

## STILL 'INSUFFICIENT OR IRRELEVANT': AUSTRALIA'S FOREIGN BRIBERY CORPORATE WHISTLEBLOWING REGULATION

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### I INTRODUCTION

Australia's enforcement of its foreign bribery regime in general has been the subject of substantial criticism in recent years.<sup>1</sup> In 2012 the Organisation for Economic Co-operation and Development's ('OECD') Working Group on Bribery issued its review of Australia's implementation of the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ('Convention on Combating Bribery').<sup>2</sup> The *Phase 3 Report* criticised Australia's performance, noting the Working Group had 'serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low'.<sup>3</sup> In 2015, following up on its earlier report, the OECD noted that Australia still had only one prosecution underway in relation to the foreign bribery provisions and that this matter had been on foot since before the *Phase 3 Report*.<sup>4</sup> The OECD Working Group identified a range of areas for improvement, including the importance of strengthened protection for

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1 This criticism culminated in a Senate Inquiry: Senate Economics References Committee, Parliament of Australia, *Inquiry into Foreign Bribery*. Initially due to report in July 2016, the Inquiry lapsed before reporting, pending the 2016 federal election: see commentary in Law Council of Australia, Submission No 10 to Senate Economics References Committee, *Inquiry into Foreign Bribery*, 24 August 2015, 1; International Bar Association Anti-Corruption Committee, Submission No 6 to Australian Senate Economics Reference Committee, *Inquiry into Foreign Bribery*, 24 August 2015, 4.

2 Working Group on Bribery in International Business Transactions, Organisation for Economic Co-operation and Development, 'Phase 3 Report on Implementing the OECD Anti-bribery Convention in Australia' (Report, October 2012) ('*Phase 3 Report*'); *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999).

3 *Phase 3 Report*, above n 2, 5.

4 Working Group on Bribery in International Business Transactions, Organisation for Economic Co-operation and Development, 'Australia: Follow-up to the Phase 3 Report & Recommendations' (Report, April 2015) 4 ('*Follow-up Report*'). A second prosecution has occurred in Australia in 2015: Tim Lamacraft, 'Foreign Bribery Investigation Launched into Sydney-based Construction Company Lifese with Links to Terrorists' *ABC News* (online), 26 February 2015 <<http://www.abc.net.au/news/2015-02-26/foreign-bribery-investigation-lifese-construction-company/6263062>>.

whistleblowers in both the public and private sectors.<sup>5</sup> The OECD Working Group described Australia's existing private sector whistleblowing laws as 'insufficient or irrelevant to foreign bribery'.<sup>6</sup>

The OECD's 2015 *Follow-up Report* noted the steps taken to implement a more supportive whistleblowing system, including in particular the passage of public sector whistleblowing legislation, the *Public Interest Disclosure Act 2013* (Cth).<sup>7</sup> However, the *Follow-up Report* pointed out that the original *Phase 3 Report* recommended additional protection measures for private as well as public sector whistleblowers.<sup>8</sup> This part of the recommendations has not been addressed. Submissions to the Senate Economics References Committee's 2015–16 Foreign Bribery Inquiry support the argument that Australia's foreign bribery private sector whistleblower framework remains inadequate.<sup>9</sup> A key continuing problem is the lack of a specific link between the foreign bribery offence and the whistleblower protections in the *Corporations Act 2001* (Cth) ('*Corporations Act*'), rendering those protections largely irrelevant to foreign bribery whistleblowing.<sup>10</sup>

The scale of the international bribery problem is increasingly well-documented. The OECD's 2014 analysis of the 427 concluded foreign bribery cases since the entry into force in 1999 of the *Convention on Combating Bribery* reported that bribes averaged 10.9 per cent of the total transaction value,<sup>11</sup> clearly demonstrating the gross economic and social distortions created by foreign bribery. Australia's lack of attention to foreign bribery corporate or 'private sector' whistleblowing seems anomalous and ultimately unsustainable. This article argues for the importance of corporate whistleblowing as an anti-bribery tool from practical and theoretical perspectives, identifies a range of shortcomings within the Australian regulatory system, and outlines the weight of international evidence pointing to the need for adequate corporate whistleblowing provisions in relation to foreign bribery. In light of these points, this article argues for some achievable amendments to the existing regulatory structure, pending more ambitious reform of private sector whistleblowing in Australia.

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5 *Phase 3 Report*, above n 2, 5.

6 *Ibid* 45 [144].

7 *Follow-up Report*, above n 4, 5, 30–1.

8 *Ibid* 5, 32–5.

9 Law Council of Australia, above n 1, 12–14; International Bar Association Anti-Corruption Committee, above n 1, 35–9.

10 *Ibid*.

11 Organisation for Economic Co-operation and Development, 'OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials' (Report, 2 December 2014) 3 ('*OECD Foreign Bribery Report*').

## II WHISTLEBLOWING AND FOREIGN BRIBERY REGULATION

### A Background

The OECD Working Group's attention to whistleblowing is consistent with a range of developments internationally that now integrate the encouragement and protection of whistleblowers into foreign bribery regulation, and greater attention to whistleblowers forms a small but significant part of growing international anti-corruption efforts generally.<sup>12</sup> From an historical perspective it can be said that whistleblowing is woven into the DNA of foreign bribery regulation. Investigations arising out of the 'Deep Throat' Watergate whistleblower revelations led in part to the passage of the ground-breaking *Foreign Corrupt Practices Act of 1977* (US)<sup>13</sup> in the United States, when a Watergate prosecutor uncovered the common device employed by US multinationals of using foreign agents to facilitate the creation of illegal unrecorded US domestic campaign slush funds.<sup>14</sup>

From a practical perspective, the ability of whistleblowing to improve internal governance structures is striking. Guidance from regulatory agencies in the United Kingdom, the United States, and from the OECD and other transnational bodies points to the significance of whistleblowing provisions as an integral part of a corporation's integrity framework.<sup>15</sup> The G20 has argued that '[w]histleblower protection is essential to encourage the reporting of misconduct, fraud and corruption ... especially in cases of bribery',<sup>16</sup> and whistleblower

12 See, eg, Working Group on Bribery in International Business Transactions, Organisation for Economic Co-operation and Development, 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (Publication, 26 November 2009) [IX(iii)] ('*Recommendation of the Council for Further Combating Bribery*'); Working Group on Bribery in International Business Transactions, Organisation for Economic Co-operation and Development, 'Annual Report 2013' (Annual Report, 2013) 41 ('*OECD Annual Report 2013*'); G20, 'G20 Anti-Corruption Action Plan Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (Report, 2011) (this study was endorsed by G20 Leaders at the 2011 G20 Summit in Cannes); Commission on Corporate Responsibility and Anti-corruption, International Chamber of Commerce, *ICC Rules on Combating Corruption* (at 17 October 2011) art 7. An associated corporate practices manual devotes a chapter to whistleblowing: Fritz Heimann and Francois Vincke (eds), International Chamber of Commerce, *Fighting Corruption: International Corporate Integrity Handbook* (ICC Books, 3<sup>rd</sup> ed, 2008) ch 7; see also Simon Wolfe et al, 'Whistleblower Protection Laws in G20 Countries: Priorities for Action' (Final Report, Blueprint for Free Speech, September 2014) 10–11.

13 15 USC § 78dd-1 (1988) ('*FCPA*').

14 Masako N Darrough 'The *FCPA* and the *OECD Convention*: Some Lessons from the US Experience' (2010) 93 *Journal of Business Ethics* 255, 257–8. At the time the US legislation constituted the first anti-bribery statute of its type: Heidi L Hansberry, 'In Spite of its Good Intentions, the *Dodd-Frank Act* Has Created an *FCPA* Monster' (2012) 102 *Journal of Criminal Law and Criminology* 195; Robert C Blume and J Taylor McConkie, 'Navigating the *Foreign Corrupt Practices Act*: The Increasing Cost of Overseas Bribery' (2007) 36 *Colorado Lawyer* 91, 91.

15 United States Department of Justice, *Principles of Federal Prosecution of Business Organizations*, 9–28.800 <<http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>>; Ministry of Justice (UK), 'The *Bribery Act 2010*: Guidance' (Guidance, March 2011) <[www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf](http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf)>. See also the references in above n 12.

16 G20, above n 12, 4.

protections have been credited with being a factor in the increased probability of a foreign bribe payer being caught.<sup>17</sup> These developments are consistent with a view that foreign bribery is a form of corporate corruption that is particularly susceptible to improved detection through the use of whistleblowers. Secrecy is an intrinsic part of bribe-paying,<sup>18</sup> making it especially difficult to detect and control. Foreign bribes are likely to involve actions by parts of the organisation far removed, geographically and structurally, from senior management at head office, and transnational bribery frequently occurs in locations that are secret and remote.<sup>19</sup> The resulting 'problem of asymmetric information' can be significant.<sup>20</sup> The difficulties parent companies face in controlling foreign activities are well illustrated by the highly-publicised prosecution in the United States of Siemens AG, where evidence was presented of spectacularly well-organised concealment of over 4000 bribe payments totalling approximately US\$1.4 billion, including false invoices, bribes mischaracterised as consulting fees, accumulated reserves recorded as liabilities in internal accounts to allow for corrupt payments, and removable 'post-it' notes employed in authorisation processes to help obscure the audit trail.<sup>21</sup> Further, where internal controls fail there is evidence to suggest the highest levels of management, including the CEO, CFO or both are likely to be involved,<sup>22</sup> making it imperative that standard reporting lines are not the sole path by which information can reach the board. Whistleblowing is well-placed to assist international bribery regulation through reduction of these information asymmetries, and especially through facilitation of the flow of information from lower reaches of an organisation to the highest levels of the management structure.

## B Whistleblowing and Escalation of Foreign Bribery Deception

Where foreign bribery does occur, whistleblowing also has the potential to assist in preventing its escalation within a corporation before it reaches the endemic levels evidenced in the Siemens prosecution, with consequential benefits for regulatory control and for internal corporate governance. Regulatory emphasis on whistleblowing as an anti-corruption tool is consistent with support available in the work of theorists Fleming and Zyglidopoulos. These authors argue for the importance of transparency in reducing the escalation of deception. In their analysis of the complex determinants of escalation of deception within organisations Fleming and Zyglidopoulos have drawn attention to the interplay of three critical factors: (1) the need for an individual to carry out a corrupt act; (2)

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17 Margot Cleveland et al, 'Trends in the International Fight against Bribery and Corruption' (2009) 90 *Journal of Business Ethics* 199, 217.

18 Cindy Davids and Grant Schubert, 'Criminalising Foreign Bribery: Is Australia's Bark Louder than Its Bite?' (2011) 35 *Criminal Law Journal* 98, 115.

19 Joseph W Yockey, 'Choosing Governance in the FCPA Reform Debate' (2013) 38 *Journal of Corporation Law* 325, 357.

20 Darrough, above n 14, 260; US Securities and Exchange Commission, *Litigation Release No 20829* (15 December 2008) <<https://www.sec.gov/litigation/litreleases/2008/lr20829.htm>>.

21 Darrough, above n 14, 265–6.

22 Ibid 268.

the necessity of internal incentives for that act to be carried out; and (3) that the act is condoned, and *any relevant moderating factors are not effective*.<sup>23</sup> The authors further identify factors that may potentially operate as those moderating influences, including, relevantly for current purposes, the organisation's control systems and ethical codes, and the risk of detection.<sup>24</sup> Fleming and Zyglidopoulos also suggest that organisational complexity reduces transparency, making it difficult to control for inappropriate behaviour since rogue activities may take place in spaces that are not within normal managerial lines of sight.<sup>25</sup> The authors argue for the importance of 'a culture of transparency' because of its potential to reduce 'ethical distance', ie, the distance separating corrupt acts from their ethical consequences.<sup>26</sup>

Organisational complexity is a likely common factor in many Australian corporates with offshore operations, and the physical and organisational distance between the foreign locations in which bribes may be paid and an Australian head office could be significant, further facilitating the creation of 'ethical distance'. Foreign agents and intermediaries (a legal requirement in some jurisdictions) can compound monitoring difficulties in relation to corrupt payments, and transnational bribery frequently takes place in locations that are remote.<sup>27</sup> Darrough has argued that in the context of international bribery 'top management in a decentralised organisation might find it difficult to exercise direct control over their agents', resulting in severe information asymmetries and 'acute agency problems'.<sup>28</sup> Fleming and Zyglidopoulos' model suggests these factors are likely to facilitate the escalation of corrupt behaviour, an analysis that appears intuitively correct.

In their discussion of control systems, Fleming and Zyglidopoulos suggest internal auditing can assist in preventing the escalation of corrupt activity.<sup>29</sup> Whistleblowing is a concept that has particular potential to support internal auditing processes, and to do so in ways that structured audits cannot, since whistleblowing is, by its nature, more random. Similarly, Wouters et al have linked Fleming and Zyglidopoulos' model to the context of international corruption frameworks, and emphasised the importance of internal anti-corruption policies in controlling corruption,<sup>30</sup> while in the specific context of foreign bribery regulation, Darrough has pointed to the critical relevance of internal controls as a tool for managing agency problems within corporations.<sup>31</sup> The value of internal whistleblowing policies in this regard is clear, an analysis supported by the OECD's *Good Practice Guidance on Internal Controls, Ethics,*

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23 Peter Fleming and Stelios C Zyglidopoulos, 'The Escalation of Deception in Organizations' (2008) 81 *Journal of Business Ethics* 837.

24 Ibid 846.

25 Ibid 842.

26 Ibid 847.

27 Yockey, above n 19, 357.

28 Darrough, above n 14, 260.

29 Fleming and Zyglidopoulos, above n 23, 844.

30 Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, 'The International Legal Framework against Corruption: Achievements and Challenges' (2013) 14 *Melbourne Journal of International Law* 205, 277.

31 Darrough, above n 14, 268.

and Compliance which recommends that whistleblowing comprise part of effective private sector internal control systems.<sup>32</sup>

Further, Darrough notes that management is in the perfect position to ensure that internal controls fail, if they wish to do so (that is, if they are implicated in the wrongdoing).<sup>33</sup> The risk of management ensuring standard lines of internal control fail is significant, given (as noted above) evidence from corporate fraud research indicating that large corruption cases commonly involve the actions of top management.<sup>34</sup> In its 2014 analysis of enforcement actions against 263 individuals and 164 entities since the introduction of the *Convention on Combating Bribery*, the OECD reported that foreign bribes were paid with the knowledge of senior management in over 50 per cent of the examples reviewed, including the CEO personally in 12 per cent of cases.<sup>35</sup> In light of this, it can be extremely difficult for standard internal systems and reporting lines to uncover irregularities.

Whistleblowing offers a slightly different internal control response by facilitating bypass of the potentially corrupt elements of management involved in foreign bribery and leap-frogging over them to the board, or even outside of the organisation, for instance to the media. As uncomfortable as that last possibility may be for a corporation, it could serve a valuable public regulatory purpose. With its potential to facilitate relatively random flows of information within a complex organisation, whistleblowing can create unpredictable windows of transparency that are harder for corrupt employees to control. This in turn increases the risk of detection, which (as noted above) is a significant moderating factor in Fleming and Zygliopoulos' deception escalation model.

### C Whistleblowing and Foreign Bribery Examples in Australia

In light of these connections between foreign bribery and whistleblowing, it is not surprising that whistleblowers have contributed significantly to several high profile foreign bribery investigations in Australia. It was reportedly a whistleblower who first raised foreign bribery concerns in relation to one of the few foreign bribery matters to receive significant publicity, the Securrency investigation and prosecutions<sup>36</sup> (although the whistleblower's concerns were reportedly dismissed by the Australian Federal Police ('AFP') without investigation, and no action was taken until Securrency 'self-reported' some time

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32 Organisation for Economic Co-operation and Development, 'Good Practice Guidance on Internal Controls, Ethics, and Compliance' (Guidelines, 18 February 2010) ('*Good Practice Guidance on Internal Controls, Ethics and Compliance*').

33 Darrough, above n 14, 268.

34 Ibid 268–9.

35 *OECD Foreign Bribery Report*, above n 11, 8, 22–3.

36 *Phase 3 Report*, above n 2, 8. For a discussion of the part played by a senior executive whistleblower in the uncovering of bribe payments at Securrency International Pty Ltd and at Note Printing Australia Pty Ltd ('NPA'), see Evidence to Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity: Integrity of Overseas Commonwealth Law Enforcement Operations, Parliament of Australia, Canberra, 30 November 2012, 1–22 (the whistleblower, Mr Brian Hood, was a former company secretary of NPA).

later).<sup>37</sup> Whistleblowers were also relied on in an inquiry into the Australian Wheat Board's involvement in the Iraq Oil-for-Food Program foreign payments scandal.<sup>38</sup> Similarly, publicity in relation to some overseas contracts of an Australian construction and mining company has involved disclosures by whistleblowers.<sup>39</sup> Interestingly, an employee of the company reportedly applied to the Federal Court for whistleblower protection in 2011, but the matter was settled on a confidential basis, and details of the grounds on which protection was sought were not revealed in the application.<sup>40</sup> However, these high-profile examples of whistleblowers assisting in uncovering Australian foreign bribery have occurred in the face of a regulatory regime that offers little encouragement for whistleblowers.

### III THE AUSTRALIAN REGULATORY REGIME

The offence of bribing a foreign public official was introduced into the Commonwealth *Criminal Code Act 1995* (Cth) schedule 1 ('*Criminal Code*') in 1999. A new chapter 4 titled 'The integrity and security of the international community and foreign governments' made it a criminal offence for an Australian to provide an illegitimate benefit to an overseas government official.<sup>41</sup> This article argues that a number of shortcomings exist in relation to the offence and Australian foreign bribery regulation in general, from a corporate whistleblowing perspective. First, no direct connection exists between the primary corporate whistleblowing protections and the foreign bribery provisions.

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37 *Phase 3 Report*, above n 2, 9.

38 Four company employees are reported to have acted as whistleblowers before the Cole Royal Commission held in relation to the relevant payments: Commonwealth, Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme, *National Report* (2006) ('the Cole Royal Commission'); Robin Pash, 'AWB Whistleblowers Face Charges', *The Australian* (online), 27 November 2006 <<http://www.theaustralian.com.au/news/latest-news/awb-whistleblowers-face-charges/story-fn3dxiwe-111112595371>>, although the original revelations arose out of a United Nations inquiry: Paul A Volcker, Richard J Goldstone and Mark Pieth, 'Independent Inquiry into the United Nations Oil-for-Food Programme: Manipulation of the Oil-for-Food Programme by the Iraqi Regime' (Report, 27 October 2005) <<https://web.archive.org/web/20130823070841/http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf>>.

39 Nick McKenzie and Richard Baker, 'Building Giant Leighton Rife with Corruption: Claims', *The Sydney Morning Herald* (online), 3 October 2013 <<http://www.smh.com.au/business/building-giant-leighton-rife-with-corruption-claims-20131002-2ut2e.html>>. A former employee also gave evidence to the Senate *Inquiry into Foreign Bribery* in relation to these contracts: Evidence to Economics References Committee, Parliament of Australia, Sydney, 22 April 2016, 1–16 (Stephen Sasse).

40 The protection sought was reportedly under the *Corporations Act 2001* (Cth) pt 9.4AAA provisions: Jenny Wiggins and Matthew Drummond, 'Leighton Exec Sought Protection of Court', *The Australian Financial Review* (Sydney), 23 October 2013, 3. Allegations in relation to Leighton Holdings Limited arose out of an investigation by Fairfax Media. The Sydney Morning Herald referred to '[k]ey Leighton witnesses and whistleblowers' in its report, and to the actions of an internal whistleblower who emailed Board members with information: McKenzie and Baker, above n 39.

41 Section 70.2 of the *Criminal Code*, as inserted by *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth). Consistently with the requirements of the *Convention on Combating Bribery* that led to the introduction of the offence, the provisions target bribery of foreign public officials rather than private individuals.

Secondly, there is a lack of transparency in Australia's foreign bribery enforcement network, complicating the process for would-be whistleblowers. Finally, a strong contrast exists between the lack of regulatory support for foreign bribery corporate whistleblowing on the one hand, and corporate governance pressures on corporations and directors that suggest increased need for whistleblowing systems on the other.

### **A Lack of a Direct Nexus between the Foreign Bribery Offences and Whistleblowing Protections**

First, there are no express whistleblowing provisions within chapter 4 of the *Criminal Code*. Further, the most likely whistleblowing provisions to be relevant in a corporate context, those contained in part 9.4AAA of the *Corporations Act*, are only indirectly applicable. The coverage provided by part 9.4AAA is limited to disclosures in relation to contraventions of the corporations legislation.<sup>42</sup> Thus foreign bribery disclosures by an internal whistleblower would be covered by part 9.4AAA only insofar as they related to a concomitant breach of the corporations legislation. Examples might include foreign-bribery related false accounting, or breaches of directors' duties arising out of the conduct constituting the foreign bribery offence. Disclosures would not attract coverage to the extent that the relevant conduct related to breaches of the foreign bribery provisions themselves.<sup>43</sup> This lack of nexus was specifically criticised by the OECD Working Group's 2012 review.<sup>44</sup> Although this deficiency could be remedied by insertion of direct reference in part 9.4AAA to the bribery provisions of the *Criminal Code*, making clear the connection between the protections of part 9.4AAA and foreign bribery disclosures, no such reform has occurred as yet. While a relatively limited reform, it does offer a potentially achievable and therefore more immediate way forward. Further, the recent introduction into Federal Parliament of a minor reform to the foreign bribery provisions to close an apparent loophole in relation to the intention elements of the offence, while perhaps far less significant, may be evidence of a developing political will to remedy shortcomings in the current regulatory regime, suggesting minor reforms of this nature may be achievable.<sup>45</sup> Slightly more ambitious possible improvements have also been identified, including the insertion into part 9.4AAA of a direct reference to a breach of the criminal law, or the insertion of a civil liability foreign bribery offence into the *Corporations Act*.<sup>46</sup>

It is worth noting that the part 9.4AAA provisions themselves have been criticised as inadequate even in relation to those matters which they specifically address. Criticisms include the narrow nature of the protection

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42 *Corporations Act 2001* (Cth) s 1317AA(1)(d).

43 *Corporations Act 2001* (Cth) pt 9.4AAA.

44 *Phase 3 Report*, above n 2, 45 [144].

45 Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth).

46 Law Council of Australia, above n 1, 13.



offered, the limited extent and ill-defined scope of the provisions' coverage,<sup>47</sup> lack of protection of anonymous complainants, the absence of requirements for internal procedures,<sup>48</sup> the emphasis on protection from retribution rather than facilitation of effective resolution of issues raised, the requirement that disclosures meet a 'good faith' test, and the limitation of coverage to disclosures made to the bodies listed in the *Corporations Act* provisions.<sup>49</sup> Thus, quite apart from identified shortcomings in relation to foreign bribery whistleblowing, statutory reform of Australia's overall corporate whistleblowing regime has been discussed for some time.<sup>50</sup> Amendments to part 9.4AAA to link it to the foreign bribery offence are to that extent less desirable than wholesale reform of private sector whistleblowing, but are likely to be far more achievable in the short term. In any event, the combined effect of part 9.4AAA's inherent shortcomings together with the lack of direct application of part 9.4AAA to foreign bribery offences is that the protection available to foreign bribery whistleblowers is inadequate, indirect and unnecessarily precarious.

In light of recent improvements to federal public sector whistleblowing regulation by virtue of the passage of the comprehensive *Public Interest Disclosure Act 2013* (Cth), still further pressure has built for corporate whistleblowing to be subject to wholesale reform. In 2014, developments arising out of a parliamentary review of the performance of Australia's corporate regulator, the Australian Securities and Investments Commission ('ASIC'), added to pressure to overhaul this area. The Commonwealth Senate Economics References Committee recommended changes to Australia's corporate whistleblower protection framework, and extension of the *Corporations Act's* part 9.4AAA whistleblowing protection provisions to bring them into line with the expanded public sector provisions contained in the *Public Interest Disclosure Act 2013* (Cth).<sup>51</sup> In addition the *2014 Senate Committee Report* recommended that the categories of whistleblowing protected under the *Corporations Act* be extended beyond information relating to potential breaches of the corporations legislation, and include revelations connected to any misconduct that ASIC may investigate.<sup>52</sup> Such amendments would enable the provisions to apply directly to whistleblowing revelations in relation to foreign bribery. All of these proposed reforms are to be welcomed, and in light of ongoing pressure are perhaps likely in the long term.

Further, the *2014 Senate Committee Report* specifically recommended consideration be given to a bounties-style scheme of the kind implemented in the United States by the *Dodd-Frank Wall Street Reform and Consumer Protection*

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47 Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) ch 14 ('*2014 Senate Committee Report*').

48 Wolfe et al, above n 12, 25.

49 See, eg, the discussion in Sulette Lombard and Vivienne Brand, 'Corporate Whistleblowing: Public Lessons for Private Disclosure' (2014) 42 *Australian Business Law Review* 351.

50 See, eg, Janine Pascoe, 'Corporate Sector Whistleblowing in Australia: Ethics and Corporate Culture' (2009) 27 *Company and Securities Law Journal* 524, 527–8.

51 *2014 Senate Committee Report*, above n 47, xxv–xxvi, recommendations 14–15.

52 *Ibid* xxv, recommendation 12.

*Act*.<sup>53</sup> The introduction of bounty payments for *FCPA* whistleblowing has seen a dramatic increase in the flow of information reaching the Securities Exchange Commission ('SEC').<sup>54</sup> The Australian Federal Government's response to the *2014 Senate Committee Report* in relation to several of these reforms was not encouraging, providing only that the recommendations were 'noted'. The response did however reference ASIC's agreement to establish an Office of the Whistleblower, in line with the Senate Committee's recommendation on this point,<sup>55</sup> a development with potential to enhance foreign bribery whistleblower support in Australia.

Other industry-specific statutory whistleblowing protection regimes in relation to life insurance and financial institutions potentially have wider application than part 9.4AAA.<sup>56</sup> However, the OECD Working Group noted that while whistleblowing protections applicable to financial institutions were less restricted in their scope and thus might provide protection in relation to foreign bribery disclosures, they applied only to financial institutions. None of the Australian whistleblowing laws considered by the OECD Working Group extended to protection in relation to disclosures to law enforcement agencies or the media,<sup>57</sup> underlining the multiple ways in which Australia's foreign bribery whistleblowing provisions fall short of the mark.

## B Lack of Transparency in Australia's Enforcement Structure

In addition to the lack of legislative support for foreign bribery whistleblowing in Australia, issues in relation to the structure of Australia's enforcement regime militate against effective whistleblower disclosures. The failure to integrate foreign bribery whistleblowing directly into the available protections in the *Corporations Act* is symptomatic of a disconnect between corporate regulation and offshore bribery in general.

A wide range of Australian agencies have connections to foreign bribery enforcement and information dissemination, including the AFP, ASIC, the Australian Prudential Regulation Authority, the Commonwealth Department of Foreign Affairs and Trade, and the Commonwealth Attorney-General's Department. A lack of clarity was identified by the OECD Working Party as to

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53 Pub L No 111-203, § 922(a), 124 Stat 1376, 1841 (2010) ('*Dodd-Frank Act*'), amending *Securities Exchange Act of 1934*, 15 USC ch 2B (2010) to insert a new § 78u-6: 'Securities Whistleblower Incentives and Protection'.

54 US Securities and Exchange Commission, '2013 Annual Report to Congress on the *Dodd-Frank Whistleblower Program*' (Annual Report, 2013) 20; see also Amy Riella, Yousri Omar and Morgan Miller, 'The "Tip" of the Iceberg? SEC Confirms Rise in *FCPA*-related Whistleblower Tips' (V&E Foreign Corrupt Practices Act Update E-communication, 27 November 2013) <<http://www.velaw.com/Insights/The-%E2%80%9CTip%E2%80%9D-of-the-Iceberg---SEC-Confirms-Rise-in-FCPA-related-Whistleblower-Tips/>>.

55 Australian Government, 'Australian Government Response to the Senate Economics References Committee Report: Performance of the Australian Securities and Investments Commission' (Report, October 2014) 8.

56 See, eg, provisions of the *Banking Act 1959* (Cth) and the *Life Insurance Act 1973* (Cth), cited in *Phase 3 Report*, above n 2, 45.

57 *Phase 3 Report*, above n 2, 45.

which Australian agency had prime responsibility for enforcement of the foreign bribery regime.<sup>58</sup> In response, the Australian government established an inter-agency Fraud and Anti-Corruption Centre, hosted by the AFP and drawing on staff from a range of relevant agencies, (including the Australian Crime Commission and ASIC, amongst many others).<sup>59</sup> An AFP Foreign Bribery Panel of Experts was also created, with responsibility for additional training for AFP officers in relation to foreign bribery.<sup>60</sup> The OECD's 2015 *Follow-up Report* noted ASIC's decision to create of an Office of the Whistleblower and the expansion of the category of whistleblower reports managed by ASIC.<sup>61</sup>

However, despite these recent improvements, the existing foreign bribery enforcement regime in Australia has been described in submissions to the Senate *Inquiry into Foreign Bribery* as a 'fractured approach',<sup>62</sup> and as demonstrating 'a fundamental structural problem',<sup>63</sup> suggesting much remains to be done. Concerns include a perceived lack of a central organising authority to deal with investigation and prosecution decision-making in relation to foreign bribery, and the AFP's lack of understanding of corporate governance structures.<sup>64</sup> The first of these points highlights the difficulties facing a potential whistleblower, since a disconnected enforcement structure and lack of transparency may make it difficult to discern to whom a disclosure should be made, and what protections might be available. The second point is also of particular relevance in the context of whistleblowers. A lack of understanding of the internal governance systems within an organisation is likely to compromise the AFP's ability to respond effectively to those tips it does receive from corporate whistleblowers. The Law Council of Australia has noted that ASIC, by contrast with the AFP, generally demonstrates a 'more sophisticated understanding' of the way in which to investigate corporate misconduct, and of corporate governance structures.<sup>65</sup> However, in response to criticisms of its inaction in relation to foreign bribery, ASIC has defended its record on the specific basis that it does not have a legislated obligation in respect of Australia's *Criminal Code* foreign bribery regime, once again highlighting the risks of disconnections between agencies in the current system. ASIC's existing obligations in relation to enforcement arise indirectly where the payment of a foreign bribe amounts to a breach of the corporations legislation, including for instance where the conduct that constituted

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58 The OECD Working Group's *Phase 3 Report* recommended that '[t]he AFP, ASIC, and APRA set out in writing with greater precision, following consultations with one another, their complementary roles and responsibilities in foreign bribery and related cases, and written rules for case referral and information sharing': *ibid* 50, recommendation 7.

59 *Follow-up Report*, above n 4, 4.

60 *Ibid*.

61 *Ibid*. Note also that the AFP operates a whistleblowing system of generic application that could be used by a foreign bribery whistleblower. The Crime Stoppers service allows the provision of 'anonymous information about criminal activity to the police without being directly involved in the investigation process': Australian Federal Police, *Crime Stoppers* (2015) <<http://www.afp.gov.au/contact/crime-stoppers>>.

62 International Bar Association Anti-Corruption Committee, above n 1, 5.

63 Law Council of Australia, above n 1, 3.

64 *Ibid*.

65 *Ibid*.

the foreign bribery offence might also give rise to an allegation of breach of directors' duties.<sup>66</sup>

A wide range of public material on foreign bribery enforcement is available on the websites of relevant federal agencies, including foreign bribery factsheets, general summaries and overviews, answers to frequently asked questions, and links to information on making a complaint in relation to foreign bribery. However, online searching of these sites reveals that the topic of whistleblowing is not mentioned in any of the relevant documents.<sup>67</sup> While not a scientifically-validated search technique, 'googling' of this kind is the approach a would-be whistleblower could be expected to adopt, if contemplating disclosing information in relation to a potential foreign bribery offence and concerned about what protection might be available to them should they do so. While prospective whistleblowers may be motivated to read all available materials and analyse the appropriate pathways to follow in making a report, the processes could be made clearer.

The OECD Working Group encouraged the AFP to 'be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations'.<sup>68</sup> Whistleblowers are one obvious way to increase the diversity of sources of information available to enforcement authorities, yet one that is unlikely to be capitalised upon in the current disjointed structure.

### C Australia's 'Corporate Culture' Liability Provisions, Directors' Duties and Whistleblowing

Several governance pressures related to the legal obligations owed by Australian corporations and their directors reinforce the significance of whistleblowing in a foreign bribery context, further emphasising the critical need to improve the regulatory environment for whistleblowing in Australia. An important consideration for Australian corporations at risk of foreign bribery involvement is the presence of corporate culture liability provisions within the foreign bribery offence. The fault elements of the relevant *Criminal Code* provisions can be established on the basis of a company culture that 'directed, encouraged, tolerated or led to non-compliance' or on the basis of a corporation having 'failed to create and maintain a corporate culture that required compliance'.<sup>69</sup> These provisions, novel at the time of their creation,<sup>70</sup> remain

66 Greg Medcraft, 'Setting the Record Straight: ASIC, Bribery and Enforcement Action' (Speech delivered at the AmCham Business Leaders Lunch, Sydney, 11 October 2013) 4–5 <<http://download.asic.gov.au/media/1346930/Setting-the-record-straight--ASIC-bribery-and-enforcement-action.pdf>>.

67 Searches undertaken on 4 September 2014. Online searching used key words 'foreign bribery', 'asic foreign bribery', 'foreign bribery guidance australia'. Within-document searching was conducted for the search term 'whistle' to identify occurrences of either 'whistleblower' or 'whistleblowing'. Key documents accessed included the AFP's 'Bribery of Foreign Officials' webpage, with linked factsheets titled 'Foreign Bribery Factsheet' and 'referring fraud related matters to the AFP': Australian Federal Police, *Bribery of Foreign Officials* (2015) <<https://www.afp.gov.au/what-we-do/our-work-overseas/bribery-foreign-officials>>. A number of links viewed during the searches were broken or out of date.

68 *Phase 3 Report*, above n 2, 50, recommendation 8(a)(ii).

69 *Criminal Code* ss 12.3(2)(c)–(d).

unused and have at times been viewed as of predominantly academic rather than practical interest.<sup>71</sup> The corporate culture concept does however have potential to assist in a prosecution of an Australian corporation that has failed to maintain adequate foreign bribery governance procedures. The OECD Working Group appeared to recognise this potential, recommending ‘Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture’,<sup>72</sup> and noting the need for ongoing monitoring of these provisions in its 2015 *Follow-up Report*.<sup>73</sup>

Where standard corporate responses to foreign bribery risk are well publicised, as is increasingly the case, Australian companies are likely to be subject to a concomitant pressure to demonstrate compliance with those approaches in order to be able to defend allegations of an inadequate corporate culture. The presence of whistleblowing systems and policies offers one way to demonstrate an appropriate culture,<sup>74</sup> especially in light of the recognition now accorded whistleblowing as an anti-corruption tool.<sup>75</sup> Conversely, lack of adequate whistleblowing systems may in time constitute evidence of a culpable culture, particularly for those companies active in industries or regions with high foreign-bribery risk. An inadequate regulatory system in relation to foreign bribery whistleblowing in Australia, including a lack of direct whistleblowing protection in relation to foreign bribery, and a lack of guidance as to what might constitute adequate whistleblowing procedures, makes it more difficult for corporations to know when they are meeting ‘corporate culture’ expectations.

Growing awareness of foreign bribery risk may also lead to increased promulgation of guidance from peak bodies on related topics,<sup>76</sup> in itself generating new default standards of conduct. The Institute of Chartered Accountants in Australia and PricewaterhouseCoopers Australia have jointly published a report on foreign bribery and corruption which identifies whistleblower hotline systems as a key element in controls to detect and respond to bribery. The Australian Securities Exchange’s *Corporate Governance Principles and Recommendations* include suggestions in relation to whistleblower protection programs consistent with the guidelines of Standards

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70 The OECD Phase 3 Working Party’s 2012 review of Australia’s foreign bribery compliance referred to the provisions as ‘somewhat novel’, and noted that they had not yet been used: *Phase 3 Report*, above n 2, 12–13 [22].

71 Ibid; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 148; 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, 492.

72 *Phase 3 Report*, above n 2, 49, recommendation 3.

73 *Follow-up Report*, above n 4, 4.

74 Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, ‘Bounty Hunters, Whistleblowers and a New Regulatory Paradigm’ (2013) 41 *Australian Business Law Review* 292, 296.

75 Wolfe et al, above n 12, 10.

76 See, eg, Institute of Chartered Accountants in Australia and PricewaterhouseCoopers Australia ‘Foreign Bribery and Corruption: The Facts, the Risks, and the Ways to Help Protect Your Organisation’ (Discussion Paper, June 2011) 11.

Australia.<sup>77</sup> The relevant Standard suggests that companies should develop an internal whistleblowing framework complementary to the company's code of ethics.<sup>78</sup>

Developments in industry guidance of this kind are significant because they can impose real-world, black-letter law consequences on directors of corporations. Such guidance could have a feedback effect on an assessment of what amounts to a compliant corporate culture for the purposes of the *Criminal Code's* corporate culture provisions. In addition, industry standards could affect black-letter law assessments of the duty of care owed by directors. Australian directors have statutory and related general law obligations to ensure they act with the degree of care and diligence that an ordinary person would exercise if they were a director of a company in the company's circumstances.<sup>79</sup> The courts will accordingly consider contextual factors when assessing compliance with the duty, and this assessment can include circumstances such as the nature of the company's business.<sup>80</sup> For Australian corporations active in offshore locations, international governance standards may be relevant, since this is part of the nature of the company's business. Further, industry publications and contemporary governance literature may be sources of evidence of current expectations in relation to director conduct,<sup>81</sup> suggesting that industry publications and guidance supporting the importance of adequate whistleblowing processes may be significant in assessing a director's discharge of their duty of care.

The increase in foreign bribery enforcement in recent years, with more than twice as many bribery investigations on foot in 2015 as in 2012,<sup>82</sup> together with increased awareness of foreign bribery risk among Australian corporations,<sup>83</sup> has made management of that risk more important than ever. Failure to address that risk leaves corporations exposed to prosecution and reputational damage. An improved, transparent and well-defined foreign bribery whistleblowing regulatory structure would assist corporations and directors to understand and

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77 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Principles and Recommendations, March 2014) 20; Standards Australia, 'Australian Standard: Whistleblower Protection Programs for Entities' (Standards No 8004, June 2003).

78 See, eg, Standards Australia, above n 77, 12 [2.3.12], 13 appendix A.

79 *Australian Securities and Investments Commission v Macdonald [No 11]* (2009) 256 ALR 199, 247 [239] (Gzell J); *Corporations Act 2001* (Cth) s 180(1); the statutory standard of duty of care and diligence is essentially the same as under the common law: *Re HIH Insurance Ltd (in prov liq) v Adler* (2002) 168 FLR 253; *Daniels v Anderson* (1995) 37 NSWLR 438.

80 *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 397 [100] (Brereton J).

81 *Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 341, 358–9 [72] (Austin J); *Australian Securities and Investments Commission v Healey* (2011) 278 ALR 618, 662 [192] (Middleton J).

82 *Follow-up Report*, above n 4, 4.

83 Surveys in 2012 and 2015 by international accounting firm Deloitte indicated the number of respondents who identified themselves as having a comprehensive knowledge of Australia's foreign bribery laws increased from 22 per cent to 27 per cent over that period (n=390 in 2012 and n=269 in 2015): Deloitte, 'Bribery and Corruption Survey 2012 Australia & New Zealand: A Storm on the Horizon?' (Report, 2012) 9; Deloitte, 'Bribery and Corruption Survey 2015 Australia & New Zealand: Separate the Wheat from the Chaff' (Report, 2015) 26.

discharge their obligations, and to ensure an appropriate corporate culture. In an environment of corporate culture liability risk, and evolving industry practices, Australia's failure to provide a clear and adequate foreign bribery corporate whistleblowing regulatory structure appears even more anomalous.

#### IV WHISTLEBLOWING, FOREIGN BRIBERY REGULATION AND INTERNATIONAL DEVELOPMENTS

Lack of effective whistleblower support for foreign bribery informants in Australia contrasts strongly with the approach in many other jurisdictions internationally. There is a clearly-identifiable trend of expansion of legislative controls on international bribery,<sup>84</sup> and whistleblowing structures increasingly form part of that regulatory environment. International organisations, national regimes and professional associations have promulgated guidance that identifies whistleblowing structures as a standard feature in foreign bribery regulation. In particular, the United States' bounty program for whistleblowers has had a dramatic effect on rates of whistleblowing generally and has assisted in the increase in anti-bribery enforcement.<sup>85</sup> For the 2013 period whistleblower tips as a whole increased by eight per cent on the previous year, but tips in relation to *FCPA* violations increased at more than three times that rate, or nearly 30 per cent.<sup>86</sup> Similarly, the United Kingdom's relatively new *Bribery Act 2010* (UK) c 23 ('*Bribery Act*') regime, described as the 'toughest anti-corruption legislation in the world',<sup>87</sup> draws attention to the relevance of whistleblowing structures as evidence of appropriate conduct for the purposes of avoiding liability under the *Bribery Act*.

##### A OECD and Other International Agency Support for Whistleblowing

Examples of country-based support for whistleblowing are reinforced by a vast suite of international anti-corruption guidelines and directives incorporating whistleblowing, emanating from the OECD, the G20, the International Chamber of Commerce ('ICC') and others. Whistleblowing has been described as one of 'the most effective, if not the most effective' anti-corruption tool.<sup>88</sup> The OECD has been at the forefront of international anti-bribery policy-setting since the introduction in 1999 of the OECD's *Convention on Combating Bribery*, now adopted by 34 member states and seven non-member countries, and referred to at

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84 Hansberry, above n 14, 225. For a comprehensive review of international anti-corruption developments, see Wouters, Ryngaert and Cloots, above n 30.

85 Andrew Ceresney, 'Keynote Address' (Speech delivered at the International Conference on the *Foreign Corrupt Practices Act*, Washington, DC, 19 November 2013) <<http://www.sec.gov/News/Speech/Detail/Speech/1370540392284#.VAaBuvmSws4>>; see also Riella, Omar and Miller, above n 54.

86 US Securities and Exchange Commission, above n 54, 20 appendix B; see also Riella, Omar and Miller, above n 54.

87 Brigid Breslin, Doron Ezickson and John Kocoras, 'The *Bribery Act 2010*: Raising the Bar above the US *Foreign Corrupt Practices Act*' (2010) 31 *Company Lawyer* 362, 362.

88 Wolfe et al, above n 12, 10.

the start of this article.<sup>89</sup> It was the need to comply with the *Convention* that prompted the passage of Australia's foreign bribery provisions in 1999, and (as indicated above) the review of Australia's current compliance with the *Convention* that resulted in the critical OECD's *Phase 3 Report* (and subsequent 2015 *Follow-up Report*). The OECD advises that whistleblowing protections form part of ongoing attempts to improve anti-bribery enforcement,<sup>90</sup> and supports that general theme in a range of guidance and recommendation documents.<sup>91</sup>

The list of other international agencies that have identified the significance of whistleblowing in combatting corruption is a lengthy one, and includes the G20,<sup>92</sup> the ICC,<sup>93</sup> the World Economic Forum,<sup>94</sup> The Global Reporting Initiative,<sup>95</sup> and the International Corporate Governance Network.<sup>96</sup> Transparency International's *Business Principles for Countering Bribery* advocates a minimum standard of 'secure and accessible channels through which employees and others should feel able to raise concerns and report violations ("whistleblowing") in confidence and without risk of reprisal'.<sup>97</sup> Many other international agencies similarly advocate whistleblowing as an anti-corruption measure.<sup>98</sup>

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89 *Phase 3 Report*, above n 2.

90 *Recommendation of the Council for Further Combating Bribery*, above n 12.

91 See, eg, *ibid* annex II; *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, above n 32; *OECD Annual Report 2013*, above n 12, 41; G20, above n 12; Organisation for Economic Co-operation and Development, 'Guidelines for Multinational Enterprises 2011 Edition' (Guidelines, 2011) 23 [13]. The Guidelines identify whistleblower protection as of 'particular relevance to anti-bribery' initiatives.

92 G20, above n 12, 2.

93 Commission on Corporate Responsibility and Anti-corruption, International Chamber of Commerce, *ICC Rules on Combating Corruption* (at 17 October 2011) art 7. An associated corporate practices manual devotes a chapter to whistleblowing: Heimann and Vincke, above n 12, ch 7.

94 World Economic Forum, 'Partnering against Corruption – Principles for Countering Bribery' (Publication, 2009) 16 [5.5.2] <[http://www3.weforum.org/docs/WEF\\_PACI\\_Principles\\_2009.pdf](http://www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf)>.

95 Global Reporting Initiative, 'G4 Sustainability Reporting Guidelines' (Guidelines, 5 August 2015) [G4–58] <<https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>>.

96 International Corporate Governance Network, 'ICGN Global Governance Principles' (Principles, 2014) 13. Principle 4.3 stipulates that boards should ensure there is in place 'an independent, confidential mechanism whereby an employee, supplier or other stakeholder can raise (without fear of retribution) issues of particular concern'. This discussion is co-located with discussion of the necessity of mitigating bribery risks.

97 Transparency International, 'Business Principles for Countering Bribery: A Multi-stakeholder Initiative Led by Transparency International' (Principles, 2013) 10 [6.5.1] <[http://www.transparency.org/whatwedo/tools/business\\_principles\\_for\\_countering\\_bribery](http://www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery)>.

98 See *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) art 33. The World Bank's *Integrity Compliance Guidelines* also provide support for whistleblowing: World Bank, *Summary of World Bank Group Integrity Compliance Guidelines*, [9.3] <[http://siteresources.worldbank.org/INTDOI/Resourses/Integrity\\_Compliance\\_Guidelines.pdf](http://siteresources.worldbank.org/INTDOI/Resourses/Integrity_Compliance_Guidelines.pdf)>. The World Bank's Integrity Vice-Presidency investigates allegations of internal and external corruption, and the Bank publishes a blacklist of barred firms and individuals on its website: Wouters, Ryngaert and Cloots, above n 30, 30. Notably, Australian corporations appear on that list: World Bank, *World Bank Listing of Ineligible Firms & Individuals* (2016) <[http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&sort\\_on=SUPP\\_CTRY\\_NAME&sort\\_order=ascending&sort\\_data=text](http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&sort_on=SUPP_CTRY_NAME&sort_order=ascending&sort_data=text)>.



## B United States *FCPA* Activity: Bounty Provisions and Increased Enforcement Activity

As noted above, a significant development in foreign bribery enforcement in recent years has been the passage in the United States of the *Dodd-Frank* whistleblower provisions, with direct application to the *FCPA*.<sup>99</sup> Whistleblower bounties have been credited with a dramatic rise in the volume of *FCPA*-related information flowing in to the SEC.<sup>100</sup> Within a short time of the *Dodd-Frank* whistleblower bounty scheme coming into effect the SEC reported it was receiving one to two ‘high value’ tips per day, compared with perhaps a dozen annually in the period before *Dodd-Frank*.<sup>101</sup> While this growth in general tips reaching the SEC is remarkable, in relation to *FCPA* tips, the SEC has reported an even more dramatic escalation in whistleblowing. As noted above, for the 2013 period whistleblower tips in relation to *FCPA* violations increased by nearly 30 per cent.<sup>102</sup> The growth trend is likely to continue; a senior SEC official has indicated the SEC expects ‘*FCPA* violations to become an increasingly fertile ground for *Dodd-Frank* whistleblowing’.<sup>103</sup> Bounties have shifted anti-bribery enforcement from a predominantly public enforcement model to one in which private citizens now ‘have a true and tangible financial stake in the global fight against corruption’.<sup>104</sup> The announcement in late 2014 of the largest bounty yet paid under the scheme (US\$30 million), although not a foreign-bribery payment, reinforces the potential significance of the *Dodd-Frank* program for foreign bribery enforcement.<sup>105</sup>

This phenomenal growth in tips is yet to convert into an *FCPA* whistleblower payment, but inevitably will do so.<sup>106</sup> When it does, the attendant publicity can be expected to generate still further growth in *FCPA* whistleblowing. That growth may not be limited to the United States; the SEC’s statistical reporting shows it has already received bounty-scheme whistleblower reports around the world, including from Australia,<sup>107</sup> and there is no reason to suppose foreign bribery reports will not form part of those statistics in the future. To the extent an Australian corporation is active in any environment to which the *FCPA* has potential extra-territorial connection, the company is exposed to whistleblower

99 *Dodd-Frank Act* § 922(a); *FCPA* § 78dd-1.

100 Riella, Omar and Miller, above n 54.

101 Hansbery, above n 14, 206; David Clarke, ‘SEC Gets More Whistleblower Tips’, *Reuters* (online), 4 February 2011 <<http://www.reuters.com/article/2011/02/04/us-sec-whistleblower-idUSTRE7135UA20110204>>.

102 US Securities and Exchange Commission, above n 54, 20; see also Riella, Omar and Miller, above n 54.

103 Ceresney, above n 85; see also Riella, Omar and Miller, above n 54.

104 Mark V Vlastic and Peter Atlee, ‘Democratizing the Global Fight against Corruption: The Impact of the *Dodd-Frank* Whistleblower Bounty on the *FCPA*’ (2012) 36(2) *Fletcher Forum of World Affairs* 79, 82.

105 *Re Claim for Award* (Securities and Exchange Commission, Release No 73 174, Whistleblower Award Proceeding File No 2014-10, 22 September 2014). The SEC issued a press release announcing the payment: US Securities and Exchange Commission, ‘SEC Announces Largest-Ever Whistleblower Award’ (Press Release, 2014-206, 22 September 2014) <<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VCzkJvmSws4>>.

106 Riella, Omar and Miller, above n 54.

107 Fifteen *Dodd-Frank* tips were received from Australia in fiscal year 2013 alone: US Securities and Exchange Commission, above n 54, 20.

risk, regardless of lack of Australian regulatory attention to whistleblowing. Further, as noted above, the 2014 *Senate Committee Report* specifically recommended consideration be given to the introduction in Australia of a bounties-style scheme of the kind implemented in the United States by the *Dodd-Frank Act*.<sup>108</sup> While the Federal Government's response to the recommendation was not particularly encouraging, going no further than noting that the recommendation had been made, the Federal Government did not reject the recommendation,<sup>109</sup> and influential submissions to the 2015–16 Foreign Bribery Senate Inquiry gave support to the introduction of some form of bounty system.<sup>110</sup>

Business prosecution guidance issued by the Department of Justice ('DoJ') on the approach it will take to assessing a corporation's compliance programs when making prosecution decisions identifies that the DoJ will consider whether information and reporting systems are in place that are capable of providing management and the board 'with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law'.<sup>111</sup> Established whistleblower systems within a corporation may assist in demonstrating the presence of information and reporting systems that have the capacity to provide such timely and accurate information to the board. Given the escalating possibility of a *Dodd-Frank* bounty tip reaching the SEC, the *FCPA* provisions represent a regulatory risk factor for Australian corporates with US connections. In mitigating that risk, affected Australian companies have, by virtue of the DoJ principles, a very real incentive to incorporate effective whistleblowing systems into their internal governance arrangements, regardless of whether Australian regulations require (or support) them. Further, to the extent that United States incentives programs increase the probability that Australian companies disclose information to United States regulatory authorities rather than their Australian counterparts, issues of policy arise. Australian regulators and corporations may prefer control of Australian-based foreign bribery whistleblowing to be retained within the local jurisdiction. Lack of adequate domestic whistleblowing systems makes this difficult.

### C United Kingdom Foreign Bribery Legislation and 'Adequate Procedures'

The United Kingdom's introduction of extensive foreign bribery provisions in 2011 set a new height for the international anti-corruption bar.<sup>112</sup> The *Bribery Act* incorporates concepts that are likely to further reinforce the need for international corporations to pay attention to their whistleblowing systems. The legislation establishes liability where an organisation is associated with another

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108 2014 *Senate Committee Report*, above n 47, xxvi, recommendation 16.

109 Australian Government, above n 55, 7.

110 Law Council of Australia, above n 1, 12 ff; International Bar Association Anti-Corruption Committee, above n 1, 35 ff.

111 US Department of Justice, *Principles of Federal Prosecution of Business Organizations* (2008) 14 [9–28.800] <<http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>>.

112 Breslin, Ezickson and Kocoras, above n 87, 362.

person who pays a bribe on behalf of the organisation.<sup>113</sup> Section 7 of the *Bribery Act* allows a defence for organisations where they can demonstrate ‘adequate procedures designed to prevent’ the associated person from engaging in bribery. The Act also requires that the Secretary of State provide organisations with some published guidance on ‘procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)’.<sup>114</sup> Guidance issued by the Secretary of State identifies whistleblowing as a procedure that could assist in demonstrating the appropriate steps had been taken by an organisation to prevent bribery.<sup>115</sup> The *Bribery Act* guidance suggests that whistleblowing procedures in relation to the reporting of bribery form part of ‘an indicative ... list of the topics that bribery prevention procedures might embrace’,<sup>116</sup> and that ‘[e]ffective formal statements that demonstrate top level commitment are likely to include ... reference to ... any protection and procedures for confidential reporting of bribery (whistleblowing)’.<sup>117</sup>

The United Kingdom’s targeted anti-bribery guidance contrasts strongly with the absence of regulator indications in Australia of the kinds of practices that could demonstrate adequate prevention procedures. Despite the incorporation of corporate fault elements tied to the presence of an inappropriate corporate culture in Australia’s *Criminal Code*, Australian corporations have no official guidance to consult on what the attributes of an appropriate culture might be, including the likelihood that one attribute would be adequate whistleblowing procedures. In light of the potential power of the corporate culture liability provisions to ground a prosecution for breach of Australia’s foreign bribery provisions, this lack of guidance from regulators on what might constitute evidence of appropriate anti-corruption practice is significant.

The United Kingdom provisions also have the potential to apply extraterritorially, including to Australian corporations, where a business or part of the corporation’s business is carried on in the United Kingdom,<sup>118</sup> or where the provider of the bribe has a ‘close connection’ with the United Kingdom.<sup>119</sup> It may be that the jurisdictional ambition of the *Bribery Act* extends beyond even the *FCPA*’s wide scope.<sup>120</sup> Further, the United Kingdom Home Office has indicated it may consider the introduction of United States-style bounty payments for whistleblowers.<sup>121</sup> Such a development would reinforce the global relevance of

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113 *Bribery Act* s 7.

114 *Bribery Act* s 9(1).

115 Ministry of Justice (UK), above n 15.

116 *Ibid* 22.

117 *Ibid* 23. It is worth noting that legislative support for whistleblowing in the United Kingdom has existed, by virtue of the *Public Interest Disclosure Act 1998* (UK) c 23, prior to the introduction of the *Bribery Act*, further reinforcing the impetus for United Kingdom companies to ensure adequate whistleblowing provisions are in place.

118 *Bribery Act* s 7.

119 *Bribery Act* s 12.

120 Wouters, Ryngaert and Cloots, above n 30, 250.

121 Caroline Binham, ‘Home Office Looks at “Bounty” Plan for Corporate Whistleblowers’, *Financial Times* (online), 10 October 2013 <<https://next.ft.com/content/2a999a90-30d3-11e3-b991-00144feab7de>>.

the United Kingdom guidance, including its whistleblower provisions. The United Kingdom's Serious Fraud Office ('SFO') was closely involved in investigations into allegations connected to Australia's Securrency foreign bribery scandal, and then SFO Chief Executive Richard Alderman described the matter at the time as 'an excellent example of how anti-fraud agencies around the world are working together to fight economic crime'.<sup>122</sup> A number of charges related to the Securrency matter were laid in the United Kingdom,<sup>123</sup> illustrating the significance of the United Kingdom anti-bribery regime for Australian companies.

The breadth and ubiquitousness of international guidelines regulating and advocating foreign bribery whistleblowing, together with the potential extraterritorial effect of national regulation (such as the *FCPA* and *Bribery Act*), throw into sharp relief Australia's failure to provide for an effective foreign bribery whistleblowing regulatory structure. By contrast with these international trends, Wolfe et al's analysis of the adequacy of whistleblower provisions within the G20 has demonstrated the level of shortcomings within the Australian system. Wolfe et al's tabulated comparison of private whistleblowing systems appears as Annexure 1. Relevant criteria include the breadth of the definition of relevant wrongdoing, the availability of anonymity, the mandating of internal disclosure procedures, the adequacy of remedies and the definition of whistleblowers.<sup>124</sup> On 9 of 14 desirable features of a 'best practice' private whistleblowing regime, Wolfe et al categorise Australia's system as 'absent/not at all comprehensive'.<sup>125</sup>

While wholesale reform of Australia's foreign bribery whistleblowing regime may not be imminent, approaches taken by foreign regulatory agencies offer potential examples of developments that could be pursued in Australia. One very achievable aim is promulgation of guidelines by regulatory agencies with responsibility for foreign bribery enforcement. The United Kingdom's *Bribery Act* guidance, with its clear statements in relation to the place of whistleblowing

122 Paul Lewis, 'Two Businessmen Held in Bribery Investigation', *The Guardian* (online), 7 October 2010 <<http://www.theguardian.com/uk/2010/oct/06/two-held-in-bribery-investigation-australia>>.

Mr Alderman has since been subject to vehement criticism: Alistair Osborne, 'Ex-SFO chief Richard Alderman Attacked over "Shocking" Stewardship', *The Telegraph* (online), 7 March 2013 <<http://www.telegraph.co.uk/finance/financial-crime/9916461/Ex-SFO-chief-Richard-Alderman-attacked-over-shocking-stewardship.html>>.

123 Innovia Films Ltd and the Reserve Bank of Australia were 50 per cent co-owners of Securrency International Pty Ltd until the Bank's sale of its stake to Innovia Films in 2013: Reserve Bank of Australia, 'Sale of Securrency' (Press Release, 2013-02, 12 February 2013). In 2011 the United Kingdom's Serious Fraud Office charged William Lowther, a United Kingdom national and deputy chairman of Innovia Films, with one count of conspiracy in relation to 2001 transactions connected to Securrency; other UK executives were also charged at the time: Rob Evans, John Burn-Murdoch and Paul Lewis, 'Serious Fraud Office Alleges UK Businessman Made Corrupt Payments', *The Guardian* (online), 16 September 2011 <<http://www.theguardian.com/law/2011/sep/15/anti-bribery-investigators-prosecute-uk-businessman>>. Mr Lowther was acquitted of the charge in 2012: Sue Crawford, 'Cumbrian Business Tycoon Cleared of Corruption', *News and Star* (online), 6 December 2012 <<http://www.newsandstar.co.uk/news/Cumbrian-business-tycoon-cleared-of-corruption-bb089406-ee87-48f3-8a0e-5997aa804604-ds>>.

124 Wolfe et al, above n 12, 3, 8.

125 Ibid 7.

in a corporation's bribery prevention arsenal, is particularly attractive in this regard. Perhaps more ambitious, but nonetheless available for consideration, are amendments to the current whistleblowing provisions in part 9.4AAA of the *Corporations Act* to allow for payments of United States-style bounties to corporate whistleblowers. Although the Federal Government did not adopt this proposal when made by the Senate Committee investigating the conduct of ASIC it did not reject it,<sup>126</sup> and the extraordinary success of the United States' bounty model is likely to result in continued calls for its consideration in the context of Australian foreign bribery enforcement.<sup>127</sup> For now however, it may be that there are more immediately achievable improvements to the foreign bribery whistleblowing regulatory regime to be pursued.

## V CONCLUSION

This article argues for the value of whistleblowing as an anti-bribery tool from both practical and theoretical perspectives. Whistleblowing systems that support internal information capture and dissemination in relation to disclosures can assist in a company's internal anti-bribery control systems. Internal reporting of foreign bribery ought to reduce the risk of escalation of bribery activity, benefiting the corporation and public regulatory goals. These arguments appear to be well understood by international regulatory agencies and industry bodies, but are yet to sufficiently influence the Australian foreign bribery regulatory system.

This article also points to a combination of shortcomings within the Australian regulatory structure applicable to Australian foreign bribery whistleblowing. These include the lack of a direct connection between the existing primary corporate whistleblowing protections and foreign bribery, the lack of transparency in Australia's foreign bribery enforcement network, and the contrast between the lack of regulatory support for foreign bribery corporate whistleblowing on the one hand, and contemporary corporate governance pressures on the other. The dramatic disparities between Australia's approach and international recognition of the relevance of whistleblowing to foreign bribery enforcement are also described. In light of these points, this article argues for some pragmatic, achievable changes to the existing regulatory structure, pending a desirable and more comprehensive (but likely longer-term) reform of the corporate whistleblowing system in Australia. It also argues for promulgation of much-needed administrative guidance on internal control systems related to foreign bribery, including in relation to whistleblowing.

Immediate improvement is possible through a range of alternative legislative amendments to part 9.4AAA of the *Corporations Act*. Despite the significant limitations of the part 9.4AAA provisions, they offer better protection than foreign bribery whistleblowers in Australia would otherwise be afforded.

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126 Australian Government, above n 55, 7.

127 See, eg, Law Council of Australia, above n 1, 13.

Simplest and most limited, and perhaps therefore most immediately achievable, would be insertion of reference to the foreign bribery offence into the existing whistleblower provisions of part 9.4AAA of the *Corporations Act*, making clear for the first time the connection between existing corporate whistleblower protections and foreign bribery disclosures. Alternatively, a wider reference in part 9.4AAA to a breach of the criminal law generally would achieve the same outcome, or more ambitiously, a civil liability foreign bribery offence could be inserted into the *Corporations Act*.<sup>128</sup> A further option exists in the 2014 *Senate Committee Report* recommendation that part 9.4AAA be linked to any revelations related to ASIC's field of investigative responsibility.<sup>129</sup> This wider amendment would be preferable, ensuring a range of whistleblowing activity was captured. Any of these approaches would carry the additional benefit of providing direct access for foreign bribery whistleblowers to ASIC's newly formed Office of the Whistleblower,<sup>130</sup> potentially simplifying current jurisdictional confusion. However, consequential implications for the resourcing of ASIC's Office of the Whistleblower unit may make the more extensive options less attractive. It needs to be said that these relatively minor, and hopefully achievable, reforms can only address the current *irrelevancy* of Australia's private whistleblower protection provisions, and much more substantial work is needed to deal with the *insufficiency* of those provisions. In the interim however, they offer a way forward.

In addition, a second achievable intervention is encouragement of whistleblower foreign bribery disclosures through regulatory guidance. Australian federal regulators could provide targeted anti-foreign bribery guidance, analogous to that promulgated by the United Kingdom Ministry of Justice, outlining appropriate internal governance procedures (including whistleblower processes) for Australian companies with offshore operations.<sup>131</sup> This relatively minor intervention would represent a significant improvement to the current regime, and one that would be likely to stimulate the development of internal whistleblowing foreign bribery control systems within Australian corporations. Further, such specific foreign bribery guidance could incorporate, or at least be consistent with, other generically relevant corporate governance practices in Australia that increasingly recognise the place of effective whistleblowing systems within a corporation's anti-corruption and governance structures.<sup>132</sup> Given Australia's novel and potentially very powerful corporate culture liability provisions, regulatory good-practice guidance of this kind would be particularly welcome.

The contribution that improved rates of corporate whistleblowing can make to enhanced foreign bribery enforcement in Australia has been under-recognised

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128 Law Council of Australia, above n 1, 13.

129 2014 *Senate Committee Report*, above n 47, xxv, recommendation 12.

130 Australian Securities and Investments Commission, *Information Sheet 52 (INFO 52) Guidance for Whistleblowers* (23 March 2016) <<http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/>>.

131 Law Council of Australia, above n 1, 10.

132 See, eg, Standards Australia, above n 77, dealing with whistleblower frameworks generally.

by the existing regulatory system. The OECD Working Group's 2012 description of the existing regime in relation to foreign bribery whistleblowers in Australia as 'insufficient or irrelevant' retains its currency. The emergence of the whistleblower has been described as 'one of the most significant developments in corporate governance in the last fifty years'.<sup>133</sup> In light of the widespread international adoption of whistleblower measures and insights offered by theoretical perspectives, the emergence of the whistleblower is also proving a crucial development in anti-bribery governance. There is now a need to harness that development for the benefit of improved foreign bribery regulation in Australia.

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133 Matt A Vega, 'Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of *Dodd-Frank Act* "Bounty Hunting"' (2012) 45 *Connecticut Law Review* 483, 485.

**ANNEXURE 1  
G20 COUNTRIES – PRIVATE SECTOR LAWS**

Table 3. G20 countries – private sector laws

Rating	1 Very/quite comprehensive		2 Somewhat/partially comprehensive		3 Absent/not at all comprehensive		Tot '3'			
	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr		
7 Anonymity	3	3	3	2	3	3	3	3	1	15
9 Internal disclosure procedures	3	3	2	3	3	3	3	2	3	14
14 Transparency	3	3	3	3	3	3	2	2	1	14
5 External reporting channels (third party/public)	3	3	3	3	3	3	2	1	3	13
13 Oversight	3	3	3	2	3	3	2	2	3	13
8 Confidentiality	3	3	3	2	2	3	3	3	2	11
12 Sanctions	3	3	3	2	3	2	2	3	2	11
11 Remedies	3	3	3	3	2	3	3	2	1	10
1 Coverage	3	3	3	3	2	3	2	2	1	10
2 Wrongdoing	3	3	3	3	3	2	2	2	1	10
6 Thresholds	3	3	3	3	2	3	2	2	2	9
10 Breadth of retaliation	3	3	3	3	3	2	2	2	1	9
3 Definition of whistleblowers	3	3	3	2	2	2	2	1	2	8
4 Reporting channels (internal & regulatory)	3	2	3	2	2	2	2	1	2	7

Simon Wolfe, Mark Worth, Suelette Dreyfus and AJ Brown, 'Whistleblower Protection Laws in G20 Countries: Priorities for Action' (Final Report, Blueprint for Free Speech, September 2014) 7 (Table 3), reprinted with permission of Blueprint for Free Speech.