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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 submission to its inquiry on foreign bribery.

My background

Today, I am a specialist consultant on business integrity, corporate governance 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. I am a member of the advisory group of the World Economic Forum's project on Infrastructure and Urban Development: Building Foundations for Transparency. Earlier this year, the Secretary-General of the Organisation for Economic Cooperation and Development (OECD) invited me to join his newly formed high level advisory group on integrity and anti-corruption. 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.

Until very recently, I was a non-executive director of Transparency International Australia. I have previously been 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 record that I was retained by the Australian Federal Police (AFP) to participate in their internal workshop 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.

My recommendations

In making my recommendations, I recognise:

a) the hugely negative impact that corruption has on ordinary citizens around the world, including developed and developing countries,

b) the world has changed greatly since Australia committed to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and

c) 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.

I make 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". Where it is shown that, on the balance of probabilities, bribery has occurred or "false accounting" has occurred, the onus should be on the organization to show that it has in place a corporate culture of compliance. This is very similar to the position recently introduced in the United Kingdom's Bribery Act – where bribery has occurred, the company will be guilty of an offence of failure to prevent bribery, unless it can show it has implemented "adequate procedures".

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. Materiality should not be a factor in this. The existing provisions in the Corporations Act are inadequate to address this.

5. Australian regulators should give clear guidance as to what would constitute a "culture of compliance". In the UK and the US, regulators have given guidance. There is no reason this could not happen here. This would be a strong incentive to companies to adopt good practices.

6. Australian regulators should adopt processes that would encourage organisations to self report incidents of foreign bribery.

    a. This should include mitigation of penalties for cooperation, including disclosure of all relevant facts (even where those facts are included in reports commissioned by lawyers and possibly covered by legal privilege).

    b. Australian regulators should consider leniency with reduced penalties for those that first report bribery incidents, similar to practices in antitrust cartel enforcement.

    c. Australia should introduce deferred prosecution agreements in a similar manner to

the recent UK practice.

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. They should also be prohibited from obtaining incentives, subsidies, grants, donations or loans from governments. The debarment prohibition should last for 10 years. It could be shortened only if the organisation enters into, and adheres to, some form of deferred prosecution agreement with regulators following complete cooperation or has self reported and fully cooperated with regulators.

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

    a. whistleblowing should be included in any guidance issued by regulators on effective compliance programs; and

    b. an effective whistleblowing program should be part of considerations in determining deferred prosecution agreements and other negotiated settlements.

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; a notice period of two years of this impending change should be granted to organisations, so that affected organisations can change their practices.

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. The Australian Government encourages Australian businesses to expand and operate overseas. However, there is little evidence of Australian Governments tackling any particular government in a foreign country in support of Australian companies operating there. This has been epitomized by the Australian Government seeking suppression orders in regard to recent Australian cases involving foreign bribery.

I comment on some of these recommendations in more detail below.

Background to foreign bribery

The USA was the first nation to introduce laws specifically dealing with bribery of foreign public officials when it introduced the FCPA in the late 1970s. In 1999, the OECD Convention commenced and the Australian Criminal Code was amended to address this. In 2005, Australia ratified the UN Convention against Corruption.

Australia was criticised by the OECD for its lack of commitment to the OECD Convention in 2012. The OECD working group made many recommendations. In April 2015, the OECD working group issued a follow up report. This noted that eight recommendations had not been addressed at all by Australia and nine recommendations had only been partly addressed by Australia.

Following criticism by the OECD, the UK's new Bribery Act commenced in 2010 and in 2013 Canada amended its Corruption of Foreign Public Officials Act 1998.

To some extent, it has been unfair on Australian regulators when they are compared to their counterparts in the US where there have been many enforcements of the FCPA. Australia lacks the laws and legal processes of the US. We should move to adopting similar laws and processes.

The Australian Government should stop dragging its feet on this and, without delay, follow the lead of the UK and Canadian Governments in addressing the weakness in our laws and legal processes.

I refer the Committee to a very interesting report issued by the OECD in December 2014 on its review of foreign bribery prosecutions in OECD countries. The review looked at over 400 cases over the last 15years. Some notable findings include:

- more than 75% of cases involved bribery being undertaken by third parties
- many cases involved management level personnel in the bribery; in fact, 12% involved the CEO
- 33% of cases were self reported
- 69% of cases were negotiated settlements
- 17% of cases arose from internal whistleblowers

The review also pointed out that most of the cases related to bribes paid in developed countries. Often, we think of this area as purely a matter relating to the developing world.

Australian companies have been slow to address the risk of foreign bribery. This is supported by surveys issued this year by Deloittes and Control Risks. Control Risks found that most companies had just "paper compliance programs". Deloittes found that 40% of companies surveyed did not have a compliance program, even though one third of them were operating in the developing world. They also found that, where companies are aware of a foreign bribery event, they rarely self reported it to Australian regulators. I encourage the Committee to ask for submissions from Deloitte and Control Risks on their respective findings.

This has also been supported by surveys of Australian listed companies. The Association of Chartered Certified Accountants (ACCA) found that listed companies scored only 38% for anti-corruption compliance program implementation. Similarly, in research conducted by Citi, it was found that, while many listed companies disclose generic information on their policies such as

policy statements, record keeping, stance on facilitation payments and whistleblower facility, few companies provided much detail on how the policies were implemented and monitored in practice. I encourage the Committee to ask for submissions from ACCA and Citi on their respective findings.

When the OECD Convention commenced, the world was quite different. When Australian companies operated overseas, they were usually competing against companies from North America or western Europe. These days, Australian companies will be competing against companies from many different geographical areas, often including local companies. Many of these competing companies come from low governance jurisdictions or low enforcement jurisdictions. The playing field is not level. The Australian government should be vocal in its support of Australian companies that try to conduct business with integrity and should be openly critical of foreign governments that are failing to take action against corrupt officials.

However, I believe that companies that have an ethical approach to business, whether it be in human rights, community support, worker safety, environment or anti-corruption, will have a competitive advantage overall and a sustainable operation over the long term.

Those Australian companies that try hard to conduct business with integrity should not be at a disadvantage 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.

It is time at least to level the playing field among Australian companies.

Explanation for recommendations

a) *Increased focus on offence of "failure to create a corporate culture of compliance"*

When the UK introduced its new Bribery Act following OECD criticism, it radically changed some of the traditional approaches. In effect, if a company's staff have paid bribes directly or indirectly to foreign government officials, the company will be guilty of an offence unless it can show that it had in place "adequate procedures" to try to prevent bribery. If it has, then it will have a defence and the employee or third party who paid the bribe could be treated as a rogue and convicted, but the company escape conviction.

The UK approach is generally regarded as leading practice. The Australian Criminal Code notion of a "culture of compliance" is similar to the "adequate procedures" concept in the UK and to the ethical decision making concept under the US Federal Sentencing Guidelines. However, Australia should change the onus in the legislation. Where it is shown that, on the balance of probabilities, bribery has occurred or "false accounting" has occurred, the onus should be on the organization to show that it has in place a corporate culture of compliance. This reversal of the usual burden of proof would follow the UK lead.

b) *Clearer laws for:*
   i. *liability of directors and senior managers who do not implement a corporate culture of compliance; and*
   ii. *liability of parent companies for subsidiaries and intermediaries, including joint ventures.*

Presently, unless directly involved or somehow complicit in the bribery, a director will not be liable for foreign bribery unless it is shown that they have breached their general duties as directors. The

legislation should be changed so that directors are liable if the organisation did not have a "culture of compliance".

Australian law does not clearly hold parent organisations responsible for bribery committed by subsidiaries and other intermediaries, unless it can be proven that the Australian company 'caused' the bribery. Most enforcements under the US FCPA against companies relate to actions taken by third parties engaged by the company, not by the company itself. The OECD review of foreign bribery cases showed that 75% related to bribery by third parties.

I recommend that legislation be altered so that directors will be liable where an organisation does not have a culture of compliance and that organisations are clearly responsible for their subsidiaries and intermediaries.

c) "False Accounting" – books and records provision

The majority of matters under the US FCPA are under the "books and records" head as it is easier to convict a company for having books or internal practices that could in effect camouflage bribery or allow it to occur. Under the FCPA, issuers must:

- keep books in reasonable detail that 'accurately and fairly reflect the transactions and dispositions of the assets of the issuer'; and
- devise and maintain a system of internal accounting controls to provide reasonable assurances that the company has accurate books and records.

In 2013, Canada introduced into its Act a series of new offences focused on books and records. The Canadian provision is more limited than the FCPA

In Australia, we do not have any such offence. There are the general accounting provisions and sections dealing with falsification of books by individuals in the Corporations Act but these are not particularly useful in a foreign bribery context. (Similarly there are provisions in State Crimes Acts dealing with falsification of accounts.) As the OECD working party noted, the penalties are very small and rarely enforced. These provisions are not disincentives to bribery.

Australia should introduce a "books and records" provision in the foreign bribery section of the Criminal Code. The regulators should not have to prove that the falsity was done for the purpose of bribery (i.e. Australia should adopt the US position). The penalties should be the same as for the general bribery offences.

d) Guidance by Australian regulators

Australian regulators should give guidance on what constitutes a corporate culture of compliance. The UK regulators have put out guidance on what they would look at in determining "adequate procedures" under the UK Bribery Act. The US regulators have also issued guidance as to what they look for under the Federal Sentencing Guidelines in the context of the FCPA. In many ways, they are similar to the UK's "adequate procedures" guidance. *Such guidance is itself an incentive for companies to be proactive in implementing an effective anti-corruption program and an incentive for the directors to take a serious interest in it*.

In Australia, the regulators have provided no such guidance to companies. The Criminal Code's reference to a "culture of compliance" is similar to the "adequate procedures" concept in the UK and to the ethical decision making concept under the US Federal Sentencing Guidelines. The

Australian regulators should provide guidance as to what they would expect from a company in order to rely on this defence.

A good starting point would be the new international standard on compliance management systems (ISO 19600). This is based on the Australasian standard that has existed for a few years. Some Federal Court competition law decisions have required companies to adopt processes based on the standard. I encourage the Committee to seek input from the ACCC on how this has been imposed on companies and how successful it has been.

There are also Australian standards on risk management and whistleblowing.

In late 2016, it is expected that there will be an international standard (ISO/CD 37001) on anti-bribery management systems. In the meantime, apart from the US and UK guidances, there are other international guidances that the Australian regulators could use in framing their own e.g. Transparency International's Business Principles for Countering Bribery.

It should not be difficult for Australian regulators to issue guidance. As stated, this in itself will be an incentive for organisations to move to adopting leading practice.

At times, business groups have stated that the differences between laws on foreign bribery make it difficult for companies. However, the real issue is for companies to receive guidance from regulators in different countries that is largely consistent as to what is a good compliance program. For that reason, the more that regulators in major countries recognise international standards such as ISO 19600 and ISO/CD 37001, the greater the incentive for companies to adopt good practice.

e) Encouragement of self reporting and negotiated settlements

The OECD Working Group recommended that Australia develop a clear framework for plea bargaining and self reporting. It stated that this framework should cover the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company's co-operation; measures to monitor the company's compliance with a plea agreement; and the prosecution of natural persons related to the company.

In Australia the Commonwealth Director of Public Prosecutions (CDPP) may enter into an agreement with a defendant to provide immunity or which provides that the defendant pleads guilty to some charges or to lesser charges. The CDPP may agree to proceed with a charge summarily rather than by indictment; to not oppose a defence submission to the Court on the appropriate sentence range. The CDPP has issued the Commonwealth Prosecution Policy setting out the factors that must be considered when deciding whether to enter into one of these agreements. This gives very little certainty of any beneficial treatment to anybody self reporting a foreign bribery incident.

Regulators should be clearer about what benefits will accrue for self reporting. These should include a likely outcome of reduced penalties. Of course, any benefit would be dependent on full cooperation with the regulators, including disclosure of all relevant facts (even where those facts are included in reports commissioned by lawyers and possibly covered by legal privilege).

Antitrust regulators in several countries have indicated the benefits of self reporting in the context of cartel behavior. There is no reason similar statements cannot be made in the context of foreign bribery.

I encourage Australian regulators to establish a leniency program that enables those who willingly report bribery to the regulators to receive reduction in penalties, provided that they fully cooperate. Such program should be similar to the programs established by anti-trust regulators in respect of cartel practices in many countries, including Australia.

Such a program would apply to both individuals and companies. The recognition, however, could not apply to both the individual and the employing company. I encourage the Committee to seek input from the Australian Consumer and Competition Commission (ACCC) on its leniency program with a view to seeing how it could work in the context of foreign bribery.

In the US, there is a long history of regulators using non- or deferred prosecution agreements (DPA). The UK has recently introduced its own version of DPAs. Importantly, the UK procedures require the DPA to go before a judge before it is adopted. I recommend that Australia should introduce a system similar to the UK. Such an approach would be consistent in many respects with the notion of enforceable undertakings that already exists in some parts of Australian law. I encourage the Committee to seek input from the ACCC and the Australian Securities & Investment Commission (ASIC) about how enforceable undertakings are used and to see if the same principles could be applied in the context of foreign bribery and particularly in the context of DPAs.

Importantly, the DPA would only be available if a company had fully cooperated with the regulators. This would include disclosure of all relevant facts (even where those facts are included in reports commissioned by lawyers and possibly covered by legal privilege). It would only be available where a company agrees to adopt measures to ensure a culture of integrity and compliance in the company going forward. The terms of the DPA would be influenced by how much effort a company had previously put into establishing such a culture.

Even where a DPA is agreed, the company may have to pay penalties, particularly disgorging a factor of the amounts equal to any benefits derived from the bribery. If debarment is introduced (see below), the DPA could set the period of debarment dependent on the organisation being able to show that it has established an effective compliance program.

Australia should work with other jurisdictions to reduce the impact of "double jeopardy" whereby an organisation could be prosecuted by a number of countries for the same incident of bribery. This will assist companies in deciding to self report.

I support strongly a focus on prosecution of individuals involved in bribery of foreign officials, whether in paying, authorizing or setting the culture in which the bribe was paid.

f) Debarment of companies from government work

As a major deterrent in this area, the Federal government should introduce a system which debars organisations who have been guilty of integrity offences, including foreign bribery, from being able to bid for government work. They should also be prohibited from obtaining incentives, subsidies, grants, donations or loans from governments.

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 deferred prosecution agreement with regulators [see above] or if the organisation self reports and fully cooperates with the regulators [see above].

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.

But the government should go further. It should require any organisation seeking government contracts to 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.

g) Private sector whistleblower protection

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. Of course, it is preferable for an employee to raise matters directly with management but there will inevitably be occasions where this is not possible or the employee is worried about doing so. A person who raises in good faith concerns about bribery of foreign officials either with their employer or with a regulator should be protected.

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.

h) Application to officials of international sporting associations and/or extension to bribery wholly within the private sector:

Some major international sporting associations are very powerful and very influential. They often have more money than many national governments. There has been a chequered history in regard to many with FIFA being the most recent. It would be a comparatively simple exercise to extend the definition of "foreign public official" to include international sporting associations in a very similar manner to that of a "public international organisation" such as the UN and World Bank.

This should be done even if the Criminal Code is not extended to cover generally foreign bribery of non government officials.

The UK Bribery Act deals with private sector bribery (ie not involving a public official e.g. company to company bribery). This is not required under the OECD Convention. Other countries probably have laws that can be used e.g. the US has prosecuted private sector bribery through the Travel Act utilising state anti-bribery legislation. In Australia, it is believed that state "secret commission" legislation (e.g. ss175 – 181 Crimes Act Vic) would have extra-territorial application.

Whilst there are strong arguments for other countries to adopt the same position as the UK, it is more important that Australia improves its laws and legal processes in relation to bribery of foreign officials. However, it should be a stated goal of the Australian government to move to a position similar to the UK in the coming years. Such a move would show that Australia is truly serious about the whole issue of foreign bribery.

i) Removal of facilitation payment defence

Facilitation payments are bribes. They are illegal in the country in which they are paid. Some countries have made an exception for them in their own legislation dealing with bribery of foreign officials.

In Australia, there is a narrow exception. Nevertheless, what many people loosely call "facilitation payments" are in fact small bribes that would not fit the definition. The Australian government publicly discourages the use of facilitation payments.

The US maintains its exception for facilitation payments but there has been discussion as to whether this is appropriate. Canada recently removed its exception for facilitation payments. In its Bribery Act, the UK continued its prohibition of facilitation payments and in a much clearer manner than previously.

Companies that have been making facilitation payments would find it challenging to change practice if the defence were removed. They should be given some time to effect this change, perhaps two years.

j) Prosecutions should not be subject to suppression orders except in extreme national security circumstances

There is little reason why publication of any prosecution on bribery of foreign officials should be suppressed. It is unfortunate that suppression orders were granted in respect of the first prosecutions. Ongoing publicity of court proceedings assists in deterring others from similar conduct.

I recommend that the government should issue strong guidelines indicating that it will not seek suppression of court proceedings relating to foreign bribery, except in extreme national security circumstances. The guidelines should make it clear that embarrassment on the part of Australia, the foreign country or the foreign official and the possibility of disruption of trade are not factors that would justify suppression.

k) The government needs to ensure that there are sufficient resources available to enforce the laws on bribery of foreign officials.

The OECD Working Group noted the formation of the AFP Fraud & Corruption and the increased cooperation between regulators, especially between the AFP and ASIC. I endorse these moves. However, it is important to ensure that there continues to be sufficient resources applied in an efficient and effective manner.

I recommend that the government should commit to a formal external review in the second half of 2017 of the resourcing by the Australian regulators on the enforcement of the laws against bribery of foreign officials, to ensure that the resources are sufficient and being applied in an effective and efficient manner.

l) Implementation of other OECD recommendations:

I recommend that the government should address without delay the recommendations by the OECD Working Party that have not been implemented or only partially implemented.

Partially implemented recommendations:

- 10c – Australian regulators ensure that they are not factors listed in Article 5 of the Convention;
- 13 - With respect to anti-money laundering measures, Australia further raise awareness of foreign bribery as a predicate offence;

- 14b – The AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted.

Not implemented recommendations:

- 2b - Take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence; Note: the government has recently amended the legislation.
- 11 - Australia take reasonable measures to ensure that a broad range of mutual legal assistance, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings to a foreign state whose legal system does not allow criminal liability of legal persons;
- 14a - Australia align the record-keeping requirements for deducting a facilitation payment under the Income Tax Assessment Act with those for the facilitation payment defence under the Criminal Code;
- 15a - Australia extend the reporting obligation of external auditors under the Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company‘s subsidiary or joint venture partner
- 15b – Australia align the Australian Public Service Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases;
- 15c - Australia ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements.

Conclusion

The Australian Government should stop dragging its feet on this and, without delay, follow the lead of the UK and Canadian Governments in addressing the weakness in our laws and legal processes in relation to bribery of foreign officials.

Corruption has a hugely negative impact on ordinary citizens around the world.

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.

It is time to level the playing field among Australian companies.

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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