Submission 46 - Mr Neville Tiffen

Mr Neville Tiffen made submission 16 to the inquiry into foreign bribery in the 44th Parliament.

This document is intended as a supplementary submission to the original submission 16.

All submissions received in the 44th Parliament can be accessed via the following link:
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions

Neville Tiffen & Associates

[redacted]

25 October 2017

Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Re: Inquiry into Foreign Bribery

I thank the Committee for the opportunity to make a supplementary submission to its inquiry on foreign bribery in the light of developments since my submission dated 24 August 2015.

1. My background

Today, I am a specialist consultant and mentor on business integrity, corporate governance, risk management and compliance. I carry on business as the sole proprietor of Neville Tiffen & Associates. I commenced this practice after leaving the Rio Tinto Group in July 2013.

Also, I am:

- an independent member of the Integrity Committee of the Victorian Department of Education & Training
- a member of the Organisation for Economic Cooperation and Development (OECD) Secretary-General's high level advisory group on integrity and anti-corruption
- a member and former Project Lead for the World Economic Forum's expert advisory committee on Anti-Corruption Collective Action Project in Infrastructure / Urban Development Industries: Building Foundations for Trust and Integrity

I am a Fellow of the Governance Institute of Australia and a member of several professional associations.

I was employed by Rio Tinto for over 20 years. My last role was Global Head of Compliance which I held for over five years. During that time, I designed and implemented its Integrity and Compliance Program, which included its approach to anti-corruption. My other roles at Rio Tinto included Regional General Counsel – USA and South America, Chief Counsel – Australia, and Corporate Secretary/Chief Counsel – Comalco.

I have also been a non-executive director of Transparency International Australia and a member of Transparency International's steering committee on its Business Principles for Countering Bribery. I was also a board delegate for the WEF's Partnering against Corruption Initiative.

For transparency, I again record that I have been retained by the Australian Federal Police (AFP) to participate in some of their internal workshops on foreign bribery.

The recommendations, comments and views expressed in this submission are my own and not the views of any organization with which I am currently, or have previously been, associated.

2. My recommendations

In my August 2015 submission, I made the following recommendations to the Committee:

1. The Criminal Code should be amended to give a greater focus to an offence of "failure to create a corporate culture of compliance".

2. The Criminal Code should be amended to make it clear that directors and very senior management of an organization are guilty of an offence where the organization has failed to put in place a culture of compliance.

3. The Criminal Code should be amended to make it clear that, where their subsidiaries and intermediaries, including joint ventures, on the balance of probabilities, have committed bribery or "false accounting", parent organisations are guilty of an offence of failing to ensure a culture of compliance.

4. The Criminal Code should be amended to introduce into the foreign bribery part an offence similar to the "books and records" head in the US Foreign Corrupt Practices Act (FCPA), requiring organisations to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls, including falsifying books and records.

5. Australian regulators should give clear guidance as to what would constitute a "culture of compliance".

6. Australian regulators should adopt processes that would encourage organisations to self report incidents of foreign bribery. This should include the introduction of deferred prosecution agreements (DPAs).

7. As a major deterrent in this area, the Australian Government should introduce a system which debars organisations which have been guilty of integrity offences, including foreign bribery, from being able to bid for government work.

8. Australia should legislate for the protection of whistleblowers in the private sector; this should cover specifically foreign bribery.

9. The Criminal Code should be amended to include in the definition of "foreign public official" persons who are employees, officials or agents of international sporting associations, i.e. international associations where the sports association of two or more countries are members.

10. The Criminal Code should be amended to remove the facilitation payment defence.

11. The Australian government should state openly that it will not seek suppression orders in relation to foreign bribery prosecutions, except in extreme national security circumstances.

12. The Australian government should commit to an external review in 2017 of the resourcing and effectiveness by the Australian regulators in enforcing the foreign bribery laws to ensure that sufficient resources are being applied in an effective and efficient manner.

13. In its April 2015 report, the OECD working group made a number of recommendations, some of which have been addressed by me in the recommendations made above. Australia should move immediately to implement all other recommendations made by the OECD.

14. Given their serious nature, there should not be a limit on the time in which prosecutions must be commenced – this is the current position.

15. Australian Governments should become more vocal toward individual foreign governments in countries where Australian companies are continually facing demands for bribes from foreign officials.

3. Further comments on my recommendations in light of developments since my April 2015 submission

HLAG report:

In March 2017, the High Level Advisory Group (HLAG) presented a report to the Secretary-General of the OECD setting out 22 recommendations on areas where the OECD could look to take its integrity and anti-corruption efforts to the next level. I have previously lodged the report with the Committee.[1]

The Committee might be interested in a couple of the HLAG recommendations as they apply to foreign bribery in particular. The first four recommendations (Section A) relate to better enforcement of OECD standards, particularly the OECD Anti-bribery Convention, and broader application of the various standards. Section B covers the introduction of new standards. In particular, it includes:

- Recommendation 5 - revise the 2009 OECD Recommendations for Further Combating the Bribery of Foreign Public Officials: updating standards for reporting allegations including whistleblower protections and financial incentives, prohibition of bribery of commercial enterprises, promoting harmonisation of corporate liability regimes

[1] https://www.aph.gov.au/sitecore/content/Home/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Additional_Documents

- Recommendation 6 - Model guidelines for criminal and civil settlements and voluntary disclosure

Other recommendations relevant to the Senate Committee in Section B include:

- Recommendation 11 - Promote more coordination and mutual legal assistance in transnational corruption cases
- Recommendation 13 - Develop standards for corporate service providers who facilitate corruption: lawyers, accountants, real estate agents

The OECD Working Group on Bribery received a briefing on the recommendations from HLAG representatives at the WGB meeting in June this year.

When an OECD based company competes internationally with other OECD based companies, it should be doing so on a level playing field. As I stated in my August 2015 submission, the playing field is not level in relation to the application of foreign bribery laws among OECD based companies – many come from low governance jurisdictions or low enforcement jurisdictions.

New Recommendation:

I recommend that the Australian government should be a lead player in the OECD to raise the efforts of all OECD member states and others to apply the OECD Convention consistently and appropriately. It should also be a lead player in the OECD to take the integrity and anti-corruption efforts of the OECD, its member states and other nations to a higher level.

Self reporting and DPAs:

In March 2016, the Attorney-General's Department (AGD) conducted public consultation about the introduction of DPAs and the following year published a proposed model for a DPA scheme. Also, the Autralian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions (CDPP) developed draft guidelines about companies self reporting and consulted external parties about them.

I submitted comments to the AGD and am supportive of the direction it is taking to introduce a DPA scheme. I have commented that a strong DPA scheme should encourage companies to self report and to cooperate with investigators. This seems to be the experience in the UK since it recently introduced a DPA scheme. I note that France has now introduced a DPA scheme.

I provided input to the AFP and CDPP on their draft guidelines. In that input, I commended the efforts of the AFP and CDPP to improve enforcement of the foreign bribery laws. I noted that there was no doubt that this topic was now much higher on the agenda of many corporations. Unfortunately, this was against a backdrop of imperfect legislation and legal processes. I also noted that the self reporting guideline was another step forward in their efforts, albeit that the AFP and CDPP were somewhat "hamstrung" by the lack of a proper DPA scheme and by the lack of legal principles enunciated by the courts. I did not think that the draft document provided sufficient incentive for a company to decide to self report and/or to cooperate with AFP and CDPP. I provided some specific suggestions and comments.

If the DPA scheme were introduced, I believe that the AFP and CDPP could recast their guidelines in a way that would cause the boards of companies to seriously consider self reporting, as seems to be happening in the UK. However, this would require the AFP, CDPP and/or AGD to give guidance on an appropriate governance framework to mitigate the risk of bribery.

Guidance to companies and the publication of ISO 37001:

As I have just stated above, and in my August 2015 submission to the Committee and indeed in many other places,[2] Australian authorities need to state what would constitute appropriate governance framework to mitigate the risk of bribery. Such guidance should be reflected in the terms of any DPA by requiring the company to implement an effective integrity and compliance program. Issuing such guidance would in itself be an incentive for organisations to move to adopting leading practice.

In October 2016, the International Standards Organization introduced a new international standard – ISO 37001: *Anti-bribery management systems – Requirements with guidance for use*. When coupled with ISO 19600 on compliance management systems issued in 2014, ISO 37001 could lead to a step change in how companies implement anti-corruption programs, in a similar way to the international standards on management of risk, environmental, quality and information security. These international standards have set benchmarks widely accepted around the world. I wrote an article for Governance Directions December 2016: *Is the new ISO a step change in the foreign bribery journey?*[3] I enclose a copy of the article as Appendix 1 to this submission. In it, I discuss the various components of the ISO.

These international standards would be a good starting point for Australian authorities to issue guidance. Of course, ISO 37001 expects organisations not to make facilitation payments. Until Australian law is changed on facilitation payments, the rest of the international standards could be used. Australian authorities have in the past expressed concern about issuing guidance when there has not been any judicial consideration. However, I note that the UK was able to issue guidance on its new Act even before it had commenced, let alone been considered by the courts. I also note that Australian Federal Court competition law decisions have required companies to adopt processes based on the compliance management standards.

It should not be difficult for Australian regulators to issue guidance in the foreign bribery area.

Whistleblowing programs:

The new international standard does not use the term "whistleblowing"; instead, it requires a process to be in place that encourages persons to report in good faith any suspected bribery. This could encompass an ombudsman program or a whistleblowing program. It requires the program to allow for anonymous reporting.

This year, the Joint Parliamentary Committee on Corporations & Financial Sevices issued a report on whistleblower protections. The Australian government is looking to require some organisations

[2] my opinion piece in Fairfax Media in 2013 http://www.theage.com.au/comment/why-we-must-do-more-to-fight-corruption-20131209-2z0g2.html

[3] https://governanceinstitute.com.au/media/881518/iso_step_change_foreign_bribery-journey-_december_2016.pdf

to have a whistleblowing program.

In an article *Corporate Australia: you need whistleblowers* in the June 2016 Company Director magazine of the Australian Institute of Company Directors[4], I wrote that central to achieving a culture of integrity and compliance is having a culture of speaking up, i.e. of openness, in the organisation. An integral plank in that is an effective whistleblowing program. My article sets out briefly how organisations can achieve an effective whistleblowing program. I enclose a copy of the article as Appendix 2 to this submission.

My August 2015 submission argued that any organisation seeking government contracts should have in place an effective compliance program, including whistleblowing and, when operating overseas, anti-corruption. Such program should be incorporated in contractual provisions, giving the government rights to terminate and other remedies. I also made that point in a submission to the Joint Committee. My August 2015 submission also stated that whistleblowing programs should be part of the guidance issued by the regulators and should be part of any consideration of granting deferred prosecution agreements or other negotiated settlements.

An effective whistleblowing program is a vital safety valve for an organisation. No compliance program can be effective without a system that enables employees and others to raise concerns confidentially.

Penalties

There has been recent media speculation that the Australian government will soon issue a paper on increased penalties for corporations.[5] The contemplated increased penalties include "triple corporate penalties" and forfeiture of profits from wrongdoing. The latter aspect is often referred to as "disgorgement" and has been part of the US legal landscape for some time. It is often the largest part of any monetary penalty imposed by US regulators in the foreign bribery context. The same notion already exists in the Australian Criminal Code in relation to foreign bribery where a corporation can be fined and have to pay three times the benefit obtained from the bribery or 10% of annual turnover.

In my August 2015 submission, I called on the Australian government to introduce a system which debars organisations which have been guilty of integrity offences, including foreign bribery, from being able to bid for government work. The debarment prohibition should last for 10 years – this is the debarment period adopted by Canada and by the World Bank. The period could be pared back if the organisation enters into, and adheres to, some form of DPA or if the organisation self reports and fully cooperates with the regulators. I pointed out that such a system exists in several countries with Canada recently introducing a formal debarment system; there it is not codified in legislation. The debarment provisions may need to have a very limited exception for public interest, as per the Canadian policy.

Anecdotally, many companies fear debarment more than monetary penalties as it affects future earnings potential. Debarment should be part of any consideration of penalties for corporations.

[4] http://aicd.companydirectors.com.au/membership/company-director-magazine/2016-back-editions/june/corporate-australia-you-need-whistleblowers

[5] http://www.afr.com/business/legal/corporate-penalties-for-wrongdoing-to-be-tripled-20171021-gz5mxb?btis

Criminalisation of bribery in the foreign private sector

The UK Bribery Act treats foreign bribery of private sector actors in the same way as bribery of foreign public officials. The HLAG report to the OECD Secretary-General (referred to above) recommended that the OECD Working Group on Bribery "consider recommending that the Parties to the Anti-Bribery Convention criminalise the bribery of private sector actors in international business transactions. Private bribery – no less than bribery of public officials – creates market distortions, which undermine fair competition and increase the costs imposed on consumers and society. A 2014 study, for instance, estimated that private-sector corruption cost 105 developing countries at least $500 billion, which was nearly four times the amount of official development assistance (ODA) in 2011."

In my August 2015 submission, I stated that it should be a goal of the Australian government of move to a position similar to the UK in the coming years. Time has moved on; bribery within the private sector continues to wreak significant havoc – the same arguments that led to the introduction of laws against bribery of foreign public officials apply equally to bribery in the foreign private sector.

> New Recommendation:
>
> I recommend that the Australian government should move quickly to introduce laws to criminalise bribery by Australian organisations and citizens of private sector actors overseas.

4. New Recommendations

As set out in the preceding section of this supplemental submission, I make the following two new recommendations to the Committee:

16. The Australian government should be a lead player in the OECD to raise the efforts of all OECD member states and others to apply the OECD Convention consistently and appropriately. It should also be a lead player in the OECD to take the integrity and anti-corruption efforts of the OECD, its member states and other nations to a higher level.

17. The Australian government should move quickly to introduce laws to criminalise bribery by Australian organisations and citizens of private sector actors overseas.

Conclusion

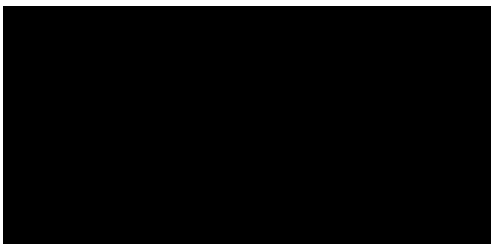
Corruption continues to have a hugely negative impact on ordinary citizens around the world.

There has been some momentum within the Australian government to address the weaknesses in our laws and legal processes as they apply to foreign bribery, albeit quite slow. This momentum needs to be increased – Australia should be viewed as a leader in global efforts to promote integrity and fight corruption.

Those Australian companies that try hard to comply with the laws relating to foreign bribery should not be disadvantaged when compared to those Australian companies that do not. They should know the benefits that will accrue to them for doing so, namely a defence to prosecution or mitigation in penalties if they can show a culture of compliance and if they fully cooperate with regulators.

Should the Committee require any further information or any clarification, please do not hesitate to contact me.

Yours faithfully,



Neville Tiffen
Principal
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Appendix 1
Governance Directions December 2016: ***Is the new ISO a step change in the foreign bribery journey?***

Is the new ISO a step change in the foreign bribery journey?

By Neville Tiffen FGIA, Principal, Neville Tiffen & Associates

- The recently launched ISO 37001 could lead to a step change in how companies implement anti-corruption programs.
- The international standard sets a benchmark likely to be widely accepted around the world.
- Companies can be certified under the new ISO which may positively set the company apart from its competitors.

There have been a few very significant step changes or landmarks over recent decades in the fight against bribery of foreign officials and foreign bribery generally.

The international scene

The first was the introduction in the late 1970s of the US legislation, Foreign Corrupt Practices Act (FCPA), which outlawed bribery of foreign government officials by US connected companies and individuals. Today, the US regulators impose the most, and the highest, penalties in the world in relation to foreign bribery.

The next landmark was the launch in 1995 of Transparency International's annual Corruption Perception Index. This clearly highlighted the countries that are most prone to corruption. It is still widely used and is a simple tool to communicate the message about corruption risk.

A very significant step change occurred in 1997 with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This has led to 35 OECD member countries and six non-member countries adopting the Convention and, with varying degrees of success, introducing legislation to give effect to it. The OECD Convention was re-enforced by the UN Convention against Corruption in 2005.

The last landmark was the United Kingdom's Bribery Act 2010. It was introduced following criticism of the UK by the OECD and is now regarded by many commentators as the 'gold standard' in foreign bribery legislation. Importantly, the Bribery Act is not limited to bribery of foreign government officials but covers also business to business bribery. In addition, it introduced the concept of 'adequate procedures' - if a bribery incident has occurred, in order to avoid conviction, a company must show that it had in place adequate procedures to prevent bribery.

The Australian scene

In Australia, step changes and landmarks have been few. The Commonwealth Criminal Code was amended in 1999 to outlaw bribery of foreign officials, but it was then seemingly forgotten by enforcement agencies and either forgotten or ignored by businesses operating overseas. (The cynic might say that this could have been because the only known instances of foreign bribery were by government related agencies!) To date, there have been no reportable convictions under the Criminal Code's foreign bribery provisions.

In 2012, the OECD issued a report that was very critical of Australia's efforts in this area. Australia did respond. The Australian Federal Police (AFP) established a division to handle foreign bribery. The AFP and other regulators, including the Australian Securities and Investments Commissions (ASIC) and the Commonwealth Director of Public Prosecutions (CDPP), improved

While there are yet to be significant step changes or landmarks in Australia, the AFP has indicated that it has many active foreign bribery investigations under way.

their cooperation significantly. The government introduced a new false accounting provision into the Criminal Code to boost the enforcement of foreign bribery provisions.

A Senate committee started an enquiry into foreign bribery and received numerous submissions. The enquiry was overtaken by the double dissolution but has now been resurrected and is due to report by mid-2017. Many of the submissions recommended adopting legislation similar to the UK Bribery Act and also the introduction of incentives for companies to self report to authorities and deferred prosecution agreements (DPAs) — something that the US has had for a long time, the UK recently introduced and the French have now adopted. The Attorney General's Department (AGD) has conducted public consultation about DPAs. The AFP and CDPP have developed draft guidelines about companies self reporting foreign bribery and have consulted external parties about them. It is very likely there will be further developments in regard to self reporting and DPAs in Australia. In addition, it is believed that government departments are actively considering further amendments to the Criminal Code.

While there are yet to be significant step changes or landmarks in Australia, the AFP has indicated that it has many active foreign bribery investigations under way. The list of investigations is likely to grow as the media discloses further foreign bribery matters. We will watch to see if this results in prosecutions and convictions.

Unfortunately, unlike their counterparts in the US and the UK, Australian regulators are yet to issue guidance to Australian companies about what they consider to be a good compliance program so that a company could show that it has a 'culture of compliance' (to use the words of the Criminal Code). In the meantime, there has been plenty of guidance issued about anti-corruption programs that Australian companies could consider. A good starting point is Governance Institute's *Good Governance Guide — Issues to consider when developing a policy on bribery and corruption*. The Institute issued this in 2015. It lists the things that a company should consider when designing an anti-corruption program and lists further useful guidance on the topic.

For some years, we have had the benefit of a number of Australasian standards relevant to the area of foreign bribery, including compliance programs, risk management, whistleblowing and fraud and corruption. For whatever reasons, overall, these did not get much traction with Australian companies.

A new international standard

In October 2016, the International Standards Organization introduced a new international standard — ISO 37001: *Anti-bribery management systems — Requirements with guidance for use*. This could be the next major landmark in relation to foreign bribery. When coupled with ISO 19600 on compliance management systems issued in 2014, ISO 37001 could lead to a step change in how companies implement anti-corruption programs.

We have seen with earlier international standards that they can set a benchmark widely accepted around the world. This has occurred, for instance, in relation to management of risk, environmental, quality and information security. It is likely to occur with anti-bribery management as well.

As with all new standards, there are those who argue for it and those who see weaknesses. This is particularly so when the discussion turns to the benefit of being certified under the standard.

The new standard had its genesis in the British standard relating to the UK Bribery Act. However, the approach was broadened and built upon well known guidances such as those issued by Transparency International and the OECD. It also took into account the guidance issued by regulators, especially those in the US and the UK. Those working on developing the standard came from company, government and NGO backgrounds. There were 56 participating countries (including Australia, the US and the UK) and another 18 observer countries. It was certainly an international effort to develop the standard and this will hopefully encourage regulators and courts to endorse the standard as good guidance for companies. If companies use the standard as the basis for design and implementation of their programs, prosecutors and courts are likely to view that as the company adopting measures to prevent bribery; then, if the company has a bribery incident, in the Australian context, it has a 'culture of compliance'.

The standard sets out requirements and then provides guidance about them. The requirements will not surprise compliance professionals. They are set out under the following headings: *Context of the organisation; Leadership; Support; Operation; Performance evaluation; Improvement*. It deals with the widely accepted subjects — tone at the top; bribery risk assessment; training and communication; due diligence on third party business associates; gifts, hospitality and donations.

Some aspects of the standard that companies should note:

- The standard recognises that it is not possible to completely eliminate the risk of bribery and no anti-bribery management system will be capable

> **The new ISO not only applies to bribery of government officials but also to business to business bribery. Indeed, it applies to receipt of bribes by a company's employees.**

of preventing and detecting all bribery.

- It speaks about 'effectiveness' — this is the extent to which the system's planned activities are realised and the planned results are achieved.
- The new ISO not only applies to bribery of government officials but also to *business to business bribery*. Indeed, it applies to *receipt of bribes* by a company's employees.
- The standard requires that there be person(s) with responsibility and authority for the operation of the anti-bribery management system. They must be competent personnel. The system must be adequately resourced. The company must have an anti-bribery policy which, among other things, sets out the authority and *independence* of the anti-bribery compliance function. The function must have direct and prompt access to the board.
- The US Federal Sentencing Guidelines have for many years required companies to carry out due diligence before hiring or promoting someone to a position of substantial authority to see if they have committed illegal activities or other conduct inconsistent with an effective compliance and ethics program. The new ISO arguably goes further. Due diligence must be conducted on anyone going into a role with more than a low bribery risk and it must be reasonable for the company to believe the person will comply with the anti-bribery policy.
- The standard specifically refers to remuneration incentives and having reasonable safeguards in place to prevent the incentives encouraging bribery.
- The new ISO indicates that facilitation ('grease') payments should be prohibited by the company. This is currently different to both Australian and US law. However, it is consistent with the practices of most leading international companies. It makes sense — most codes of conduct state the company will comply with the law wherever it operates; facilitation payments are illegal in the country in which they are made; how can you maintain to your staff that some laws can be ignored while others cannot?
- It also requires periodic compliance certificates from all people in roles with more than a low bribery risk.
- Not only does the new ISO require anti-bribery awareness and training be given regularly as *appropriate* to the roles of employees (that is, targeted training), it recognises that this might have to be given to third party business associates.
- The standard does not specifically use the term 'whistleblowing' but it does require processes to be in place that encourage persons to report in good faith any suspected bribery. The words could accommodate an ombudsman system as used in Europe frequently. The process should allow anonymous reporting. It also requires the company to require its relevant personnel to cooperate in any investigation.

The new ISO does not require the anti-bribery management system to be stand alone, but recognises that it could be part of a broader integrity and compliance program. Indeed, that would be good practice. Consequently, parts of the new ISO include matters that are also covered by the standard on compliance management programs including monitoring, internal audit and improvement.

ISO 37001 is not easy to read but its audience is intended to be governance professionals. It has been criticised for not being specific. This is a criticism that has been thrown at the US and UK government guidances and the NGO guidances. Often, guidances will use language such as 'reasonable', 'proportionate' and 'appropriate' or refer to taking steps that suit the company's circumstances or risks. When I was an in-house professional, I found that frustrating. I wanted someone to produce a couple of 'straw man' examples of what a company in specific, stated circumstances should have in place. Governance professionals need to rely on their experience — where do the issues inside the company arise, what have regulators or courts said in particular cases.

It is not possible for a standard to be too specific, as each company's circumstances will vary — from, at one end, very large global companies operating in many jurisdictions with a range of corporate functions to, at the

other end, small companies operating in just one or two overseas locations. However, the new ISO is a 'one stop shop' in designing and implementing an anti-bribery management system. It has clear international standing.

For some years, Transparency International has argued that companies should have their anti-bribery programs audited and the results should be published. Many companies have resisted that call because it has been felt that what constitutes an effective program is somewhat subjective. To my mind, the effectiveness of a program is demonstrated when, first, very senior management follow the principles and requirements of the system unerringly on all occasions and, secondly, when middle management in the furthest outposts of the company are aware of, and apply, those requirements in their day to day roles. That's a hard test.

Now we have a bribery ISO under which companies can be certified. Just like many of the other international standards, companies will have varying views on whether to be certified. Many will look at their programs and start to move toward a position where they feel they could achieve certification. However, certification will not be cheap, but it could be helpful — it might set the company apart from its competitors; it might speed up due diligence enquiries from customers and other interested stakeholders; it might give directors (particularly non-executive directors) comfort that the company is on the right track; it might give assurance to institutional shareholders and other stakeholders; it might convince regulators that the company has made reasonable endeavours to have a 'culture of compliance'. As with many things, such as the considerations of companies on certification under the environmental management standard, it will be a cost benefit decision for companies. And, there will still be some subjectiveness on the part of the assessor.

I believe it is likely that ISO 37001 will become a benchmark in a similar way that ISO 31000 on risk management is now often used as a benchmark. As indicated earlier, Australian regulators are yet to give guidance on anti-bribery compliance programs. Here is their chance — an international standard based on the best of existing international guidances. It would be quite straightforward for the Australian regulators to indicate that they will base their assessments on the new ISO — what an encouragement to Australian companies to gauge their programs against the standard and improve them accordingly.

Are we on the cusp of a further step change in enforcement of the laws against foreign bribery? Time will tell, but momentum is gathering!

Neville Tiffen FGIA can be contacted by email at nevillet@ntcompliance.com.

Appendix 2:
Company Director June 2016 ***Corporate Australia: you need whistleblowers***

OPINION

Corporate Australia, you need whistleblowers

Australian organisations lag their overseas counterparts when it comes to whistleblowing. Neville Tiffen explains why, and how to change.

Here is a timely question to directors of Australian companies: do you want your organisation to conduct its affairs with integrity or would you prefer to read about how you do business in the media or when a regulator arrives on the doorstep?

This question is central in the ongoing debate about corporate culture in Australia. A recent article highlighted how management paints serious misconduct as "isolated" events and not culture, that is, it's the fault of a few bad apples. Many compliance professionals will say there is never one or two bad apples, there is often something wrong with the barrel.

There is a lot of talk today about culture in organisations. A couple of years ago, a UK survey found that a large majority of financial sector executives thought ethics were important, but a majority thought that if they adhered to their company's code of conduct, it would limit their career progression. What an indictment on their companies. But ask yourself: would it be the same in your company? If it could be, how would you find out where the code of conduct is not being applied?

An ethical company wants to know about serious misconduct early and it will respond – its board and management will be thankful to those who have brought it to their attention. A company needs an *effective* whistleblowing program. Australian organisations lag their overseas counterparts when it comes to whistleblowing and it is time this changed.

To achieve a culture of integrity, a company needs to have a culture of speaking up. Without that, one day, your company will have a major incident that is in the full public glare. Companies should examine how open they are – how likely are staff to raise bad news; what is likely to happen if they do. Boards should be asking management these questions.

Even if your organisation has a culture of speaking up (and not many do), it should still have a whistleblowing program. It is a safety net. It is a protection for the company, its directors and management and often its employees. There will be some matters which employees will naturally be concerned about raising, even in the most open environment. Also, in organisations where generally there is openness, there will be pockets where this is not the case.

Many companies have a whistleblowing program and feel they can tick a box; they are clearly not putting in any effort. This is a serious lack in judgement by their leaders, particularly independent directors. Employees will quickly pick up on the company's attitude and not use the program.

There are still managers who think that they can keep unpleasant facts secret. The chance of that happening these days is rapidly diminishing with the rise of social media and investigative journalism. A whistleblowing program is subtle pressure on managers to encourage openness and address issues before a whistleblower report is made.

> "There will be some matters which employees will naturally be concerned about raising, even in the most open environment."

ASIC has announced it is backing the Griffith University survey of whistleblowing in the private, public and not-for-profit sectors. A Senate committee recently published an issues paper entitled *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence* and whistleblowing was part of the remit of the Senate committee examining foreign bribery. Prudent directors will recognise that the company should have an environment of open communication well ahead of being forced to take action by legislation.

Establishing a program

Whistleblowing programs are not difficult. There are some basic elements. First, don't call it a whistleblowing program. "Whistleblower" still connotes bad things to many people – it is like the Australian concept of "dobber". You don't want any language that sounds like a whinger or complainer. Find another name for the program like "Speak Up" or "Open Talk". This will help with messaging, namely that the board and senior management want to hear about serious misconduct because they want to do something about it. Of course, the earlier a company hears about concerns, the better – it is far better to nip something in the bud before there is a major scandal.

Second, the whistleblowing mechanism should be handled by an

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experienced external provider which provides easy access to the program 24/7 through various avenues, for example via a toll-free telephone number or through a website. It is standard practice to have unique numbers for each report so that follow up with the reporter can occur. The external provider should give a monthly summary of all reports received – this should go to the CEO and one other person, perhaps the chief compliance officer or an external director. This adds to confidence of those contemplating using the program, and the confidence of the boards and senior management that they are hearing about issues.

Third, allow anonymous reporting. Some people fear the system will be used vexatiously by anonymous reporters to attack individuals and those individuals will not have a fair right of reply. Experienced personnel are able to provide reassurance of fair process. I have never heard an experienced compliance professional list anonymous reporting as a major issue for their whistleblowing program. Anonymity could be the factor that convinces an employee to provide crucial information. Even where the reporter is not anonymous, their identity should be treated confidentially.

Fourth, make it clear how reports will be handled. Who hears about it? When will reports be dealt with by the central office and when will they be handled by the local unit? It is possible to set parameters so that matters receive the appropriate response – these parameters include the seniority of those alleged to be involved, the amount of financial impact and the type of allegation, for example antitrust, insider trading and corruption.

Fifth, and most importantly, it must be clear that a whistleblower with an honestly held belief will not suffer any retribution for using the program. In fact, they should be recognised and in some instances rewarded. It should be a badge of honour, just like raising a safety concern in a mining company. Not all whistleblowers will have clean hands and if they have committed some wrongdoing as well, there may be implications for them – this is a matter for balanced judgement at senior levels. On the other hand, reporters using the system other than in good faith, and who can be identified, should face discipline.

Sixth, examine all matters reported to determine an appropriate response. Investigate thoroughly those reports that should be investigated. There should be processes to give appropriate feedback to the whistleblower.

Seventh, communication is vital. There needs to be ongoing internal publicity about the whistleblowing program and how it works. I recall conducting a staff discussion at a site. The attendees knew about the whistleblowing program but none of them knew how it operated and, worse, none of them knew if anything ever happened if someone used it – consequently they would not use it. A company must communicate to its employees about the program – how many matters were received and how many resulted in some action.

> "To achieve a culture of integrity, a company needs to have a culture of speaking up."

Clear support of senior management is vital. I remember after a staff meeting at an overseas site the CEO asked to be taken to look at the whistleblowing posters in the office. That act became known around the group – it was worth 100 messages from me. Directors and senior management visiting sites should look for the posters and if they cannot see them, ask – try the telephone number to make sure it works. What a simple act to reinforce the message.

Finally, look at the reports more broadly: why did the reporters feel they had to use the program and not raise the issue directly with management? Could the reports be just the tip of the iceberg? Are there worrying trends? Directors should be asking these questions when being presented with reports about the program. They should be ensuring that the analysis is used to improve the company's integrity and compliance efforts.

If you want your company to act with integrity, it should have an effective whistleblowing program. Not having one comes at a cost. ■

The AICD is a supporter of the *Whistling While They Work 2* research project on public interest whistleblowing led by Griffith University. To participate in the project or for information visit: www.whistlingwhiletheywork.edu.au