

GOVERNANCE AND REGULATION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

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1. INTRODUCTION

The purpose of this paper is twofold. First, to discuss the liability of the corporation¹ for the criminal offence of (transactional) bribery of a foreign public official under Division 70 of the *Criminal Code Act 1995* (Cth) (the Code) and second, to discuss the importance (and the financial and operational burden) for management to develop, or re-evaluate, their internal compliance programs and policies to implement and promote a corporate culture of compliance with Australia's anti-bribery regime by its employees and agents.

The standard of internal corporate culture and governance controls discouraging, and ultimately the prevention of, the payment of bribes by its employees or agents to foreign public officials will be an important corporate governance issue over the next few years². There are a number of reasons for this - the Securrency International and Note Printing Australia investigation³ (where the first criminal charges under Division 70 have been laid against Australian directors and an Australian corporation); the Federal Government's proposal to remove from Division 70 of the Code the defence of 'facilitation payments'⁴ (as a reaction to the UK *Bribery Act 2010*); the 2012 criticisms by the OECD of Australia's anti-bribery regime;⁵ and recent investigations by the United States Department of Justice of Siemens AG and Morgan Stanley.

Despite the Federal Government's lack of enforcement in this area, directors and corporations risk facing criminal sanctions for breaches by their employees and agents of Division 70 offences. Failure to mitigate those risks place directors and corporations precariously within the reaches of the criminal law. Directors can face penalties of up to AUD\$1.7m and imprisonment for up to 10 years and corporations are at the risk of

¹ *Corporations Act 2001* (Cth), s 57A: 'a corporation includes (a) a company; (b) a body corporate; and (c) an unincorporated body.'

² J McNulty, J Knox, P Harned, 'What an effective corporate compliance program should look like,' (2013) 9 *Journal of Law, Economics and Policy* 375; M Stevens, 'Time to end facilitation payments', *The Australian Financial Review* (Melbourne), 11 July 2013, 32; N McKenzie and R Baker, 'Defence company in bribe inquiry', *Sydney Morning Herald* (Sydney) 29 May 2012; L McNamara, 'Construction giant Leighton Holdings admits it had no anti-bribery policy', *The Australian*, 27 March 2012.

³ Australian Federal Police, 'Foreign bribery charges laid in Australia', (Media Release, 1 July 2011), at <http://www.afp.gov.au/media-centre/news/afp/2011/july/foreign-bribery-charges-laid-in-australia.aspx> (accessed 1 May 2013).

⁴ *Criminal Code Act 1995* (Cth) s 70.4.

⁵ OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, [22], at <http://www.oecd.org/daf/briberyinternationalbusiness/AustraliaPhase3en.pdf> (accessed 16 June 2013).

penalties up to AUD\$11m (or 10% of annual turnover),⁶ together with reputational damage, with shareholders and markets at large.

Direct knowledge or involvement by a director or the corporation of the physical element of the offence committed by its employees or agents will not be a determining factor for investigate and enforcement agencies to establish liability under Division 70 - even when the offence is committed by employees or agents in direct contravention of a corporate compliance program and internal policies and procedure. The uncertainty faced by Australian corporations is the issue of *standard*. The result of the recent investigations of the United States Department of Justice (the DoJ) in *Siemens AG* and *Morgan Stanley* establishes the standards by which the DoJ will hold US corporations and directors to account when determining whether to pursue a corporation for criminal offences committed by its employees and agents. The decision by the DoJ not to charge (under criminal or civil laws) *Morgan Stanley* vicariously for the acts committed by an employee in China was due to the veracity of its internal corporate compliance program. *Morgan Stanley* illustrates that if Australian investigative and enforcement agencies follow the DoJ's lead when complying with its OECD and UNCAC obligations, only evidence of a strong and sophisticated corporate culture and compliance program will suffice to protect the corporation, it's directors, and ultimately it's shareholders, from large fines and penalties.

The expense and burden (both financial and operational) facing Australian corporations is onerous. A corporation's corporate culture and compliance program will be subject to scrutiny in every international commercial transaction, every international site visit, all inspections of goods, and all international movement of personal and goods. The ultimate responsibility of ensuring the corporation is compliant with anti-bribery laws will rest with the board, who face the challenge in discharging their duties to the corporation while also responding in a meaningful way to government investigation.⁷ This means that Australian corporations must implement various procedures and policies to avoid being "trapped in costly situations, not just in financial terms but also careless and/or unintended brushes with the law."⁸

⁶ *Criminal Code Act 1995* (Cth) s 70.2(5).

⁷ US Department of Justice, Official memorandum of Office of the Deputy Attorney General, P McNulty, *Principles of Federal Prosecution of Business Organisations*, 1, http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (accessed 16 June 2013).

⁸ P Yeoh, 'The UK Bribery Act 2010: contents and implications,' (2012) 19(1) *Journal of Financial Crime* 37, 38.

The impetus of this discussion is in part a response to countries strengthening their anti-bribery laws⁹ - in order to avoid criticism from the OECD and UNCAC. The response by the United Kingdom in introducing the *UK Bribery Act 2010*, will undoubtedly cause further apprehension and raise levels of uncertainty across Australian boards seeking to broaden investment in risk adverse foreign jurisdictions. It is clear that signatories to the OECD Convention,¹⁰ and UNCAC¹¹, will no longer be able to avoid their obligations to deter and investigate allegations of transactional bribery by domestic corporations operating internationally. As the DoJ has noted, corporations are likely to take "immediate remedial steps when one indicted for criminal conduct that is pervasive through a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale."¹²

2. TRANSACTIONAL BRIBERY OF FOREIGN PUBLIC OFFICIALS

2.1 Transactional Bribery

A bribe is defined as a 'favour or gift offered or given with the intention of influencing behaviour or opinions of foreign public officials in order to obtain business or other improper advantages.'¹³ Bribery, in a generic sense, will almost always occur within the lower hierarchy of corporations (or agents and consultants on the ground) without direct (or indirect) involvement or knowledge of the board or upper management, making it difficult for management to detect and prevent, particularly where the act of payment of small bribes¹⁴ has been the norm for corporations operating in volatile jurisdictions. The burden facing Australian corporations will be to reverse it's culture of bribery (particularly where 'facilitation payments' are viewed as a legitimate business expense) and implementing corporate compliance programs and policies, to prevent and encourage it's employees and

⁹ Ibid 37.

¹⁰ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention)* [1999] ATS 21, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf (accessed 1 May 2013).

¹¹ *United Nation Convention against Corruption*, General Assembly resolution 58/4 (New York, 31 October 2003) [2006] ATS 2 at http://www.unodc.org/documents/treaties/UNCAC/publications/convention/08-50026_E.pdf (accessed 1 May 2013).

¹² J McNulty, J Knox, P Harned, 'What an effective corporate compliance program should look like,' (2013) 9 *Journal of Law, Economics and Policy* 375, 2.

¹³ Australian Council of Superannuation Investors, 'Anti-corruption and Bribery Practices in Corporate Australia: A review of exposure to corruption and bribery risk across the S&P/ASX 200, October 2011, 7, at <http://www.acsi.org.au/research/research-reports.html> (accessed 1 May 2013).

¹⁴ Yeoh, above n 8, 49.

agents, at all levels of the corporate hierarchy, to refrain from engaging in the practice of transactional bribery to secure investment.

2.2 Bribery and its Harm

The payment of a bribe to a public official is often seen, and valued, as a necessity for corporations managing international assets based on contracts or licences that require illicit payments in order to secure them (or payment of small sums after a contract or licence is secured to speed up the implementation process - see: 'facilitation payments'), or dependence of lower-income countries for revenue based on those payments.¹⁵ The payment of bribes to foreign officials often reduces the risk of harm to employees (or agents) susceptible to harm and assists the host country facilitating standard tasks (such as processing mundane requests and licences) where local authorities are dependent on such payments. The justification for alleviating the culture, and dependence, of the act of payment of bribes by the international community include:

- "Bribery corrupts political and commercial life by inviting inappropriate grounds for decision making. It creates political instability, distorts markets, undermines legitimacy, retards development, wastes resources, undercuts confidence in decision-making institutions and leads to injustice, unfairness and inefficiency";¹⁶
- "[Bribery] perverts competition by pushing government contracts towards those who can pay the most, rather than those who are most qualified, and thus reduces the quality of investment in foreign countries, many of which rely on such investment for their economic development."¹⁷
- "[Bribery] corrode[s] the rule of law and adversely impact the business environment in areas where they are the norm"¹⁸ and also leads to poor allocation of public resources";¹⁹
- "The problem is that corruption, like temptation, exists everywhere, but in poor countries it can kill. Money meant for drugs for a sick child, or to build a hospital, can be siphoned off into overseas bank accounts or to build a luxury house";²⁰

¹⁵ Australian Council of Superannuation Investors, above n 13, 7.

¹⁶ J Horden, 'Bribery as a form of criminal wrongdoing' (2011) 127 Law Quarterly Review 37, 42.

¹⁷ Y Chueng, R Pau and A Stouraitis, *Which firms benefit from bribes, and by how much?: Evidence from corruption cases worldwide*, June 2011, 4-5, at <http://ssrn.com/abstract=1772246> (accessed 16 June 2013)

¹⁸ Australian Council of Superannuation Investors, above n 13.

¹⁹ H Benn, *Government and Development' speech given at Holyrood, Edinburgh, 22 June 2006, The National Archives website*, at <http://www.dfid.gov.uk/news/files/speeches/governance-development.asp> (accessed 16 June 2013).

²⁰ Ibid.

- "[C]orrupt practices contribute to the spread of organised crime and terrorism, undermine public trust in government and destabilise economies"²¹
- "Several UN treaty bodies and UN special procedures have concluded that, where corruption is wide-spread, states cannot comply with their human rights obligations"²²
- "A company that is used to getting business by paying bribes is embarking upon quite a different process. It is not selling goods and services, it is selling vehicles for bribery".²³

The social harm of large scale, or culturally embedded bribery (and corruption) is clear, but the alleviation and prevention of bribery is a difficult and onerous task for corporations to enforce, and for agencies to investigate and enforce, where the culture of bribery is, and has been, the norm for corporations operating in volatile jurisdictions. The corporation willing to engage in, or encouraging the payment of bribes by its employees and agents in order to secure contracts and licences, in the past has more often than not secured tenders against competing corporations unwilling to engage in the process of bribery or payment of 'facilitation payments'. As one African miner has been recently reported in the *Australian Financial Review*, "sometimes there is no point in being the only one that is right and proper."²⁴

It is not enough to discourage corporations from engaging in the practice of payment of bribes. A holistic approach needs to be taken, with a stronger focus on preventing the expectation and request for a bribe by the local official. The international communities focus on the corporation engaging in the act of bribery, rather than the foreign official and systemic failure of the host country to deter bribery, fails to recognise the onerous burden facing the international business community. For example, the removal of the defence of allowing 'facilitation payments' under Division 70 (discussed below) will undoubtedly have a follow on effect to lower-income countries where corporations may think twice about investing in certain countries.

²¹ G8, final communiqué of St Petersburg Summit, '*Fighting High Level Corruption*', 16 July 2006, at <http://en.g8russia.ru/docs/14.html> (accessed 16 June 2013); Horden, above n 16, 42.

²² Second Submission to the Joint Committee on Human Rights Inquiry into Business and Human Rights, citing the International Committee on Economic, Social and Cultural Rights, E/C.12/1/add.91, 2003, paragraph 12.

²³ J Carver, *Evidence to the Joint Committee on the Draft Bribery Bill*, 11 June 2009, at <http://www.publications.parliament.uk/pa/jt200809/jtbribe> (accessed 16 June 2013).

²⁴ M Stevens, 'Time to end facilitation payments', *The Australian Financial Review* (Melbourne), 11 July 2013, 32.

3 INTERNATIONAL RESPONSE TO TRANSACTIONAL BRIBERY

The international response to transactional bribery has focused primarily on the 'supply side'²⁵ of the bribe, the investing corporation and its employees and agents. In response to the growing effect of bribery of foreign public officials²⁶, members of the OECD, together with the United Nations, adopted the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention).²⁷

The Convention came into force on 15 February 1999 and has since been ratified by all 34 member countries of the OECD together with Argentina, Brazil, Bulgaria, Mexico, Italy and soon to be Brazil.²⁸ The Convention is one of the key "international instruments dealing with corruption", along with the 2003 *United Nations Convention Against Corruption* (UNCAC), which mirrored Art 1 and 2 of the Convention,²⁹ which Australia has also ratified.³⁰

The Convention "adopts best practices for making businesses liable for foreign bribery to prevent misuse and deter the avoidance of detection, investigation and prosecution by using agent and intermediaries including foreign subsidiaries."³¹

3.1 Specific Convention obligations

Article 1 of the Convention requires each signatory to criminalise the provision of an advantage to a foreign entity, whether directly or indirectly (through agents or intermediaries) to a foreign public official to induce them to act or refrain from acting in

²⁵ C Barker, 'Australia's Implementation of the OECD Anti-Bribery Convention', 7 February 2012, 1, at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/AntiBribery (accessed 1 May 2013).

²⁶ Ibid.

²⁷ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention)* [1999] ATS 21, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf (accessed 1 May 2013).

²⁸ OECD Working Group on Bribery, *Annual Report 2010*, 2011, 11-12, at <http://www.oecd.org/dataoecd/7/15/47628703> (accessed 29 June 2013); Barker, above n 25, 1; McNulty, Knox, Harned, above n 12, 376.

²⁹ J Entwisle, 'Corporate Liability for the bribery of foreign public officials: Reassessing Australia's legislative regime in light of the 'banknote scandal' and UK Bribery Act 2010' (2012) 27 *Australian Journal of Corporate Law* 205, 208.

³⁰ *United Nation Convention against Corruption*, General Assembly Resolution 58/4 (New York, 31 October 2003) [2006] ATS 2 at http://www.unodc.org/documents/treaties/UNCAC/publications/convention/08-50026_E.pdf (accessed 1 May 2013); Barker, above n 25, 1.

³¹ Yeoh, above n 8, 40.

relation to the performance of official duties, in order to gain an improper advantage in the conduct of international business.³² Article 2 of the Convention requires each signatory to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.³³ Article 2 of the Convention then requires the introduction by each signatory of effective, proportionate and dissuasive' penalties.³⁴ Article 30(9) of Convention allows each signatory to establish defences to the offence (such as exempting 'facilitation payments') as they choose.³⁵ parties are not required to criminalise small 'facilitation payments' that are made in some countries to induce a public official to perform routine functions such as processing licences or permits, or transferring goods (however, the OECD's position on 'facilitation payments' has since changed without yet imposing obligations on signatories to criminalise those payments).³⁶

In addition to the obligations imposed on Parties by the Convention, Parties must accept the *1997 Revised Recommendation of the Council on combating Bribery in International Business Transactions* (the Recommendation), which contains non-criminal measures for combating transactional bribery.³⁷ Specifically, the Recommendation asks Parties to disallow tax deductibility of bribes to foreign public officials;³⁸ to implement measures to require corporations to maintain transparent accounts; to adopt practices to deter corruption in public procurement; and to ensure independent external auditing

³² OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention)* [1999] ATS 21, Art 1(1), at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf (accessed 1 May 2013).

³³ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention)* [1999] ATS 21, Art 2, at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf (accessed 1 May 2013).

³⁴ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention)* [1999] ATS 21, Art 3(1), at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf (accessed 1 May 2013)..

³⁵ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention)* [1999] ATS 21, Art 30(9), at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf (accessed 1 May 2013)..

³⁶ OECD, Commentaries on the Convention on Combating Bribery of Foreign Officials in International Business Transactions, *United States: Phase 3 report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, OECD, 2010, 10, at <http://www.oecd.org/dataoecd/10/49/46213841> (accessed 1 May 2013).

³⁷ OECD, *Fighting Bribery in International Business Deals*, Policy brief, October 2009, 5, <http://www.oecd.org/dataoecd/54/2/43866715.pdf> (accessed 1 May 2013).

³⁸ See: *Income Tax Assessment Act 1997* (Cth) s 26-52 and 26-53.

requirements of corporate books, which are adequate and encourage development of internal corporate controls.³⁹

The end offender of the criminal offence of bribery in this context will almost always be a low-level employee or foreign agent or consultant. However, the Convention and UNCAC is focused primarily on the acts of, and prevention of the offence, by the corporation. This is largely because specific deterrence of the corporation will have a "far wider reaching affect within the industry and market the offending corporate operates within"⁴⁰ than penalties and criminal convictions against offending individuals who have wide ranging motivations when engaging in criminal conduct compared with the corporation.

3.2 Australia's response to it's Convention obligations

Australia has been slow to enforce its OECD anti-bribery obligations. At the time of the Convention, Australian industry recognised that the proposed anti-bribery offences would have "important implications for Australian corporations and the way in which they conduct their international operations."⁴¹ The broad implications for corporations and the potential exposure to criminal liability was said to have the effect of disadvantaging Australian business overseas "vis-à-vis competitors that were not subject to such constraints."⁴²

Opposition to the Convention was also voiced by ASEAN Nations tasked with coordinating anti-bribery proposals in the region on the basis that "it represented Western protectionism"⁴³ - however, in response to that opposition, it was argued that Asian countries, where corruption was tolerated and the norm, had suffered greatly, in that "awarding contracts to the company with the biggest slush fund rather than the best product or price stunts economic development."⁴⁴

³⁹ OECD, *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*, adopted by the Council on 23 May 1997, at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C\(97\)123/FINAL&doclanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C(97)123/FINAL&doclanguage=En) (accessed 1 May 2013).

⁴⁰ McNulty, above n 7, 2.

⁴¹ J Hill, 'Prohibiting Bribery of Foreign Public Officials - Implications for Corporate Criminal Liability,' (1998) 16 *Companies and Securities Law Journal* 384, 384.

⁴² Ibid, 384. See: 'ACCI Attacks Bribery Ban Plan', *The Australian Financial Review*, 31 March 1998.

⁴³ Hill, above n 41, 384. See: 'Is corruption an Asian Value?', *The Asian Wall Street Journal*, 3 May 1996, 8.

⁴⁴ Hill, above n 41, 384

In December 1997, the Australian government announced that Australia would introduce legislation, in response to its Convention obligations, by criminalising bribery of foreign public officials, and related offences.⁴⁵ Australia's response to the Convention was ratified in 1999, contained in Division 70 of the *Criminal Code Act 1995* (Cth).⁴⁶ The division commenced on 17 December 1999 and came into force on that same date.⁴⁷

3.3 How does Australia investigate and enforce the offence

Despite its early ratification of the Convention and codification of the offence, Australia has seen little by way of active enforcement of the offence and no judicial consideration of Division 70.

The Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecution (CDPP) are tasked with the investigation and prosecution of foreign bribery offences, respectively.⁴⁸ Both agencies have inadequately investigated and enforced the offence leading to greater levels of uncertainty as to how the offence will be investigated and what standard of compliance corporations will be held to. The AFP evaluates matters referred to it in accordance with its *Case Categorization and Prioritisation Model* (CCPM) including "consideration of the incident type, its impact on Australian society, its priority for the AFP and the referrer and the resources required."⁴⁹ Foreign and domestic bribery are included in the second highest of four categories under the impact element and obligations under international treaties in the second highest of four under the priority element of the CCPM.⁵⁰ The CDPP's decisions about whether to institute, or continue proceedings, are made in accordance with the *Prosecution Policy of the Commonwealth*.⁵¹ The policy does not give higher priority to any particular types of offences.⁵²

⁴⁵ Ibid.

⁴⁶ Introduced through the *Criminal Code Amendment (Bribery of Foreign Officials) Act 1999*.

⁴⁷ Barker, above n 25, 6.

⁴⁸ Barker, above n 25, 7-8.

⁴⁹ Australian Federal Police, *Case Categorisation and Prioritisation Model (CCPM)*, May 2010, at <http://www.afp.gov.au/~media/afp/pdf/c/ccpm-may-2010-pdf.ashx> (accessed 1 May 2013).

⁵⁰ Barker, above n 25, 6.

⁵¹ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, November 2008, at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf> (accessed 1 May 2013).

⁵² Barker, above n 25, 8.

For almost 10 years, the offence, as one commentator has put it, was "nothing more than the basis of an interesting academic discussion on the nature of corporate criminal liability."⁵³ This comment is reflected in the first charges not being laid by the AFP until 2011. As at 21 May 2010, the AFP had received 20 referrals relating to foreign bribery since the offence was inducted, six were not accepted for investigation, ten were finalised without charges being laid, three were active investigations and one was under evaluation.⁵⁴

The Federal Government, in a 15 November 2011 *Public Consultation Paper*, emphasised its commitment to stamping out corruption (and bribery).⁵⁵ Although Federal investigative and enforcement agencies have often been criticised for their low level of prosecutorial activity, Australia as at 2011, was ranked as the 8th most corruption free nation in the world by the *Transparency International Corruption Perceptions Index*.⁵⁶ Further, in September 2011, the Federal Government announced the commitment of AUD700,000 to develop and implement Australia's first National Anti-Corruption Plan.⁵⁷

In an October 2011 paper, the Australian Council of Superannuation Investors (ACSI), noted that "incidents and allegations of corrupt practices in corporate behaviour have increased in recent years, bringing the risk of a formerly peripheral issue into sharp focus."⁵⁸ It is clear that the Federal Government in recent has increased its efforts to comply with its OECD and UNCAC obligations. Whether those efforts will amount to increased investigations and prosecutions, still remains unclear.

The first highly publicised investigation was the investigation of the Australian Wheat Board (AWB) where the AWB was found to have been involved with illegal payments to the Iraqi

⁵³ V Brand, 'Legislating for moral propriety in corporations? The Criminal Code Amended (Bribery of Foreign Public Officials) Act 1999 (200) 18 Companies and Securities Law Journal 476, 491.

⁵⁴ M Newton, *Senate Legal and Constitutional Affairs Legislation Committee, Attorney-General's portfolio, Budget Estimates 2010-2011*, 25 May 2010, <http://www.aph.gov.au/hansard/senate/committee/S13014.pdf> (accessed 1 May 2013); Barker, above n 25, 8.

⁵⁵ 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, 15 November 2011, at <http://www.crimeprevention.gov.au/Financialcrime/Documents/v2Public%20consultation%20paper%20-%20amendments%20to%20bribery%20offences%20-%20corrected%20version%2018%20November%202011.pdf> (accessed 1 May 2013).

⁵⁶ *Ibid* 1.

⁵⁷ *Ibid*.

⁵⁸ Australian Council of Superannuation Investors, above n 13.

government in order to retain business.⁵⁹ The Cole Royal Commission was established, but despite a number of successful prosecutions by the Australian Securities and Investment Commission against former AWB directors, the case against AWB was discontinued at the advice of Paul Hastings QC, who declared that "the prospect of convictions was limited and not in the public interest."⁶⁰

The first Australian prosecutions of foreign bribery were initiated on 1 July 2011, when the AFP laid charges under Division 70 against subsidiaries of the Reserve Bank of Australia, Securruency International Pty Ltd and Note Printing Australia Limited, together with six individuals⁶¹ (a seventh charge on 10 August 2011).⁶² The charges relate to bribes allegedly paid to public officials in Indonesia, Malaysia and Vietnam between 1999 and 2005. The allegations are in substance that senior managers from both subsidiaries used international sales agents to bribe foreign public officials to secure bank note contracts.⁶³

Recent media reports suggest that the AFP's investigation in the Note Printing Scandal has sufficient resources⁶⁴ but noting that what is less clear is the "level of resources the AFP and CDPP will able to devote to prosecuting the resulting cases and cases into the future."⁶⁵

⁵⁹ Barker, above n 25, 9.

⁶⁰ Ibid; Australian Council of Superannuation Investors, above n 13, 9; Federal police drop AWB investigation, *The Australian (online)*, 29 August 2009, at www.theaustralian.com.au/business/breaking-news/federal-police-drop-awb-investigation/story-e6frg90f-1225767255737 (accessed 1 May 2013).

⁶¹ Australian Federal Police, 'Foreign bribery charges laid in Australia', (Media Release, 1 July 2011), at <http://www.afp.gov.au/media-centre/news/afp/2011/july/foreign-bribery-charges-laid-in-australia.aspx> (accessed 1 May 2013); J Entwisle, above n 29, 205.

⁶² Australian Federal Police, 'Further charges laid in foreign bribery investigation,' (Media release, 10 August 2011), at <http://afp.gov.au/media-centre/news/afp/2011/august/further-charges-laid-foreign-bribery-investigation.aspx> (accessed 1 May 2013).

⁶³ Barker, above n 25, 10.

⁶⁴ C Overington, 'Federal Police drop AWB investigation', *The Australian (online)*, 29 August 2009, at <http://theaustralian.com.au/business/breaking-news/federal-police-drop-awb-investigation/story-e6frg90f-1225767255737> (accessed 16 June 2013): 'the AFP's investigation into matters arising from the Cole Inquiry had been under resourced.'

⁶⁵ C Overington, above n 64; Barker, above n 25, 16: there have been criticisms of the AFP's perceived lack of confidence of prosecution under the current framework, the lack of adequate whistleblower protection and an apparent lack of specialist skills required to investigate foreign bribery; F Heimann and G Dell, 'Progress Report 2009: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', Transparency International, 23 June 2009, 17, at http://archive.transparency.org/publications/publications/conventions/oecd_report_2009 (accessed 1 May 2013).

Further, it was reported in March and May 2012 by the *Sydney Morning Herald* and *The Australian* newspapers, that notable ASX listed Australian Companies Leighton Holdings and Tenix Defence had voluntarily disclosed potential instances of bribery in their overseas operations.⁶⁶ As recently as 11 July 2013, *The Financial Review* reported potential breaches of the offence by BHP.⁶⁷ The ACSI (as at October 2011) identified the following key findings relevant to Australian corporations:

- more large Australian companies are now prohibiting bribery than five years ago but still lag their international peers
- 59% of ASX 200 companies with international operations prohibit bribery
- during the last 5 years an additional 19 companies in the ASX 100 prohibited bribery, and improvement of 30% since 2006
- 16% of ASX 100 companies prohibit facilitation payments and only half restrict or control them
- half the ASX 200 companies with international operations and one third of ASX 100 companies make brief, limited or no reference to their Code of Conduct in their management implementation systems - little had changed from the previous five years
- pressure for companies to improve their performance in preventing bribery and corruption is coming more from foreign events, particularly legislative changes in the United States and the United Kingdom, than from Australian law enforcement
- of over half the ASX 200 companies that have operations in the UK and US, 35% had no stated policy that prohibits bribery or facilitation payments and 43% had inadequate management systems to implement company policy⁶⁸

Market commentators expect that the prospect of directors and corporations being criminally pursued for offences committed by its employees and agents is high.⁶⁹ It is clear that Australian corporations are not immune to the risk of breaches by its employees and agents of bribery offences. This is pertinent where corporations as sophisticated as BHP are still grappling with, and failing to deter, the risk of their employees and agents engaging in acts of bribery (including 'facilitation payments'⁷⁰). The shift in emphasis of the Federal Government actively addressing its OECD and UNCAC obligations will have wide-reaching

⁶⁶ N McKenzie and R Baker, 'Defence company in bribe inquiry', *Sydney Morning Herald* (Sydney) 29 May 2012; L McNamara, 'Construction giant Leighton Holdings admits it had no anti-bribery policy', *The Australian*, 27 March 2012.

⁶⁷ Stevens, above n 24.

⁶⁸ Australian Council of Superannuation Investors, above n 13, 5.

⁶⁹ G Benson, A van der Walt, M Maxwell, *Directors' duties and foreign bribery obligations*, (14 February 2013), at http://www.claytonutz.com.au/publications/edition/14_february_2013/20130214/directors_duties_and_foreign_bribery_obligations.page (accessed 1 May 2013).

⁷⁰ Ibid.

effects on Australian corporations. Division 70 has onerously increased corporate and director obligations when operating in risk adverse markets - notably in Africa, Asia and Pacific nations. The reality is that bribery offences under Division 70 now pose genuine financial and operational risk to Australian corporations.

4. The Offence: Division 70 of the *Criminal Code Act 1995*

4.1 Corporate Criminal Liability: General Law Principles

In the context of the offence of bribery of a foreign public office in international transactions, it is first necessary to discuss the common law principles for finding a corporation vicariously liable for the acts committed by its employees and agents.

Under generic criminal law concepts, the offender must have committed the act of the offence - being the *actus reus* element of the crime, and must have at the time the act is committed the necessary intention - being the *mens rea* or *fault* element of the crime.⁷¹ A company, as "an abstract legal construct, with no actual physical existence, has no real capacity for physical action or the possession of information or knowledge"⁷² relying on the judgment, and intention, of its officers.

Despite the inconsistencies with generic criminal law principles, holding the corporation criminally liable for the 'physical' and 'mental' elements of a crime committed by its employees and agents is not a new concept in Anglo-Australian jurisprudence - where corporate criminal liability has traditionally been recognised.⁷³ Lord Denning, in the House of Lords case of *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 stated:

"Some of the people in the company are mere servants and agents who...cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company control what it does. The state of the mind of these managers is the state of mind of the company....Whether their intention is the company's intention depends on

⁷¹ *He Kay The v R* (1985) 157 CR 253; 60 ALR 449; [1985] HCA 43; BC8501099.

⁷² *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 507; R Grantham, 'Attributing Responsibility to Corporate Entities: A doctrinal Approach' (2001) 19 Companies and Securities Law Journal 168, 169.

⁷³ Hill and Marker, 'Criminal Liability of Corporations - Australia' in H Doelder and K Tiedemann, *Criminal Liability of Corporations*, Kluwer Law International, The Hague, 1996, 71, 77 - 79.

the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case."⁷⁴

Traditionally, it was the acts and intention of a director that were vicariously those of the corporation. *HL Bolton* was followed by the House of Lords decision in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (which has been followed by Australian Courts)⁷⁵ where Lord Reid noted:

"I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these."⁷⁶

The House of Lords' decision in *Tesco* supported the notion that *attribution* of the mental and physical elements of a criminal offence to the corporation would only occur if both the mental and physical elements of the crime could be traced to (a) the board of directors; (b) the managing director; or (c) the superior officer or agent with delegated management power from the board of directors (or managing director) to act on behalf of the corporation without further instruction.⁷⁷ It follows that a corporation could not be liable for a criminal offence committed by its employees or agents unless the act itself, or knowledge of any wrongdoing, could be traced to those at the "top managerial totem pole, who represented the corporate nerve-centre".⁷⁸ Therefore, no criminal liability would be attributable to the corporation provided that any information concerning the offence was restricted to the level of middle management or lower within the ranks of the corporation.⁷⁹

The *Tesco* principle has been criticised as being unable to "deal with the changing nature of the modern corporation [in particular, the multinational corporation] where a high degree of delegation is given to lower ranks and middle management."⁸⁰ In the context of anti-bribery offences, where the offence is often always committed by low-level employees or external agents and consultants, in the absence of direct managerial knowledge of the payment and intention of the bribe, under a strict interpretation of the *Tesco* principle, the

⁷⁴ *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159; [1956] 3 All ER 624; [1956] 3 WLR 804, at QB 172.

⁷⁵ See: *Hamilton v Whitehead* (1988) 166 CLR 121.

⁷⁶ *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; [1971] 2 All ER 127; [1971] 2 WLR 1166, at AC 170.

⁷⁷ J Overland, 'Corporate liability for insider trading: How does a company have the necessary 'mens rea'?' (2010) 24 Australian Journal of Corporate Law 266, 275.

⁷⁸ Hill, above n 41, 385.

⁷⁹ Ibid 386

⁸⁰ Ibid 385.

corporation would avoid liability for the offence committed by the offending employee or agent.

4.2 The Statutory Offence

Bribery of a foreign public official is a crime under Division 70 the *Criminal Code Act 1995* (as amended by the *International Trade Integrity Act 2007* and the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2009*).⁸¹

Because the offence contained in Division 70⁸² is aimed at bribery in *international business* transactions, the issue of 'corporate' criminal responsibility is "central to its effectiveness."⁸³ The offence applies where the conduct constituting the offence occurs wholly (or partly) in Australia or where the conduct constituting the offence occurs wholly outside Australia and at the time of the alleged offence, the person was an Australian citizen or resident or was a body corporate incorporated by or under an Australian law.⁸⁴

Section 70.2 provides that a *person*⁸⁵ is guilty the offence if:

- (1) A person is guilty of an offence if:
 - (a) the person:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the benefit is not *legitimately due* to the other person; and
 - (c) the first-mentioned person does so 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 in order to:
 - (i) obtain or retain business; or

⁸¹ See: *Criminal Code Act 1995* (Cth) Div 141: 'the offence for bribing a Commonwealth public official and for a Commonwealth public official soliciting a bribe.'

⁸² See: *Criminal Code Act 1995* (Cth) Div 11: 'provides for ancillary offences including complicity, attempt and conspiracy.'

⁸³ Entwisle, above n 29, 213.

⁸⁴ *Criminal Code Act 1995* (Cth) s 70.5.

⁸⁵ *Criminal Code Act 1995* (Cth) the Schedule: '*person* includes a Commonwealth Authority that is not a body corporate'; *Acts Interpretation Act 1901* (Cth) s 2C(1): '*person* includes a body politic or corporate as well as an individual.'

(ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

It is not necessary to prove that business, or a business advantage, was actually obtained or retained by the person. Benefit is defined as 'any advantage and is not limited to property.'⁸⁶ A benefit can be non-monetary or non-tangible inducement - it does not need to be provided or offered to the foreign public official; it can be provided or offered to another person (including an agent).⁸⁷

Section 70.1, broadly defines *foreign public official* as including, but not limited to:

- An employee/ official of a foreign government
- A member of the executive, judiciary or magistracy of a foreign country
- A person who performs official duties under a foreign law
- A member/ officer of the legislature of a foreign country
- An employee/ official of public international organisation (such as the United Nations)⁸⁸

Further, section 70.2(2) provides that in determining whether the benefit is not *legitimately due*⁸⁹, the following are to be disregarded:

- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
- (b) the value of the benefit;
- (c) any official tolerance of the benefit.⁹⁰

⁸⁶ *Criminal Code Act 1995* (Cth) 70.1: 'benefit includes any advantage and is not limited to property.'

⁸⁷ Attorney-Generals Department, *Fact Sheet 2: Foreign Bribery*, 2, at <http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx>, (accessed 1 May 2013): 'a benefit can be forfeited to the Australian Government under the *Proceeds of Crime Act 2002* (Cth).'

⁸⁸ Attorney-Generals Department, *Fact Sheet 2: Foreign Bribery*, 2, at <http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx>, (accessed 1 May 2013).

⁸⁹ 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, 15 November 2011, 5, at <http://www.crimeprevention.gov.au/Financialcrime/Documents/v2Public%20consultation%20paper%20-%20amendments%20to%20bribery%20offences%20-%20corrected%20version%2018%20November%202011.pdf> (accessed 1 May 2013): 'the Australian Government has proposed an amendment to the *Criminal Code Act 1995* (Cth) s 70.2.(2)(b) with the intention of clarifying that bribery remains an offence irrespective of the value of the benefit offered or given but a court may consider the value where value alone suggests a benefit is not legitimately due.'

Lastly, section 70.2(3) provides that when determining what *business advantage* that is not *legitimately due*, the following are to be disregarded:

- (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation
- (b) the value of the business advantage
- (c) any official tolerance of the business advantage.⁹¹

The maximum penalty for an individual who is found guilty of bribing a foreign public official is imprisonment for not more than 10 years and/or a fine not more than 10,000 penalty units (AUD\$1.1m).⁹² The maximum penalty for a body corporate found guilty of bribing a foreign public official is a fine not more than the greatest of the following:

- (a) 100,000 penalty units (AUD\$11m) or 3 times the value of benefits obtained;
- (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
- (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the *turnover period*)⁹³ of 12 months ending at the end of the month in which the conduct constituting the offence occurred.⁹⁴

Two defences to the offence currently exist. Section 70.3 provides that a person (legal or natural) will not be guilty of the offence under s 70.2 if the conduct was lawful in the foreign official's country.⁹⁵ Section 70.3 applied where it could be established that the conduct would not have constituted an offence against a law in place in the foreign official's

⁹⁰ Ibid: 'an example of where a benefit is not *legitimately due* could be where a fee for a service is legitimately due (for example, solicitor's fees for arranging licences or permits in a particular jurisdiction) but where the fee may be highly improper to the public official or other person.'

⁹¹ Ibid.

⁹² *Criminal Code Act 1995* (Cth) s 70.2(4)

⁹³ *Criminal Code Act 1995* (Cth) s 70.2(6): 'for the purposes of this section, the *annual turnover* of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies: (a) supplies made from any of those bodies corporate to any other of those bodies corporate; (b) supplies that are input taxed; (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); (d) supplies that are not made in connection with an enterprise that the body corporate carries on.'

⁹⁴ *Criminal Code Act 1995* (Cth) s 70.2(5)

⁹⁵ The defendant bears the evidentiary burden.

country, but was amended in 2007 following "criticism by the OECD Working Group and the findings of an inquiry into the conduct of the Australian Wheat Board and other Australian corporations involved in the UN oil for food programme."⁹⁶ Section 70.4 provides for the exemption of 'facilitation payments' (discussed below).

4.3 US and UK responses to its Convention obligations

The US anti-bribery regime has proved to be the most robust with the DoJ being heavily active in the enforcement of its Convention obligations. The *Foreign Corrupt Practices Act 1977* (FCPA), which like Australia has a global reach for US corporations and individuals.⁹⁷ Individuals in contravention of the FCPA face fines of up to USD\$100,000 and up to five years imprisonment if convicted of bribing foreign officials with corporations facing fines of USD\$2m if convicted of the offence.⁹⁸ Punitive actions against corporations also include the withdrawal of export approvals and exclusion from government contracts, and investigations and convictions can place the corporation at risk of class action suits for damages.⁹⁹ Unlike the UK (discussed below), the US does not consider a payment to be bribe if it is lawful under written law in the recipients country and 'facilitation payments' are also permitted.¹⁰⁰ However, this defence remains narrow in scope, even in the US where authorities are increasingly unwilling to tolerate facilitation payments in the absence of exceptional circumstances and strong supporting evidence.¹⁰¹

Five elements must be established by the DoJ to constitute a violation of the offence under the FCPA: (1) there must be identification of the parties involved; (2) there must exist corrupt intent of the wrongdoer (*mens rea*); (3) element of payment must be established; (4) the recipient of the payment must be established (foreign officials, foreign political parties or party officials or candidates for political office); and (5) compliance to the business purpose test.¹⁰²

⁹⁶ Barker, above n 25, 7.

⁹⁷ Yeoh, above n 8, 47.

⁹⁸ Australian Council of Superannuation Investors, above n 13, 9.

⁹⁹ Australian Council of Superannuation Investors, above n 12, 9.

¹⁰⁰ Yeoh, above n 8, 47.

¹⁰¹ Ibid; Australian Council of Superannuation Investors, above n 12, 9.

¹⁰² Summary taken from: Yeoh, above n 8, 47.

The US has investigated and prosecuted more foreign bribery cases than any other Party to the Convention.¹⁰³ From 1998 to 16 September 2010, 50 individuals and 28 companies have been criminally convicted of foreign bribery while 69 individuals and companies have been held civilly liable for foreign bribery. In addition, 26 companies have been sanctioned (without being convicted) for foreign bribery under non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs).¹⁰⁴ Sanctions have also been imposed for accounting misconduct and money laundering related to foreign bribery.¹⁰⁵

The UK on the other hand was slow to ratify its Convention and UNCAC obligations. The criminal offence of bribery of a foreign public official was addressed to some degree in the 1906 and 1916 *Prevention of Corruption Acts* and the *Public Bodies Corruption Act* of 1989,¹⁰⁶ however, it was not until 2010 that the UK government enacted legislation in accordance with its obligations under the Convention. The *Bribery Act 2010* (the BA) (passed on 8 April 2010) was the UK's response to OECD criticism.¹⁰⁷

Similar to the US and Australia, the offence can occur anywhere in the world.¹⁰⁸ Section 7 of the BA introduces a strict liability offence for the employer corporation - the corporation will be criminally liable vicariously for offences committed by its employees and agents. The capacity of the employee or agent is immaterial -¹⁰⁹ liability of the corporation extends to the failure to deter or prevent bribery.¹¹⁰ The BA is the most rigid response to the Convention. This is seen by requiring the corporation to produce evidence that the corporation has 'adequate measures or procedures' (undefined) to prevent bribery from

¹⁰³ Barker, above n 25, 13.

¹⁰⁴ Ibid. OECD, Working Group on Bribery in International Business Transactions, *United States: Phase 3 report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, OECD, 2010, 10, <http://oecd.org/dataoecd/10/49/46213841.pdf> (accessed 1 May 2013).

¹⁰⁵ OECD, Working Group on Bribery in International Business Transactions, *United States: Phase 3 report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, OECD, 2010, 10, <http://oecd.org/dataoecd/10/49/46213841.pdf> (accessed 1 May 2013).

¹⁰⁶ Yeoh, above n 8, 36.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 42.

¹⁰⁹ Ibid 43.

¹¹⁰ UK *Bribery Act 2010*, s 7; Yeoh, above n 8, 43.

being committed by its employees and agents.¹¹¹ Corporations under the BA therefore assume a high degree of burden of proof.

In the absence of any judicial authority, it is unclear what standard corporations will be held to - however, the BA provides the test of what a "reasonable person in the United Kingdom would expect."¹¹² Seemingly in response to that uncertainty, the UK Ministry of Justice (MoJ) has published (non-binding) considerations for determining whether the corporation has 'adequate measures and procedures' in place. They are (1) risk assessment; (2) top-level commitment; (3) due diligence; (4) clear practical and accessible policies and procedures; (5) effective implementation; and (6) monitoring and review.¹¹³

The BA goes one step further than the US by refusing to recognise 'facilitation payments' as a legitimate business expense.¹¹⁴ However, again seemingly in response to further uncertainty, limited assurance has been given by the UK MoJ to industry that no actions would be taken against individuals or corporations where such payments (said to be bribes) were "small or where they are made in situations amounting to extortion by the receivers."¹¹⁵ Despite these limited assurances, the burden would still fall on the individual at first instance, and ultimately the corporation, to lead evidence regarding the "nature and the amount of the payment; the options confronting the payer at the time the alleged bribe was made; whether the payment was an isolated occurrence and the elements of the alleged extortion."¹¹⁶

Promotional items like gifts, hospitality and related expenses are now a subject of controversy in the UK as they will now fall "within prosecutorial discretion."¹¹⁷ Even culturally accepted gifts, hospitality provided to travelling dignitaries or other related considerations are, at modest levels, an offence under the BA if the offering was meant to influence a foreign public official and to procure or retain a particular business advantage -

¹¹¹ Yeoh, above n 8, 43

¹¹² UK *Bribery Act 2010*, s 5(1)" 'tests of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of the type of function concerned.'

¹¹³ Yeoh, above n 8, 47.

¹¹⁴ J Ellis and R Smith, *Facilitation payments and Australian anti-bribery laws*, (30 November 2012), at http://www.ashurst.com/page.aspx?id_Content=8550 (accessed 1 May 2013).

¹¹⁵ J Fisher, 'How the Bribery Act brings the law of hidden consequences into play', *The Daily Telegraph*, 21 January 2001, at www.telegraph.co.uk/finance/yourbusiness/bribery-act/8271792/how-the-bribery-act-brings-the-law-of-hidden-consequences-into-play (accessed 19 June 2013).

¹¹⁶ Yeoh, above n 8, 49.

¹¹⁷ *Ibid.*

"as a matter of best practice, such promotional expenses are [to be] made transparent, are reasonable, proportionate and bona fide and supported by sufficient controls." (emphasis added)¹¹⁸

Despite the success of FCPA and the DoJ in enforcing its Convention and UNCAC obligations, Australia appears to be following the path of the BA and the UK MoJ model which will not give Australian boards any degree of comfort and certainty when discharging their obligations and when exploring foreign investment opportunities for the corporation.

4.4 Unnecessary removal of the exemption of 'facilitation payments'

Section 70.4 provides that a person is not guilty of an offence under s 70.2 if:

- (a) the value of the benefit was of a minor nature [undefined]; and
- (b) the person's 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; and
- (c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and
- (d) any of the following subparagraphs applies:
 - (i) the person has retained that record at all relevant times;
 - (ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;
 - (iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

Facilitation payments, often referred to as 'grease payments' are often viewed as a necessary means of doing business, particularly in lower-income countries.¹¹⁹ The OECD identifies 'facilitation payments' by the circumstance in which they are made. A payment is a facilitation payment (and not a bribe) "where it is paid to government employees to speed up an administrative process when the outcome is already pre-determined."¹²⁰ The difference between the two definitions "lies in the decision-making power of the recipient."¹²¹ The burden of proof for determining whether a payment is a 'facilitation

¹¹⁸ Ibid.

¹¹⁹ Ellis and Smith, above n 114.

¹²⁰ Ibid.

¹²¹ Ibid.

payment' rests with the corporation seeking to rely on the exemption and can be particularly difficult to discharge and it is often the case that genuine 'facilitation payments' are not recorded due in part to their regularity in certain countries.¹²²

The issue of whether a payment is a 'facilitation payment' is yet to be raised before Australian Courts. Despite the safeguard the defence provides corporations when dealing with foreign officials and protecting it from offences committed by its employees and agents, the OECD's current view is that it will not tolerate facilitation payments in international transactions¹²³ - without yet imposing obligations on signatories to outlaw the practice. The Federal Government has recently moved on the recommendation by proposing to follow the lead of the UK by removal of the 'facilitation payment' defence.¹²⁴ The Federal Government raised the following arguments in favour of the removal: (a) compliance with international treaty obligations; (b) consistency with foreign laws and international standards; (c) promoting overseas aid objectives; (d) regulatory certainty; (e) reducing corruption and associated delays and costs; and (f) following the reported practices of Australian companies.¹²⁵ The Federal Government has also recognised arguments in favour of the defence.¹²⁶

¹²² TRACE International, *The High Cost of Small Bribes*, 2009, 7, at https://secure.traceinternational.org/data/public/The_High_Cost_of_Small_Bribes_2-65416-1.pdf (accessed 1 May 2013): "Every bribe of a government official - regardless of size, breaks the law of at least one country. There is no country anywhere with a written law permitting the bribery of its officials." A payment to hurry along a visa application that is certain to be granted is a facilitation payment. If the outcome is determined by regulation, then a payment to alter a decision in this respect would be a bribe i.e. a payment to a government employee before a tender process has been concluded to be a bribe as the recipient may consider the payment when deciding on awarding the contract.'

¹²³ OECD, *Commentaries on the Convention on Combating Bribery of Foreign Officials in International Business Transactions*, adopted by the Negotiating Conference on 21 November 2009, 2, <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (accessed 1 May 2013): a shift in position adopted by the United Kingdom by the absence of the defence in the *UK Bribery Act 2010*.

¹²⁴ 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, 15 November 2011, 5, at <http://www.crimeprevention.gov.au/Financialcrime/Documents/v2Public%20consultation%20paper%20-%20amendments%20to%20bribery%20offences%20-%20corrected%20version%2018%20November%202011.pdf> (accessed 1 May 2013): consequential amendments or repeal of the *Income Tax Assessment Act 1997* s 26-52(4) and (5) of allowing deductions for facilitation payments will be required.

¹²⁵ *Ibid* 4.

¹²⁶ *Ibid* 4-5: '*Competitive disadvantage* - businesses that do not make facilitation payments may be less competitive; *Duress* - it would be unfair to penalise people for acts necessary to prevent threatened detriment; *Uneven playing field*- large businesses have greater bargaining power to refuse demands for payments than smaller businesses.'

Some commentators argue that the removal of the safeguard does not go far enough.¹²⁷ However, the removal of the defence will increase the level of uncertainty facing corporations when promoting compliance of anti-bribery laws with its employees and in particular it's foreign agents who rely on the ability to pay 'facilitation payments'. If the amendments take place as expected, there will be an impetus on enforcement and investigating agencies to enforce the offence and to identify a standard of compliance against Australian corporations suspected of continuing the practice of using 'facilitation payments' in order to create a level playing field within particular industries.

Despite the increase of risk and importance of developing strong internal compliance and a culture of compliance, many corporations still lack the willingness or policies that make clear how 'facilitation payments' are to be treated.¹²⁸

5. CORPORATE CULTURE OF COMPLIANCE

In the context of transactional bribery, *Tesco* and Division 70 (both discussed above) are in direct conflict. The *Tesco* principle requires that the physical and mental elements of the offence is directly attributable to the mind and will of the company, whereas Division 70 provides that corporations, could be criminally liable for the acts of any employee (or agent) if it can be shown that the practices and policies of the company did not discourage the conduct - it will also be possible for the Courts to look at the unwritten rules of the corporation if these are inconsistent with formal compliance documentation.¹²⁹

Division 70 and the *Tesco* principle "therefore differ radically by recognising independent corporate fault by broadening the circumstances in which corporate criminal liability can be triggered despite vicarious liability being rejected in criminal law."¹³⁰

The focus of Division 70 therefore moves from the "intent of the offender [the employee or agent] to whether that intent is attributable to the directing mind and will of the

¹²⁷ Stevens, above n 24; Entwisle, above n 29.

¹²⁸ 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, 15 November 2011, 5, at <http://www.crimeprevention.gov.au/Financialcrime/Documents/v2Public%20consultation%20paper%20-%20amendments%20to%20bribery%20offences%20-%20corrected%20version%2018%20November%202011.pdf> (accessed 1 May 2013); Australian Council of Superannuation Investors, above n 13.

¹²⁹ Hill, above n 41, 386.

¹³⁰ Ibid; E Colvin, 'Corporate Personality and criminal liability' (1995) 6 Criminal Law Forum 1, 3.

corporation"¹³¹ - in the sense that the corporation's internal practices, procedures and culture have contributed in some way to the employee or agent committing the offence.¹³²

Under that approach there is "no need to show endorsement of the offence by those with managerial control."¹³³ Proof that the board of directors or a "high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence"¹³⁴ becomes irrelevant in the context of criminal offences under Division 70.

This wholesale adoption of vicarious liability agency principles, which "flies in the face of the precepts that govern criminal liability,"¹³⁵ places the added emphasis on the corporations ability to introduce and manage a culture of compliance. Australia is certainly not alone in this regard. There a number of countries, notably the US, who pursue corporations for offences committed by an employee or agent, at any level of the corporation, in the absence of board endorsement of the offence.¹³⁶

In the US, a corporation may be liable for criminal offences committed by its employees and agents whenever those individuals act "within the scope of their employment and at least in part to benefit the corporation."¹³⁷ US Courts have upheld criminal corporate liability charges even where the employee or agent was acting "contrary to express corporate policy."¹³⁸ "Such is the state of the modern doctrine in the United State's law of vicarious criminal corporate liability that under federal law" as one commentator has put it, "a company can be held liable for agents no matter what their place in the corporate

¹³¹ Hill, above n 41, 386; See: *Criminal Code Act 1995* (Cth) pt 2.5.

¹³² Hill, above n 41, 386.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ A Weissmann, 'A new approach to corporate criminal liability', (2007) 44 *American Criminal Law Review* 1319, 1324.

¹³⁶ Wise, *Criminal Liability of Corporations - USA* in Doelder and Tiedemann (eds), *Criminal Liability of Corporations* (Kluwer Law International), The Hague, 1996, 383.

¹³⁷ Weissmann, above n 135, 1319.

¹³⁸ *United States v Basic Construction Co.*, 711 F.2d 570, 573 (4TH Cir, 1983): '[A] Corporation may be held criminally responsible for antitrust violations committed by its employees...even if, as in *Hilton Hotels and American radiator*, such acts were against corporate policy or express instructions'; *United States v American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 204-05 (3rd Cr. 1970): summary taken from Weissman, above n 135, 1319.

hierarchy"¹³⁹ regardless of the strategies and procedures put in place by the corporation to deter its employees and agents committing criminal offences.¹⁴⁰

It has been said that "actual or apparent authority of the corporation has been interpreted so expansively that it is practically invisible in many contexts."¹⁴¹ In *United States v Automated Medical Laboratories*, 770 F 2d 399 (4th Cir. 1985), the Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely "his ambitious nature and his desire to ascend the corporate ladder" as the Court noted:

"[Partucci] was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA."

[B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basis purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agent which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation."¹⁴²

Such disproportionate power may be warranted in situations (both in the US and Australia) where the corporation flagrantly violated the law and failed to take the necessary steps to "prevent the illegality of its employee, since it enables the government to bring a swift and righteous action."¹⁴³ But for a corporation that has in place a corporate compliance program and policies to enhance a corporate culture of compliance to prevent and deter what the criminal law would seek to impose, the primary effect of the current US system

¹³⁹ *United States v Dye Construction Co.*, 510 F. 2d 78, 82 (10th Cir. 1975) (superintendent, foreman and backhoe operator).

¹⁴⁰ Weissmann, above n 135, 1319.

¹⁴¹ Ibid 1320.

¹⁴² See *United States v Sun-Diamond Growers of California*, 138 F. 3d 961, 969-70 (D.C. Cir 1998): 'the Court rejected a corporation's argument that it should not be held criminally liable for the actions of its vice-president since the vice-president's "scheme was designed to - and did in fact - defraud [the corporation], not benefit it. According to the court, the fact that the vice-president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president's job was to cultivate the corporation's relationship with the congressional candidate's brother, the Secretary of Agriculture: summary taken from Weissmann, above n 135, 1320

¹⁴³ Weissmann, above n 135, 1322.

and Division 70 will make it difficult for the corporation to defend itself.¹⁴⁴ This is where the Federal Government, in the context of Division 70 and any proposed removal of the defence of allowing 'facilitation payments', should be minded to provide some guidance or illustration on the 'standard' of compliance it will seek the Court's to impose, in the absence of judicial consideration.

5.1 Corporate Culture

It is imperative that Australian corporations recognise the importance of implementing internal compliance programs and measures to ensure protection against corporate criminal liability for Division 70 offences.

With the enforcement of anti-bribery laws comes "a response from multinational corporations to try to avoid that enforcement and to put in place programs that might accomplish that" - when enforcement risk increases substantially then corporations need to manage that risk like they manage all risk being operational, strategic, financial and legal.¹⁴⁵ From a financial perspective, compliance programs must be in place as a way of reducing penalties and civil actions by shareholders. The issues facing Australian corporations is will a compliance program assist to avoid criminal sanction and what the standard of internal culture of compliance are we expected to introduce and enforce?

Part 2.5 of the Code introduces the notion of *corporate culture*.¹⁴⁶ Part 2.5 provides that offences generally consist of 'physical elements' and 'fault elements'¹⁴⁷ and that the existence of the relevant elements must be proven in order for a person (both legal and natural) to be found guilty of an offence.¹⁴⁸ Corporations are liable under Part 2.5 for acts 'permitted or perpetrated by their directorate or agents, or for a *culture* of pattern of some wrongdoing within the corporation.'¹⁴⁹ If such a 'pattern of wrongdoing' was observed to exist within the corporation, then that would suffice for the formation of corporate intent under Division 70 - if the corporation 'failed to create and maintain a corporate culture that required compliance with the division' - the focus is not so much on a guilty mind as on a

¹⁴⁴ Ibid.

¹⁴⁵ McNulty, Knox, Harned, above n 12, 376

¹⁴⁶ Overland, above n 77, 268: 'no prosecutions against companies for insider trading offences.'

¹⁴⁷ *Criminal Code Act 1995* (Cth) s 3.1(1).

¹⁴⁸ *Criminal Code Act 1995* (Cth) s 3.2.

¹⁴⁹ Hill, above n 41, 386; Entwisle, above n 29, 218-219.

guilty culture, or pattern of activities in the body corporate.¹⁵⁰ However, none of the "traditional goals of the criminal law supports the application of agency principles of vicarious liability where a corporation has taken all reasonable measures to conform its employees conduct to the law."¹⁵¹

Corporations, through their board, counsel and formal deliberative processes and procedure, generally pay particular attention to precedent in deterring the risks and rewards of contemplated action.¹⁵² Imposition of corporate criminal liability under Part 2.5 and Div 70 where a corporation has taken all reasonable steps to 'deter and detect' the criminal conduct of its employees and agents, furthers none of the goals of the criminal law - "a company does not need to be specially deterred."¹⁵³ A corporation is fundamentally different than an individual - "a corporation cannot control absolutely the people's conduct for which they can be criminally liable - an organisation cannot control the actions of its employees [and agents] in the manner that an individual can typically control his or her own actions."¹⁵⁴ What Division 70 and Part 2.5 seek to impose is an offence for 'failing to prevent and deter the offence' committed by its employees and agents. But despite taking all reasonable steps to prevent criminal conduct by its employees and agents (by introducing a compliance program designed to 'prevent and deter') it does not follow that the "culpability of the corporation is non-existent."¹⁵⁵ Where breaches of Division 70 are not symptomatic or condoned, but actively discouraged, Division 70 and Part 2.5 still provides for criminal prosecution against the corporation "no matter how low the employee is in the corporate hierarchy."¹⁵⁶ Further "it is not necessary that the employee [or agent] be primarily concerned with benefiting the corporation, because courts [in the US] recognise that many employees act primarily for their own personal gain."¹⁵⁷(emphasis added) The substance of internal compliance programs and policies therefore becomes essential - particularly on the issue of penalty.

¹⁵⁰ Ibid; Brand, above n 55, 491; G Acquah-Gaisie, 'Corporate Crimes: Criminal Intent and Just Restitution,' (2011) 13 Australian Journal of Corporate Law 1, 4.

¹⁵¹ Weissmann, above n 136, 1324.

¹⁵² Ibid 1325.

¹⁵³ Ibid 1326.

¹⁵⁴ Weissmann, above n 136, 1324.

¹⁵⁵ Weissmann, above n 136, 1326.

¹⁵⁶ Ibid 1326 and 1330.

¹⁵⁷ H Han and N Wagner, 'Twentieth Survey of White Collar Crime: Corporate Criminal Liability' (2007) 44 American Criminal Law Review 337, 342-43

5.2 Corporate Compliance Program

A *compliance program* is defined as "a system of ethical standards and practical procedures, and controls that are developed and implemented in a company to *try* to conform that company's behaviour globally to public policy expectations"¹⁵⁸ Compliance programs are established by corporate management to prevent, deter and detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations and rules.¹⁵⁹

The existence of a compliance program will not be sufficient, in and of itself, to justify not charging a company under Part 2.5. Indeed, the commission of such crimes in the face of a compliance program may suggest that "corporate management is not adequately enforcing its program."¹⁶⁰

The US has active jurisprudence in this area. In *United States v Basic Construction Co.*, 711 F. 2d 570 (4th Cir. 1983) the Court found that:

"[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if...such acts were against corporate policy or express instructions."

Further, in *United States v Potter*, 463 F. 3d 9, 25-26 (1st Cir), the Court noted:

"[A] corporation cannot avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts; "even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents."

While the US DoJ recognises that no compliance program can prevent all criminal activity¹⁶¹, the critical factors in evaluating any compliance program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether "corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives."¹⁶²

¹⁵⁸ McNulty, Knox, Harned, above n 12, 381; McNulty, above n 7, 12.

¹⁵⁹ McNulty, above n 7, 12

¹⁶⁰ Ibid 12-13.

¹⁶¹ McNulty, above n 7, 14.

¹⁶² Ibid.

Like Australia and the UK, the DoJ has no formal guidelines for the standard corporations should promote and enforce when introducing a corporate compliance program but will ask itself the following questions: is the corporate compliance program well designed? and does the compliance program work?¹⁶³ In answering those questions, the DoJ has released some key indicators of an effective compliance program being: "comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs."¹⁶⁴

The program cannot simply be a 'paper program.' It must be well designed and implemented in an effective, strategic and holistic manner. For example, is "the board able to exercise independent review over proposed corporate actions; are the directors provided with information sufficient to enable the exercise of independent judgment; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organisation reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organisations compliance with the law?"¹⁶⁵

5.3 US examples of effective and inept Corporate Compliance Programs in the context of Transactional Bribery: *Siemens* and *Morgan Stanley*

Siemens and *Morgan Stanley* examine the content of a corporations compliance program and culture of compliance - the approach taken by the DoJ in both cases should be adopted by the AFP and CDPP when conducting like investigations and determining whether charges should be laid against offending corporations under Division 70. If the standard is to onerous and burdensome, the industry needs to be aware of the standard to be enforced and must be applied by agencies and Courts across the board in order to establish financial and operational certainty for corporations and directors.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

On 13 December 2011, the DoJ charged 8 former executives and agents of Siemens AG for allegedly engaging in a decade-long scheme to bribe senior government officials in Argentina. Bribes were paid to public officials in order to secure, implement and enforce a 1 USD billion contract with the government of Argentina to produce national identity cards. The bribery scheme lasted from 1996 to early 2007.¹⁶⁶

Siemens AG is a large international conglomerate based in Germany with over 400,000 employees. The company has a large foreign government infrastructure team with expertise in energy and technology projects. Founded in 1847, Siemens AG listed on the NYSE on 2001, thereby subjecting itself to the FCPA.¹⁶⁷ It was alleged by the DoJ that Siemens AG routinely entered into contracts in excess of US1 billion with foreign governments with the DOJ focusing its investigation on what it alleged to be an "identifiable culture of top-down corruption throughout its business, worldwide."¹⁶⁸ The DoJ investigation uncovered that Siemens AG, over a several year period, paid in excess of USD\$1.3 billion in corrupt payments to government officials, often through intermediaries.¹⁶⁹ Siemens AG had an elaborate system to make these payments and hide the payments from auditors, regulators and from some levels of management (for example, the corporation had cash desks in which employees could take up to EU1 million in cash for the payment of bribes, and in some instances, high level executives delivered suitcases full of cash to third party intermediaries to hand over to government officials).¹⁷⁰ Siemens AG maintained offshore, off-books accounts in safe-haven jurisdictions that were used to make bribe payments. The corporation hired consultants or sales agents paying them up to 3 to 5 % of the bribe payments - their job was to transfer money from the corporation to the recipient of the bribe.¹⁷¹

Siemens AG did however have a corporate compliance program to deter and prevent bribery by its employees and agents, but the program was described by the DoJ as inept - comprising of only 6 lawyers for an organisation of 400,000 employees; it failed to

¹⁶⁶ Summary taken from McNulty, Knox, Harned, above n 12, 383-385.

¹⁶⁷ Trace Compendium, 'Siemens (Foreign Bribery Actions)', 2013, 2, at <https://www.traceinternational2.org/compendium/view.asp?id=124> (accessed 16 June 2013).

¹⁶⁸ Summary taken from: J McNulty, J Knox, P Harned, above n 12, 383-385.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Summary taken from: J McNulty, J Knox, P Harned, above n 12, 383-385

discipline employees caught paying bribes; and failed to investigate credible allegations of corruption within its ranks.¹⁷²

Based on the evidence compiled in the investigation, the DoJ prosecuted not just the individuals involved but also the corporation with convictions obtained against Siemens AG and three subsidiaries in Bangladesh, Argentina and Venezuela for FCPA violations.¹⁷³ Siemens AG paid approximately \$800 million to the US authority, \$600 million to the Munich prosecutor and another \$100 million to the World Bank as a part of its global settlement of its corruption problems.¹⁷⁴

Although an extreme case due to the gravity of the conduct and the size of the fines, it is an excellent example of how a culture of non-compliance places the corporation (and ultimately its shareholders) at risk of investigator scrutiny.

In *Morgan Stanley*, Garth Peterson, a US citizen and a former Managing Director of its international real estate and fund advisory business in Shanghai was sentenced to 9 months imprisonment by the District Court of Brooklyn.¹⁷⁵ Mr Peterson was fired in 2008 amid a probe into a suspect real estate deal.¹⁷⁶ Whilst details of the deal have not been disclosed publicly, this was the first FCPA case dealing with the financial services industry¹⁷⁷ and has now set the standard of compliance expected by the DoJ and US Courts in that industry.

Mr Peterson, on behalf of Morgan Stanley, entered into a deal with an unnamed Chinese official from Yongye. It was alleged by the DoJ that Mr Peterson assisted the official and an unnamed Canadian lawyer to secretly buy a stake (at a discounted price) in a valuable

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ J Meager and M Fader, 'Siemens Pays Record \$800 million to settle foreign corrupt practices Act', December 2008, at <http://www.klgates.com/simens-pays-record-800-million-to-settle-foreign-corrupt-practices-act-charges-12-2-3-2008> (accessed 16 June 2013).

¹⁷⁵ *U.S. v Peterson*, 859 F.Supp.2d 477 (E.D.N.Y. 2012); J Dye, 'Update 2- Ex-Morgan Stanley exec gets prison time in bribery case', 16 August 2012, *Reuters (online)*, at <http://www.reuters.com/assets/print?=USL2E8JGJ7N20120816> (accessed 17 June 2013).

¹⁷⁶ J Dye, 'Update 2- Ex-Morgan Stanley exec gets prison time in bribery case', 16 August 2012, *Reuters (online)*, at <http://www.reuters.com/assets/print?=USL2E8JGJ7N20120816> (accessed 17 June 2013).

¹⁷⁷ Dye, above n 177.

Shanghai property owned by a Morgan Stanley Fund. In exchange, the official would help find investment opportunities for Morgan Stanley in China's real estate market.¹⁷⁸

Mr Peterson pleaded guilty and was charged with one-count of criminal information after conspiring to evade Morgan Stanley's internal accounting controls that were implemented (internationally) to accord with the FCPA.¹⁷⁹ Mr Peterson alleged that he brought the official into the deal as an expression of "guanxi".¹⁸⁰

Morgan Stanley was not charged under the FCPA after cooperating with the DoJ. Morgan Stanley itself noted Mr Peterson's "...intentional circumvention of Morgan Stanley internal controls was a deliberate and egregious violation of our values and policies."¹⁸¹ In the official Federal Prosecutors press release (addressing why the company was not charged under the FCPA) noted:

"Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to [a] foreign government official. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions and business units, and tested to indentify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners."

"After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing officials, the Department of Justice declined to bring any enforcement against Morgan Stanley related to Peterson's conduct. The company

¹⁷⁸ Ibid.

¹⁷⁹ B Singer, 'Update: A cynic's Guide to Shocking Revelations of Corruption in China and Mexico', Forbes.com, 26 April 2012, at <http://forbes.com/sites/billsinger/2012/11/15/update-a-cynics-guide-to-shocking-revelations-of-corruption-in-china-and-mexico/> (accessed 17 June 2013).

¹⁸⁰ Dye, above n 177: 'a chinse custom referring to the exchange of gifts/ favours in professional relationships.'

¹⁸¹ Dye, above n 177.

voluntarily disclosed this matter and has cooperated throughout the department's investigation."¹⁸²

The DoJ decided that Morgan Stanley's compliance program was a critical factor in determining whether to prosecute the corporation.¹⁸³ There was extensive due-diligence on behalf of Morgan Stanley to prevent misconduct by employees and agents internationally (it hired an outside law firm to review documents and to conduct interviews around the real estate deal). It is clear, "that the company made extraordinary efforts to prevent corruption of bribery"¹⁸⁴ and has set the standard for corporations required to implement and enforce a corporate compliance program and to promote a culture of compliance with anti-bribery laws.

The AFP and CDPP in following the lead of the DoJ must consider whether Australian corporations have "provided for staff to audit, document, analyse, and utilise the results of the corporation's compliance efforts; and whether staff are adequately informed about the compliance program and are convinced of the corporation's commitment to it"¹⁸⁵ In considering these issues, together with whether the corporation has in place a process to actively engaged with authorities to disclose potential breaches of anti-bribery laws by its employees and staff, Australian corporations and directors will position themselves to evade the reaches of the criminal law and resulting reputational damage.¹⁸⁶

6. CONCLUSION

"Can a company with over 100,000 employees located in 50 countries worldwide, in high risk jurisdictions expect to prevent every alleged act of corruption or bribery?" The answer will inevitably be no.¹⁸⁷ The challenge, and the uncertainty, facing Australian corporations seeking to promote a culture of compliance with Div 70 by introducing compliance programs will be what standard the AFP and CDPP will seek to impose when identifying or investigating allegations of bribery. This uncertainty, together with the financial and operational burden, will not only affect ASX 200 corporations, but will affect all companies

¹⁸² US Department of Justice, 'Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA,' ('Press Release, 25 April 2012), at <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html> (accessed 17 June 2013).

¹⁸³ Ibid.

¹⁸⁴ McNulty, Knox, Harned, above n 12, 383.

¹⁸⁵ McNulty, above n 7, 14.

¹⁸⁶ Ibid.

¹⁸⁷ McNulty, Knox, Harned, above n 12, 383.

operating internationally. In the absence of legislative or judicial guidance, this author suggests that Australian corporations operating internationally, or identifying international investment opportunities should look to the US for the standard Federal agencies and courts are likely to impose, in order to mitigate the risks of investigation and audit. Australian corporations must demonstrate that they have in place detailed and effective anti-bribery compliance programs and strategies (that they will actively enforce) and active promotion of a corporate culture of compliance.

The burden on Australian corporations is onerous. However, in line with OECD and UNCAC obligations, and international expectations, this burden will become an ever present risk for corporations evaluating whether to continue with, or to explore foreign investment opportunities. In the absence of specialist knowledge of a particular market and skilled employees on the ground, corporations will always seek to rely on their foreign agents. However, if the risk is too great, even with an effective compliance program and a strong corporate culture of compliance, certain corporations will elect (depending on the circumstances) to disengage with foreign partners or from a foreign project, due to the reach of Div 70 and Pt 2.5 and the uncertainty it poses.

To alleviate the uncertainty and risks Australian corporations face, the Federal Government should refrain from removing the 'facilitation payment' defence and issue guidance (whether binding or not) on the standards of both corporate compliance programs and a corporate culture Australian corporations will be required to introduce and enforce.

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