
Policing corruption and corporations in Australia: Towards a new national agenda

Simon Bronitt*

Local and international public opinion polls suggest that Australia is a low-risk country in terms of corruption. This article challenges this reputation contending that the relative invisibility of corruption in Australia is the result of low levels of enforcement of existing laws, and the political failure to implement a co-ordinated national strategy against corruption. As a result, Australia has become increasingly vulnerable to corrupt overseas politicians seeking a safe haven for their illicit assets. These enforcement vulnerabilities extend also to cases of foreign bribery perpetrated offshore by Australian corporations, employees and agents. Enforcement of foreign bribery offences in Australia, unlike the equivalent United Kingdom offences, is hampered by an overly broad defence which excuses “facilitation payments” that otherwise would constitute acts of bribery. The conclusion is that an urgent review of the effectiveness and scope of anti-corruption laws is needed, combined with a much stronger political and law enforcement commitment to tackle corruption at home and abroad.

INTRODUCTION: PERCEPTIONS OF CORRUPTION IN AUSTRALIA

A recurrent theme in Australia’s political life, which can be traced from the earliest colonial period,¹ 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 1980s² and 1990s,³ 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 (former) Prime Minister,⁴ the Speaker of

* Director, Australian Research Council (ARC) Centre of Excellence in Policing and Security (CEPS); Professor, Griffith University. An earlier version of this article was presented at the International Conference on International Strategies against Corruption: Public Private Partnerships and Criminal Policy (Courmayeur Mont Blanc, Italy, 14-16 December 2012). The author would like to acknowledge the funding support from ISPAC and the Australian Research Council, as well as the excellent research assistance provided by Monique Mann and Lisa Gilmore. Professors Adam Graycar and AJ Brown generously provided feedback on earlier drafts and assistance with sources.

¹ For example, the pervasive corruption of New South Wales military officers led to the Rum Rebellion of 1808: see Neal D, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991); Davidson G, Hirst J and Macintyre S (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998) p 567.

² In Queensland, between 1987 and 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 Lewis C, Ransley J and Homel R (eds), *The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond* (Australian Academic Press, 2010).

³ 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). See Dixon D (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999).

⁴ The former Prime Minister, Julia Gillard, has been implicated a union corruption scandal, having assisted the establishment of “slush fund” that her then boyfriend Bruce Wilson allegedly used to defraud the Australian Workers Union (AWU) and to embezzle union funds. Gillard has vigorously denied any wrongdoing: Jones G, “Union Corruption is Plaguing Prime Minister Julia Gillard”, *The Daily Telegraph* (30 November 2012); Baker M, “Police Extend AWU Slush Fund Inquiry”, *The Sydney Morning Herald* (29 November 2012).

the House of Representatives,⁵ and federal and State politicians.⁶

Occasional high profile cases aside, public opinion surveys reveal that on a day-to-day basis Australians do not encounter, in any significant numbers, demands for or expectations of bribes for the provision of public services. The most recent national poll (ANUPOLL) published in 2012,⁷ 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”.⁸ It appears that the general public’s personal experience of bribery is more likely to occur among those who are in the labour force, employed in manual (as opposed to non-manual) occupations, and who are younger.⁹ Institutions enjoying the highest levels of public confidence and that are regarded as the least corrupt are the Australian Defence Force (ADF), the public service and the police. Conversely, the institutions that held the lowest levels of public confidence and that are perceived to be most corrupt were the media, trade unions and political parties.¹⁰

There are, however, clear 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 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 to 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% nominated the Ombudsman. Only 5% of the total number surveyed mentioned one of the existing anti-corruption agencies in Australia!

International perspectives on vulnerability to corruption are even less equivocal about Australia’s good standing. Transparency International 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. Of course, public opinion and perceptions about levels of 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” in the communities. This regulatory blind spot 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, bankers and accountants, etc) that have become (unwittingly or not) facilitators of corruption in the region.

⁵ The former federal Speaker, Mr Peter Slipper, is currently facing charges of fraud stemming from the alleged misuse of cab charges and hire cars funded by the Commonwealth: McGregor K, “AFP Launches Investigation into Peter Slipper” *Herald Sun* (8 January 2013).

⁶ 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: Cullen S, “Police Arrest MP Craig Thomson on 150 Fraud Charges”, *ABC News* (31 January 2013). Similar scandals have also emerged in New South Wales, with adverse ICAC findings relating to the business dealings of former Labor ministers Eddie Obeid and Ian MacDonald.

⁷ ANUPOLL measures public confidence in government and institutions, perceptions and experiences of corruption and the ethical conduct of elected representatives and political mood: McAllister I, Pietsch J and Graycar A, *Perceptions of Corruption and Ethical Conduct – The Australian National University Poll (ANUPOLL)*, Report No 13 (2012).

⁸ McAllister et al, n 7, p 11.

⁹ McAllister et al, n 7, p 12.

¹⁰ The largest reported increases in public confidence observed in ANUPOLL were in the public service and legal system, with the largest decreases reported in the confidence in federal government and political parties: McAllister et al, n 7, p 8.

¹¹ McAllister et al, n 7, p 12.

¹² McAllister et al, n 7, p 13.

¹³ According to Transparency International’s Corruption Perceptions Index, since 2003, Australia has consistently ranked in the top 10 countries with the least perceived amount of corruption, with the only exception being 2007, when Australia was ranked 11th: <http://www.transparency.org/research/cpi>.

There is now a growing concern that Australia's enforcement laxity has made it a "honey pot" 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, controversially 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 was being sent offshore to countries like Australia. In a recent public address, Mr Koin pointed out that the Registrar of Land Titles in North Queensland had confirmed that six known PNG politicians had invested in local million-dollar properties (worth more than AU\$11.5 million in total). In response to this negative publicity, the Australian government announced that it would no longer issue visas to PNG citizens who utilise corrupt funds to invest in Australia.¹⁵

Unlike countries lacking effective laws and independent criminal justice institutions (police, prosecutors and courts), Australia has a plethora of regulatory tools available to tackle corruption. 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 to corruption. Clearly then, the enactment of new laws (with even more severe penalties) is not necessarily the solution. Rather, Australia's strategy 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: CO-OPERATIVE 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 nine 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 Federal Parliament's power to legislate in this field derives from the numerous international treaties and conventions Australia has adopted to combat corruption, including: (1) *United Nations Convention Against Corruption* (UNCAC);¹⁶ (2) Organisation for Economic Co-operation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials*;¹⁷ and (3) *United Nations Convention Against Transnational Organised Crime* (UNTOC).¹⁸ Australia meets its

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

¹⁵ Nanol F, "Australia Turns Away PNG Investors using 'Corrupt Money'", *ABC News* (2 November 2012). See also "Onshore Financial Centres: Not a Palm Tree in Sight", *The Economist* (16 February 2013), <http://www.economist.com/news/special-report/21571554-some-onshore-jurisdictions-can-be-laxer-offshore-sort-not-palm-tree-sight>.

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).

international obligations through a combination of legislation,¹⁹ enforcement action,²⁰ audit²¹ and industry self-regulation, and international co-operation with regional and international institutions.²²

TOWARDS A NATIONAL ANTI-CORRUPTION PLAN: A WORK IN PROGRESS

Australia has the legal and constitutional basis to enact a single comprehensive anti-corruption law deriving its constitutional competence from the international treaties mentioned above. Although there has been a significant expansion of federal power in recent decades, there are no signs that the federal legal competencies would be expanded in this field. Rather the current approach to anti-corruption measures continues the status quo of power-sharing between the Commonwealth, States and Territories. This model of co-operative federalism is reflected in the proposed National Anti-Corruption Plan (NACP) that advocates a “multi-agency”²³ and “whole-of-government”²⁴ model of regulation. (At the time of writing, the NACP remains in draft form.) Although the federal Attorney-General’s Department is the central executive agency tasked with the NACP, 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 operationalised 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 co-operation – both bureaucratic and political – that cannot be imposed through a top-down approach.²⁵ The next section challenges whether NACP model, which requires a high level of commitment to the ideals of co-operative federalism,²⁶ is the best approach for tackling corruption particularly in its transnational/multi-jurisdictional forms.

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, that summarised Australia’s national strategy. This reflects the lack of national policy priority attached to the issue of corruption. Somewhat surprisingly, not all of Australia’s States and Territories have an anti-corruption agency and there is currently no formal forum or mechanism for co-operation 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

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

²⁰ The Australian government enforces laws relating to corruption through its executive agencies including the Attorney-General’s Department, Australian Federal Police (AFP), Australian Crime Commission (ACC), Australian Securities and Investment Commission (ASIC), 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, and public budget statements, with industry self-regulation promoted by, for example, the Australian Stock Exchange and the voluntary Corporate Governance Guidelines.

²² Attorney-General’s Department, *The Commonwealth’s Approach to Anti-Corruption – The Anti-Corruption Plan Discussion Paper* (2012) (Anti-Corruption Discussion Paper) p 4.

²³ Anti-Corruption Discussion Paper, n 22, pp 12ff.

²⁴ Anti-Corruption Discussion Paper, n 22, p 20.

²⁵ Pollitt C, “Joined Up Government: A Survey” (2003) 1 *Polit Stud* 46. See also Christensen T and Laefreid P, “The Whole of Government Approach to Public Sector Reform” (2007) *Publ Admin Rev* 1059. Painter comments “where whole of 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”: Painter M, “Australian Federalism and the Policy Process: Politics with Extra Vitamins” (2007) 23 *Politics* 62.

²⁶ The deals are discussed in Blackshield T, Coper M and Williams G (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) p 273.

Commonwealth government announced its intention to develop the first NACP for Australia.²⁷ 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.²⁸ 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.²⁹

Australia's multi-agency approach reflects the fact that 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) (BFPO), which implements Australia's obligation under the OECD Convention.³⁰ The advantage of federal corruption offences is that they apply in all nine Australian jurisdictions, as well as extending to conduct that occurs beyond its borders.

Curbing foreign bribery: The limits of federal criminal law

The BFPO amended the federal *Criminal Code* by inserting a new offence of bribery of foreign public officials. Under s 70.2(1) of the *Criminal Code* a person is guilty of the offence if that person "provides", "causes", "offers to provide, or promises to provide" or "causes an offer of the provision of a benefit, or a promise of the provision of a benefit" that "is not legitimately due to the other person", 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", to "obtain or retain business" or "obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient of the business advantage".

The offence has both territorial and extraterritorial operation, in respect of the latter applying to the conduct of Australian citizens, residents and corporations overseas.³¹ The maximum penalty for the offence of bribing a foreign public official for an individual is 10 years imprisonment and/or a fine of 10,000 penalty units (currently \$1.1 million).³² As established in s 12.1 of the *Criminal Code*, the offence applies also to corporations, with proportionately more severe penalties than those applying to

²⁷ Anti-Corruption Discussion Paper, n 22, p 4.

²⁸ Anti-Corruption Discussion Paper, n 22, p 5.

²⁹ 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/II/2/1, p 9.

³⁰ 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. Davids C and Schubert G, "Criminalising Foreign Bribery: Is Australia's Bark Louder than its Bark?" (2011) 35 Crim LJ 98.

³¹ *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth), s 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 Bronitt S and McSherry B, *Principles of Criminal Law* (3rd ed, Law Book Co., 2010) pp 93-105; Davids and Schubert, n 30 at 103.

³² Attorney-General's Department, *Fact Sheet 1: Why you need to know about foreign bribery and its implications* at [1], <http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx>.

individuals.³³ In addition to the general defences applicable to all offences in s 10 of the *Criminal Code*,³⁴ there are two specific defences that apply only to foreign bribery: (1) the defence of lawful conduct (under foreign law, or the “foreign law defence”);³⁵ and (2) the facilitation payment defence.³⁶

The foreign law defence applies when the benefit paid was required or permitted by a “written law” of the country of the foreign official.³⁷ Limiting the foreign law defence to “written law” excludes customary practices that are not enacted in positive law (that is, 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.³⁸ This scandal involved more than US\$200 million in kickbacks being paid to the Hussein regime by the AWB, in contradiction of the United Nations Oil-for-Food program.³⁹ 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 s 70.2(1) of the *Criminal Code*.⁴⁰ Since 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, the Cole Inquiry concluded that these payments could be considered lawful under Iraqi law within the terms of the defence in s 70.3.⁴¹

Under s 70.4, the facilitation payment defence only applies where the value of the payment made to the foreign official was of a “minor nature” 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”. 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”.⁴² The defence is controversial since it normalises and legitimises 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.⁴³ 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

³³ 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 10% of the annual turnover of the corporation. Fact Sheet, n 32, p 1. See further Davids and Schubert, n 30 at 106-109.

³⁴ Davids and Schubert, n 30 at 110.

³⁵ *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth), s 70.3.

³⁶ *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth), s 70.4.

³⁷ The *International Trade Integrity Act 2007* (Cth) inserted “this written law requires or permits the provision of the benefit” into s 70.3(1) of the *Criminal Code*.

³⁸ See Davids and Schubert, n 30 at 110.

³⁹ Botterill L, *Wheat Marketing in Transition: The Transformation of the Australian Wheat Board* (Springer, 2012) p 94.

⁴⁰ Cole T, *Report of the Inquiry into Certain Australia Companies in Relation to the UN Oil-for-Food-Programme* (2006) (Cole Report) Vol 5 (Appendix 26: Outline of potentially relevant offences) at [348ff], http://www.oilforfoodinquiry.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report_Volume_5_Volume_5_-_Index.html.

⁴¹ Cole Report, n 40. See further Buckley R and Danielson M, “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.

⁴² See *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth), s 70.4(1)(a)-(c).

⁴³ 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: *Bribes and Facilitation Payments: A Guide to Managing your Tax Obligations*, <http://www.ato.gov.au/corporate/content.aspx?menuid=0&doc=/content/00104079.htm&page=4&H4>.

of proposed facilitation payments.⁴⁴ 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 facilitation payments, where such payments have never been lawful.⁴⁵ 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 recently recommending discouraging these payments,⁴⁶ the Australian government is examining whether the facilitation payments defence should be removed from s 70.4 of the *Criminal Code*.⁴⁷

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 under the FCPA in the United States.⁴⁸ There appear to be some signs of change, with increasing political and media attention being given to foreign bribery practised 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.⁴⁹ Interestingly, the Chief Financial Officer and Company Secretary of Securrency, David Ellery, was 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.⁵⁰

TACKLING ENFORCEMENT DEFICITS

Despite fresh investigations launched by the AFP into foreign bribery,⁵¹ in the most recent phase (three) of the review of implementation of the OECD Convention, the OECD Working Group on Bribery noted with serious concern that the overall enforcement of the foreign bribery offence in

⁴⁴ United States 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, n 30 at 112.

⁴⁵ *Public Bodies Corrupt Practices Act 1889* (UK); *Prevention of Corruption Act 1906* (UK); *Prevention of Corruption Act 1916* (UK); *Bribery Act 2010* (UK).

⁴⁶ Davids and Schubert, n 30 at 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* (9 December 2009) at [4], <http://www.oecd.org/corruption/governmentsagreestopupfightagainstbribery.htm>.

⁴⁷ 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) p 5.

⁴⁸ Wee SY, “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* 372.

⁴⁹ AFP, *Foreign Bribery Charges Laid in Australia*, Media Release (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 (2011), <http://www.rba.gov.au/media-releases/2011/mr-11-14.html>.

⁵⁰ See *R v Ellery* [2012] VSC 349. 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 co-operate with federal investigations as reflected in the sentencing notes. See further Barker R and McKenzie N, “Securrency Boss to Testify against Other Bribe Accused”, *The Sydney Morning Herald* (8 June 2013).

⁵¹ See also the investigation into Tenix Defence: Barker R and McKenzie N, “Ex-Navy Men Caught in Bribery Probe”, *The Age* (20 March 2012). 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* at [12], http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_convention.

Australia has been “extremely low”.⁵² The Working Group recommended 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.⁵³

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 organisational 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 bolster this, Australia should consider adopting the offence of “criminalising the failure to prevent bribery” in similar terms to the offence recently enacted in the United Kingdom. Under s 7(2) of the *Bribery Act 2010* (UK), a commercial organisation (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”. This means under this provision, despite an incident of bribery, C will have a complete defence if it can demonstrate that preventative procedures were in place.⁵⁴ Section 8(1) of the *Bribery Act* deems a person is “associated” with C if the person “performs services for or on behalf of C” and s 8(3) further stipulates, by way of example, that this may include an “employee, agent or subsidiary”. 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.⁵⁵ Unlike the *Bribery Act*, 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”.⁵⁶

Unlike many other jurisdictions, which retain a restrictive approach to corporate criminal responsibility, the federal rules governing corporate criminal responsibility were subject to a major revision in 2001 with the insertion of Pt 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 and exercises control over what it does (the so-called “identification principle” in *Tesco Supermarkets Ltd v Natrass*).⁵⁷ Section 12.3(2) of the *Criminal Code* extended criminal responsibility to corporations in which the board of directors or high managerial agent had intentionally, knowingly or recklessly carried out or engaged in the conduct, or expressly, tacitly, or implied authorised or permitted the commission of the offence. In a further departure from the previous common law test, that authorisation 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”. 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

⁵² OECD Working Group on Bribery in International Business Transactions, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (2012) p 9.

⁵³ OECD, n 52, p 5.

⁵⁴ 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).

⁵⁵ Jordan J, “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” (2011) 7 NYU J L & Bus 866; Yeoh P, “The UK Bribery Act 2010: Contents and Application” (2012) 19 *Journal of Financial Crime* 43.

⁵⁶ Transparency International, n 51, p 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.”

⁵⁷ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170.

conduct, or the authorisation or permission". The due diligence provision places a duty on corporations to demonstrate what steps were taken to eliminate or at least minimise the risk of corrupt practices by its employees.⁵⁸

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 United Kingdom's Serious Fraud Office. 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.⁵⁹ There are also several agencies that investigate or provide intelligence emerging from financial institutions about corruption in the private sector, and as such, assist in criminal law responses against corruption on a domestic level. These include:

- AUSTRAC, which provides financial intelligence on potential crimes including corruption;
- the 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; and
- ASIC, which 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 1⁶⁰ reveals there is very limited prosecution activity arising from corruption referrals.

TABLE 1 Federal Prosecution of Corruption-Related Offences 2011-2012

Offence	Statute	No of Prosecutions
Bribery of a Commonwealth official	ss 141-142 <i>Criminal Code</i> (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 <i>Criminal Code</i>	Nil charges.
Abuse of public office	s 142.2 <i>Criminal Code</i>	3 summary charges. 1 indictable charge.
Trading in influence	s 142.3 <i>Criminal Code</i>	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 <i>Criminal Code</i>	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

⁵⁸ Wells C, "Corporate Crime: Opening the Eyes of the Sentry" (2010) 30 *Legal Studies* 388; Wells C, *Corporations and Criminal Responsibility* (3rd ed, Oxford University Press, 2001) p 138.

⁵⁹ Federal jurisdiction in relation to criminal matters is invested in State and Territory courts: *Judiciary Act 1903* (Cth), s 68(2). This means that a person may be charged with federal and State offences in the same proceedings.

⁶⁰ Prosecution statistics from the CDPP for the fiscal year 2011-2012: CDPP, *Annual Report 2011-2012* (2012) p 119. Note Table 1 excludes ongoing investigations and more recent enforcement activity such as the prosecutions against Security International Pty Ltd and Note Printing Australia, discussed above. No systematic data are reported on the prosecution of corruption offences by the State and Territory Directors of Public Prosecution or corresponding integrity and anti-corruption agencies. Moreover, not all States and Territories have an independent anti-corruption agency.

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.⁶¹ 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 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 co-operation with law enforcement and regulatory agencies, and to lift levels of compliance.⁶² 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 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 co-operation with authorities for full or qualified immunity, or reduction in charges and sentence.⁶³ A key insight is to recognise 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 jurisdictions in Australia; federal legislation has recently passed through Parliament.⁶⁴ Existing federal, State and Territory protections, however, are limited to whistleblowers employed in the public sector. As Peter Bowden noted, there was “virtually no legislative coverage of private sector whistleblowing in Australia”.⁶⁵ 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.⁶⁶ While whistleblowing protection laws are widely touted as a valuable measure for encouraging disclosures of

⁶¹ “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”: Mazerolle L and Ransley J, “Third Party Policing” in Wakefield A and Fleming J (eds), *The SAGE Dictionary of Policing* (Sage Publications Ltd, 2009) pp 302-303. On harnessing insights from crime prevention generally, see Graycar A and Sidebottom A, “Corruption and Control: A Corruption Reduction Approach” (2012) 19(4) *Journal of Financial Crime* 384.

⁶² Mazerolle L and Ransley J, *Third Party Policing* (Cambridge University Press, 2005) pp 23-26. See also Buerger M and Mazerolle L, “Third-Party Policing: A Theoretical Analysis of an Emerging Trend” (1998) 15(2) *Justice Quarterly* 301. An example of TTP is the enlisting of pharmacists in preventing the diversion of “over the counter” medications into illicit drug manufacture.

⁶³ See, for example, *R v Ellery* [2012] VSC 349.

⁶⁴ *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); *Protected Disclosure Act 2012* (Vic); *Public Interest Disclosures Act 2002* (Tas); *Public Interest Disclosure Act 2003* (WA); *Public Interest Disclosure Act 2010* (NT). The federal Parliament recently passed the *Public Interest Disclosure Act 2013* (Cth) which provides protections for public officials who make public interest disclosures and provides for investigation of disclosures that have already been made.

⁶⁵ Bowden P, *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) p 4. See also De Maria W, “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.

⁶⁶ “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”: Pascoe J, “Corporate Sector Whistleblower Protection in Australia – Some Regulatory Problems and Issues” (2008) 22 *Aust J Corp L* 96.

corporate wrongdoing, there are doubts whether these measures are effective in preventing the victimisation and corporate reprisals against whistleblowers.⁶⁷

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 labour unions under *Racketeer Influenced and Corrupt Organizations Act* (US) (known as “RICO”).⁶⁸ 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 United States 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”.⁶⁹ The Qui Tam action decentralises the monitoring, enforcement and litigation of acts of fraud against the United States government by enlisting private citizens.⁷⁰ Qui Tam suits have arguably become a strong deterrent against defrauding the federal government serving to increase corporate compliance.⁷¹ 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’s senior anti-corruption lawyer Sam Koim pointed out in a recent special issue of *The Economist*, are essential to removing the profits from corruption.⁷² 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.⁷³

In the field of anti-corruption, informational regulation is a promising strategy for altering norms and attitudes toward corruption, and for building cultures of corporate compliance.⁷⁴ A recent example of informational regulation is s 9(1) of the *Bribery Act 2010* (UK) under which the Secretary of State is required to publish guidance about preventative procedures that corporations can implement to prevent bribery. It is also vital to recognise the role that corporate self-education plays in this field. In Australia, the Export Finance and Insurance Corporation similarly educates exporters and relevant

⁶⁷ See, for example, De Maria, n 65; Bowden, n 65; Martin B, *Illusion of Whistleblower Protection*, Paper presented at the Public Right to Know Conference (13-15 September 2002); De Maria W, “Whistleblowing: Public Interest Disclosure Laws in Australia and New Zealand – Who Are They Really Protecting?” (1995) 20 *Alt LJ* 270; Fox R, “Protecting the Whistleblower” (1993) 15 *Adelaide Law Review* 137; Lewis D, “Whistleblowing Statutes in Australia: Is it Time for a New Agenda?” (2003) 8 *Deakin Law Review* 318; Brown AJ and Latimer P, “Symbols or Substance: Priorities for the Reform of Australian Public Interest Disclosure Legislation” (2008) 17 *Griffith Law Review* 223.

⁶⁸ The civil measures under RICO have been more successful than the criminal measures: see Jacobs J, *Mobsters, Unions, and Feds: The Mafia and the American Labor Movement* (New York University Press, 2007).

⁶⁹ See Petty AR, “How Qui Tam Actions Could Fight Public Corruption” (2006) 39 *University of Michigan Journal of Law Reform* 851; Raspanti MS and Laigaie DM, “Current Practice and Procedure under the Whistleblower Provisions of the Federal False Claims Act” (1998) 71 *Temp L Rev* 23; Fisch JE, “Class Action Reform, Qui Tam, and the Role of the Plaintiff” (1997) 60 *Law & Contemp Probs* 167.

⁷⁰ Kovacic WE, “Whistleblowing Bounty Laws as Monitoring Devices in Government Contracting” (1996) 29 *Loy LA L Rev* 1809.

⁷¹ Androphy JM and Corroero MA, “Whistleblower and Federal Qui Tam Litigation – Suing the Corporation for Fraud” (2004) 45 *S Tex L Rev* 28.

⁷² *The Economist*, n 15.

⁷³ See, generally, Frieberg A, *Tools of Regulation* (The Federation Press, Sydney, 2010). Frieberg A, “Re-Stocking the Regulatory Tool Kit” (2010) (Working Paper 15) *Jerusalem Papers in Regulation and Justice* 5.

⁷⁴ Frieberg (Tools of Regulation), n 73, p 22.

third parties about the legal ramifications of bribery and requires exporters to implement a declaration against bribery.⁷⁵ 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.⁷⁶ Providing incentives to encourage self-regulation,⁷⁷ enforce self-regulation,⁷⁸ and promote capacity building,⁷⁹ as well as fostering cultures of integrity and accountability,⁸⁰ 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 the fight against 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.

KEY RECOMMENDATIONS: A SUMMARY

The above analysis supports the following recommendations. These key "take-home messages" have been framed to maximise impact upon the policy-making, law enforcement and corporate communities.

- The facilitation defence in respect of minor payments in federal law should be repealed. Furthermore, the Attorney-General should provide a "hotline" for the business community to assist companies to determine whether there is a risk that an apparently legitimate business payment would breach the terms of foreign bribery offences in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth).
- The resources and technical skill-base for federal law enforcement in the field of corruption should be increased, with serious attention given to calls for the establishment of a national anti-corruption agency with enforcement powers, similar to the Serious Fraud Office in the United Kingdom.
- A new federal offence of criminalising the failure to prevent bribery in the terms of the *Bribery Act 2010* (UK) should be enacted, with liability extended to those acting on behalf of the corporation in the terms discussed above.
- Legal protection for whistleblowers in the corporate sector should be extended beyond corporation law offences. The protection in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) should extend to corruption and fraud offences more generally.
- The range of civil measures available to support public interest disclosures and litigation should be examined, including "best practice" lessons drawn from the use of private citizen suits or Qui Tam actions in the United States.
- Corporate cultures of compliance/integrity should be addressed through alternative regulatory strategies, including examining the imposition of a duty on regulators to provide guidance on preventative strategies in similar terms to s 9 of *Bribery Act 2010* (UK).

⁷⁵ Anti-Corruption Discussion Paper, n 22, p 21.

⁷⁶ Anti-Corruption Discussion Paper, n 22, p 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 Findlay M and Stewart A, "Implementing Corruption Prevention Strategies through Codes of Conduct" (1992) 3 *Current Issues in Criminal Justice* 262.

⁷⁷ Bush RJ, "Stimulating Corporate Self-Regulation – the Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea" (1993) 87 *Nw U L Rev* 597.

⁷⁸ Braithwaite J, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 *Mich L Rev* 1466.

⁷⁹ Villarreal R, "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).

⁸⁰ Gregory R and Hicks C, "Promoting Public Service Integrity: A Case for Responsible Accountability" (1999) 58 *AJPA* 3; Verhezen P, "Giving Voice in a Culture of Silence: From a Culture of Compliance to a Culture of Integrity" (2010) 96 *Journal of Business Ethics* 187.

- Research into the application of TPP and other innovative crime prevention strategies to combat corruption should be made a National Research Priority in Australia.⁸¹
- Systematic collection, collation and reporting of information regarding corruption offences, investigations and prosecutions in all of Australia's jurisdictions.

⁸¹ The National Research Priority Statement identifies "Safeguarding Australia" in terms of terrorism, crime, invasive diseases and pests, strengthening our understanding of Australia's place in the region and the world, and securing our infrastructure, particularly with respect to our digital systems. The list makes no mention of corruption: Australian Research Council, *The National Research Priorities and their Associated Priority Goals*, http://www.arc.gov.au/pdf/nrps_and_goals.pdf.

