (ASIC) with power to take action for civil penalties under the Corporations Act.

Indeed, the only case where the directors' duties provisions have been used in the context of foreign bribery was the 2007 action by ASIC against six former directors and officers of the Australian Wheat Board (AWB), alleging contraventions of sections 180 (duty of care) and 181

(failure to act in the best interests of the corporation) of the *Corporations Act 2001*. In 2012, the case against the former Managing Director was settled in the Victorian Supreme Court, with a pecuniary penalty of $100,000 and a disqualification order imposed.[2] In settling this case, Justice Robson emphasized the importance of applying a high standard of care to cases involving foreign corruption. He noted that 'there is significant public importance in appropriate standards being expected of directors' and, that although directors and officers of corporations are expected to take calculated commercial risks, the proper assessment of those risks was a matter that demanded the exercise of care.

Subsequently, in a second settlement between AWB's Chief Financial Officer and ASIC, the defendant admitted that he had co-authorised the payment of fees when he had information to suggest that they were being paid to a foreign government, and that he took no steps to ascertain whether this information was true or not, or to inform the board of it.[3] Justice Robson again agreed that the defendant had breached his duty of care and stated that, although he had not acted dishonestly, he had 'failed to join the dots' and ask appropriate questions.

The outcomes in these cases are consistent with the high standard of care expected of directors in Australia, which includes a general responsibility to monitor the activities of management, establish appropriate management systems and ask questions to ensure that adequate information is presented to the board. In addition, directors can breach their duties if they cause or allow their company to enter into transactions that expose it to risk, without the prospect of producing any benefit for the company.[4] Given the breadth of these duties, it is clear that civil penalty prosecutions by ASIC against directors of corporations involved in the payment of foreign bribes can operate as a strong addition or alternative to criminal liability under the Criminal Code Act.

Whistleblower laws

Finally, it is essential that Australia reform its corporate integrity reporting (or whistleblower) laws. The OECD Working Group on Bribery's 2012 Phase 3 Review of Australia was very critical of the current protections, describing them as 'insufficient or irrelevant' in the context of foreign bribery. Effective private whistleblowing rules also are identified as essential integrity and accountability reforms in the United Nations Convention Against Corruption (UNCAC), G20 Anti-Corruption Action Plan and various other international instruments. Finally, the 2014 Senate Economics Reference Committee Report on the *Performance of the Australian Securities and Investments Commission* recommended that Australia reform its private sector whistleblowing laws in line with the new public sector provisions contained in the *Public Interest Disclosure Act, 2013* (Cth).

Overall, it is submitted that Australia needs to move from being one of the slowest jurisdictions to effectively regulate and respond to foreign bribery and corruption, to one of the leaders in this area.

I trust these submissions will assist the Committee.

Yours sincerely

[2] *ASIC v Lindberg* [2012] VSC 332.
[3] *ASIC v Ingelby* [2012] VSC 339, [4].
[4] *Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72; 20 ACLC 576*; Adler v ASIC* (2003) 46 ACSR 504; 21 ACLC 1810.

ANU College of Law

Canberra ACT 0200 Australia

www.anu.edu.au

Dr Kath Hall
Associate Professor
ANU College of Law