

Policing Corruption and Corporations in Australia: Towards A New National Agenda?

Simon Bronitt¹

Context: Perceptions of Corruption in Australia

A recurrent theme in Australia's political life, which can be traced from the earliest colonial period,² is the scourge of corruption and abuse of high office. The late 20th century witnessed strenuous efforts to address cultures of political corruption, exposed by various inquiries into police in the 1980s³ and 1990s,⁴ which led to the creation of independent police integrity and anti-corruption agencies in some Australian jurisdictions. Few spheres of public life have been immune from the taint of corruption. A week rarely passes in Australia without allegations of serious fraud and corruption surfacing implicating individuals in high public office, including the Prime Minister,⁵ the Speaker of the House of Representatives,⁶ and a federal politician.⁷

¹ Director, Australian Research Council (ARC) Centre of Excellence in Policing and Security (CEPS) and Professor, Griffith University, Australia. Correspondence: s.bronitt@griffith.edu.au. I would like to acknowledge the generous funding support from Australian Research Council, as well as the excellent research assistance provided Monique Mann and Lisa Gilmore.

² For example the pervasive corruption of New South Wales Military officers led to the Rum Rebellion of 1808, see David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991); Graeme Davidson, John Hirst and Sturat Macintyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998), 567.

³ In Queensland, between 1987-1989, the Fitzgerald Inquiry exposed widespread police and political corruption: *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*. Following the Fitzgerald Inquiry, the Crime and Misconduct Commission was established under the *Crime and Misconduct Act (2001)* (Qld). See further: Colleen Lewis, Janet Ransley and Ross Homel (eds), *The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond* (Australian Academic Press, 2010).

⁴ In New South Wales the 1994-1997 Wood Commission (Royal Commission into the New South Wales Police Service). In the wake of the Wood Commission the Police Integrity Commission was established under the *Police Integrity Commission Act (1996)* (NSW). David Dixon (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999).

⁵ The Prime Minister, Julia Gillard, has been implicated a union corruption scandal, having assisted the establishment of 'slush fund' that her then boyfriend Bruce Wilson used to defraud the Australian Workers Union (AWU) and to embezzle union funds. Gillard has vigorously denied any wrongdoing: Gemma Jones, 'Union corruption is plaguing Prime Minister Julia Gillard', *The Daily Telegraph* (online), 30 November 2012 <<http://www.dailytelegraph.com.au/news/union-corruption-is-plaguing-prime-minister-julia-gillard/story-e6freuy9-1226527053409>. Mark Baker, 'Police extend AWU slush fund inquiry,' *The Sydney Morning Herald* (online), 24 January 2013

High profile cases aside, public opinion surveys reveal that on a day-to-day basis, Australians do not encounter demands for or expectations of bribes for provision of public services in any significant numbers.⁸ The most recent national poll (ANUPOLL) published in 2012,⁹ confirmed that acts of bribery involving public officials in Australia are very low: when asked whether they (or a family member) had encountered a public official who hinted he or she wanted, or asked for a bribe or favour in return for a service, 91% of respondents said never.¹⁰ There are clearly signs of a growing public anxiety about corruption in Australia. For example, the ANUPOLL survey revealed that a significant proportion (43%) of Australians surveyed believed that corruption is on the rise,¹¹ and one in three surveyed expressed the view that the Federal Government was corrupt!¹² Of serious concern is the general public's lack of knowledge about how to respond or report corrupt activity: ANUPOLL revealed that only half of those surveyed knew where to report corrupt activity, and of those, one half nominated the police, and 15 percent nominated the Ombudsman. Only 5 percent of the total survey mentioned one of the existing anti-corruption agencies!

<<http://www.smh.com.au/opinion/political-news/police-extend-awu-slush-fund-inquiry-20130123-2d7d2.html>>.

⁶ The former federal Speaker, Mr Peter Slipper, is currently facing charges of fraud stemming from the misuse of cab charges and hire cars funded by the Commonwealth: Ken McGregor, 'AFP launches Investigation into Peter Slipper', *Herald Sun* (online), 2 May 2012 <<http://www.heraldsun.com.au/news/victoria/a-new-twist-to-the-peter-slipper-scandal-as-top-liberal-admits-he-met-accuser/story-fn7x8me2-1226344140499>>.

⁷ Federal Member of Parliament Craig Thomson was recently arrested on 150 charges of fraud allegedly committed while serving as National Secretary of the Health Services Union: Simon Cullen, 'Police arrest MP Craig Thomson on 150 Fraud Charges', *ABC News* (online), 1 February 2013 <<http://www.abc.net.au/news/2013-01-31/craig-thomson-arrested/4493722>>.

⁸ The leading national poll, ANUPOLL, measures public confidence in government and institutions, perceptions and experiences of corruption and the ethical conduct of elected representatives and political mood: Ian McAllister, Juliet Pietsch and Adam Graycar, *Perceptions of Corruption and Ethical Conduct - The Australian National University Poll* (ANUPOLL), Report No. 13 (2012).

⁹ Ibid.

¹⁰ Ibid 11.

¹¹ Ibid 12.

¹² Ibid 13.

International perspectives on vulnerability to corruption are even less equivocal about Australia's good standing. Transparency International (TI) regularly places Australia in the top 10 countries with the perceived least amount of corruption.¹³ Such perceptions, which are largely drawn from within the business community, may explain why corruption has not been a serious priority for Australian governments.

Public perceptions and opinions about corruption are not necessarily the best guide for the development of government or legal policy in this field. Like family violence and institutional sexual abuse, offending behaviour in relation to corruption has often been either hidden from view or normalised. This regulatory blindspot towards corruption, in turn, fosters a similar attitude among public officials, law enforcement officers and third parties such as financial institutions and professional groups (lawyers, accountants, etc) that have become (unwittingly or not) the facilitators of corruption in the region.

There is now a growing concern that Australia's enforcement laxity has made it a 'honeypot' for laundering the proceeds of overseas corruption. Mr Sam Koin, a senior lawyer with the Papua New Guinea (PNG) Justice Department and Chair of the anti-corruption taskforce, Operation Sweep, recently described Australia as the 'Cayman Island of the Pacific'.¹⁴ Operation Sweep was established in 2011 to investigate the level of corruption in PNG and has found that a significant proportion of funds were being sent offshore to countries like Australia. In a recent public address, Koin pointed out that the Registrar of Land Titles in North Queensland had confirmed that six known PNG politicians have invested in million-dollar properties (worth more than \$A11.5 million in total). In response to this negative publicity the Australian

¹³ According to Transparency International, since 2003 Australia consistently ranks in the top 10 countries with the least perceived amount of corruption, with the only exception being 2007, in which Australia was ranked as the 11th country with the least perceived amount of corruption: *Transparency International, Corruption Perceptions Index* (2012) <<http://www.transparency.org/research/cpi>>.

¹⁴ This jibe may be a serious disservice to the Government of the Cayman Island, which has made significant strides to work with international partners to address money laundering in that jurisdiction. See J Masters, "Passing the Buck", CEPS Seminar 27/11/2012 (<http://www.ceps.edu.au/events/72>, accessed 15 February 2013).

government has announced that they would no longer issue visas to PNG citizens who utilize their corrupt money to invest in Australia.¹⁵

Unlike countries lacking effective laws and independent agencies (police, prosecutors and courts) empowered to tackle corruption, Australia has a plethora of regulatory tools available. There is no shortage of laws suitable for use against corruption (both civil and criminal) available to federal, state and territory authorities, which in part explains why Australia is *perceived* to have a strong official response against corruption. Clearly then, the enactment of more law (with more severe penalties) is not necessarily the solution. Rather Australia's response must address the primary weakness in its regulatory system, namely, the weak political commitment to vigorous law enforcement, in particular, the governmental failure to provide adequate resources (both financial and technical) to enable the effective detection, investigation and prosecution of corruption offences, as well as forfeiture of tainted assets. The next step is to resource more cross border investigations and prosecutions, and to redouble efforts to locate and confiscate tainted assets in Australia. What tools then do Australian authorities have to achieve this?

Legal Frameworks to Combat Corruption: Cooperative Federalism at Work

Australia is a federal system that distributes the power to legislate and regulate between the Commonwealth of Australia, and its six constituent States and two Territories. As a consequence, the power to make criminal laws (including corruption offences) in Australia is a competence shared between 9 separate jurisdictions. In Australia, federal criminal law does not automatically oust State and Territory law, with the result that jurisdictions often overlap. This is the case with laws relating to corruption. The respective competence to legislate at the federal, State and Territory level in Australia is further examined in the Appendix A below.

¹⁵ Firmin Nanol, 'Australia turns away PNG investors using 'corrupt money'', *ABC News* (online), 2 November 2012 <www.abc.net.au/news/2012-11-02/an-png-property/4350390>. See also 'Onshore financial centres: Not a palm tree in sight,' *The Economist* (online), 16 February 2013 <<http://www.economist.com/news/special-report/21571554-some-onshore-jurisdictions-can-be-laxer-offshore-sort-not-palm-tree-sight?zid=306&ah=1b164dbd43b0cb27ba0d4c3b12a5e227>>.

The Federal Parliament's power to legislate in this field derives from the numerous international treaties and conventions adopted to combat corruption including (i) United Nations Convention Against Corruption (UNCAC) (entered into force 14 December 2005),¹⁶(ii) Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials (entered into force 15 February 1999),¹⁷ and (iii) United Nations Convention Against Transnational Organised Crime (UNTOC)¹⁸ (entered into force 2004). Australia meets its UNCAC obligations through a combination of legislation,¹⁹ enforcement action,²⁰ audit²¹ and industry self-regulation, and international cooperation with regional and international institutions.²²

Towards a National Anti-Corruption Plan: A Work in Progress

Reflecting the current constitutional status quo in Australia that shares legal competencies in criminal matters between the Commonwealth, States and Territories, the proposed National Anti-Corruption Plan (NACP) advocates a 'whole-of-government'²³ and 'multi-agency'²⁴ model of regulation. The federal Attorney-General's Department (AGD) is the central executive agency with responsibility for

¹⁶ *United Nations Convention against Corruption*, opened for signature 9 December 2003 (entered into force 14 December 2005).

¹⁷ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997 (entered into force 12 February 1999).

¹⁸ *United Nations Convention against Transnational Organised Crime*, opened for signature 12 December 2000 (entered into force 29 September 2003).

¹⁹ Commonwealth Legislation such as the Criminal Code Act 1995, Public Service Act 1999, Commonwealth Electoral Act 1918, Financial Management and Accountability Act 1997, Freedom of Information Act 1982, Corporations Act 2001, Proceeds of Crime Act 2002 and the Mutual Assistance in Criminal Matters Act 1987.

²⁰ The Australian Government enforce laws relating to corruption through its executive agencies including the Attorney-General's Department, Australian Federal Police, Australian Crime Commission, Australian Securities and Investment Commission, Australian Public Service Commission and the Australian Transaction Reports and Analysis Centre (AUSTRAC).

²¹ Auditing of government agencies is undertaken by the Australian National Audit Office (ANAO), and public budget statements, with industry self-regulation promoted by, for example, the Australian Stock Exchange (ASX) and the voluntary Corporate Governance Guidelines.

²² *The Commonwealth's Approach to Anti-Corruption - The Anti-Corruption Plan Discussion Paper*, (2012), 4.

²³ *Ibid.* 20.

²⁴ *Ibid.* 12ff.

developing the NACP, though its implementation would be a matter for all levels of government. The 'whole-of-government' philosophy that underwrites the NACP raises questions about how effectively this policy will be operationalized through Australia's model of federalism, where governments share, negotiate and contest their respective competencies to regulate and enforce laws. For 'whole-of-government' initiatives to be effective, there must be a strong commitment to cooperation – both bureaucratic and political - that cannot be imposed through a top-down approach.²⁵ In this section, I challenge whether NACP model, which requires a high level of commitment to the ideals of cooperative federalism,²⁶ is the best approach for tackling corruption particularly in its transnational/multi-jurisdictional forms.

(i) New Anti-Corruption Regulatory Models: From 'Holes-in-Governance' to 'Whole-of-Government'

Until recently, Australia lacked a national policy in relation to corruption: there was no single Australian government policy statement, emanating from either the Commonwealth Government or Council of Australian Governments (COAG), that summarized Australia's national strategy. Somewhat surprisingly, not all of Australia's States and Territories have an anti-corruption agency²⁷ and there is currently no formal forum or mechanism for cooperation among anti-corruption agencies. This governance gap in relation to a national plan for tackling corruption was identified as an issue in September 2011, when the Commonwealth Government announced its intention to develop the first National Anti-Corruption Plan (NACP) for

²⁵ Christopher Pollitt, 'Joined up government: a survey' (2003) 1 *Political Studies Review*, 46. See also Tom Christensen & Per Laefreid, 'The whole of government approach to public sector reform' [2007] *Public Administration Review*. Painter comments 'where whole government considerations come to the fore, the painstaking, cooperative work of official negotiations, proceeding along tracks previously laid down for policy development or implementation in a particular sector, can amount to nought.' Martin Painter, 'Australian federalism and the policy process: Politics with extra vitamins,' (2007) 23 *Politics*, 23, 62.

²⁶ Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), 273.

²⁷ See Appendix B for State and Territory Anti-Corruption Agencies.

Australia.²⁸ At the time of writing, NACP has not been officially released by the Attorney-General's Department.

A key objective of the proposed NACP is to strengthen Australia's existing governance arrangements by developing a 'whole-of-government' policy on anti-corruption. The NACP would bring the multiple responsible agencies together under a cohesive framework in order to strengthen the Government's capacity to identify and address corruption risks. It will also outline the existing Commonwealth approach to combating corruption, undertake a risk assessment of current and emerging corruption risks to identify national priorities, and subsequently implement a national framework addressing the identified risks and priorities. NACP represents the Commonwealth's political commitment to develop a multi-jurisdictional approach to combating corruption.²⁹ This proposed policy has been welcomed at the international level. In June 2012 the implementation review group of the Conference of the State Parties to the UNCAC recommended that Australia continue the consultative and developmental process for the NACP.³⁰

Australia's multi-agency approach to combating corruption reflects the fact responsibility for combating corruption is shared across multiple agencies within its borders. As noted above, the Commonwealth Parliament does not have a plenary power to enact criminal law, though it does have power to enact laws (and to create law enforcement agencies) to implement the anti-corruption treaties to which it is a party. An example of the latter is the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth) hereafter "BFPO", which implements Australia's obligation under the OECD Convention (see above).³¹ The advantage of federal

²⁸ Commonwealth Government, Attorney-General's Department, *The Commonwealth's Approach to Anti-Corruption - The Anti-Corruption Plan Discussion Paper*, (2012), 4.

²⁹ *Ibid.* 5.

³⁰ Conference of the State Parties to the United Nations Convention against Corruption, Implementation Review Group, *Review of Implementation of the United Nations Convention against Corruption 2012*, UN Doc CAC/COSP/IRG/I/2/1, 9.

³¹ This offence was enacted to comply with the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Australia had ratified. Cindy Davids and Grant Schubert, 'Criminalising Foreign Bribery: Is Australia's bark louder than its bark?' (2011) 35 *Criminal Law Journal* 98.

corruption offences is that they apply in all 9 Australian jurisdictions, as well as extending to conduct that occurs beyond its borders.

(ii) Curbing Foreign Bribery: The limits of federal criminal law.

The BFPO amended the federal Criminal Code inserting a new offence of bribery of foreign public officials. Under section 70 of the Criminal Code a person is guilty of the offence if that person 'provides,'³² 'causes,'³³ 'offers to provide, or promises to provide'³⁴ or 'causes an offer of the provision of a benefit, or a promise of the provision of a benefit'³⁵ that 'is not legitimately due to the other person,'³⁶ and 'with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official,'³⁷ to 'obtain or retain business'³⁸ or 'obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient of the business advantage.'³⁹ The offence has both territorial and extraterritorial operation, in respect of the latter applying to the conduct of Australian citizens, residents and corporations overseas.⁴⁰ The maximum penalty for the offence of bribing a foreign public official for an individual is ten years imprisonment and/or a fine of 10,000 penalty units (currently \$1.1 million).⁴¹ As established in section 12 of the Criminal Code,⁴² the offence applies also to corporations, with proportionately more severe penalties than those applying to

³² *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth), s 70.2(1)(a)(i).

³³ *Ibid* s 70.2(1)(a)(ii).

³⁴ *Ibid* s 70.2(1)(a)(iii).

³⁵ *Ibid* s 70.2(1)(a)(iv).

³⁶ *Ibid* s 70.2(1)(b).

³⁷ *Ibid* s 70.2(1)(c).

³⁸ *Ibid* s 70.2(1)(c)(i).

³⁹ *Ibid* s 70.2(1)(c)(ii).

⁴⁰ Section 70.5(1)(b). The offence applies if the relevant conduct occurs 'wholly or partly in Australia' (or wholly or partly on an Australian ship or aircraft) or is committed by an Australian citizen, resident or a body corporate incorporated under Australian Commonwealth or State/Territory law'. For a discussion of extended non-geographical jurisdiction see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Law Book Co, 3rd ed, 2010), 93-105; Davids and Schubert, above n 33, 103.

⁴¹ Attorney-General's Department, *Fact Sheet 1 Why you need to know about foreign bribery and its implications* (2010), 1

<<http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx>>.

⁴² Section 12.1 of the *Criminal Code Act 1995* (Cth).

individuals.⁴³ In addition to the general defences applicable to all offences in section 10 of the Criminal Code,⁴⁴ there are two specific defences that apply only to foreign bribery, namely (1) the defence of lawful conduct (under foreign law, or the ‘foreign law defence’)⁴⁵ and (2) the facilitation payment defence.⁴⁶

The foreign law defence applies when the benefit paid was required or permitted by a ‘written law’ of the country of the foreign official.⁴⁷ Limiting the foreign law defence to ‘written law’ excludes customary practices that are not enacted in positive law (ie legislation or regulation), precluding defendants from raising the defence on the basis that the foreign law did not expressly prohibit the payment. The limitation was introduced by the *International Trade Integrity Act (2007)* (Cth) following the Australian Wheat Board (AWB) scandal.⁴⁸ This scandal involved more than \$US200 million in kickbacks being paid to the Hussein regime by the AWB, in contradiction of the UN Oil-for-Food program.⁴⁹ The Cole Inquiry into the activities of the AWB found that the payments made by AWB were not unlawful in domestic Iraqi law, and although in violation of the United Nations sanctions that were in place at the time, did not constitute an offence under subsection 70.2(1) of the Criminal Code.⁵⁰ As the Ministers or officials of the Iraqi government had issued directives or orders requiring the AWB to pay inland transport or after-sales-service fees to Iraqi entities,

⁴³ The maximum penalty that can be incurred by corporations where the value of the benefits obtained as a result of the bribe can be ascertained is a fine issued in penalty units (100,000 penalty units or \$11 million), or proportionate to three times the value of the benefits obtained. If the value of the benefits of the bribe cannot be ascertained, the maximum penalty is 100,000 penalty units or the equivalent to ten percent of the annual turnover of the corporation. Attorney-General’s Department, above n 46, 1. See further Davids and Schubert, above n 33, 106-109.

⁴⁴ Davids and Schubert, above n 33, 110.

⁴⁵ *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth) s 70.3.

⁴⁶ *Ibid.* s 70.4.

⁴⁷ The *International Trade Integrity Act 2007* (Cth) inserted ‘this written law requires or permits the provision of the benefit’ into subsection 70.3(1) of the Criminal Code.

⁴⁸ See Davids and Schubert, above n 33, 110.

⁴⁹ Linda Botterill, *Wheat Marketing in Transition: The Transformation of the Australian Wheat Board* (Springer, 2012), 94.

⁵⁰ Terence Cole, *Report of the Inquiry into Certain Australia Companies in Relation to the UN Oil-for-Food-Programme* (2006) Vol 5 (Appendix 26: Outline of potentially relevant offences), 348ff.

<http://www.oilforfoodinquiry.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report_Volume_5_Volume_5_-_Index.html>

the Cole Inquiry concluded that these payments could be considered lawful under Iraqi law within the terms of the defence in section 70.3.⁵¹

The facilitation payment defence only applies where the value of the payment made to the foreign official was of a 'minor nature,'⁵² and 'the conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature'.⁵³ There is a further requirement that the person making the payment has made a record of the conduct, 'as soon as practicable after the conduct occurred'.⁵⁴ The defence is controversial since it normalizes and legitimates facilitation payments, a practice which should (both as a matter of sound policy and best commercial practice) be discouraged by those offering and receiving these payments.⁵⁵ The Australian licence towards some types of facilitation payment follows the approach taken in the United States in the *Foreign Corrupt Practices Act of 1977* (US) (FCPA). However, unlike the FCPA, the Australian legislative model in the BFPO lacks a system that can prospectively 'vet' the legality of proposed facilitation payments.⁵⁶ As a result, Australian corporations and their legal advisors assessing the legality of proposed facilitation payments may adopt overly generous and self-serving interpretations of what constitutes a payment of a 'minor nature' intended to facilitate 'routine government action'. In other words, senior corporate executives, concerned not to lose out on high value international contracts may be willing - both literally and figuratively - to 'push the envelope' to its maximum extent. By comparison, the United Kingdom has taken a strict prohibitionist stance towards

⁵¹ Ibid. See further Ross Buckley and Mark Danielson, 'Facilitation Payments in International Business: A Proposal to Make Section 70.4 of the Criminal Code Workable' [2008] *University of New South Wales Faculty of Law Research Series*, 2.

⁵² *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth), s 70.4(1)(a).

⁵³ Ibid s 70.4(1)(b).

⁵⁴ Ibid s 70.4(1)(c).

⁵⁵ The government's policy position on facilitation is equivocal with the Australian Taxation Office imposing a strict prohibition on claiming such (ostensibly lawful) payments as legitimate business expenses: Australian Taxation Office, *Bribes and Facilitation Payments: A Guide to Managing your Tax Obligations* (27 April, 2008) <<http://www.ato.gov.au/corporate/content.aspx?menuid=0&doc=/content/00104079.htm&page=4&H4>>.

⁵⁶ US corporations can seek advice from the United States Attorney-General about whether their conduct in making facilitation payments is at risk of breaching the FCPA: Davids and Schubert, above n 33, 112.

facilitation payments, where such payments have never been lawful.⁵⁷ Due to sound policy arguments against facilitation payments (for example being detrimental to good governance and encouraging corrupt practices) and the OECD Working Group on Bribery's recent recommendation discouraging these payments,⁵⁸ the Australian Government is examining whether the facilitation payments defence should be removed from section 70.4 of the Criminal Code.⁵⁹

As Davids and Schubert pointed out in 2011, for more than a decade no charges were instituted for foreign bribery under the BFPO. This poor record of enforcement activity in Australia may be contrasted with the more vigorous approach taken towards the FCPA in the United States.⁶⁰ There appear to be some signs of change, with increasing political and media attention being given to foreign bribery practiced by large Australian companies. In July 2011, the first charges under the BFPO were laid against two companies, Securrency International Pty Ltd (Securrency) and Note Printing Australia Ltd (NPA), and six individuals (including two former Chief Executives). Both companies are subsidiaries of the Reserve Bank of Australia. It was alleged that between 1999 and 2005 bribes were made to public officials in Indonesia, Malaysia and Vietnam in order to secure banknote-printing contracts.⁶¹ Interestingly, the Chief Financial Officer of Securrency and company secretary, David Ellery, was

⁵⁷ *The Public Bodies Corrupt Practices Act 1889* (UK); *The Prevention of Corruption Act 1906* (UK); *The Prevention of Corruption Act 1916* (UK); *Bribery Act 2010* (UK).

⁵⁸ Davids and Schubert, above n 33, 112; OECD Working Group on Bribery in International Business Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November, 2009), 4
<<http://www.oecd.org/corruption/governmentsagree-to-step-up-fight-against-bribery.htm>>.

⁵⁹ See further Attorney-General's Department, 'Divisions 70 and 141 of the Criminal Code Act 1995: Assessing the 'facilitation payments' defence to the Foreign Bribery offence and other measures,' (Public Consultation Paper, 2011), 5.

⁶⁰ Shu Ying Wee, 'The OECD Convention on Combating Bribery of Foreign Public Officials and its Effectiveness in Australia: Are We Doing Enough?' (2012) 15 *International Trade and Business Law Review*, 15, 372.

⁶¹ Australian Federal Police, 'Foreign bribery charges laid in Australia', (Media Release, 1 July 2011) <<http://www.afp.gov.au/media-centre/news/afp/2011/july/foreign-bribery-charges-laid-in-australia.aspx>>. See also Reserve Bank of Australia, 'Statement Concerning Securrency International Pty Ltd and Note Printing Australia Ltd', (Media Release, 1 July 2011) <<http://www.rba.gov.au/media-releases/2011/mr-11-14.html>>.

found guilty of the offence of false accounting, an offence under the State law of Victoria, rather than the federal offences related to foreign bribery.⁶²

Tackling Enforcement Deficits

Despite fresh investigations launched by the Australian Federal Police (AFP) into foreign bribery,⁶³ in the most recent phase (three) of the review of implementation of the OECD Convention, the OECD Working Group on Bribery notes with serious concern that the overall enforcement of the foreign bribery offence in Australia has been 'extremely low'.⁶⁴ The OECD Working Group of Bribery recommends the AFP adopt significant measures to ensure that investigations into allegations of foreign bribery are not closed prematurely and that the AFP takes a proactive stance in information/intelligence gathering relevant to foreign bribery matters.⁶⁵

The question then becomes, what strategies are needed to improve enforcement of corruption offences? The most urgent reform required is the repeal of the facilitation payment defence for the reasons outlined above. Also, there is a need to promote stronger cultures of compliance and organizational responsibility within the Australian business community. This may be achieved by reframing the foreign bribery offence to impose more clearly upon corporate boards and employees a positive legal duty to ensure that bribery is not tolerated by corporate culture. To

⁶² See *R v Ellery* [2012] VSC 349 (20 August 2012). In August 2012 the accused was convicted of false accounting offences under s 83(1)(a) of the *Crimes Act 1958* (Vic). No federal offences were pursued against Ellery. It is conceivable that these charges were not proceeded with because of charge bargaining and Ellery's willingness to cooperate with federal investigations as reflected in the sentencing notes. See further: Richard Barker and Nick McKenzie, 'Securrency boss to testify against other bribe accused', *The Sydney Morning Herald*, 9 June 2012 <<http://www.smh.com.au/national/securrency-boss-to-testify-against-other-bribe-accused-20120608-201g7.html>>.

⁶³ See also investigation into Tenix Defense. Richard Barker and Nick McKenzie, 'Ex-Navy men caught in bribery probe', *The Age* (online), 21 March 2012 <<http://www.theage.com.au/national/exnavy-men-caught-in-bribery-probe-20120320-1vhws.html>>. These new investigations have moved Australia from Transparency International's 'little enforcement' category to the 'moderate enforcement' category. Transparency International, 'Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention' (Progress Report, 2012), 12 <http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio>.

⁶⁴ OECD Working Group on Bribery in International Business Transactions, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (2012), 9.

⁶⁵ *Ibid* 5.

bolster this, Australia should consider adopting the offence of “criminalizing the failure to prevent bribery” in similar terms to the offence recently enacted in the United Kingdom. Under the *Bribery Act 2010* (UK) a commercial organization (C), which includes corporations and partnerships, has a defence where C proves that it ‘had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct’.⁶⁶ This means under this provision, despite an incident of bribery, C will have a complete defence provided it can demonstrate preventative procedures were in place.⁶⁷ The *Bribery Act 2010* (UK) deems a person is ‘associated’ with C if the person ‘performs services for or on behalf of C’⁶⁸ and further stipulates, by way of example, that this may include an ‘employee, agent or subsidiary’.⁶⁹ In effect, this extends liability to corporate entities for acts of bribery committed by employees of the corporation and third parties that are acting on the behalf of the organisation.⁷⁰ Unlike the *Bribery Act 2010* (UK), there are no provisions within the BFPO that expressly extend liability to agents or subsidiaries of the corporation. In response to this deficit, Transparency International has called upon Australia to widen the offence, to include ‘agents or subsidiaries’.⁷¹

Unlike many other jurisdictions, which retain a restrictive approach to corporate criminal responsibility, the federal rules governing corporate criminal responsibility was subject to a major revision in 2001 with the insertion of Part 2.5 into the Criminal Code (Cth). The Criminal Code abolished the common law test which linked corporate liability to the fault of the person who is the directing mind or will of the company

⁶⁶ Section 7(2) of the *Bribery Act 2010* (UK).

⁶⁷ Under s 9(1) of the *Bribery Act 2010* (UK) the Secretary of State is required to ‘publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing.’ See United Kingdom Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into practice to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, (2011).

⁶⁸ Section 8(1) of the *Bribery Act 2010* (UK).

⁶⁹ *Ibid* s 8(3).

⁷⁰ Jon Jordan, ‘Recent developments in the Foreign Corrupt Practices Act and the new UK Bribery Act: A global trend towards greater accountability in the prevention of foreign bribery,’ (2010-2011) 7 *NYU Journal of Law & Business* 866; Peter Yeoh, ‘The UK Bribery Act 2010: contents and application,’ (2012) 19 *Journal of Financial Crime* 43.

⁷¹ Transparency International, above n 65, 12, recommending: ‘Legislation should clearly spell out the responsibility of companies for bribery committed by subsidiaries and other intermediaries, as presently the Australian provisions may not apply unless it can be proven that the Australian company “caused” the bribery’.

and exercises control over what it does (the so-called identification principle in *Tesco v Natrass*).⁷² Section 12 of the Criminal Code extended criminal responsibility to corporations in which the board of directors or high managerial agents had ‘intentionally, knowingly or recklessly engaged in the conduct, or expressly, tacitly, or implied authorized or permitted the commission of the offence.’⁷³ In a further departure from the previous common law test, that authorization or permission of the corporation may be established through a ‘a corporate culture ... that directed, encouraged, tolerated or led to non-compliance’ or that the corporation ‘failed to create and maintain a corporate culture that required compliance’.⁷⁴ In relation to high managerial agents (who are defined as employees, agents or officers, of sufficient seniority that they may be reasonably regarded as representing corporate policy) the corporation may raise a defence if it can establish that it ‘exercised due diligence to prevent the conduct, or the authorization or permission.’⁷⁵ The due diligence provision places a duty on corporations to demonstrate what steps were taken to eliminate or at least minimize the risk of corrupt practices corruption by its employees.⁷⁶

As well as a modernised model of corporate criminal responsibility, the law enforcement and prosecution agencies must have adequate resources to undertake these highly complex, often transnational, investigations of corruption. In Australia, there is no dedicated investigative and prosecution unit for corruption equivalent to the UK’s Serious Fraud Office (SFO). Under present arrangements, the Commonwealth Director of Public Prosecutions (CDPP) conducts the prosecution of all federal offences, typically on referral from AFP or other federal agency.⁷⁷ There are also several agencies that investigate or provide intelligence emerging from financial

⁷² *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170.

⁷³ *Criminal Code Act (1995)* (Cth) s 12.3(2)(a) and (b).

⁷⁴ *Ibid* s 12.3(2)(c) and (d).

⁷⁵ *Ibid* s 12.3(3).

⁷⁶ Celia Wells, ‘Corporate Crime: opening the eyes of the sentry’ (2010) 30 *Legal Studies*, 388; Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 3rd ed, 2001), 138.

⁷⁷ Federal jurisdiction in relation to criminal matters is invested in State and Territory courts: s 68(2) of the *Judiciary Act 1903* (Cth), This means that a person may be charged with federal and state offences in the same proceedings.

institutions about corruption in the private sector, and as such, assist in criminal law responses against corruption on a domestic level.⁷⁸ These include:

- *Australian Transaction Reports and Analysis Centre (AUSTRAC)*, which provides financial intelligence on potential crimes including corruption.
- *Australian Competition and Consumer Commission (ACCC)*, which educates the business community and the public—for example, how to make a complaint—and advises small businesses how to avoid corrupt conduct.
- *Australian Prudential Regulation Authority (APRA)*, which oversees banks, credit unions, building societies, insurance companies, and the superannuation industry.
- *Australian Securities and Investment Commission (ASIC)*, that has powers to investigate offences by corporations and corporate officers including powers to investigate bribery offences, the misleading of shareholders or other abuses for personal gain.

Notwithstanding the plethora of regulatory agencies working in this field, as Table 1 reveals there is very limited prosecution activity arising from corruption referrals.

⁷⁸ Ibid 21.

TABLE 1.
Federal Prosecution of Corruption-Related Offences 2011-2012⁷⁹

Offence	Statute	No. of Prosecutions
Bribery of a Commonwealth official	ss 141 and 142 Criminal Code (giving or receiving a bribe)	Nil charges for giving bribes. 5 indictable charges for receiving bribes.
Bribery of a foreign public official and officials of public international organisations	s 70.2 Criminal Code	Nil charges.
Abuse of public office	s 142.2 Criminal Code	3 summary charges. 1 indictable charge.
Trading in influence	s 142.3 Criminal Code	Nil charges.
Embezzlement, misappropriation or other diversion of property by a public official	Parts 3, 4, 6 & 9, <i>Financial Management and Accountability Act 1997</i> (Cth)	Nil charges.
Embezzlement of property in the private sector	s 131.3 Criminal Code	Nil charges.

With limited levels of enforcement against corruption, attention turns to ‘third party policing’ (TPP) and its potential to lengthen the arm of law enforcement. TPP recognises that the state and public officials such as the police do not have a monopoly over regulatory power (if indeed that ever was the case!). The idea of TPP is that members of the non-offending populace who have control over the offenders’ environment – termed guardians and place managers – should be enlisted in new crime prevention strategies.⁸⁰ Unlike the place managers who exercise control over the physical space in which street crime occurs, third parties in the context of corporate crime are in effect ‘market-place’ managers; the lawyers, bankers, accountants, real estate agents etc, who provide the financial systems and business

⁷⁹ Prosecution statistics from the Commonwealth Director of Public Prosecutions for the fiscal year 2011-2012. Commonwealth Director of Public Prosecutions, *Annual Report 2011-2012* (2012), 119. Note Table 1 excludes ongoing investigations and more recent enforcement activity such as the prosecutions against Securrency International Pty Ltd and Note Printing Australia, discussed above.

⁸⁰ ‘TPP occurs when police engage with other organizations or individuals and use a range of civil, regulatory and administrative laws to create or enhance crime control and prevention networks’: Lorraine Mazerolle and Janet Ransley, ‘Third Party Policing’ in A Wakefield and J Fleming (eds), *The SAGE Dictionary of Policing* (Sage Publications Ltd, 2009), 302-303. On harnessing insights from crime prevention generally, see Adam Graycar and Aiden Sidebottom, ‘Corruption and control: a corruption reduction approach,’ (2012) 19(4) *Journal of Financial Crime* 384.

services that may be used to enable corruption. Harnessing TPP in relation to corruption has the potential to enhance self-governance in the private sector and professions, as well as instituting new public-private sector partnerships to facilitate more effective cooperation with law enforcement and regulatory agencies, and levels of compliance.⁸¹ At a practical level, the fundamental challenge for law enforcement is determining whether a particular third party is a contributor to the offending behaviours (as either perpetrator or accessory), or rather is simply the innocent unwitting victim who can be enlisted to assist with the law enforcement and prosecution authorities. From a policing perspective, third parties will often be viewed as 'persons of interest' who can move between categories, some of whom are motivated by less altruistic motives, bargaining prospective cooperation with authorities for full or qualified immunity, or reduction in charges and sentence.⁸² A key insight is to recognize that third parties – whether corporations, employees or clients – fall within and move between any or all of the above categories, and that regulatory strategies must be attentive to this degree of mutability in TPP as a corruption prevention strategy.

Another key strategy is to promote public interest disclosure of corrupt acts among corporate sector employees. There have been moves to implement stronger protection for employees in the private sector who disclose corruption in the public interest. Whistleblower legislation exists in all state and territory jurisdictions in Australia, though federal legislation has not yet passed through parliament notwithstanding promises to do so by successive governments.⁸³ Existing state and territory protections however are limited to whistleblowers employed in the public

⁸¹ Lorraine Mazerolle and Janet Ransley, *Third Party Policing*, (Cambridge University Press, 2005), 23-26. See also Michael Buerger and Lorraine Mazerolle, 'Third-party policing: A theoretical analysis of an emerging trend,' (1998) 15(2) *Justice Quarterly* 301. An example of third party policing is the enlisting of pharmacist in preventing the diversion of 'over the counter' medications into illicit drug manufacture.

⁸² For example David Ellery as described above at n 64.

⁸³ *Whistleblowers Protection Act 1993 (SA)*, *Whistleblowers Protection Act 1994 (QLD)*, *Public Interest Disclosure Act 2010 (QLD)*, *Public Interest Disclosure Act 2012 (ACT)*, *Protected Disclosures Act 1994 (NSW)*, *Whistleblowers Protection Act 2001 (Vic)*, *Public Interest Disclosures Act 2002 (Tas)*, *Public Interest Disclosure Act 2003 (WA)*, *Public Interest Disclosure Act 2010 (NT)*. The *Public Interest Disclosure (Whistleblower Protection) Bill 2012 (Cth)* was introduced into federal parliament as a Private Member's Bill by Independent MP Mr Andrew Wilkie in October 2012. The Bill has since lapsed.

sector. As Peter Bowden noted, there was ‘virtually no legislative coverage of private sector whistleblowing in Australia’.⁸⁴ Protection for corporate whistleblowers is ad hoc and piecemeal: for example, at the federal level, under the provisions in the *Corporations Act 2001* (Cth), inserted by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth), the type of reportable conduct is narrowly limited to offences against corporations law.⁸⁵ While whistleblowing protection laws are widely touted as a valuable measure for encouraging disclosures of corporate wrongdoing, there are doubts whether these measures are effective in preventing the victimization and corporate reprisals against whistleblowers.⁸⁶

Another civil law measure encouraging and rewarding employees who disclose corruption from within the corporate section is the *Qui Tam* action, also known variously as the private Attorney-General or public interest citizen suit. These actions have been developed in the United States to combat corporate fraud and corruption targeting the federal government, as well as to encourage recovery action against corruption within labor unions under *Racketeer Influenced and Corrupt Organizations Act* (RICO).⁸⁷ Under the *False Claims Act 1986* (US) a *Qui Tam* action enables any person, the complainant (the ‘relator’), to institute litigation for fraud against the US

⁸⁴ Peter Bowden, ‘A comparative analysis of whistleblower protection’ (Paper presented at the Australian Association for Professional and Applied Ethics 12th Annual Conference, Adelaide, 28-30 September 2005), 4. See also William De Maria, ‘Common law- common mistakes? Protecting whistleblowers in Australia, New Zealand, South Africa and the United Kingdom’ (2006) 19 *International Journal of Public Sector Management* 650.

⁸⁵ ‘Reportable conduct is limited narrowly to breaches of corporations legislation (the Corporations and ASIC Acts) and precludes reporting of other forms of misconduct or harm.’: Janine Pascoe, ‘Corporate sector whistleblower protection in Australia- Some regulatory problems and issues,’ (2008) 22 *Australian Journal of Corporate Law* 96.

⁸⁶ See for example De Maria, above at n 85; Bowden, above at n 85; Brian Martin, ‘Illusion of whistleblower protection’ (Paper presented at the Public Right to Know Conference, 13-15 September 2002); William De Maria, ‘Whistleblowing: Public interest disclosure laws in Australia and New Zealand who are they really protecting?’ (1995) 20 *Alternative Law Journal* 270; Richard Fox, ‘Protecting the whistleblower’ (1993) 15 *Adelaide Law Review* 137; David Lewis, ‘Whistleblowing statutes in Australia: Is it time for a new agenda?’ (2003) 8 *Deakin Law Review* 318; AJ Brown and Paul Latimer, ‘Symbols or substance: Priorities for the reform of Australian Public Interest Disclosure Legislation’ (2008) 17 *Griffith Law Review* 223.

⁸⁷ The civil measures under RICO have been more successful than the criminal measures: see James Jacobs, *Mobsters, Unions, and Feds: the Mafia and the American labor Movement* (New York University Press, 2007).

government on behalf of the state. Qui Tam lawsuits are attractive for citizens because the relator receives a proportion of the recoveries in return for their efforts, which has stimulated an industry of Qui Tam specialist litigation firms who are prepared to underwrite the litigation costs in whistleblower cases in return for a contingency fee arrangement of 'no win, no fee'.⁸⁸ The Qui Tam action decentralizes the monitoring, enforcement and litigation of acts of fraud against the US Government by enlisting private citizens.⁸⁹ Qui Tam suits have arguably become a strong deterrent against defrauding the federal government serving to increase corporate compliance.⁹⁰ There are no similar civil measures in Australia under equivalent corruption legislation, though it is a model that is worthy of further exploration.

Conclusion: Promoting Law Enforcement and Cultures of Compliance

Legal measures, such as asset confiscation, as PNG senior lawyer Sam Koim pointed out in a recent special issue of *The Economist*, is essential to removing the profits from corruption.⁹¹ However, law enforcement intervention cannot be the sole or indeed primary regulatory strategy for dealing with corruption. As eminent Australian lawyer-criminologist Arie Frieberg points out, government regulators have a broad palette of regulatory tools for tackling complex societal problems ranging across the domains of economic, transactional or contract, authority, structural, informational and legal regulation.⁹² In the field of anti-corruption, informational regulation is a promising strategy for altering norms, attitudes toward corruption and building cultures of corporate compliance.⁹³ An recent example of informational regulation is Section 9(1) of the *Bribery Act 2010* (UK) under which the Secretary of State is

⁸⁸ See Aaron R Petty, 'How Qui Tam actions could fight public corruption' (2005-2006) 39 *University of Michigan Journal of Law Reform*; Marc S Raspanti and David M Laigaie, 'Current practice and procedure under the whistleblower provisions of the federal False Claims Act,' (1998) 71 *Temple Law Review*; Jill E Fisch, 'Class action reform, Qui Tam, and the role of the plaintiff,' (1997) 60 *Law and Contemporary Problems*.

⁸⁹ William E. Kovacic, 'Whistleblowing bounty laws as monitoring devices in government contracting,' (1995-1996) 29 *Loyola of Los Angeles Law Review*, 1809.

⁹⁰ Joel M Androphy and Mark A Correro, 'Whistleblower and federal Qui Tam litigation-suing the corporation for fraud,' (2003-2004) 45 *South Texas Law Review*, 28.

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⁹² See generally, Arie Frieberg, *Tools of Regulation* (The Federation Press, 2010). Arie Frieberg, 'Re-stocking the regulatory tool kit' (2010), Working Paper 15 *Jerusalem Papers in Regulation and Justice*, 5-6.

⁹³ *Ibid* 22.

required to publish guidance about preventative procedures that corporations can implement to prevent bribery.⁹⁴ It is also vital to recognise the role that corporate self-education plays in this field. In Australia, the Export Finance and Insurance Corporation (EFIC) similarly educates exporters and relevant third parties about the legal ramifications of bribery and requires exporters to implement a declaration against bribery.⁹⁵ A further recent development is the Australian Government's advocacy campaign called 'Trading with Integrity', which aims to foster a culture of integrity by educating businesses about their obligations under Australian law.⁹⁶ Providing incentives to encourage self-regulation,⁹⁷ enforce self-regulation,⁹⁸ promote capacity building,⁹⁹ as well as cultures of integrity and accountability,¹⁰⁰ are some of the regulatory strategies available to creating cultures of compliance within both the public and private sectors. In sum, the road ahead in fight corruption globally is a rocky one. Recent legal reforms in Australia and elsewhere are promising, but more imagination and financial commitment (for enforcement) is needed by the Australian and global regulators to ensure impact of these reforms.

⁹⁴ See above, at n 69.

⁹⁵ Commonwealth Government, Attorney-General's Department, *The Commonwealth's Approach to Anti-Corruption - The Anti-Corruption Plan Discussion Paper*, (2012), 21.

⁹⁶ Ibid 22. See also Commonwealth Government, Department of Foreign Affairs and Trade, *Measures Against Corruption*, <<http://www.dfat.gov.au/issues/measures-against-corruption.html>>.

Such anti-corruption declarations and codes of conduct should be supplemented with proactive management strategies such as commitment to model practice, employee motivation, internal reporting procedures with an independent audit function, and methods for countering intimidation and conflicts of interest. See Mark Findlay and Andrew Stewart, 'Implementing corruption prevention strategies through codes of conduct,' (1991-1992) 3 *Current Issues in Criminal Justice*, 262-263.

⁹⁷ Robert J Bush, 'Stimulating corporate self-regulation- The corporate self-evaluative privilege: Paradigmatic preferentialism or pragmatic panacea,' (1993) 87 *Northwestern University Law Review*.

⁹⁸ John Braithwaite, 'Enforced self-regulation: A new strategy for corporate crime control,' (1982) 80 *Michigan Law Review*.

⁹⁹ Roberto Villarreal, 'Regulatory quality improvements for preventing corruption in public administration: A capacity building perspective' (Working Document, Expert Group Meeting on Countering Corruption in the Public Sector, United Nations Department of Economic and Social Affairs, 25-28 June, 2012).

¹⁰⁰ Robert Gregory and Colin Hicks, 'Promoting public service integrity: A case for responsible accountability,' (1999) 58 *Australian Journal of Public Administration*; Peter Verhezen, 'Giving voice in a culture of silence: From a culture of compliance to a culture of integrity,' (2010) 96 *Journal of Business Ethics*.