

BRIBERY AND CORRUPTION: KEY ISSUES FOR AUSTRALIAN COMPANIES OPERATING OVERSEAS

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I INTRODUCTION

Laws criminalising bribery of foreign public officials are proliferating. Enforcement is growing exponentially. Transparency International, the leading anti-corruption NGO, now lists seven countries – including the US and the UK – as ‘active enforcers’ of foreign bribery laws. This has increased from just four in 2009.¹

Even so, awareness of bribery laws is low. A 2008 Ernst & Young survey found that only one-third of corporate respondents had *some* knowledge about the *Foreign Corrupt Practices Act of 1977* (US)² – the most significant foreign bribery legislation.³ Fifty-eight per cent of senior in-house counsels were not familiar with the legislation at all.⁴ The reach of foreign bribery laws is wide. Few corporations would consider their dealings with employees of Chinese banks or of sovereign wealth funds through the prism of bribery risk. Still fewer would appreciate that benefits such as hospitality, business development expenditure and even local aid can be red flags.

All signs suggest that Australian companies will increasingly find themselves targeted by regulators for foreign bribery. Pursuant to the landmark *1997 OECD Convention on Combating Bribery of Foreign Public Officials* (‘*OECD Convention*’), developed countries are directing more attention and resources towards anti-bribery enforcement than ever before. The 2010 UK Foreign Bribery Strategy⁵ commits the UK government to strong enforcement measures,

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1 Transparency International, *Progress Report on the Enforcement of the OECD Anti-Bribery Convention* (2010) 11 (‘*TI Progress Report*’).

2 15 USC §§ 78m–78ff (2010) (‘*US FCPA*’).

3 Ernst & Young, *Corruption or Compliance – Weighing the Costs* (10th *Global Fraud Survey*) (2008).

4 *Ibid* 2.

5 Ministry of Justice (UK), *UK Foreign Bribery Strategy* (2010).

including generous resourcing and stronger transnational cooperation. Foreign bribery has also increasingly attracted public and political attention. The issue has been front-page news in Australia, with the DPP laying Australia's first charges under Commonwealth bribery of foreign public officials legislation. Anti-bribery enforcement is not limited to OECD countries. The 2005 *United Nations Convention Against Corruption*⁶ – the full effect of which is yet to be felt – commits its 155 State Parties to criminalise bribery of foreign public officials and to facilitate international enforcement efforts.

In this context, this article is intended to be a primer on legal risks for Australian companies. Part II outlines bribery laws in the three jurisdictions of most significance for Australian companies – Australia, the US and the UK.⁷ Part III sets out current enforcement trends. In short, the trend is towards more enforcement, broader interpretation of existing offences, growing international cooperation and weightier sanctions. Part IV covers, at a high level, key issues which arise for Australian companies.

II BRIBERY LAWS

A The Principal Bribery Offences

This part outlines the coverage of the principal legislation concerning bribery of foreign public officials in Australia, the US and the UK. We set out the core elements of the legislation in the text with further detail in the footnotes.

The principal Australian offence is in section 70.2 of the *Criminal Code Act 1995* (Cth) ('Australian *Criminal Code*').⁸ The Australian *Criminal Code* is, in the main, enforced by the Australian Federal Police (which has investigative power) and the Commonwealth Director of Public Prosecutions (which has prosecutorial power).

In the US, corruption offences are set out in the US *FCPA*, with different provisions governing the offence based on the reason for the enlivening of US jurisdiction. In the US, the Department of Justice ('US DoJ') is solely responsible for criminal enforcement, and shares responsibility for civil enforcement with the Securities and Exchange Commission ('SEC').⁹

As regards the UK, this outline covers the *Bribery Act 2010* (UK) ('UK *Bribery Act*'), which commenced on 1 July 2011,¹⁰ not the pre-existing UK

6 *United Nations Convention Against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

7 For a useful summary of international enforcement, see Frank Razzano and Travis Nelson, 'The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance' (2008) 42 *International Lawyer* 1259.

8 *Criminal Code 1995* (Cth) ch 4, div 70.

9 See Rollo C. Baker, 'Foreign Corrupt Practices Act' (2010) 47 *American Criminal Law Review* 647, 664.

10 See *Bribery Act 2010 (Commencement) Order 2011* (UK) o 2.

offences which govern offences committed prior to 1 July 2011.¹¹ In March 2011, the UK Ministry of Justice published guidance in respect of the UK *Bribery Act*.¹²

The UK *Bribery Act* creates:

- separate offences of bribing another person (who may, but need not, be a public official)¹³ and bribing a foreign public official (together, the ‘standard bribery offences’). These offences overlap, but are not coextensive;¹⁴ and
- a discrete offence for ‘commercial organisations’ of failure to prevent bribery.¹⁵

While the details of the offences of course differ between the three jurisdictions, with the exception of the UK offence of failure to prevent bribery, they broadly have two common elements:

- an illegitimate transaction – being an offer, promise or provision of a benefit by the offender to another person; and
- a culpable state of mind – being an intention on the part of the offender to impermissibly influence a foreign public official.

B Who is Covered by Foreign Bribery Laws?

A preliminary question is *who* foreign bribery laws cover. The short answer is that foreign bribery laws apply broadly and cover people with only a loose personal or territorial connection to the criminalising jurisdiction.

Australian, US and UK bribery laws operate through both ‘personal’ (or ‘national’) and ‘territorial’ jurisdiction. With respect to *personal* jurisdiction, what is ordinarily required is some connection between the person and the criminalising jurisdiction (eg, citizenship, incorporation, residency or business operation).

With respect to *territorial* jurisdiction, the normal requirement is some minimal territorial connection between the offence and the criminalising jurisdiction (eg, that some part of the conduct constituting the offence, such as a wire transfer, occurred in the criminalising jurisdiction). The Commentaries to the OECD Convention indicate that parties should interpret territorial jurisdiction broadly, ‘so that an extensive physical connection to the bribery act is not

11 The legislation governing offences committed prior to 1 July 2011 are constituted by *Public Bodies Corrupt Practices Act 1889* (UK), *Prevention of Corruption Act 1906* (UK) and *Prevention of Corruption Act 1916* (UK). The UK *Bribery Act* only applies to offences committed wholly after its commencement: UK *Bribery Act* c 23, s 19(5).

12 Ministry of Justice (UK), *Bribery Act 2010 – Guidance* (2011) (‘UK *Bribery Act* Guidance’).

13 UK *Bribery Act* c 23, s 1.

14 *Ibid* s 6.

15 *Ibid* s 7.

required'.¹⁶ The intention of the Convention is obvious: to ensure that developed world bribers cannot evade jurisdiction through inadequate local enforcement in the place of bribing.¹⁷

1 *Australia*

The Australian *Criminal Code* applies if:¹⁸

- the conduct constituting the offence occurred wholly or partly in Australia or on board an Australian aircraft or ship; or
- the person who engaged in the conduct is an Australian citizen, resident, or body corporate¹⁹ incorporated in Australia.

2 *US*

The US *FCPA* bribery offences apply to:

- 'issuers':²⁰ meaning entities which, under US securities laws, have a class of securities registered with the SEC or which are required to file reports with the SEC. This section of the US *FCPA* operates as section 30A of the *Securities Exchange Act of 1934* (US).²¹ Australian corporations may be covered by this provision if they have securities listed in the US (eg, through a dual listing or the issuing of American Depository Receipts);
- 'domestic concerns':²² meaning US citizens, nationals and residents, and entities which are either organised in the US or have the US as their principal place of business;
- persons acting 'on behalf of' issuers or domestic concerns and who are officers, directors, employees, agents or shareholders of the issuer or domestic concern;²³ or

16 OECD, *Commentaries on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents* (2011) 16, [25].

17 Bribery is of course ordinarily an offence in the country in which the bribe is offered or received.

18 Australian *Criminal Code* s 70.5(1).

19 The Australian Government deliberately rejected a recommendation to extend the offence's coverage to foreign businesses which conduct operations in Australia on the basis that these persons 'should be the responsibility of their home jurisdictions': Commonwealth, *Government Response to the Joint Standing Committee on Treaties Report – OECD Convention on Combating Bribery and Draft Implementing Legislation* (1999) [4.8].

20 US *FCPA* §§ 78dd-1(a), (g). Where no act in furtherance of the offence occurs outside the United States, the offence only applies to 'issuers' where there is a corrupt use of the mails or an instrumentality of interstate commerce in furtherance of the offence.

21 15 USC § 78a (1934) ('*Securities Exchange Act*').

22 US *FCPA* §§ 78dd-2(a), (i). Where no act in furtherance of the offence occurs outside the United States, the offence only applies to 'issuers' where there is a corrupt use of the mails or an instrumentality of interstate commerce in furtherance of the offence.

23 *Ibid* §§ 78dd-1(a), (g), 78dd-2(a), (i).

- ‘any’ person who corruptly makes use of the mails or any instrumentality of interstate commerce in furtherance of the offence of bribery.²⁴ The US DoJ considers this to have a very broad application. According to the US DoJ, the provision extends to any person who causes, directly or through agents, the use of an instrumentality of interstate commerce (including emails, telephone calls, faxes, wire transfers, and interstate or international travel)²⁵ in furtherance of a corrupt payment.²⁶ It is apparent that the potential scope of this is broad. In a June 2011 case, a US District Court judge, in a decision without a written record, dismissed a count against a defendant apparently on the basis that the jurisdictional nexus should be read down so as to require, in each count, an act in US territory.²⁷ If this ruling is followed, it may provide a significant limitation on the scope of this basis of jurisdiction.

3 UK

The standard bribery offences in the UK *Bribery Act* apply if:

- any conduct forming part of the offence took place in the UK;²⁸ or
- the person who engaged in the conduct forming part of the offence had a ‘close connection’ with the UK. Persons with ‘close connections’ include British citizens, residents, Overseas Citizens,²⁹ and bodies incorporated in the UK.³⁰

The special offence of failure by a ‘commercial organisation’ to prevent bribery has a broader application. In addition to applying to corporations and partnerships which are incorporated or formed in the UK, it applies to corporations or partnerships which ‘carr[y] on a business, or part of a business, in any part of the United Kingdom’.³¹ The scope of this is potentially broad.³² The UK Ministry of Justice has indicated that, in its opinion, the mere fact that a body corporate is listed in the UK or has a UK-incorporated subsidiary would be

24 Ibid § 78dd-3. It may be necessary that the defendant commit the relevant act *in* US territory. See the discussion on Africa Sting on Mike Koehler's blog FCPA Professor: eg, Mike Koehler, ‘Significant dd-3 Development in Africa Sting Case’ (9 June 2011) FCPA Professor <<http://fcpaproffessor.blogspot.com/2011/06/significant-dd-3-development-in-africa.html>>.

25 See, eg, information in *United States v ABB Vetco Gray Inc*, (SD Tex, No 04-279, 22 June 2004) slip op 18–21 (premising jurisdiction an email sent from the US and wire transfers between US and UK banks).

26 Department of Justice (US), *Foreign Corrupt Practices Act: Anti-Bribery Provisions* (2011) <<http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>>.

27 See Koehler, *FCPA Professor*, above n 24.

28 UK *Bribery Act* ch 23, s 12(1).

29 This category includes many citizens of former British colonies (eg Hong Kong).

30 UK *Bribery Act* ch 23, s 12(4).

31 Ibid s 7(5). The UK *Bribery Act Guidance* indicates that this may apply to charitable or public organisations where they engage in ‘commercial activities’: above n 12, 15 [35]

32 Under Australian law, whether a company is carrying on business within a territory is a ‘question...of fact and must be decided by having regard to all the circumstances of the case’: *Luckins (Receiver and Manager of Australian Trailways Pty Ltd) v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 178 (Gibbs J), 186 (Stephen J), 187 (Mason J).

insufficient.³³ This will, however, be a matter for the Courts, and the head of the Serious Fraud Office ('SFO') has indicated he intends to exercise a 'wide jurisdiction' to prosecute whenever it is in the UK's public interest, including having regard to the desire not to disadvantage UK-incorporated entities relative to their foreign-incorporated competitors.³⁴

C The Illegitimate Transaction: Offering or Providing a Benefit or Advantage to Another

The core physical element (or 'actus reus') of bribery involves an offender causing, authorising or engaging in some illegitimate transaction with another person. Australian, UK and US laws differ in detail, if not in general, as to what types of transactions are covered.

1 Australia

The Australian *Criminal Code* applies to the offering, promising or provision of a benefit to another person that is not legitimately due³⁵ to that person.³⁶ It also applies where the offender *causes* a benefit of that kind to be offered, promised or provided.³⁷

'Benefit' is broadly defined, to include 'any advantage'.³⁸ In determining whether a benefit is 'not legitimately due', the value of the benefit, any official tolerance of the benefit, and the fact that the benefit may be perceived to be

33 *UK Bribery Act Guidance*, above n 12, 15–6.

34 Simon Bowers, 'Serious Fraud Officer Vows to Pursue Corrupt Companies Vverseas', *The Guardian* (London), 26 March 2011, 40.

35 The question of when a benefit is not legitimately due is unclear. The Explanatory Memorandum to the Bill that introduced the foreign bribery offences states that 'the term is to have its ordinary meaning': Explanatory Memorandum, Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999, [25]. The condition that the benefit be not legitimately due may have been inserted because the OECD Convention only requires parties to criminalise 'undue' advantages: OECD Convention art 1(1). There is no similar qualification under the US *FCPA* or UK *Bribery Act*. Irrespective of its construction, it would be difficult to argue that (as is a common case) if A offered a benefit to B, in circumstances where A intended the transaction to be, and B knew the transaction was, part of a chain of transactions in which a public official would ultimately be 'bribed' could ever be considered to be legitimately due. See also Martijn Wilder and Michael Ahrens, 'Australia's Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (2001) 2 *Melbourne Journal of International Law* 568, 576.

36 It is likely that the offender must be 'reckless' as to whether the benefit was not legitimately due. That the benefit is not legitimately due is likely to be a 'circumstance' of the offence: Australian *Criminal Code* s 5.1(1). The default fault element for circumstances is recklessness: s 5.6(2). 'Recklessness' is defined in s 5.4(1).

37 *Ibid* s 70.2(1)(a)–(b).

38 *Ibid* s 70.1. The commentaries to the OECD Convention suggest this should be understood broadly: 'it is also an offence irrespective of ... the value of the advantage': see OECD, *Commentaries on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, above n 13, [7].

customary or necessary in the situation must all be disregarded.³⁹ The offeree or recipient of the benefit need not be the public official who is ultimately intended to be influenced.⁴⁰

The scope of when a benefit is ‘caused to be offered, promised or provided’ is not clear. The concept is potentially broad. It may be significant where conduct is carried out by a low-level employee, subsidiary, agent or joint venture partner of a corporation. If it can be shown that the corporation *caused* the other person to make the offer, promise or gift, even if the corporation did not directly carry out the conduct itself, the corporation may be liable. In cases where a corporation might be said to have ‘caused’ another to make an offer, promise or gift, the corporation may also be at risk of committing a secondary offence (eg, incitement or conspiracy) or being attributed (under principles of corporate criminal responsibility) with the conduct of the person so caused. The offence of ‘causing’ would, however, allow the prosecution an alternative avenue. This alternative avenue may assist a prosecution where the only possible basis for the coverage of the Australian *Criminal Code* is that part of the conduct constituting the offence occurred in Australia: even where most of the offending conduct occurred overseas, so long as that conduct was *caused* by corporate conduct which occurred in Australia the offence may apply.

2 US

The US *FCPA* applies to persons who offer, pay or promise to pay anything of value to a person or authorise conduct of that kind.⁴¹ ‘Anything of value’ is understood broadly. US regulators have not applied any *de minimis* criterion.⁴² The term includes benefits which are valuable only because the recipient subjectively values them.⁴³ This of course feeds into the *absence* of a *de minimis* exception – a gift of relatively low value in a developed country may be of relatively greater value in a developing country.

Importantly, US regulators consider in-kind benefits – even benefits of low value – to be sufficient. Proceedings have been brought in respect of a company which provided social functions, educational seminars, travel, lodging and

39 Australian *Criminal Code* s 70.2(2). These follow the commentaries on the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, see *Commentaries on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, above n 16, [7]. Explanatory Memorandum, Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 18 [33] states that ‘[a]ny allowance for cultural norms would undermine the offence’.

40 Australian *Criminal Code* s 70.2(1)(c). Explanatory Memorandum, Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 14 [24] states that ‘the conduct described will be an offence ... whether the offer or promise is made or the pecuniary or non-pecuniary benefit is given on that own person’s behalf or on behalf of any other person. It would, eg, cover the provision of a benefit to the partner of the foreign public official to influence the exercise of the official’s duties (through the partner)’.

41 US *FCPA* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

42 Mike Koehler, ‘The Facade of FCPA Enforcement’ (2010) 41 *Georgetown Journal of International Law* 907, 914.

43 See Baker, above n 9, 658–9.

meals.⁴⁴ In the same case, the SEC relied on gifts of electronic equipment, watches, expensive wines and office furniture. Similarly, the Siemens complaint included allegations that Siemens paid for travel by Chinese officials.⁴⁵

3 UK

The UK *Bribery Act* offence of bribing another person applies to the offering, promising or giving of a financial or other advantage to another person.⁴⁶

The offence of bribing a foreign public official applies to a person who directly, or through a third party, offers, promises or gives a financial or other advantage either to a foreign public official or to another person with the assent or acquiescence of a foreign public official.⁴⁷

‘Financial or other advantage’ is not defined. The Explanatory Notes to the UK *Bribery Act* indicate that its meaning should be determined ‘as a matter of common sense by a tribunal of fact’.⁴⁸

D Culpable State of Mind: An Intention to Influence a Public Official

The touchstone of bribery is the culpable state of mind of the person who causes, authorises or engages in the transaction. People, of course, regularly provide benefits to public officials. It is the state of mind which accompanies the provision of that benefit which distinguishes bribery from an innocent transaction.

1 Australia

Under the Australian *Criminal Code*, the offender must have provided, promised or offered the benefit, or caused it to be provided or offered, with the intention⁴⁹ of influencing a foreign public official in the exercise of the official’s duties and ‘in order to’ obtain or retain business or a business advantage which is not legitimately due.⁵⁰

44 *SEC v Syncor International Corporation* (DDC, No 02-02421, 10 December 2002) slip op 2.

45 *SEC v Siemens Aktiengesellschaft*, (DDC, No 08-02167, 21 December 2008) slip op 23–5.

46 UK *Bribery Act* ch 23, ss 1(2)–(3). Section 1(5) states: ‘it does not matter whether the advantage is offered, promised or given by [the offender] directly or through a third party’.

47 *Ibid* s 6(3).

48 Explanatory Notes, *Bribery Act 2010* (UK) [15].

49 Noting that ‘tacit approval’ was sufficient for corporate criminal responsibility, the Australian Government deliberately rejected an extension of the offence to recklessness: Commonwealth, *Government Response*, above n 16, [2.2].

50 Australian *Criminal Code* s 70.2(1)(c). See s 70.1 for the definition of ‘duty’. While the point has not been judicially tested, the limitation to obtain or retain ‘business’ and ‘business advantages’ may provide some meaningful confinement to the offence. The effect may be to exclude circumstances where the sought advantage could be described as ‘public’ or ‘non-commercial’ in nature. Alternatively, it may exclude circumstances where the intended advantage is so minimal as to be incapable of constituting the obtainment or retention of a business advantage. ‘The meaning of “legitimately due” is to have its ordinary meaning – there must be a legal basis for the activity and it therefore could not include an activity which is in breach of a statutory requirement’: Explanatory Memorandum, Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999, 15 [27].

It is unclear what kinds of states of mind will be capable of constituting the requisite intention. There may be difficulties in proving the requisite intention where the recipient of the offer or the benefit is not the public official.⁵¹

2 US

The US *FCPA* offences apply where, in making an offer or payment to a foreign official, the offender acts corruptly,⁵² in order to obtain or retain business,⁵³ and with a purpose of:⁵⁴

- influencing the official conduct of a foreign official;
- inducing a foreign official to act in violation of lawful duty;
- securing an improper advantage; or
- inducing a foreign official to influence a foreign government or foreign government instrumentality.

A special provision covers circumstances where the offer or payment is made to a third party, not the public official. In those circumstances, the requisite state of mind exists where the offer or payment is made or authorised ‘while knowing that all or a portion of [the thing of value] will be offered, given, or promised, directly or indirectly, to any foreign official’.⁵⁵ A person is deemed to know that result where the person is aware or has a firm belief that the result is substantially certain to occur.⁵⁶ This special provision is important where (as is often the case) the bribery is alleged to have occurred through an intermediary.

51 Australian *Criminal Code* s 5.2(3) provides that, ordinarily, a person intends a result if the person ‘means to bring it about or is aware that it will occur in the ordinary course of events’. In other words, intention can be proven by showing either motive or foresight. However, the bribery offence is of a kind that has been described by a leading Australian criminal law text as an offence of ‘ulterior intention’: the prosecution must prove an intention to bring about a result, but need not prove that the result actually came about: Ian Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (Attorney-General’s Department, 2002) 61 [5.2-D]. This may ground a technical argument that the ordinary Australian *Criminal Code* definition of ‘intention’ does not apply and a narrower concept, perhaps only including motive and not foresight, may apply instead.

52 According to the Senate Report in respect of the US *FCPA*, ‘[t]he word “corruptly” connotes an evil motive or purpose, an intent to wrongfully influence the recipient’: S. Rep. No. 95-114, at 10 (1977). According to general principles, the defendant need know that the conduct was unlawful, but need not know the specific provisions which render it unlawful: Baker, above n 9, 656, 660–1. The requirement of ‘corrupt’ action may mean that the offender’s intention must be that the public official provide a ‘quid pro quo’ or some advantage ‘in exchange for’ the benefit: see, eg, *United States v. Alfisi*, 308 F 3d 144, 149 (2d Cir. 2002).

53 This is understood broadly, and includes business with non-governmental entities, favourable tax treatment, reduced tariffs and tolerance of non-compliance with applicable laws: Roger M Witten et al, ‘Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies’ (2009) 64 *Business Lawyer* 691, 698. For criticism of the US regulators’ view, see Koehler, ‘The Facade of FCPA Enforcement’, above n 42, 920–1.

54 US *FCPA* §§ 78dd-1(a)(1)–(2), 78dd-2(a)(1)–(2), 78dd-3(a)(1)–(2).

55 *Ibid* §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

56 *Ibid* §§ 78dd-1(f)(3), 78dd-2(h)(3), 78dd-3(f)(3).

3 UK

The UK *Bribery Act* offence of bribing another person applies where the person intends the advantage to *induce* or *reward* improper performance of certain functions or activities⁵⁷ or where the person knows or believes that acceptance of the advantage would constitute the improper performance of certain functions or activities.⁵⁸ It is not clear whether the provision of a ‘retrospective’ benefit on account of something the public official has already done could constitute bribery – the reference to both inducing *and* rewarding suggests that a reward for something already done may be sufficient.

The offence of bribing a foreign public official applies to persons who intend to influence a foreign public official in the official’s capacity as a foreign public official.⁵⁹

E Who is a ‘Foreign Public Official’

‘Foreign public official’ and its equivalents are expansively defined in Australian, US and UK laws. Four pages of the Australian *Criminal Code* are taken up with defining the term.⁶⁰ Despite its centrality to the legislative schemes, there is only very limited judicial interpretation in the United States⁶¹ and none in Australia or the UK.⁶²

While it is not practicable to set out all the criteria which may designate someone as a foreign public official, some of the broader, and less obvious, circumstances in which a person is deemed to be a foreign public official are:

- under the Australian *Criminal Code*, entities⁶³ which are majority-owned by a foreign government or in respect of which the foreign government has potential de facto control. Also covered are employees, contractors and actual or ‘apparent’ intermediaries of such entities;
- under the Australian *Criminal Code*, entities which enjoy special status, benefits or privileges under a law of a foreign country because of their association with the foreign government. Also covered, again, are employees, contractors and actual or ‘apparent’ intermediaries of those entities;

57 The functions and activities covered by the offence are set out in section 3 of the UK *Bribery Act*. The concept of ‘improper performance’ is covered by section 4.

58 UK *Bribery Act* ch 23, ss 1(3)–(4).

59 UK *Bribery Act* s 6(1). See also s 6(4).

60 Australian *Criminal Code* s 70.1 for definitions of ‘foreign public official’, ‘foreign government body’, ‘foreign public enterprise’ and ‘public international organisation’.

61 See *United States v Aguilar* (CD Cal, No 10-01031-AHM, 20 April 2011); *United States v Carson* (CD Ca, No 09-77-JVS, 18 May 2011).

62 As at 20 September 2011.

63 One submission to the Committee which considered the foreign bribery provisions of the Australian *Criminal Code Act* estimated (in 1998) that approximately 3 million Chinese companies might fall within this definition: see Vivienne Brand, ‘Legislating for Moral Propriety in Corporations? The Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999’ (2000) 18 *Company and Securities Law Journal* 476, 488 fn 57.

- under the US *FCPA*, officers or employees of any department, agency or ‘instrumentality’ of a foreign government. There is judicial authority that state-owned corporations can be instrumentalities;⁶⁴ and whether they are instrumentalities is a question of fact, depending on the nature and characteristics of the business entity.⁶⁵ Regulators understand ‘instrumentalities’ to include many government enterprises, with key factors being the degree of government ownership and control;⁶⁶ and
- under the UK *Bribery Act* offence of bribing a foreign public official, individuals who hold administrative positions of any kind, or who exercise a public function of any kind for any foreign public agency or enterprise.

In addition to this, the UK *Bribery Act* covers bribery of private persons who are *not* public officials. It applies in many circumstances⁶⁷ where the intended recipient of the bribe is expected to perform their functions or activities in good faith or impartially or is in a position of trust with respect to the function or activity.⁶⁸

F Exclusions and Defences

1 *Facilitation Payments*

Small ‘facilitation payments’ are excluded from the offences in the Australian *Criminal Code* and US *FCPA*.

Under the Australian *Criminal Code*, the exception applies only where:

- the benefit was minor;⁶⁹

64 See *United States v Aguilar* (CD Cal, No 10-01031-AHM, 20 April 2011) slip op 14 (Matz J).

65 See *United States v Carson* (CD Cal, No 09-77-JVS, 18 May 2011) slip op 12 (Selna J). There is also a suggestion that a mere shareholding would be insufficient, but if a shareholding were combined with ‘additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a government instrumentality’: at 7.

66 In April 2010, the Assistant Chief of the US DoJ indicated that the following factors were relevant to identifying whether an entity was an ‘instrumentality’: (i) the extent of operational control exercised by the foreign government; (ii) the percentage of shares in the company held by the government; (iii) whether the government appoints corporate officers and directors; and (iv) whether the foreign government exercises veto power: Gary Anderson, ‘Strategies for Effective FCPA Compliance in Today’s Global Regulatory Environment’ in *Foreign Corrupt Practices Act Compliance Issues: Leading Lawyers on Responding to Recent FCPA Enforcement Actions, Maintaining an Effective Compliance Program, and Navigating Risk in Emerging Markets (Inside the Minds)* (Aspatore, 2010) 18. Forty-three per cent foreign government ownership has been considered sufficient: DoJ, Information, *United States v Alcatel-Lucent*, (SD Fla, No 10-20906, 27 December 2010) slip op 21.

67 UK *Bribery Act* ch 23, s 3(2).

68 *Ibid* ss 3(3)–(5).

69 ‘Minor’ may be understood in context. See Explanatory Memorandum, Criminal Code Amendment (Bribery Foreign Public Officials) Bill 1999 21 [45], stating that the term enables ‘the court to take all appropriate circumstances into account and to decide whether the nature of the payment in a particular case is minor’. For a useful summary of the legislative history, see Ross Buckley and Mark Danielson, ‘Facilitation Payments in International Business: A Proposal to Make Section 70.4 of the Criminal Code Workable’ [2008] *University of New South Wales Law Research Series* 2.

- the dominant purpose of its provision was to expedite or secure the performance of a minor routine government action;⁷⁰ and
- an appropriate record of the payment was created (and retained) as soon as practicable after it was made.⁷¹

The Australian Department of Foreign Affairs and Trade does not condone or encourage facilitation payments and, where they are made, considers them to be a business risk.⁷²

Under the US *FCPA*, the exception applies to ‘facilitating or expediting payment[s] to a foreign official ... the purpose of which is to expedite or secure the performance of a routine governmental action ...’.⁷³

There is no such exclusion under the UK *Bribery Act*. In some cases, however, small facilitation payments may fall outside the scope of the offence of bribery of a foreign public official as they may not be made in order to obtain or retain a business advantage or an improper advantage.⁷⁴

2 Lawful in Country of Receipt

In Australia,⁷⁵ circumstances in which local *written* law requires or permits the benefit to be provided are carved out of the offence of bribing a foreign public official. In the US, it is an affirmative defence if the offering or giving of the benefit was ‘lawful under the written laws and regulations’ of the foreign country.⁷⁶ This carve out does not extend to customary practices. These defences may have particular significance where domestic laws require or permit bidders for local contracts to fund local investment as a *quid pro quo* for winning a tender.

70 The Australian *Criminal Code* excludes certain decisions from the scope of ‘routine government action’. These are decisions about whether to award a new business; whether to continue existing business with a particular person; or the terms of new or existing business: Australian *Criminal Code* s 70.4(2)(d). The purpose appears to be to distinguish genuine facilitation payments from discretionary payments: Explanatory Memorandum, Criminal Code Amendment (Bribery Foreign Public Officials) Bill 1999 23 [50]. ‘Routine government action’ may be construed consistently with the US *FCPA* facilitation payment exception. The phrase is ‘in very similar terms to the definition in the *FCPA* thereby achieving the important objective that Australian legislation be on a par with US legislation’: at 23 [49].

71 Australian *Criminal Code* s 70.4(1)(c)–(d). See s 70.4(2) for the definition of ‘routine government action’; s 70.4(3) for record-keeping requirements. A defendant bears an evidential onus in relation to this exception: s 13.3(3).

72 Peter Scott, ‘International Corruption and Trade Sanctions Risks’ (Powerpoint presentation presented at Sanctions and Transnational Crim – Department of Foreign Affairs and Trade, 26 October 2009).

73 US *FCPA* §§ 78dd-1(b), 78-2(b); 78-3(b).

74 The commentaries to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions state that ‘[s]mall “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” ... and accordingly are ... not an offence’: OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials*, n 13, 15 [9].

75 Australian *Criminal Code* s 70.3. The defendant bears an evidential burden: s 13.3(3).

76 US *FCPA* §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1). This defence does not apply where the conduct, though initially unlawful, was later absolved: *United States v Kozeny*, 582 F Supp 2d 535 (SDNY, 2008).

The UK offence of bribing a foreign public official has a narrower carve-out: the offence does not apply if the foreign official was permitted or required by applicable written law to be influenced in the official's capacity as a foreign official by the offer, promise or gift.⁷⁷ In other words, it is not enough that the provision of the benefit was authorised, the actual influence must have been authorised. There may be few circumstances in which this exception will apply.

The UK offence of bribing any person does not have an exception or defence where the benefit was lawful in the country of receipt. However, the offence only applies where (in effect) receipt of the benefit would be 'improper' in the sense that it would be contrary to what was reasonably expected of the recipient.⁷⁸ In identifying what is reasonably expected of the recipient, local custom or practice is to be disregarded except to the extent that local written law permits or requires the relevant conduct.⁷⁹ This provides some room for the operation of a 'lawful under local law' exception.

3 *US FCPA: Small Marketing or Contractual Expenses*

The US *FCPA* contains a special affirmative defence for small marketing or contractually-mandated expenses. The defence applies where the benefit was 'reasonable and bona fide ... such as travel and lodging expenses' and was 'directly related' either to 'the promotion, demonstration or explanation of products or services' or 'the execution or performance of a contract with a foreign government or agency'.⁸⁰ There is no similar defence under Australian or UK law.

G Corporate Liability

Foreign bribery laws are, more than most criminal laws, targeted at corporations. The OECD Convention covers bribery in international *business* transactions. The limitation to the obtainment or retention of business is reflected in the offences in the Australian *Criminal Code* and US *FCPA*. It is also reflected in the UK *Bribery Act* offence of bribing a foreign public official. Each of these offences hinges around the offender intending to obtain a *business* advantage.

1 *Australia*

The Australian *Criminal Code* provides a specific statutory regime for criminal liability. To be liable, a corporation must be attributed with both the physical elements of an offence and the mental (or 'fault') elements of the offence.

77 UK *Bribery Act* ch 23, s 6(3)(b). See also s 6(7). This expressly includes written judicial decisions: s 6(7)(c).

78 UK *Bribery Act* ch 23, s 5(1): 'the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned'.

79 *Ibid* s 5(2).

80 US *FCPA* §§ 78dd-1(c)(2); 78-2(c)(2); 78-3(c)(2).

A physical element of an offence is attributed to a corporation if the conduct was committed by an employee, agent or officer of the body corporate acting within the actual or apparent scope of the person's employment or authority.⁸¹

According to the statutory regime, a body corporate is deemed to have the requisite 'fault elements' for an offence if the body corporate 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'.⁸² Authorisation or permission can be established in several ways, including where:

- the board of directors⁸³ or a 'high managerial agent'⁸⁴ (in effect, a senior officer) either carried out the conduct or authorised or permitted the offence;
- there was a 'corporate culture'⁸⁵ within the body corporate that directed, encouraged, tolerated or led to non-compliance with the offence;⁸⁶ or
- the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.⁸⁷

The scope of these provisions is untested, but they are potentially broad. In the context of foreign bribery, the provisions concerning corporate culture direct particular attention to the adequacy of a corporation's compliance program. The program must be both sound on paper and implemented and monitored effectively.

In addition to the statutory regime, the pre-existing common law encompassing 'directing mind and will' doctrines may continue to operate, at least where the common law would provide for broader liability than the Australian *Criminal Code*.

2 US

US law provides for broad corporate criminal culpability. A body corporate is liable for the conduct of persons acting for and on behalf of the corporation.⁸⁸ Broad corporate liability principles are tempered by US prosecution policy. The result is that there is substantial enforcement discretion; and enforcement practices may be as important as legal provisions. We discuss these trends in Part III below.

81 Australian *Criminal Code* s 12.2.

82 Ibid s 12.3(1).

83 Ibid s 12.3(2)(a).

84 Ibid s 12.3(2)(b). A 'high managerial agent' is an 'employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy'. Where liability can only be sheeted home to the body corporate under this provision, the body corporate has a defence of due diligence: s 12.3(3).

85 'Corporate culture' is defined to mean 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place': ibid s 12.3(6). The reference to corporate culture 'in the part of' the body corporate may have the effect that a corporation may be liable where there is merely one 'renegade' department, such as a regional sales team.

86 Ibid s 12.3(2)(c).

87 Ibid s 12.3(2)(d).

88 See *United States v Hilton Hotels Corp*, 467 F 2d 1000, 1007 (9th Cir, 1972).

3 UK

The UK *Bribery Act* creates a discrete offence of failure by a commercial organisation to prevent bribery by an ‘associated person’.⁸⁹ This offence is broad. It applies to ‘commercial organisations’ (as described in Part II, above), which include businesses which carry on business in the UK. Liability is strict. The corporation commits an offence unless it can prove it had adequate procedures in place to prevent associated persons committing bribery.

The offence applies where a person ‘associated’ with a commercial organisation bribes another person (either under the specific offence of bribing a foreign public official or the general offence of bribing another person)⁹⁰ intending to obtain or retain business or a business advantage for the organisation.⁹¹ The UK Bribery Act Guidance indicates that, if the commercial organisation is to be convicted, the prosecution must prove beyond reasonable doubt the commission of the offence by the associated person.⁹²

An ‘associated person’ is a person who ‘performs services for or on behalf of’ the commercial organisation.⁹³ ‘Associated persons’ could (depending on the circumstances) include sales agents, contractors, subsidiaries, joint venture entities, joint venture partners and others. The UK *Bribery Act* Guidance sets out principles to assist in identifying who might be considered ‘associated persons’. These include, for example, that ordinarily participants in a supply chain will only be ‘associated’ with their immediate contractual counterparty in the chain.⁹⁴

There is a defence if it is proved that the organisation ‘had in place adequate procedures designed to prevent’ associated persons from committing the offending conduct.⁹⁵ Information on appropriate procedures is set out in the UK *Bribery Act* Guidance. The procedures are detailed, but are non-prescriptive and based around six key principles. The premise of the guidance is that the mere

89 UK *Bribery Act* ch 23, s 7(1).

90 It appears that this includes circumstances in which the associated person is only secondarily liable by, eg, being guilty of aiding, abetting, counselling or procuring the offence. It also appears that the prosecution must show that the associated person would be guilty if prosecuted: Explanatory Notes, *Bribery Act 2010* (UK) [51]. It is not apparent whether the ‘associated person’ must be prosecutable, in the sense that they are a person covered by the provisions of the Act (eg, because they are a British citizen) or whether it is sufficient if the associated person engaged in conduct, which, if they were prosecutable, would constitute the offence.

91 UK *Bribery Act* ch 23, s 7(1).

92 UK *Bribery Act* Guidance, above n 12, 9 [13].

93 UK *Bribery Act* ch 23, s 8(1). Section 8(3) provides that the person may be the organisation’s ‘employee, agent or subsidiary’. Section 8(4) directs that, in applying section 8(1), regard is to be had to ‘all the relevant circumstances’. Section 8(5) provides that an employee of a corporation is deemed to be an associated person unless the contrary is shown.

94 UK *Bribery Act* Guidance, above n 12, 16 [39]. See also 16–7 [37]–[42].

95 UK *Bribery Act* ch 23, s 7(2). It appears that the standard of proof on the defendant is the balance of probabilities: Explanatory Notes, *Bribery Act 2010* (UK) [50]. Section 9 of the UK *Bribery Act* obliges the Secretary of State to publish guidance about procedures that can be put in place to prevent associated persons from bribing. There is no specific statutory provision deeming that an organisation which shows it has implemented the guidance will be considered to have made out the defence.

occurrence of bribery by an associated person does *not* mean that the organisation had inadequate procedures. The principles are as follows:⁹⁶

- ‘proportionate procedures’ – an organisation’s procedures should be proportionate to the risks it faces, and the nature, scale and complexity of the organisation’s activities;
- ‘top-level commitment’ – top management should be committed to bribery prevention and foster a culture in which bribery is unacceptable;
- ‘risk assessment’ – the organisation should periodically assess its bribery risks in an informed and documented manner;
- ‘due diligence’ – having regard to assessed risk and the principle that procedures need only be proportionate, organisations should apply due diligence procedures in respect of persons performing services for the organisation;
- ‘communication (including training)’ – bribery prevention procedures should be ‘embedded’ in the organisation; and
- ‘monitoring and review’ – bribery prevention procedures should be periodically monitored and (where necessary) improvements made.

In addition to the discrete offence, existing ‘directing mind and will’ principles – according to which a body corporate is attributed with the state of mind of persons who may properly be regarded as *the corporation* and not merely the body corporate’s servant or agent⁹⁷ – may render a body corporate directly liable for one of the standard bribery offences.

In these circumstances, the purpose of the specific statutory bribery provisions assist in identifying who may constitute a body corporate’s directing mind and will.⁹⁸ In other words, a person ‘low’ in the hierarchy of a body corporate may constitute directing mind and will if that is consistent with the statutory purpose. In the case of foreign bribery laws, where the offensive conduct may often be expected to be carried out by a low-level employee, far from corporate ‘headquarters’, it may be arguable that the statute was intended to sheet home liability to the corporation in precisely those circumstances. Given this, and while it is yet to be judicially tested, the category of persons who constitute ‘directing mind and will’ for the purposes of the UK *Bribery Act* may be extensive.

96 *UK Bribery Act Guidance*, above n 12, 21–31. These are similar to the principles set out in the US Sentencing Commission, *Guidelines Manual* (2009) ch 8.

97 See *Tesco Supermarkets Pty Ltd v Natrass* [1972] AC 153. Ordinarily, the ‘board of directors, the managing director and perhaps other superior officers of a company’ constitute directing mind and will: at 171 (Reid LJ).

98 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 511.

H Sanctions

Sanctions for bribery are large and growing. For bodies corporate, the Australian *Criminal Code*⁹⁹ provides for a fine of the larger of 100 000 penalty units (currently \$11 000 000), three times the value of the benefit received, or (where a Court cannot determine the value of the benefit received), 10 per cent of the body corporate's annual turnover.¹⁰⁰ For individuals, the penalty is 10 000 penalty units (\$1 100 000) or up to five years' imprisonment.¹⁰¹

The US *FCPA* provides, in cases of wilful violation, for fines of up to \$25 000 000 for corporations (other than issuers) and \$5 000 000 or 20 years' imprisonment for individuals.¹⁰² For 'issuers' and individuals associated with issuers, fines and imprisonment are less severe, but nevertheless substantial.¹⁰³

In the US, the US DoJ and SEC are also increasingly requesting that companies 'disgorge' any profits achieved in consequence of the illegal conduct.¹⁰⁴ Fines added to disgorgement can result in hefty financial penalties – the Siemens settlement, eg, was \$800 million, including \$330 million in disgorged profits. The amount required to be disgorged often pushes the total settlement above the maximum fine permissible under the US *FCPA*.¹⁰⁵

The UK *Bribery Act* provides for an unlimited fine or (for individuals) 10 years' imprisonment.¹⁰⁶

In addition to these direct legal sanctions, companies involved in bribery face a range of further, less direct sanctions:

- companies convicted of bribery may be debarred from obtaining government contracts or ruled ineligible to receive export licences;¹⁰⁷
- investigation costs, both in financial terms and in terms of diversion of management attention, are substantial. Financial costs often include the costs of conducting an internal investigation to assess and manage risk, and the costs of complying with regulatory investigations. Siemens, eg, spent more than USD950 million – more than the quantum of its settlement figure – in professional fees for external lawyers and

99 Sanctions were substantially increased by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth). These penalties only apply to offences committed after the commencement of those provisions (20 February 2010): *Crimes Act 1914* (Cth) s 4F(1).

100 Australian *Criminal Code* s 70.2(5).

101 *Ibid* s 70.2(4).

102 US *FCPA* § 78ff(a). The maximum penalty may be affected by the US Sentencing Guidelines Manual. See Baker, above n 9, 667.

103 US *FCPA* § 78ff(c).

104 In 2010, 96 per cent of penalties levied by the SEC under the US *FCPA* were through disgorgement: Mike Koehler, SEC Enforcement of the FCPA – 2010 Year in Review on *FCPA Professor* (11 January 2011) <<http://fcpprofessor.blogspot.com/2011/01/sec-enforcement-of-fcpa-2010-year-in.html>>.

105 Koehler, 'The Facade of FCPA Enforcement', above n 42, 983.

106 UK *Bribery Act* ch 23, s 11(1)–(3).

107 See, eg, in the US *Federal Acquisition Regulation*, 48 CFR § 9.406-2 (2009).

accountants, and fees for document collection, preservation and storage;¹⁰⁸

- companies may be required to pay back taxes and interest on corrupt payments improperly recorded as deductions;¹⁰⁹
- regulators, particularly US regulators, may require, as a condition of settlement, that the company appoint (and pay for) an independent monitor of anti-corruption compliance.¹¹⁰ The appointed compliance officer may be required to provide periodic reports to the regulator, something which many corporations may consider to be intrusive; and
- even before conviction, the announcement of an investigation of course has significant reputational consequences.

I Books, Records and Disclosure

The US *FCPA* has special provisions obliging issuers to maintain internal accounting records.¹¹¹ The intention is to deter bribery by mandating transparent recording of financial transactions. The obligation is twofold: first, to make and keep records which are reasonably detailed ‘accurate and fairly reflect the transactions and dispositions of the assets of the issuer’; and, second, to devise and maintain sufficient internal accounting controls to provide reasonable assurances that (amongst other things) transactions are recorded in accordance with management authority and to enable accountability of assets and that access to assets is permitted only in accordance with management authority.¹¹² An issuer’s duty is lower with respect to the controls of an entity in which the issuer holds 50 per cent or less of the voting power – in that case, the issuer’s duty is only to ‘proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances’ to cause the firm to implement adequate controls.¹¹³ Criminal penalties apply where a person knowingly fails to implement a system of internal accounting controls or knowingly falsifies books or accounts kept in accordance with the obligation.¹¹⁴

108 Zack Harmon, ‘Confronting the New Challenges of FCPA Compliance: Recent Trends in FCPA Enforcement and Practical Guidance for Meeting these Challenges’ in *Foreign Corrupt Practices Act Compliance Issues*, above n 66, 4.

109 For example *Income Tax Assessment Act 1997* (Cth) ss 25–52 denies deductibility to a taxpayer for outgoings determined to be bribes to foreign public officials.

110 For example, after settling with the US DoJ in 2008, Siemens was required to install a compliance monitor for four years, implement an extensive compliance program and report regularly to the US DoJ: Department of Justice (US), *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines* (December 15 2008) Department of Justice <<http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>>.

111 These operate in *Securities Exchange Act of 1934* 15 USC §13(2)(b).

112 US *FCPA* § 78m(b)(1). ‘Reasonable assurances’ and ‘reasonable detail’ are defined to mean ‘such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs’: § 78m(b)(7). For the factors the SEC considers, see SEC Notice of Withdrawal of Proposed Rules Regarding Statement of Management on Internal Accounting Controls, 45 Fed. Reg. 40, 135–43 (1980).

113 US *FCPA* § 78m(b)(6).

114 *Ibid* § 78m(b)(5).

US regulators are increasingly relying on ‘books and records’ prosecutions as an indirect avenue to penalise bribery. This may suit both the prosecution (because the offence is easier to prove than bribery) and the defendant company (since sanctions are lower, and the risk of debarment that would follow on a bribery conviction is avoided).

The Australian *Criminal Code* foreign bribery provisions and the UK *Bribery Act* do not contain specific provisions governing record-keeping and accounting controls. However, failures of this kind may of course bear on the attribution of mental elements to a body corporate (under the Australian *Criminal Code* corporate culture provisions) and the application of the UK *Bribery Act* offence of failure to prevent bribery. In addition, other laws may impose general record-keeping obligations. For example, Australian income tax and corporations laws require the keeping of records that adequately explain transactions.¹¹⁵ The Australian Securities & Investments Commission and the Australian Taxation Office may have jurisdiction to investigate and enforce the laws in these circumstances.¹¹⁶ Similarly, UK companies legislation requires companies to keep ‘adequate accounting records’ to show and explain the company’s transactions.¹¹⁷

Some laws may also positively require disclosure of payments to foreign public officials. For example, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection legislation in the US amended section 13(q) of the *Securities Exchange Act* to require ‘resource extraction issuers’ (a definition which is likely to include Australian resources companies which are ‘issuers’ under the US *FCPA*) to disclose payments (excluding *de minimis* payments) to foreign governments (including, relevantly, ‘instrumentalities’ of foreign governments, who may be ‘foreign officials’ for the purposes of the US *FCPA*) for the purpose of the commercial development of oil, natural gas or minerals.

The SEC has also taken the view in several cases that the failure to disclose payments in SEC filings to public officials constitutes a failure to disclose a material fact in violation of securities laws.¹¹⁸

J Alternative Liability Risks

It is beyond the scope of this article to set out all the grounds on which a corporation implicated in bribery might find itself liable. Nevertheless, particularly in US courts, companies implicated in bribery are increasingly finding themselves open to a multi-pronged yet predictable attack.

115 *Income Tax Assessment Act 1936* (Cth) s 262A; *Corporations Act 2001* (Cth) s 286. Forgery laws may also apply to falsified records: see Australian *Criminal Code* Pt 7.7.

116 ASIC has expressly acknowledged its functions in respect of record-keeping regarding bribery-related transactions: ASIC, *ASIC’s OECD related work*, Australian Consumer Investment Commission <<http://www.asic.gov.au/asic/asic.nsf/byheadline/OECD+Convention+on+Combating+Bribery+of+Foreign+Public+Officials+in+International+Business+Transactions?openDocument>>.

117 *Companies Act 2006* (UK) c 36, s 386.

118 See the discussion in Witten et al, above n 53, 701–2.

In the past three years, US companies implicated in bribery have found themselves liable to:

- suits by regulators for ‘federal’¹¹⁹ contraventions of state bribery laws, which apply to kickbacks paid to *private individuals* overseas as well as bribery of foreign officials. The UK *Bribery Act* of course directly applies to private kickbacks – this offence may be of particular significance for Australian companies with UK-incorporated subsidiaries. In Australia, state ‘secret commissions’ offences, which criminalise private kickbacks, may have a broad extra-territorial operation;¹²⁰
- suits in US courts by victims of foreign bribery in the country of bribing (e.g. foreign governments). In *June* 2008, eg, the Iraqi government filed a civil lawsuit in a New York Federal Court seeking more than \$10 billion compensation against dozens of companies for corrupt activities in connection with the oil-for-food program;¹²¹
- suits by competitors for harm caused by unlawful conduct;¹²²
- suits by shareholders for failure to disclose bribery conduct;¹²³ and
- suits against directors and officers for failures to take care by not implementing appropriate compliance systems with respect to foreign bribery.¹²⁴

While Australia and the UK are yet to see many companies being exposed to these kinds of liability, there is clearly a risk given both analogous legal rules and the increasing international coordination of responses from regulators and NGO’s to foreign bribery. Of course, as evidenced by the March 2010 convictions in

119 The mechanism is through *The International Travel Act of 1961*, 22 USC 2121 (‘*Travel Act*’). The *Travel Act* criminalises the use of any facility of interstate commerce to ‘facilitate the promotion, management, establishment or carrying on of an unlawful activity’. ‘Unlawful activity’ is defined to include bribery in violation of the laws of the State in which conduct was committed. Most US states have laws prohibiting private kickbacks. The US DoJ recently used this path to prosecute, and settle with, Nexus Technologies Inc in September 2010: Federal Bureau of Investigation, *Former Nexus Technologies Inc. Employees and Partner Sentenced for Roles in Foreign Bribery Scheme Involving Vietnamese Officials* (16 December 2010) Federal Bureau of Investigation <<http://philadelphia.fbi.gov/dojpressrel/pressrel10/ph091610a.htm>>. The US DoJ has relied on the *Travel Act* in at least four cases since 2005.

120 Section 70.6 of the Australian *Criminal Code* was intended to save State secret commissions offences in circumstances of overlapping liability: Commonwealth of Australia, *Parliamentary Debates* (10 March 1999) 2546 (Sen. Ian Campbell). For secret commissions offences, see, eg, *Crimes Act 1958* (Vic) ss 175–181. These offences may, in certain circumstances, have extra-territorial application.

121 TI Progress Report, above n 1, 64.

122 See Paul Carrington, ‘Enforcing International Corrupt Practices Law’ (2010) 32 *Michigan Journal of International Law* 129, 134–5.

123 See, eg, the suit by Siemens shareholders: Complaint in *Johnson v Siemens AG*, (EDNY, No 09-CV-5310, 4 December 2009).

124 See, eg, *Grynberg v BG Group, PLC*, F.3d, 2009 WL 2461604 (C.A.D.C.) (D. Mass., 8 April 2009) (alleging breach of duties of loyalty, honesty and care, based on failure to implement or comply with reasonable procedures and to monitor overseas transactions).

China of persons associated with Rio Tinto, enforcement in the country where the bribe takes place remains an ever-present risk.¹²⁵

While it has not yet been a major feature of bribery enforcement,¹²⁶ money-laundering offences will also often be enlivened by the financial transactions related to foreign bribery.¹²⁷

III ENFORCEMENT TRENDS

In this area, regulatory enforcement trends are as important as legal provisions. Very few cases are litigated. Most settle. Far more conduct which technically constitutes bribery occurs than is actually enforced. Accordingly, there is substantial regulatory discretion as to what and against whom to enforce.¹²⁸ Discretion is magnified by the fact that most bribery conduct is an offence against the laws of multiple jurisdictions. Further, few bribery laws have been judicially construed.

In this section, we set out the key current enforcement trends. These trends are largely driven by the practices of the US DoJ and SEC, but are increasingly being influenced by broader transnational trends, including the practices of the UK's SFO and the Overseas Anti-Corruption Unit of the City of London Police. In this section, we set out the key current enforcement trends.

A More Enforcement; Larger Penalties

The clearest, and most significant, trend in foreign bribery enforcement is towards more and heftier enforcement. In 2010, the US DoJ and SEC had 74 enforcement actions under way; this was an 85 per cent increase on 2009, which

125 For a useful overview of domestic enforcement in China, see Joseph F Warin, Michael S Diamant and Jill M Pfenning, 'FCPA Compliance in China and the Gifts and Hospitality Challenge' (2010) 5 *Virginia Law and Business Review* 33, 37–43.

126 In 2008, the SFO settled with Balfour Beatty plc for contravention of the books and records provisions of the *Companies Act 1985* (UK). The SFO obtained civil recovery of £2.25 million under the *Proceeds of Crime Act 2002* (UK), which allows for recovery of property obtained through unlawful conduct. See Serious Fraud Office, *Balfour Beatty Plc* (6 October 2008) <<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx>>.

127 In Australia, many cases of bribery will also enliven the money laundering provisions of Part 10.2 of the *Australian Criminal Code*. Broadly, those provisions apply where: a person deals with money (eg a corporation transfers money); there is a risk that the money will become an instrument of crime (eg that it would be used in the commission of the offence of bribing a foreign public official); and the person 'intended' the money to become an instrument of crime, 'believed' it would become an instrument of crime or was 'reckless' or 'negligent' as to the risk that it would become an instrument of crime. Penalties differ based on the quantum of the money dealt with and the nature of the offender's state of mind. In addition, there is also often an overlap between countries in which bribes are customary and those which are the subject of sanctions. Activities in sanctioned countries raise significant risks in respect of laws prohibiting dealings in those countries or with designated entities or individuals.

128 A leading US commentator calls US DoJ and SEC practice '*de facto* FCPA case law': Koehler, 'The Facade of FCPA Enforcement', above n 42, 907.

was itself a 'record' year.¹²⁹ Of seven foreign bribery cases ever concluded in the UK, five were in 2009 and 2010.¹³⁰ Resourcing of corruption regulators is greater than ever before.¹³¹ Foreign companies are certainly not immune from this trend. In 2010, 90 per cent of penalties for US *FCPA* violations were paid by non-US companies.¹³²

At the same time, sanctions are becoming more severe. The 10 largest US anti-bribery settlements – including Siemens record \$800 million settlement – were all reached between 2008 and 2010. Following 2010 amendments to the Australian *Criminal Code*, a guilty company now faces a fine of up to 10 per cent of the company's annual turnover. Further, as set out in Part II(H) above, companies implicated in bribery often face consequences far beyond the imposition of a fine.

Whistleblowers also have stronger protection than ever before. Indeed, following the 2010 US Dodd-Frank Wall Street reform legislation,¹³³ whistleblowers now have strong financial incentives. That legislation provides for up to 30 per cent of any fine levied by the SEC above \$1 million to be given to the whistleblower who disclosed the relevant violation of anti-corruption laws.¹³⁴ Of course, when conduct is revealed by whistleblowing, particularly when senior company officials were previously unaware of the bribery conduct, the content and timing of the disclosure is out of the company's control and the company may lose any ability to obtain credit for voluntary disclosure.

A further aspect of increased enforcement is the growing targeting of individuals, particularly senior executives.¹³⁵ Since 2010, the US DoJ has charged at least 50 individuals with US *FCPA* violations, up from a handful in 2009.¹³⁶ The US Assistant Attorney-General has described the 'prosecution of individuals as a cornerstone of our enforcement strategy'.¹³⁷ Understandably, targeting senior executives is perceived to be a uniquely effective stick for encouraging corporate compliance.

129 See Gibson Dunn, *2010 Year-End FCPA Update* (3 January 2011) Gibson Dunn Publications <<http://www.gibsondunn.com/publications/Pages/2010Year-EndFCPAUpdate.aspx>>.

130 TI Progress Report, above n 1, 61.

131 Nick Mendelsohn, Head of the Department of Justice's FCPA enforcement wing said, in 2010: 'more resources are being dedicated to this area than ever before': Skip Kaltenhauser, 'Anti-Corruption – US Leads the Way' (2010) 64(1) *International Bar News* 12, 14.

132 Koehler, 'SEC Enforcement of the FCPA' above n 104.

133 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376, (2010).

134 Inserting the new section 21F into the *Securities Exchange Act*.

135 See Kaltenhauser, above n 131, 14.

136 See Dunn, above n 129.

137 Claudius Sokenu, 'FCPA Compliance Issues in the Global Marketplace: New Challenges for Multinational Clients' in *Foreign Corrupt Practices Act Compliance Issues*, above n 66, 2. But see Koehler, 'SEC Enforcement of the FCPA', above n 104, suggesting that individuals are primarily targeted where the conduct is committed by a small corporation: Mike Koehler, 'Interesting, Significant and Bold' (3 January 2011) *FCPA Professor* <<http://fcpaprofessor.blogspot.com/2011/01/interesting-significant-and-bold.html>>.

The trend towards the prosecution of individuals has been supported by a novel ground for liability, which the SEC has recently pressed. Section 20(a) of the *Securities Exchange Act* provides for joint and several responsibility for any person who ‘directly or indirectly, controls’ a person who is liable under the Act. The provision applies to some US *FCPA* offences because the provisions regarding ‘issuers’ – including both the anti-bribery offences and the ‘books and records’ provisions – form part of the *Securities Exchange Act*. The consequence is that an individual (or, in appropriate circumstances, a corporate parent) can be prosecuted for conduct of which they were not aware, so long as the conduct occurred within an area under their control. The 2009 *Nature’s Sunshine Products* case is an example of this ‘control liability’.¹³⁸ *Nature’s Sunshine Products* had allegedly been paying bribes. The CEO and CFO were prosecuted. There was no evidence they were aware of the bribes. The basis of the charge was that they had control of internal compliance and accounting systems. The mere failure to supervise was sufficient.¹³⁹ The UK offence applying to commercial organisations which fail to prevent bribery by an associated person¹⁴⁰ and the corporate culture provisions of the Australian *Criminal Code*¹⁴¹ may of course also apply in similar situations.

A major cause of growing bribery enforcement is improved international cooperation.¹⁴² Cooperation, including mutual legal assistance, extradition, cooperation in asset recovery and the tracing of international financial transactions, forms a key part of international treaty regimes, including the OECD Convention and the 2005 *UN Convention Against Corruption*. Enforcement is also being assisted by stronger transnational systems for tracking and uncovering money laundering.¹⁴³ In the Siemens investigation, for example, US and German regulators coordinated enforcement actions to occur on the same day to maximise effectiveness.¹⁴⁴ Regulators are also cross-referring matters to other jurisdiction’s regulators.¹⁴⁵ The effect of this is that it is increasingly difficult to ‘fall through the cracks’.

B Cooperation and Pre-Trial Settlement

A second trend is cooperation between regulators and companies implicated in foreign bribery. Typically, this culminates in pre-trial settlement. US regulatory practice encourages voluntary disclosure of suspicious conduct and cooperation with investigations and settlement offers. Under the US Prosecution

138 This case was settled before going to trial: United States Securities and Exchange Commission, ‘SEC Charges Nature’s Sunshine Products, Inc With Making Illegal Foreign Payments’ (Litigation Release, No 21162, 31 July 2009).

139 Sokenu, above n 137, 5.

140 UK *Bribery Act* ch 23, s 7.

141 Australian *Criminal Code* s 12.

142 See Sokenu, above n 137, 1.

143 TI Progress Report, above n 1, 16.

144 Kaltenhauser, above n 131, 14.

145 See Sokenu, above n 137, 9 (reference to the SFO from the US DoJ).

Principles, voluntary disclosure may result in a corporation not being charged at all.¹⁴⁶ It may also mitigate the severity of sanctions sought. For example, in the large 2008 Siemens case, following extensive cooperation by Siemens (which spent close to \$1 billion on a multinational legal review) the US DoJ settled for a fine of just USD450 million, well below the \$2.7 billion it could have pressed at trial.¹⁴⁷ Similarly, the key UK regulators, the SFO and the Director of Public Prosecutions, have published guidance on prosecution policy in respect of the UK *Bribery Act* ('UK Joint Prosecution Guidance') which encourages leniency in cases of self-reporting and cooperation.¹⁴⁸

In the US, corporations now depart on a well-trod path once the US DoJ or SEC commence an investigation. This begins with a factual investigation (conducted by both the corporation and the regulators); then proceeds to 'advocacy' by the corporation under investigation on key issues of fact, law and regulatory discretion; and typically culminates in a negotiated settlement (or, failing that, a trial). The process is iterative. For example, if new issues are identified at the advocacy stage, further factual investigations may result. At each stage companies face a complex calculus – balancing strategic cooperation against the desires not to wantonly disclose information or to alert the regulators to the tactics, which might be adopted in any defence in court.

US and UK regulators are increasingly settling foreign bribery matters involving a corporate defendant before hearing.¹⁴⁹ A significant feature of these pre-trial settlements in the US and UK¹⁵⁰ is that regulators often do not seek a conviction for bribery. Instead, regulators are pressing offences, such as 'books and records offences', which are related to bribery, but which do not carry the same degree of legal or reputational sting. The reasons appear to be a desire to avoid the expense that would result from a vigorous defence and also the perceived severity of the consequences (particularly debarment) which flow for a company convicted of bribery. In the Siemens case, the US DoJ charged the parent with books and records violations, in part because of the 'collateral

146 'Principles of Federal Prosecution of Business Organizations' in *United States Attorney Manual* [9.28.700] – [9.28.720], [9.28.750].

147 See the comments of Lanny A Breuer (Speech delivered at the 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance, Washington DC, 26 May 2010) 5 <<http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf>>.

148 See Crown Prosecution Service, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* 7, 9.

149 See, eg, Koehler, 'The Facade of FCPA Enforcement' above n 42, 1006–7. There has been some recent judicial disquiet about the informality and leniency of sanctions pressed by the regulators. See, eg, Simon Neville, 'Blow for BAE over 'Corruption' Case', *Daily Mail* (London) 21 December 2010 (referring to 'stinging criticisms' from the judge, Bean J, in respect of the vague drafting and the 'general amnesty' which the plea bargain created for BAE). There is some suggestion that, following these criticisms, the SFO will start involving judges earlier in the settlement process: Dan Atkinson, 'SFO Boss Calls for Shake-up after BAE Case', *Mail on Sunday* (London) 26 December 2010. In the US, pre-trial settlements typically take the form of 'deferred prosecution agreements' or 'non-prosecution agreements'. These are privately negotiated, and then blessed by a judge.

150 For example, the 2008 Balfour Beatty plc settlement, in which the SFO pressed charges for contravention of record-keeping requirements in the *Companies Act 1985* (UK).

consequences' that could have resulted from anti-bribery charges, including the 'risk of debarment and exclusion from government contracts'.¹⁵¹

While this trend may often be positive for companies, it raises difficult challenges. In the case of disclosure, for example: should the company voluntarily disclose; and when and what should be disclosed? There are risks in not disclosing. Failure to publicly disclose may be an offence in itself;¹⁵² delayed disclosure may raise the ire of regulators; or the matter may be taken out of the company's hands if there is a whistleblower. Equally, there are risks in disclosing too soon, particularly before an internal review has been able to identify the scope and severity of the conduct. Further, absent a statutory duty to disclose, disclosure may breach confidence or waive privilege.

C Industries under the Spotlight – A Possible Focus on the Financial Services Industry?

The US DoJ has recently commenced conducting industry-wide investigations.¹⁵³ This makes sense: where one company is found to be corrupt, particularly where that is known to, but has not been disclosed by, competitors, it may indicate an industry-wide problem. Further, the investigation of one company often has a ricochet effect, turning up suspicious conduct by market competitors.

There is some evidence that the financial services industry, which has so far largely avoided regulatory attention, may be one of the next targets. In May 2010, the UK Financial Services Authority ('FSA') published detailed guidance on anti-bribery and corruption measures for commercial insurance brokers and indicated it intended to turn its sights on investment banks.¹⁵⁴ This followed a record fine of £5 250 000 levied by the FSA on financial services company, Aon Limited, in early 2009 in respect of corruption allegations.¹⁵⁵ In January 2011, US newspapers reported that the SEC had initiated a broad industry probe into financial services firms in respect of dealings with sovereign wealth funds.¹⁵⁶

It is not difficult to see why financial services firms may make an attractive target for regulators. Large financial services firms often deal with foreign officials, particularly when dealing with representatives of sovereign wealth

151 Koehler, 'The Facade of FCPA Enforcement' above n 42, 992–3. The information against BAE similarly lacked US *FCPA* bribery charges: at 995.

152 For example, laws requiring disclosure to the market of material information of which the company is aware may apply. See also *Crimes Act 1900* (NSW) s 316(1), regarding failure, without reasonable excuse, to disclose evidence of the commission of a serious indictable offence.

153 Kaltenhauser, above n 131.

154 Financial Services Authority, *Anti-bribery and Corruption in Commercial Insurance Broking – Reducing the Risk of Illicit Payments or Inducements to Third Parties* (2010) <http://www.fsa.gov.uk/pubs/anti_bribery.pdf>.

155 Financial Services Authority, *FSA Fines Aon Limited £5.25m for Failings in its Anti-bribery and Corruption Systems and Controls* (8 January 2009) <<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/004.shtml>>

156 See, eg, Peter Lattman and Michael De La Merced, 'US Studies Sovereign Fund Deals' *International Herald Tribune* (15 January 2011) 13.

funds or government-owned banks, or when acting as custodians of assets for foreign state-owned enterprises. Sales practices in the financial services industry, which include wide use of sales agents, remuneration structures based around commissions and lavish treatment of potential or existing foreign investors, all raise red flags for regulators. Further, following the ‘global financial crisis’, demand and competition for foreign capital (often through foreign governments) may have increased at the same time as domestic attention on financial services firms has increased.

IV ISSUES FOR AUSTRALIAN COMPANIES

A Key Issues

In this section, drawing on international enforcement trends, laws covering foreign bribery and standard business practices, we set out key issues for Australian companies when conducting business overseas. In Part IV(G)-(H) below, having regard to these key issues, we set out an overview of current best practice in establishing a general compliance program to manage bribery risk.

B Foreign Intermediaries: Consultants, Agents, Partners, Joint Venturers and Foreign Subsidiaries

Many companies operating overseas do so through intermediaries. Intermediation may take many forms, from the engagement of a foreign consultant to advise on local issues to the establishment of a local operating subsidiary. The use of intermediaries raises significant risks. It is not a defence that bribery occurred through a foreign intermediary – companies may be directly or indirectly liable for the conduct of such intermediaries. Far from avoiding liability, extensive use of intermediaries may be a red flag to regulators: 91 per cent of US foreign bribery cases in 2009 involved allegations that payments were made through intermediaries.¹⁵⁷

How may companies be liable for the conduct of their intermediaries? Based on the breadth of anti-bribery offences, companies can be ‘directly’ liable for conduct that ostensibly occurs through foreign intermediaries. For example, the Australian *Criminal Code* offence applies where a person *causes* another person to make an illegitimate offer to another. Under the US *FCPA*, a corporation may be liable if it *authorised* the act in furtherance of the corrupt payment or if it knew the intermediary was going to disburse money to a foreign public official.

Companies may also be attributed with the conduct of their foreign intermediaries. Under the Australian *Criminal Code*, eg, a company is attributed with physical elements of a foreign intermediary acting as the agent of the Australian body corporate. The company may be attributed with the mental elements of the offence of bribery if the company failed to maintain a corporate

157 Harmon, above n 108, 11.

culture (either generally or in a specific area, such as its regional sales operations), which required the intermediary to abide by bribery laws. Under US corporate criminal laws, companies are in effect strictly liable for the conduct of foreign intermediaries acting for and on behalf bodies corporate that are within the US *FCPA*'s coverage.¹⁵⁸ The UK Joint Prosecution Guidance specifically refers to 'directing mind and will' principles, acknowledging that a body corporate may be liable if a person constituting the body's directing mind and will 'encourages or assists' another person to commit bribery.¹⁵⁹

Companies may also be 'indirectly' liable for the conduct of their foreign intermediaries. This kind of indirect liability may arise in a myriad of ways. Companies may be secondarily liable for the offence of a foreign intermediary if, eg, their conduct constituted attempt, conspiracy, aiding and abetting or inciting the bribe. The UK *Bribery Act* offence of failing to prevent bribery by an associated person is also clearly targeted at sheeting home liability to corporations for conduct ostensibly committed by foreign intermediaries.

The risks in using foreign intermediaries are obvious. The challenge for companies is that using a foreign intermediary is often commercially desirable¹⁶⁰ or legally necessary. Intermediary selection, supervision and (as appropriate) disciplining is critical to managing risk in this area.

Based on US DoJ¹⁶¹ and UK Ministry of Justice¹⁶² guidance, with respect to foreign intermediaries, companies should consider:

- ensuring there is a real commercial justification for the use of the intermediary. Relevant questions are: is the intermediary really required? Does the intermediary's expertise match the task? Is there a risk that the choice of intermediary may be perceived to be motivated solely by connections with government officials?
- conducting and documenting due diligence in advance of hiring, including: obtaining references; obtaining information on familial connections between the intermediary and people in government positions, particularly in government procurement; obtaining information on owners, partners and principals;

158 In deciding whether to enforce US criminal laws against corporations, and in deciding the severity of sanctions to request, US regulators take into account any diligence exercised by the corporation with respect to avoiding the offensive conduct: see 'Principles of Federal Prosecution of Business Organizations' in *United States Attorney Manual* [9.28.800].

159 Crown Prosecution Service, above n 148, 11.

160 One scholar has pointed out: 'only a foolish principal would retain an agent *without* influence': Matthias Scherer, 'Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals' (2002) 5 *International Arbitration Law Review* 29, 30.

161 See, eg, Department of Justice (US), 'Foreign Corrupt Practices Act Review' (Opinion Procedure Release, No 06-02 (31 December 2006)); Department of Justice (US), 'Foreign Corrupt Practices Act Review' (Opinion Procedure Release, No 01-03, 11 December 2001). See also John Hatchard, 'Recent Developments in Combating the Bribery of Foreign Public Officials: A Cause for Optimism?' (2007) 85 *University of Detroit Mercy Law Review* 1, 21–2.

162 See especially *UK Bribery Act Guidance*, above n 12, 27–8, 35, 38, 41.

- incorporating appropriate provisions in the intermediary's engagement, including: undertakings to abide by the corporate code of conduct and anti-corruption laws; requiring the intermediary to regularly certify ongoing compliance with contractual undertakings; provisions for immediate termination of the engagement¹⁶³ and (if possible) the forfeiting of accrued commissions upon evidence of breach of the anti-corruption undertakings; a right to audit the intermediary's accounts;¹⁶⁴ provision for regular reporting from the intermediary; and (in appropriate circumstances) making the engagement renewable annually or periodically;
- considering remuneration structures, with a particular view to ensuring that they reflect a commercial return on the stated work completed by the intermediary and, where a commission structure is used, that there is good reason for choosing that remuneration structure over a flat-fee retainer;
- being alert to suspicious conduct by the intermediary, including requests for pre-payment of expenses, requests for payment to a third party or a third country, and requests for reimbursement for extraordinary, ill-defined or last-minute expenses;
- in the case of joint ventures, incorporating parity of board representation into the joint venture agreement and establishing an audit committee with power to review joint venture accounts;¹⁶⁵
- providing anti-corruption training for foreign intermediaries and employees dealing with foreign intermediaries; and
- if evidence of corruption comes to light after the intermediary has been engaged, ensuring that, if the engagement is to continue, the matter is fully investigated, continues to be monitored and (if necessary) regulators are informed.

US DoJ opinions indicate that companies need to be particularly cautious when an intermediary is *themselves* a foreign official.¹⁶⁶ As an example, a local police officer may be retained to provide security services for a mine site operated by a foreign corporation. There is nothing intrinsically unlawful engaging a foreign official, at least when the engagement is entirely unrelated to the person's official functions. Foreign bribery offences apply to benefits intended to influence the public official *in their capacity as a foreign official*: a commercial retainer, in an area unrelated to the official's duties, may generally not be accompanied by such an intention.

163 The US DoJ indicated that a 'materially adverse effect' standard for terminating a joint venture was unduly restrictive: Department of Justice (US) (Opinion Procedure Release, No 01-01, 24 May 2001).

164 Which should be exercised, as appropriate.

165 *UK Bribery Act Guidance*, above n 12, 35.

166 Particular risks may arise where payments are made to a media organisation for favourable media coverage and (as is the case in many countries, including China) the media organisation is controlled by the government.

The risk is, however, that either in fact or perception, the engagement will be related to influencing or taking advantage of the person's official capacity. DoJ guidance indicates that the key to avoiding risk is to ensure that: the arrangement is transparent to the foreign government and complies with local law; and there are safeguards preventing the official from improperly using the position to assist the company.¹⁶⁷ The former may require disclosure and local legal advice. The latter may require a structure which clearly separates 'official' and 'unofficial' functions, a recusal policy and contractual warranties from the intermediary that the official position will not be abused. In any case, extreme caution would be necessary, and it may be appropriate only to retain a foreign official when necessary and after obtaining legal advice.

C Who is a 'Public Official'?

Most foreign bribery laws are directed at relations with public officials. This raises the issue of whether, in formulating internal policies, companies should distinguish relations with 'public officials' from other sales efforts. There are at least four reasons why it is not easy for companies to adopt this course.

First, definitions of 'public official' differ between jurisdictions.¹⁶⁸ The Australian *Criminal Code* definition extends to several pages; the US *FCPA* definition is substantially shorter, but covers (unlike Australia) candidates for political office.

Second, even where there is overlap, there is no clear, judicial elaboration of the provisions. In this vacuum, the US DoJ has, in recent years, taken an increasingly broader view of who constitutes a foreign public official.¹⁶⁹ The US DoJ, eg, considers employees of state-owned (or state-controlled) enterprises ('SOE's') to be foreign public officials. In some countries, SOE's comprise a vast swathe of business activity.

Third, the facts identifying a person as a public official are often not apparent. Whether someone is a public official will often turn on the degree of government control of their employer. In countries such as China, which have extensive economic centralisation, this will rarely be obvious. There are also difficult issues in circumstances where, eg, a sovereign wealth fund has taken a large, but professedly passive, stake in an otherwise private company. There may be further difficult issues in respect of formerly private entities which, following the global financial crisis, are now majority-owned by foreign governments.

Fourth, in any event, as set out in Part II(J), above companies are increasingly being targeted for kickbacks to private individuals as much as public bribery.

Given enforcement priorities, the risks are of course likely to be greater with respect to dealings with public officials. Nevertheless, in the circumstances, it

167 See, eg, Department of Justice (US), 'Foreign Corrupt Practices Act Review' (Opinion Procedure Release, No 10-03, 1 September 2010) 3; Department of Justice (US), (Opinion Procedure Release, No 01-02, 18 July 2001).

168 See above Part II(E).

169 See Koehler, 'The Facade of FCPA Enforcement' above n 42, 907.

may become increasingly worthwhile for companies to adopt *blanket* policies applicable regardless of whether the target of business development activities is public or private.

D Business Development Through In-Kind Benefits: Gifts, Hospitality and Promotional Expenditure

Contrary to widespread perception, and broad business practice, in-kind benefits, such as gifts, travel, entertainment and per diems are *all* capable of constituting bribery *and* are often the subject of enforcement.

Australian, US and UK bribery laws are not limited to financial benefits – the proverbial ‘cash in the brown paper bag’. The elements of the illegitimate transaction – an offer of a ‘benefit’ or ‘anything of value’ – are broadly defined, and deliberately so. As set out in Part II(C)(2) above, in kind benefits have been the subject of enforcement.

In the case of in-kind benefits, the key issue is often whether there is some express or tacit quid pro quo – was the provision of the benefit accompanied by an intention to influence. The smaller and more generic the benefit, the more difficult it is to establish the requisite culpable state of mind – an intention to influence a person.¹⁷⁰ The *UK Bribery Act Guidance* uses the phrase ‘sufficient connection’ to describe what, in the Ministry of Justice’s opinion, is necessary to link the benefit and the desired effect on the public official.¹⁷¹ This is not a statement of law, but it may be a useful guide. Generally, the more proximate the actual or perceived connection between the benefit provided and a potential advantage which may be provided by a public official, the more likely the requisite intention may be considered to exist. Factors relevant to identifying that proximity may include:

- the nature of the gift or hospitality – is the nature of the gift or hospitality of a kind (eg, because of its lavishness) to inevitably raise an inference that it was accompanied by an intention to influence;
- time – how long will elapse between the provision of the hospitality and public officials considering whether to provide the corporation with an advantage;
- specificity of the quid pro quo – is the advantage that might be conferred by the public official something specific (eg, a particular licence) or something generic and distant from a particular benefit (eg, collegiate feeling between the official and the foreign corporation); and

170 This is *a fortiori* in the case of the bribery of foreign public official offences, where the intention must be (in effect) to influence a foreign public official *in order to obtain or retain a business advantage*.

171 *UK Bribery Act Guidance*, above n 12, 13 [28]. The guidance states: ‘[I]n many cases ... the question as to whether such a connection can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances. It would include matters such as the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular public official has over awarding the business’.

- interposition – is the benefit being directly provided to a public official who will be responsible for considering whether to allocate advantages to the corporation, or is there instead some interposed person or entity to whom the benefit is being provided.

Further, where a company reimburses a foreign official's expenses, this may not constitute a 'benefit' to the official if the official's expenses would clearly otherwise have been borne by the foreign government. Under the US *FCPA*, there is also the specific, and useful, defence for reasonable and bona fide expenses directly related to the promotion of products.

The challenges for companies in this area are immense. The provision of gifts and hospitality to current or potential clients is, to a greater or lesser extent, culturally ingrained worldwide. The line between 'bribery' and 'mere networking' is fine. Further, what may constitute mere networking in one jurisdiction may of course be considered bribery in another. In this area, there is a kind of 'race to the top', with the most restrictive jurisdiction's laws setting the global standard. There is also inevitably a disparity between what is technically unlawful and which unlawful conduct is in fact the subject of enforcement.¹⁷²

The *UK Bribery Act Guidance* captures the difficulty corporations face. On the one hand, it indicates that the *UK Bribery Act* was not intended to prohibit 'reasonable and proportionate' hospitality and gives as an example of something which would be 'extremely unlikely' to constitute bribery an invitation to foreign clients to attend a rugby match at Twickenham 'as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field'.¹⁷³ On the other hand, it states that 'hospitality and promotional or other similar business expenditure can be employed as bribes'.¹⁷⁴

As indicated by this last comment in the *UK Bribery Act Guidance*, enforcement *does* occur in this area and, unsurprisingly, enforcement is particularly intense in respect of conduct in regions where hospitality and gifts are most culturally necessary. For example, 13 of the 27 US *FCPA* prosecutions between 2002 and 2010 concerning China involved allegations of gifts, meals, travel and entertainment.¹⁷⁵ Most recently, in March 2011, IBM settled charges brought by the SEC concerning the provision of overseas trips, entertainment and improper gifts to Chinese officials.¹⁷⁶

172 Director of the Serious Fraud Office and Director of the Public Prosecutions, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (30 March 2011) Serious Fraud Office, 10 <<http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>>. The UK Joint Prosecution Guidance states, eg that a prosecution will not take place if the prosecutor 'is sure that there are public interest factors tending against prosecution which outweigh those tending in favour'.

173 *UK Bribery Act Guidance*, above n 12, 10 [20].

174 *Ibid* 12 [26].

175 Warin, Diamant and Pfenning, above n 125, 59.

176 Paul McDougall, 'IBM to pay \$10 million to settle bribery charges' *InformationWeek* (18 March 2011) <http://www.informationweek.com/news/hardware/unix_linux/229301284>.

US DoJ opinions,¹⁷⁷ the *UK Bribery Act Guidance*¹⁷⁸ and the UK Joint Prosecution Policy¹⁷⁹ indicate that, to manage risk in this area, where a company provides ‘in-kind’ benefits to public officials, risks are lower where:

- the corporation has conducted a risk assessment in relation to the provision of gifts and hospitality;
- the benefit is provided in accordance with an appropriate corporate policy (which may include, eg, that benefits above a certain value require senior management sign-off);
- the benefit is provided openly;
- if possible, the provision of the benefit has been cleared with the body for which the public official works;
- the benefit is not ‘lavish’ (eg, economy, not business class, flights);
- the benefit is ‘reasonable’ and ‘proportionate’ in the context of general business norms, or norms applicable to a specific industry;¹⁸⁰
- the conduct does not contravene local law;
- the benefit is a gift or sample and is visibly emblazoned with the corporate logo;
- if the benefit is a financial reimbursement for approximate costs, the amount represents a reasonable approximation of likely costs and is paid directly to the service provider, not through the public official;
- the company has no pending, non-routine business before the recipients and there is otherwise no apparent expectation of reciprocity;
- the benefit is provided solely to the public officials, and not also to spouses or family members;¹⁸¹
- benefits are not provided to the same official regularly and over a period of time; and
- the provision of the benefit is accurately recorded.

In the US, these cases are often considered as falling within the special defence for bona fide and reasonable marketing expenses. While there is no similar defence in Australia and the UK, where a company follows the guidance above, the benefit may not be ‘illegitimate’ (under Australian law) or improper

177 See, eg, Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 08-03, 11 July 2008); Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 07-02, 11 September 2007).

178 See especially *UK Bribery Act Guidance*, above n 12, 12–4, 36.

179 Ibid 10.

180 Ibid 14 [31] distinguishes between hospitality which is clearly over and above what was necessary for business development. In discussing the provision of a trip to New York to a foreign official to meet with senior executives, the guidance states: ‘if the choice of New York as the most convenient venue as in doubt because the organisation’s senior executives could easily have seen the official with all the relevant documentation when they had visited the [foreign official’s] country the previous week then the necessary inference might be raised.’

181 Cf ibid 14 [31] referring specifically to the possible permissibility of benefits being provided to a partner.

(under the general UK *Bribery Act* offence). Further, in following this guidance, corporations may find it easier to refute any allegation that the hospitality or gift was provided with an intention to influence a foreign public official. Adopting best practice may also of course bear on enforcement discretion.

E Aid and Charitable Donations

Many Australian companies operating overseas also face the issue of charitable donations. Charity, particularly in the form of aid towards local development, is often requested as a quid pro quo for granting some government privilege. Even where it is not required, companies often choose to ‘give something back’ to a local community by funding services or donating to a local cause.

In certain circumstances,¹⁸² and particularly where there is an express or implied quid pro quo between the charity and the receipt of the business advantage from the government, this may fall foul of foreign bribery laws. The charity is the provision of a benefit; the known quid pro quo indicates an intention to influence. In addition, ‘charities’ are sometimes fronts used to channel funds directly to foreign officials – in other words, the charitable donation is akin to using an intermediary to funnel cash. Where the charity takes the form of a donation to a political party, the red flags are even clearer¹⁸³ – political parties may constitute ‘foreign public officials’ and the donation may give rise to a clear inference that a quid pro quo, in the form of favourable regulation, was intended. The SEC has initiated prosecutions based on charitable contributions.¹⁸⁴

As described in Part I above, in some circumstances, local aid may be required or permitted by local written law, meaning that it falls within a defence or exception to bribery prohibitions (at least under Australian and US law). Where there is no clear local permission, charity and aid may raise substantial corruption risks. Risks are particularly great where the public official requests that a donation be made to a particular organisation or pet project. Despite these risks, US DoJ guidance¹⁸⁵ and the *UK Bribery Act Guidance*¹⁸⁶ indicate that controls can be installed to manage risk. These controls include:

- development, implementation and communication of appropriate internal charity and aid policies;

182 Aid may sometimes be required or permitted by local (eg as a statutory quid pro quo for development) thereby falling within an exception to the offences.

183 Several major recent investigations have involved allegations of donations to political parties, including the Haliburton case (Nigerian political parties) and the Siemens case (Greek political parties). See TI Progress Report, above n 1, 17.

184 See Complaint in *SEC v Schering-Plough Corporation*, (DDC, No 04-945, 9 June 2004). The SEC alleged that the giver considered the donations to be ‘dues’ necessary to obtain favourable treatment from officials.

185 See, eg, Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 10-02, 16 July 2010) 6; Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 06-01, 16 October 2006).

186 See especially *UK Bribery Act Guidance*, above n 12, 40.

- disclosure to the local government and competitors;
- anti-corruption certifications by the recipient;
- due diligence to ensure that (as appropriate) the arrangement is legitimate, none of the officers of the recipient of the charity are affiliated with the foreign government and, where possible, recipients of any benefit are selected objectively and not by reference to affiliation with foreign officials;
- where the donation must be routed through a government account, ensuring that records are properly kept and the account is properly audited;
- a requirement that the recipient provide audited financial statements;
- a written agreement with the recipient restricting the use of funds, and steps to ensure that the funds are transferred to a valid bank account;
- ongoing monitoring; and
- provision, in hard cases, for the legitimacy of the donation to be reviewed by a manager with appropriate expertise and seniority.

F Facilitation Payments

A difficult question for companies is whether to prohibit all facilitation payments. Corporate practice on this issue is varied. However, recently, the trend has been towards prohibiting all such payments, even though facilitation payments are excluded from the offence in both Australia and the US.

There are several reasons for this trend. Many jurisdictions – including the new UK *Bribery Act* – do not expressly exclude facilitation payments from corruption offences.¹⁸⁷ Further, the OECD has recently condemned the ‘corrosive’ effect of facilitation payments and encouraged parties to the OECD Convention to regularly review their approach to them, suggesting that the trend is towards lesser, not greater, utility to this exclusion.¹⁸⁸ This OECD pressure, combined with foreseeable pressure from the UK to create a level playing field, suggests there is good reason to think Australia will soon revisit the existence of the exception in the Australian *Criminal Code*.

In addition to this, the exception has not been judicially-considered, so its application is uncertain. Facilitation payments may be contrary to local law – eg, China contains no facilitation payment exception in its domestic bribery prohibition.¹⁸⁹ Many companies have also found a nuanced rule – requiring low- to mid-level employees to distinguish between what are and what are not

187 Crown Prosecution Service, above n 148, 7, 9: The UK Joint Prosecution Guidance sets out specific public interest principles which militate in favour of, or against, prosecution in respect of facilitation payments.

188 OECD Working Group on Bribery in International Business Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (26 November 2009) art VI.

189 Warin, Diamant and Pffering, above n 125, 64–5.

facilitation payments – both too risky and too difficult to enforce. A further deterrent to relying on the facilitation payment defence is that, for the defence to operate, a proper record must be kept – if the payment is held not to constitute a facilitation payment, then the record kept may itself become evidence of bribery.

In these circumstances, at the very least, companies need a clear facilitation payments policy and, given current circumstances, may wish to consider banning facilitation payments entirely.

G ‘Successor Liability’ and ‘Investor Liability’: Mergers, Acquisitions and Corporate Finance

Foreign bribery issues often emerge during mergers and acquisitions. There is growing awareness of the risks these transactions involve.¹⁹⁰

The risks are most apparent for the purchaser. Latent corrupt conduct in a target company may affect a purchaser in multiple ways. First, if the purchaser knows (or suspects) that part of the purchase price will be used as bribes, then the sale transaction itself may fall foul of bribery laws. This risk may be particularly great where the transaction is the privatisation of a public enterprise, and there is a risk that part of the sale price will be directed towards public officials who instigated or facilitated the sale.¹⁹¹

Second, the target may, post-sale, continue to make payments in respect of existing contracts or agreements in circumstances where those payments enliven bribery laws. The target may, eg, have payment obligations in respect of existing contracts with a foreign government and may continue, post-sale, to make payments in respect of those contracts in circumstances where management of the target is aware that part of the payment is a ‘bribe’. In this case, the target would likely be liable and the purchaser could, depending on the relevant corporate criminal liability rules, also be liable. The risk for the purchaser would be particularly great where either it became aware of suspicious conduct during due diligence and failed to make appropriate inquiries, or it failed to make any inquiries at all.

Third, if the target were corrupt pre-sale, there may be good reason to think that the target will continue to be corrupt, and form and perform new corrupt agreements, post-sale. This would again expose the target directly and, depending on relevant corporate criminal liability rules, may also expose the acquirer.

Fourth, aside from the legal risk to the purchaser, latent bribery conduct will typically bear on the target company’s value and, inevitably, on the reputation of the parent. Often, the public will lose sight of whether any alleged bribery occurred prior to or after a purchaser completed the sale.

190 In 2008, the US DoJ issued a landmark opinion in respect of the proposed acquisition of a company by Halliburton. The opinion sets out the key legal issues as well as a detailed overview of the compliance program Halliburton put in place to mitigate corruption risk. See Department of Justice Opinion Procedure Release – No.: 08-02 (13 June 2008).

191 See, eg, Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 08-01, 15 January 2008).

The recent US *Frederic Bourke*¹⁹² case shows the risk investors face, at least where the investment is in a US ‘issuer’ or ‘domestic concern’. Bourke was convicted in August 2009 of conspiring to violate the US *FCPA*. Bourke invested in an energy-related company. It was alleged that, during due diligence, he either became aware that the company was bribing Azerbaijani officials or was wilfully blind to that fact. In support, the US DoJ referred to evidence that Bourke failed to conduct sufficient due diligence, failed to request counsel to conduct due diligence and ignored numerous red flags. Bourke was sentenced to one year’s imprisonment and to pay a fine of \$1 million.¹⁹³

There are also risks for vendors. Vendors may have latent legal risk for historical conduct of former subsidiaries but may find that, when that risk crystallises, they no longer have control of the corporate information necessary to properly assess and manage that risk. When a sale occurs *after* suspicious information comes to light, there are substantial reputational risks for a company perceived to be ‘washing its hands’ of a tainted subsidiary. Sometimes, latent corrupt conduct may kill a deal – as was the case in 2004 when Lockheed Martin pulled out of a merger with Titan Corporation after it uncovered corrupt conduct during a premerger investigation.¹⁹⁴ Further, where a purchaser uncovers corrupt conduct during due diligence it may be obliged (irrespective of confidentiality obligations) to disclose that conduct to regulators – the timing and content of that disclosure may, in that case, be out of the vendor’s control.

In light of this, when engaging in merger and acquisition activity, companies are increasingly managing risk by:¹⁹⁵

- incorporating a corruption risk element into due diligence,¹⁹⁶ including educating employees who will be conducting the due diligence in identifying corruption risks, and reviewing documents (eg audit reports, foreign intermediary arrangements, transaction records) and conducting interviews that shed light on corruption risk. The degree of diligence may of course need to be varied according to the riskiness of the target’s business, including the location of its markets, the degree of business sourced from government, any previous allegations of corruption, and the adequacy of compliance programs. Conducting appropriate due diligence may be particularly difficult where local law restricts the capacity of a purchaser to access corporate information of the target – regulators have been willing to take these limitations into account in exercising enforcement discretion; and

192 *United States v Kozeny*, 664 F Supp 2d 369 (SD NY, 2009).

193 See, eg, Anderson, above n 66, 5.

194 See John Gibeaut, ‘Battling Bribery Abroad’ (2007) 93(3) *American Bar Association Journal* 48, 51.

195 See Witten et al, above n 53, 735–6.

196 This may be expensive. In a 2004 deal arranged by an investment group including JP Morgan Partners Global Fund, the acquirers’ review involved more than 115 lawyers, 44,700 person hours, 165 interviews, and travel to 21 countries: Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 04-02, 12 July 2004).

- inserting boilerplate ‘no corruption’ representations and warranties, and indemnification provisions, into sale documents.¹⁹⁷ Provisions such as this are of course incapable of mitigating the risk of prosecution. Proper due diligence remains necessary.

Where corrupt practices *are* identified during due diligence, potential acquirers need to consider disclosure to regulators and how to ensure the target is cleansed before settlement or as soon as possible afterwards.¹⁹⁸

H Managing Risk through Compliance Programs

Incorporating a corruption element into risk management systems is increasingly important. Adequate compliance programs may avoid bribery conduct in the first instance. They will often bear on whether the company is liable and whether, irrespective, regulators choose to press enforcement action. The adequacy of compliance systems may also be a factor in regulatory¹⁹⁹ or judicial²⁰⁰ choice of the sanction to levy.

Fortunately, guidance on best practice is readily available from international organisations,²⁰¹ regulators,²⁰² and commentators.²⁰³ The extent of compliance desirable for a company is of course dependent on many factors, including the riskiness of the company’s business (particularly whether the company depends on foreign regulatory approvals or foreign government procurement) and the riskiness of the regions within which the company operates.

As a general guide, however, some key considerations (in addition to those set out in Part IV(A)–(G) above) which should assist Australian companies in managing bribery risk include:

- risk assessment – companies should formalise a process for identifying and periodically reviewing their bribery risk;

197 The SEC has taken the view that securities laws may be contravened where a no-corruption representation is included in a sale contract, the contract is included in a SEC filing, and the representation is false: see Witten et al, above n 53, 722.

198 The Haliburton opinion sets out a detailed scheme for post-sale cleansing: Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 08-02, 13 June 2008). See also Department of Justice (US), ‘Foreign Corrupt Practices Act Review’ (Opinion Procedure Release, No 04-02, 12 July 2004).

199 ‘Principles of Federal Prosecution of Business Organizations’ in *United States Attorney Manual* [9.28.800].

200 US Sentencing Commission, above n 96, §3E1.1.

201 OECD, *Good Practice Guidelines on Internal Controls, Ethics and Compliance* (2010).

202 See, eg, the corporate compliance program mandated by the US DoJ as part of its deferred prosecution agreement with Panalpina World Transport: *United States of America v Panalpina World Transport (Holding) Ltd – Deferred Prosecution Agreement*, Department of Justice (US) 67 (attachment C) <<http://www.justice.gov/opa/documents/panalpina-world-transport-dpa.pdf>>. See also the draft guidance for commercial organisations provided by the UK Ministry of Justice: Ministry of Justice (UK), *Consultation on Guidance about Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010)* (2010) 25 (Annex B).

203 See, eg, Anderson, above n 66.

- the ‘tone at the top’ – regulators focus on the messages sent by the Board, CEO and senior and middle management;
- the need for a strong anti-corruption statement in the company’s code of conduct;
- formulating and communicating specific policies on difficult areas – gifts, hospitality, entertainment, expenses and customer travel; charitable donations, sponsorships and political donations; and facilitation payments. We have set out above information on DoJ guidance, where it exists, on these issues;
- programs for educating staff in anti-corruption risk, and for providing guidance (urgent, if necessary) in hard cases;
- embedding a compliance manager in business development meetings and business development proposals;
- establishing disciplinary procedures for breaches of anti-corruption policies, and a demonstrated willingness to enforce those procedures;
- providing for rewards for compliance, not just discipline for transgression;
- having a strong whistle-blower program, including a clear anonymous reporting system;
- appointing an employee with senior management authority to be responsible for anti-corruption compliance, with clear reporting lines to the relevant compliance representative;
- ensuring that finance, internal audit teams and compliance representatives have appropriate training to comply with books and records requirements, and to identify and review corruption risk; and
- periodic reviews of anti-corruption compliance programs.

V CONCLUSION

Australian companies operating overseas must confront corruption risk. Based on current indicators, this need will only magnify in the near future. The tide of enforcement in this area is rising. In this article, we have aimed to provide an outline of the legal landscape and the key issues Australian companies will face in confronting these risks. If current trends are indicative, Australian companies with international operations can ill afford not to reckon with these issues. Companies may find it is preferable to confront these risks *ex ante* than *ex post*.