Governance Institute of Australia

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Dr Kathleen Dermody
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Dr Dermody

Inquiry into foreign bribery

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance advisers and risk managers are second to none.

Our members are all involved in governance, corporate administration, risk management and compliance with the *Corporations Act 2001* (the Act) with their primary responsibility being the development and implementation of governance and risk management frameworks in public listed and public unlisted companies, private companies, and not-for-profit organisations. Many of our members work in the financial services industry and all have extensive experience of financial markets.

Governance Institute of Australia the welcomes the opportunity to comment on the inquiry into foreign bribery as set out in the terms of reference.

General comments

Our members strongly support measures to improve Commonwealth regulation of foreign bribery in order for Australia to comply with our requirements as a signatory to the OECD anti–bribery Convention. We also consider that this will offer substantial benefits and protections to Australian companies and their employees seeking to ensure compliance and high standards in relation to this issue both in Australia and other jurisdictions.

We note that over the years Australia has dropped to 11th in the 2014 Transparency International Corruption Perception Index. In addition, the new TRACE Matrix which seeks to measure bribery risk across countries by assessing and number of relevant domains ranks Australia as 29th and well below most of the OECD countries. Australia's reputation appears to be suffering from the perception of the rigour of its anti-bribery laws and the appetite of its regulators to enforce those laws.

We will not address the individual terms of reference, but will rather address the issues on a broader governance basis.

Comparisons between anti-bribery legislation in Australia and other jurisdictions

While Australia has longstanding anti-bribery provisions under s 70 of the *Criminal Code Act 1995 (Cth)*, unlike the United Kingdom and United States it does not have dedicated anti-bribery legislation. In addition, given the differing laws across the Commonwealth, states and territories, there is no single-government anti-bribery policy. This raises the question whether having dedicated anti-bribery legislation will improve corporate compliance and the effectiveness of the enforcement regime.

Our members represent both domestic and international companies and are of the view that the UK Bribery Act, which came into force on 1 July 2011, constitutes one of the strictest anti-bribery regimes in the world, and offers the most complete reform to date, being broader in scope than both the Criminal Code and the Foreign Corruption Practices Act (FCPA).

Primary attributes of the UK Bribery Act which members point to in providing certainty as well as direction for compliance are:

- the application of the Act to both the public and private sectors
- the prohibition of facilitation payments (which are permitted under Australian law)
- the prohibition of both active and passive bribery
- the corporate offence of failure to prevent bribery (with the adequate procedures defence)
- information on adequate procedures being set out in clear non-prescriptive guidance based on six key principles
- the publication of prosecution guidance which provides guidance on the approach prosecutors will take when deciding whether to prosecute offences under the Act.

In a brief comparison, FCPA has a more narrow scope than the UK Act — FCPA does not cover bribery on a private level; only covers active (rather than passive) bribery and excludes some facilitation payments if they are seen as not affecting the decision-making process. While it has been in operation since 1977, it is highly legalistic, rather than principles-based, and very technical, requiring expert legal assistance. Moreover, in the US, any whistleblower may receive 30 per cent of any monies offered in bribery, which creates moral hazard. Our members do not believe that this is the appropriate model to follow.

While we recognise that the lack of prosecutions in Australia have been addressed to some degree and the penalties increased to a comparable level to other jurisdictions, Australia continues to lag behind other countries in the enforcement of the OECD convention principles.

We recognise that the Commonwealth Attorney General's Office provides guidance on foreign bribery. However, Australian companies operating both domestically and internationally must have regard to a wide range of legislation, rules and guidance which complicates the development of clear compliance frameworks. This makes it extremely challenging, particularly for smaller companies that do not have significant in-house resources, to gain clarity about the regulatory framework applicable to foreign bribery.

As noted, Australia has various regulatory frameworks that may apply to anti-bribery and corruption. Division 70 of the Criminal Code is the key legislation relating to bribery of foreign officials. Private sector bribery (such as secret commissions), however, is covered by state and territory legislation. Additional federal legislation also applies.[1]

Governance Institute is of the view that the multiplicity of regulations in Australia should be addressed by replacing the range of state and federal laws with a single piece of legislation and readily accessible guidelines which would simplify compliance and improve outcomes. The outcomes would include not only improved clarity in relation to accepted standards and compliance, but also extended economic and social benefits in many jurisdictions in which Australian companies operate.

For example, the UK Bribery Act, by setting an uncompromising benchmark, requires companies subject to that Act to operate in the same fashion when it comes to bribery and to implement compliance programs having regard to the risk-based guiding principles.

Recommendation

Governance Institute recommends that Australia implement either:

- a principles-based approach, similar to the UK model, with one overarching set of legislation, rules and guidance, that includes a term of reference, operational processes, education, and applicable defences, or
- guidance as to how to navigate within the current 'jigsaw puzzle' of fragmented legislation, regulation and guidance, available in a readily accessible section of the website of ONE government agency, so that there is clarity for companies as to where to turn when seeking to understand their obligations and how to comply with them.

Clarity and visibility as to the regulatory framework, either through one piece of legislation or the collation of guidance on one website, will not only assist Australian companies to be more effective in implementing anti-bribery and corruption policies, but also assist their employees to more easily explain to the people with whom they interact in other jurisdictions as to why the company policy operates and the long-term benefits to the local economy and community.

Enforcement

The OECD report card found that Australia was weak in the area of enforcement of anti-bribery and corruption. While this is may be due in part to the fragmented regulatory framework discussed above, Governance Institute also notes that there is a lack of public visibility as to enforcement. In turn, this means that breaches are not highlighted.

We recommend that consideration be given to greater visibility by the government agencies to any prosecutions they may pursue. We recognise that there are issues of confidentiality, which can restrict government agencies from speaking publicly about their prosecutions or proactive achievements. Nonetheless, Governance Institute believes that the lack of visibility in enforcement diminishes the importance of the issue.

[1] *Corporations Act 2001 (Cth), Mutual Assistance in Criminal Matters Act 1987 (Cth), Extradition Act 1999 (Cth)*

Conclusion

As organisations continue to operate across international boundaries, they increasingly need to consider the threat and management of bribery and corruption. The introduction of a firm rule for Australian companies and their customers across all jurisdictions would go a long way in ensuring compliance and protection and lead to positive outcomes.

Yours sincerely

Tim Sheehy FGIA
Chief Executive