

HOLDING COMPANIES RESPONSIBLE? THE CRIMINAL LIABILITY OF AUSTRALIAN CORPORATIONS FOR EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS

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I INTRODUCTION

Allegations of extraterritorial corporate misconduct illustrate the global dimensions of Australia's challenge¹ to implement the United Nations ('UN') Guiding Principles on Business and Human Rights ('Guiding Principles').² In the mid-1990s, companies in the BHP Billiton group faced claims that they had polluted a river in Papua New Guinea, thereby causing damage to the customary lands and livelihoods of Indigenous Peoples.³ Less than a decade later, the Australian Federal Police commenced a criminal investigation against an Australian-Canadian joint venture for alleged support of government violence in the Democratic Republic of Congo.⁴ The inquiries were discontinued,⁵ and the

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- 1 See Australian Human Rights Commission, 'Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement' (August 2016) 4, 10–11 (recognising 'offshore operations of Australian companies' as 'key business and human rights challenges for Australia' and making recommendations about required extraterritorial regulatory actions).
- 2 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Guiding Principles on Business and Human Rights*'). See also John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008) ('*Protect, Respect, Remedy Report*').
- 3 *Dagi v The Broken Hill Proprietary Company Ltd [No 2]* [1997] 1 VR 428; discussed further in Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) *Australian Journal of Human Rights* 2. The case settled.
- 4 Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 *Yale Human Rights and Development Law Journal* 127, 147–8. See also Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code' (2007) 5 *Journal of International Criminal Justice* 809.

case became something of a negative *cause celebre* for academics and non-government human rights organisations.⁶ In the last ten years, two Australia Reserve Bank subsidiaries (and some of their executives) were accused in multiple jurisdictions of bribing foreign public officials.⁷ More recently still, the Australian government, along with its private sector contractors, was sued in tort in connection with the Manus Island offshore detention facility.⁸ In mid-June 2017, the parties proposed a settlement worth more than \$70 million plus costs, albeit without an admission of liability from the government or a disclosure of the division of the payout between the defendants.⁹

Australia's broad and innovative federal criminal laws would appear to be the silver lining to the story told above. Adopted as a schedule of the *Criminal Code Act 1995* (Cth), the Commonwealth Criminal Code ('*Criminal Code 1995* (Cth)' or 'Code') prohibits a variety of behaviours that directly or indirectly violate 'internationally recognised human rights' as identified in the Guiding Principles.¹⁰ Amongst other things, the Code gives effect to Australia's 'hard law' obligations to prevent and suppress international and transnational crimes, like offences against humanity and specific acts of corruption. Many of its prohibitions apply extraterritorially, some on the basis of the universality principle of jurisdiction. In principle, all of its offences may be committed by bodies corporate, including limited liability companies established under the

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- 5 See Justice Ian Binnie et al, 'The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases' (Amnesty International and International Corporate Accountability Roundtable, October 2016) 16–19, also discussing failed or apparently stalled criminal and civil actions in the Democratic Republic Congo and Canada. These Principles were adopted by a committee co-chaired by Justice Ian Binnie and Anita Ramasastry. The project advisers were Amnesty International and the International Corporate Accountability Roundtable ('ICAR').
- 6 *Ibid*, also noting that the company denied responsibility for any wrongdoing.
- 7 See generally Paul Latimer, 'Anti-bribery Laws – Compliance Issues in Australia' (2017) 24 *Journal of Financial Crime* 4, 11; Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Parliament of Australia, *Integrity of Overseas Commonwealth Law Enforcement Operations* (2013) 9–10.
- 8 Kamasae, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 6770, 7 April 2017. Supreme Court of Victoria, *Manus Island Detention Centre Class Action* (21 July 2017) <<http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/manus+island+detention+centre+class+action>>. See also James Cavallaro et al, 'Communiqué to the Office of the Prosecutor of the International Criminal Code under Article 15 of the *Rome Statute*: The Situation in Nauru and Manus Island: Liability for Crimes against Humanity' (14 February 2017) pt III(2), alleging crimes against humanity against Australian government officials and officers of private sector contractors.
- 9 Slater and Gordon Lawyers, 'Manus Island Class Action' (Notice of Proposed Settlement) <<https://www.slatergordon.com.au/class-actions/current-class-actions/manus-island-class-action>>. See also Ben Doherty and Calla Wahlquist, 'Government to Pay \$70m Damages to 1905 Manus Detainees in Class Action', *The Guardian* (online), 14 June 2017 <<https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>>.
- 10 *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex Guiding Principle 12, defining the scope of the business responsibility by inclusive reference to, eg, the International Bill of Rights and certain standards of the International Labour Organisation. For an alternative and more descriptive definition, albeit one focused on state obligations, see Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press, 2009) 32: 'internationally guaranteed legal entitlements of individuals *vis-à-vis* the state, which serve to protect fundamental characteristics of the human person and his or her dignity in peacetime and in times of armed conflict'.

Corporations Act 2001 (Cth). Last but not least, the Code's 'modern' corporate criminal liability rules appear designed to incentivise company directors to create compliant cultures and to prevent high-level managerial offending.¹¹ In these ways, Australia would seem to be a formal step closer to discharging its duty to protect international human rights standards in business situations and to provide victims with remedies.¹²

What the *Criminal Code 1995* (Cth) does not expressly regulate is the transmission of criminal responsibility between companies within international corporate 'families'. In other words, it does not explicitly engage with the challenge of corporate group or multinational enterprise ('MNE') accountability, which is implicit in the examples above and was a background factor in the UN Guiding Principles. This article therefore asks whether part 2.5 of the Code can be read to enable holding companies to be attributed with liability for extraterritorial human rights abuses committed in the context of a foreign subsidiary's overseas operations. It reaches an answer in four steps. First, the article reviews the problem of multinational corporate (criminal) accountability and the solution proposed for the UN by Harvard Professor John Ruggie (Part II). Second, it describes how the *Criminal Code 1995* (Cth) enables particular companies to be imputed with extraterritorial offences that correspond to violations of human rights standards (Part III). However, third, it determines that there are relatively few situations in which an Australian holding company will be responsible for subsidiary offences, quite less extraterritorial offences committed by overseas 'child' companies (Part IV).¹³ The Code would seem to require a connection in private or corporate law between the errant human actors and the holding company itself. Hence, fourth, this article evaluates a recent proposal to criminalise a holding company's failure to prevent foreign bribery *inter alia* by its subsidiaries (Part V). Our preliminary finding is that a corporate 'failing to prevent' offences would remove some – but create other – problems of corporate attribution and accountability.

11 See Part III below.

12 *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex Guiding Principles I, 15, 25. See also Australian Human Rights Commission, above n 1, 10.

13 For consistency with current statutory language, references to 'holding company' and 'subsidiary' are taken from the *Corporations Act 2001* (Cth) s 46:

A body corporate ... is a subsidiary of another body corporate if, and only if:

- (a) the other body:
 - (i) controls the composition of the first body's board; or
 - (ii) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the first body; or
 - (iii) holds more than one-half of the issued share capital of the first body...; or
- (b) the first body is a subsidiary of a subsidiary of the other body.

See also definitions of 'control of body corporate's board' and 'related bodies corporate' respectively: at ss 47, 50. Cf ss 9, 50AA, defining a broader concept of controlled entities.

II BACKGROUND PROBLEMS OF MULTINATIONAL CORPORATE (CRIMINAL) ACCOUNTABILITY

In the background of this analysis are debates about the attribution of crimes to legal persons and the governance of multinational enterprises. We briefly sketch the problems in comparative and international law in this Part, before considering how Australia responds to them in Part III.

A Corporate Criminal Liability Law

Corporate criminal liability has been a traditional source of division amongst regulators and legal theorists in continental Europe, North America and the British Commonwealth.¹⁴ The division principally concerns the issue of whether a corporation, as a *legal* person, could commit crimes that include a culpable mental state as an element.¹⁵ On the standard account, common law jurisdictions were initially more willing to recognise corporate criminal liability than civil law ones.¹⁶ The United States developed a concept of strict vicarious liability from tort law at the beginning of the 20th century.¹⁷ English courts followed suit, finding that companies could commit mens rea offences if the culpable acts and omissions were those of a human being with whom the company could be identified.¹⁸ In several continental European jurisdictions, the adoption and extension of corporate criminal law norms coincided with the end of the Cold War and new concerns about the risks of late modernity.¹⁹ Meantime, within and outside Europe, states had concluded a range of multilateral treaties under which they committed to preventing and suppressing so-called transnational crimes.²⁰

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- 14 Mark Pieth and Radha Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer, 2011) 3. See also Celia Wells, *Corporate Criminal Responsibility* (Oxford University Press, 2nd ed, 2001) 85, ch 7. Cf Markus Duber and Tatjana Hömle, *Criminal Law: A Comparative Approach* (Oxford University Press, 2014) 329. For a recent law firm survey of corporate criminal liability laws that includes coverage of Asia-Pacific jurisdictions, see Linklaters, 'Corporate Criminal Liability: A Review of Law and Practice Across the Globe' (2016) <https://www.allens.com.au/pubs/pdf/ibo/CorporateCriminalLiabilityPublication_2016.pdf>.
- 15 Pieth and Ivory, above n 14, 4: 'Corporations could, like human beings, hold rights and duties under private law but they could not be regarded as possessing the moral faculties that would enable them to be addressees of the criminal law'.
- 16 Ibid 9–12.
- 17 Roni A Elias, 'The Virtues of the Due Diligence Defense for Corporations in Criminal Cases: Solving the Problems of a Corporation's Vicarious Liability for the Crimes of Its Agents and Employees' (2015) 13 *Georgetown Journal of Law & Public Policy* 423, 433, citing *New York Central & Hudson River Railroad Co v United States*, 212 US 481 (1909).
- 18 See generally James Gobert and Maurice Punch, *Rethinking Corporate Crime* (LexisNexis Butterworths, 2003) 63; Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 3rd ed, 2013) 42; Wells, *Corporate Criminal Responsibility*, above n 14, 93–8. On the common law position in Australia, see Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' in Justin O'Brien and George Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Hart Publishing, 2013) 251, 254.
- 19 Pieth and Ivory, above n 14, 9–10.
- 20 See generally Neil Boister, "'Transnational Criminal Law'?" (2003) 14 *European Journal of International Law* 953, 955, 962–4; Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law*

Many of those illicit activities have an economic dimension; so, several of those treaties oblige state parties to recognise corporate criminal (or quasi-criminal) responsibility.²¹ Today, there are hold-outs within Europe, but also examples of corporate criminal liability rules in Latin America and in the Asia-Pacific region.²²

B Multinational Enterprise Governance

Governing multinational enterprises presented the likes of John Ruggie with a related but distinct set of challenges. The centralisation of economic power (and authority) within an MNE is at odds with the diffusion of regulatory competence in the international legal system.²³ The companies that may comprise an MNE²⁴ are incorporated under domestic legislation and generally upon the principles of limited liability and separate legal personality.²⁵ As a rule, each company is distinct from the others; each has the capacity to limit the liability of its members and managers to contribute to its debts. There may be grounds for ‘veil piercing’ in domestic law, but these are exceptions.²⁶ Moreover, there

(Routledge, 2014) 11, 13, defining the substantive focus of the treaties as ‘criminal activities that have ... actual or ... potential transboundary effects’ or ‘transboundary moral impacts’.

- 21 See, eg, *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) arts 2, 3(2) (‘*OECD Convention on Combatting Bribery*’); *Second Protocol, Drawn Up on the Basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities’ Financial Interests*, opened for signature 6 June 1997, OJC 221 (entered into force 16 May 2009) art 3; *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002) art 5; *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 19 September 2003) art 10; *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005) art 26. See also Financial Action Task Force, ‘The FAFT Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation’ (June 2017) 11 [6], 30 [3], [5].
- 22 See Linklaters, above n 14, 34; Pieth and Ivory, above n 14, 11–13.
- 23 John Gerard Ruggie, ‘Multinationals as Global Institution: Power, Authority and Relative Autonomy’ (2017) *Regulation and Governance* (Early View), 4–5, 11. See also Peter Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 *Cambridge Journal of Economics* 915.
- 24 For a broad de facto definition of the MNE, albeit without the supposition that one entity within the group controls the others, see Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* (first published 2008, 2011 ed) 17 [4]:
- They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.
- 25 *Protect, Respect, Remedy Report*, UN Doc A/HRC/8/5, 5–6; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 129–32; Muchlinski, ‘Limited Liability and Multinational Enterprises’, above n 23, 920; Ruggie, ‘Multinationals as Global Institution’, above n 23, 4–5, 11. See also John Armour, Henry Hansmann and Reinier Kraakman, ‘What is Corporate Law?’ in Reinier Kraakman et al (eds), *The Anatomy of Corporate Law* (Oxford University Press, 2nd ed, 2009) 1, 1–11.
- 26 For Australian authority on the partitioning of parent and child firms: see, eg, *Walker v Wimborne* (1976) 137 CLR 1, 6–7 (Mason J); *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567, 577 (Mason J). For a

is a ‘jurisdictional veil’ between holding companies and foreign subsidiaries in international law.²⁷ The better view is that states may only assert active personality jurisdiction over a corporation that ‘counts’ as its national.²⁸ The universality principle does not require a connection between the corporation and the enforcing state but is probably only accepted for core crimes.²⁹ It is also uncertain whether corporations may themselves commit crimes directly under international law.³⁰ In any case, corporations are expressly excluded from the jurisdiction of the International Criminal Court (‘ICC’).³¹

These problems with MNE governance were the focus of several international standard-setting initiatives,³² not least, the UN project that resulted in the Guiding Principles. Although Ruggie’s UN mandate was relevant to all types of businesses,³³ ‘in practice it was intended to shed particular light on multinational corporations’.³⁴ Under the Principles’ first ‘Protect’ pillar, states have the primary duty to guard against human rights violations by ‘third parties, including business enterprises’.³⁵ As part of this duty, governments are encouraged to regulate against extraterritorial abuses by businesses within their jurisdictions.³⁶ The second ‘Respect’ pillar identifies an active obligation on the

statutory exception to the corporate veil, see, eg, *Corporations Act 2001* (Cth) s 588V, creating ‘holding company’ liability for insolvent trading by a ‘subsidiary’. For a review of recent judicial attitudes to veil-piercing and tort liability in the context of corporate groups in England and Australia, see Ryan J Turner, ‘Revisiting the Direct Liability of Parent Entities Following *Chandler v Cape Plc*’ (2015) 33 *Company and Securities Law Journal* 45.

27 Muchlinski, ‘Limited Liability and Multinational Enterprises’, above n 23, 920.

28 Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed, 2015) 108–9, arguing that ‘[t]he “control theory” is *prima facie* not in line with international law, which considers nationality, and not control, as controlling’ (emphasis in original). See also Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006) 106–9.

29 Ryngaert, above n 28, 127.

30 For recent surveys of the issues, see, eg, Markos Karavias, *Corporate Obligations under International Law* (Oxford University Press, 2013) 95–103; Joanna Kyriakakis, ‘Corporations before International Criminal Courts: Implications for the International Criminal Justice Project’ (2017) 30 *Leiden Journal of International Law* 221; Volker Nerlich, ‘Core Crimes and Transnational Business Corporations’ (2010) 8 *Journal of International Criminal Justice* 895; Peter T Muchlinski, ‘Corporations in International Law’ (Max Planck Encyclopedia of Public International Law, June 2014) [48]–[49]. See also Monica Hakimi, ‘*In re Akhbar Beirut & Al Amin*’ (2017) 111 *American Journal of International Law* 132.

31 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002, ratified by Australia 1 July 2002) art 25(1) (‘*Rome Statute*’).

32 For a review of these efforts, see Olivier De Schutter, ‘The Challenge of Imposing Human Rights Norms on Corporate Actors’ in Oliver De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing, 2006) 1; John Gerard Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 *American Journal of International Law* 819; David Weissbrodt, ‘Human Rights Standards Concerning Transnational Corporations and Other Business Entities’ (2014) 23 *Minnesota Journal of International Law* 135; David Bilchitz and Surya Deva, ‘The Human Rights Obligations of Business: A Critical Framework for the Future’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 1, 4–10.

33 *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex Guiding Principle 6.

34 John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton, 2013) xi–xii.

35 *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex Guiding Principle 1.

36 *Ibid* Guiding Principle 2.

part of businesses to ‘avoid infringing’ human rights and to address harms in which they are implicated.³⁷ A core component of this responsibility is that businesses implement appropriate internal policies and processes, including those that ensure ‘due diligence’.³⁸ Due diligence requires that businesses undertake and embed human rights impact assessments in their organisations, review their responses thereto, and report to outside parties.³⁹ Businesses should also contribute to remediation.⁴⁰ The third ‘Protect’ pillar in fact distributes the obligation of providing victims with remedies between businesses and states.⁴¹

III REALISING THE UN GUIDING PRINCIPLES THROUGH THE *CRIMINAL CODE 1995* (CTH)

Within Australia, the *Criminal Code 1995* (Cth) appears to be a first port of call for implementing the UN Guiding Principles. The Code is not the only statute that creates corporate criminal liability in cross-border commerce.⁴² However, it is ‘the key legislative instrument concerning federal offences’.⁴³ It prohibits a range of behaviours that correspond to violations of fundamental human entitlements, often responding to treaties on international and transnational deviance. The Code’s chapter 2 also sets forth general principles on extraterritorial jurisdiction and corporate criminal liability. This Part describes the legal framework and shows how it enables particular corporations to be held to account for human rights abuses in business situations.

A Offences that Protect Human Rights Standards

The Code’s offence provisions effectively criminalise behaviours that violate or jeopardise international human rights standards. For example,⁴⁴ crimes against humanity, genocide and war crimes would seem to correlate to large-scale violations of rights to life, integrity of person and a private and family life, not to mention the freedom from discrimination.⁴⁵ These and other related offences are addressed in division 268 of the Code, which was added after Australia’s

37 Ibid Guiding Principle 11.

38 Ibid Guiding Principle 17.

39 Ibid Guiding Principles 18–21.

40 Ibid Guiding Principle 22.

41 Ibid Guiding Principles 25–31.

42 See, eg, *Illegal Logging Prohibition Act 2012* (Cth), discussed further in Ryan J Turner, ‘Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law’s New Frontier’ (2016) 17 *Melbourne Journal of International Law* 188, 205–20.

43 Allens, ‘Stocktake on Business and Human Rights in Australia’ (April 2017) 31–2 <<http://dfat.gov.au/international-relations/themes/human-rights/business/Documents/stocktake-on-business-and-human-rights-in-australia.pdf>>.

44 See further ibid 27–44.

45 For an overview of the relationship between human rights and international criminal law, see Andrew Clapham, ‘Human Rights and International Criminal Law’ in William Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press, 2015) 11; see especially at 15–17.

ratification of the ICC's *Rome Statute*.⁴⁶ Australia is also party to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*,⁴⁷ as well as to treaties on the protection of those categories of person.⁴⁸ Divisions 270 to 272 of the Code reflect these commitments in that they criminalise the overseas sexual exploitation of minors⁴⁹ and the enslavement, trafficking and debt bondage of all people.⁵⁰ Connections can be drawn between those crimes and various rights of workers and children.⁵¹ The Code's slavery provisions more broadly recall prohibitions on enslavement,⁵² as well as the rights to just and favourable pay and employment conditions.⁵³ Even corruption is presented as a risk to a range of fundamental entitlements. Public officials may be motivated to violate rights to property and the person by the opportunity for corrupt gain. In so doing, they may divert assets that might otherwise be used to advance progress towards social and economic goals, and/or simultaneously violate individual civil and political rights, like fair trial guarantees.⁵⁴ Australia banned the bribery of foreign public officials pursuant to its obligations in an

46 *Criminal Code 1995* (Cth) ch 8 div 268, as inserted by *International Criminal Court (Consequential Amendments) Act 2002* (Cth). See also *Rome Statute*.

47 *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001) annex II ('*Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*').

48 See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Australia 17 December 1990); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, ratified by Australia 28 July 1983).

49 *Criminal Code 1995* (Cth) ch 8 div 272, as inserted by *Crimes Legislation Amendment (Sexual Offences against Children) Act 2010* (Cth).

50 *Criminal Code 1995* (Cth) divs 270–1, as inserted by *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth), and as later partially repealed and amended by *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth). As of early July 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade was conducting the Inquiry into Establishing a Modern Day Slavery Act in Australia: Parliament of Australia, *Inquiry into Establishing a Modern Day Slavery Act in Australia* (2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery>.

51 Marianna Brungs, 'Abolishing Child Sex Tourism: Australia's Contribution' (2002) 8 *Australian Journal of Human Rights* 101, 105 n 3; Melissa Curley and Elizabeth Stanley, 'Extraterritorial Jurisdiction, Criminal Law and Transnational Crime: Insights from the Application of Australia's Child Sex Tourism Offences' (2016) 28 *Bond Law Review* 169, 170–1; Danielle Ireland-Piper, 'Extraterritoriality and the Sexual Conduct of Australians Overseas' (2010) 22(2) *Bond Law Review* 16, 38.

52 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, ratified by Australia 13 August 1980) art 8.

53 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 23(1)–(3); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976, ratified by Australia 10 December 1975) art 7.

54 See, eg, International Council on Human Rights Policy, 'Corruption and Human Rights: Making the Connection' (Report, 2009) <<http://www.ichrp.org/en/projects/131>>. There are even claims of a right to be free from corruption in liberal political and legal theory, if not in the international *lex lata*: Andrew Brady Spalding, 'Corruption, Corporations, and the New Human Right' (2014) 91 *Washington University Law Review* 1365, 1385–6, 1402; cf Cecily Rose, 'The Limitations of a Human Rights Approach to Corruption' (2016) 65 *International and Comparative Law Quarterly* 405.

OECD convention.⁵⁵ It is also a party to the *United Nations Convention against Corruption*.

B Broad Extraterritorial Jurisdiction

The Code asserts a mixture of territorial and extraterritorial jurisdiction over behaviours that amount to international and transnational crimes. Section 14.1 preserves the presumption of territoriality at common law.⁵⁶ Sections 15.1 to 15.4 then describe four situations in which conduct is an offence, although it was committed wholly outside the Commonwealth. So-called ‘Category A’ crimes may be committed anywhere in the world if, ‘at the time of the alleged offence, the person [was] an Australian citizen; or ... a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory’.⁵⁷ Category B offences are identical but may also be committed by Australian residents. Category C and D crimes are capable of commission by anyone anywhere, subject to a ‘foreign law’ defence for Category C offenders who are not nationals of Australia.⁵⁸ Many of the offences mentioned above are extraterritorial through the operation of this categorisation.⁵⁹

Other offences are extraterritorial by virtue of their particular criminalisation provision. Division 70 provides that the offence of foreign bribery occurs when the conduct was perpetrated wholly or partly in Australia or the alleged perpetrator was an Australian citizen, resident or body corporate.⁶⁰ The company’s nationality is determined having regard to its place of incorporation: ‘by or under a law of the Commonwealth or of a State or Territory’.⁶¹ Certain child sex offences are only indictable when the conduct occurred outside Australia and the offender had one of four personal connections to the Commonwealth.⁶² Specifically, a (natural) person may only be charged with an offence under division 272 if he or she was an Australian (a) citizen or (b) resident.⁶³ For a body corporate, the relevant status is incorporation (c) ‘by or under a law of the Commonwealth or of a State or Territory’ or (d) the ‘carr[ying] on [of] its activities principally in Australia’.⁶⁴

55 See *OECD Convention on Combatting Bribery; Criminal Code 1995* (Cth) s 70.2, as inserted by *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth). See also Explanatory Memorandum, *Criminal Code Amendment (Bribery of Public Officials) Bill 1999* (Cth) 3.

56 *Criminal Code 1995* (Cth) ss 14.1(2)(a)–(b); *MacLeod v A-G (NSW)* [1891] AC 455, 458 (Halsbury LC). See also Bernadette McSherry, ‘Terrorism Offences in the “Criminal Code”: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 *University of New South Wales Law Journal* 354, 367.

57 *Criminal Code 1995* (Cth) s 15.1(1)(c).

58 *Criminal Code 1995* (Cth) ss 15.3(2), (4).

59 See, eg, *Criminal Code 1995* (Cth) ss 270.9, 271.10, applying Category B jurisdiction to slavery-like offences and div 271 offences other than domestic trafficking in persons or organs; at ss 268.117, 270.3A, applying Category C jurisdiction to crimes against the administration of the ICC and Category D jurisdiction to the offences of genocide, crimes against humanity, war crimes and slavery.

60 *Criminal Code 1995* (Cth) s 70.5.

61 *Criminal Code 1995* (Cth) ss 70.2, 70.5.

62 *Criminal Code 1995* (Cth) s 272.6.

63 *Criminal Code 1995* (Cth) s 272.6(a)–(b).

64 *Criminal Code 1995* (Cth) s 272.6(c)–(d).

C Corporate Criminal Liability

The Code's innovative, detailed and 'modern' rules on corporate criminal liability would also seem to support efforts at corporate human rights protection (and remediation).⁶⁵ Bodies corporate could offend at common law prior to the introduction of the Code; however, they would only commit mens rea offences if the culpable acts and omissions were those of a human being who was the company's 'directing mind and will'.⁶⁶ The House of Lords construed that concept narrowly in *Tesco Supermarkets Ltd v Nattrass*.⁶⁷ The various judgements located the corporate power in the 'corporate organs, corporate officers, and other natural persons who have been delegated wide discretionary powers of corporate management and control'.⁶⁸ In this form, the identification doctrine came to be seen as a barrier to the prosecution of large corporations, including in Australia. Within such entities, it could be difficult for the Crown to identify the particular wrongdoer. Senior executives would most likely be remote from the operations that create opportunities for an offence.⁶⁹ The alternative approach – to deal with typically corporate forms of misconduct via regulatory regimes and strict liability offences – was criticised as contributing to a discursive distinction between 'real crime' and public welfare offences.⁷⁰

Part 2.5 of the Code responds to both of these problems and in so doing opens up the possibility that corporations may be responsible for conduct that jeopardises or violates internationally recognised human rights. First, section 12.1(1) of the *Criminal Code 1995* (Cth) clarifies that 'bodies corporate' are subject to the Code 'in the same way' as individuals, albeit with such modifications as necessary to reflect the corporate features of the wrongdoer. This presumption of corporate capacity would seem to avert an argument that corporations are not capable of committing international 'core' crimes against the

65 See, eg, John C Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Survey' in Albin Eser, Günter Heine and Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Edition Iuscrim, 1999) 9, 20; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 138; Gobert and Punch, above n 18, 74; Adán Nieto Martín and Marta Muñoz de Morales, 'Compliance Programs and Criminal Law Responses: A Comparative Analysis' in Stefano Manacorda, Francesco Centonze and Gabrio Forti (eds), *Preventing Corporate Corruption: The Anti-bribery Compliance Model* (Springer, 2014) 333, 336; Alan Rose, 'Developments in Criminal Law and Justice – 1995 Australian Criminal Code Act: Corporate Criminal Provisions' (1995) 6 *Criminal Law Forum* 129, 135; Wells, *Corporate Criminal Responsibility*, above n 14, 136.

66 Dixon, above n 18, 253–4; Shirley Quo, 'Corporate Culture and Corporate Criminal Responsibility in Australia' (2016) 37(12) *Company Lawyer* 389, 390. On the doctrine, see generally Gobert and Punch, above n 18, 63; Pinto and Evans, above n 18, 42–52.

67 [1972] AC 153 ('*Tesco Supermarkets*').

68 Pieth and Ivory, above n 14, 24. See also Clough and Mulhern, above n 65, 89–90; Pinto and Evans, above n 18, 44–7.

69 Gobert and Punch, above n 18, 69–70; Pinto and Evans, above n 18, 48–50; Celia Wells, 'Corporate Criminal Liability: A Ten Year Review' [2014] *Criminal Law Review* 849, 854. See also Attorney General's Department (Cth), 'Review of Commonwealth Criminal Law: Interim Report: Principles of Criminal Responsibility and Other Matters' (Australian Government Publishing Service, 1990) 304–5 [26.5]–[26.7].

70 Wells, *Corporate Criminal Responsibility*, above n 14, 5–8.

person, as transposed into domestic law.⁷¹ It would also seem to work against a construction of acts of transnational economic malfeasance, like corruption, as lesser forms of misconduct than typically human property crimes, like theft.

Second, sections 12.3 and 12.4 expand the methods for attributing crimes to companies both within and beyond the concept of identification. Section 12.3(1) provides that fault elements of intention, knowledge or recklessness are imputed to a corporation if it ‘expressly, tacitly or impliedly authorised or permitted’ the offence.⁷² ‘Authorisation or permission’ may be established by reference to the actions of the board or the company’s ‘high managerial agent[s]’ under sections 12.3(2)(a) and (b). The concept of the high managerial agent would appear to be broader than the concept of the ‘directing mind and will’ at common law, especially after a recent Queensland Supreme Court decision, discussed further below.⁷³ Alternatively, under sections 12.3(2)(c) and (d), authorisation or permission may be found in a body corporate’s deviant or non-compliant ‘culture’. The corporate culture provisions remove the need to show that high-status individual(s) authorised or permitted the wrong. Rather, taking an ‘organisational’ or ‘holistic’ approach to corporate action, they locate corporate guilt in patterns of errant decision-making.⁷⁴ Section 12.4 aggregates conduct across the corporation to find the fault element of negligence.⁷⁵

Third, when read in the light of the Guiding Principles, part 2.5 necessitates a degree of human rights ‘due diligence’ by companies. On the one hand, section 12.3(3) expressly provides a ‘due diligence defence’ to bodies corporate that have attempted to prevent their high managerial agents from committing, authorising or permitting an offence. On the other hand, in making fault partly conditional on organisational negligence, sections 12.3(2)(c) and (d) create an incentive for corporate managers to prevent Code crimes. Ruggie’s 2008 report recognised the role that states play in ‘foster[ing] corporate cultures in which respecting rights is an integral part of doing business’; it canvassed the use of the criminal law to incentivise cultures of compliance and thereby ‘reinforce’ company respect for human rights.⁷⁶

71 Kyriakakis, ‘Australian Prosecution for International Crimes’, above n 4, 815–16.

72 *Criminal Code 1995* (Cth) s 12.3(1).

73 See further below at Part IV(B)(1). See also Wells, *Corporate Criminal Responsibility*, above n 14, 136. Cf Tahnee Woolf, ‘The *Criminal Code Act 1995* (Cth) – Towards a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257, 261.

74 See generally Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Parliament of Australia, *Model Criminal Code – Chapter 2: General Principles of Criminal Responsibility – Final Report* (1992) 111, 113; Dixon, above n 18, 259–64; Pieth and Ivory, above n 14, 6–7, 26; Wells, *Corporate Criminal Responsibility*, above n 14, 136, 157. See also Brent Fisse, ‘The Attribution of Criminal Liability to Corporations: A Statutory Model’ (1991) 13 *Sydney Law Review* 277, 281–2.

75 See further Dixon, above n 18, 259.

76 *Protect, Respect, Remedy Report*, UN Doc A/HRC/8/5, 10–11.

IV PART 2.5 CRIMINAL CODE 1995 (CTH) AND THE PROBLEM OF INTRA-GROUP LIABILITY

The *Criminal Code 1995* (Cth) thus appears to implement the UN Guiding Principles with respect to particular companies with multinational operations. The question then becomes whether and, if so, how part 2.5 applies in the context of a corporate group with subsidiaries incorporated and operating overseas. In this Part, we ask if a holding company may be liable as a principal offender for an extraterritorial offence committed in the context of a foreign subsidiary's undertaking.

A Attributing the Physical Elements: Section 12.2 *Criminal Code 1995* (Cth)

Section 12.2 of the *Criminal Code 1995* (Cth) sets out the conditions for the attribution of the physical elements of an offence to a company:

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

Who will qualify as an 'employee, agent or officer' of the holding company? When will those people act criminally for the holding corporation?

1 Conduct of an 'Employee, Agent or Officer'

Interpreted in accordance with the rules at general law, section 12.2 attributes a company with the conduct of a natural person whom it has appointed to the position of 'employee, agent or officer'. It is uncontroversial that individuals may be appointed as employees, agents or officers of a body corporate and may hold a number of such roles in multiple companies. Hence, it would not matter that the officer was jointly appointed to the board of both the holding and subsidiary companies or that the employee was temporarily working within the subsidiary, eg, on secondment from the holding firm. People engaged as external consultants by the holding company to assist in or advise on the subsidiary's operations could also be 'agents' if they had authority to create legal relations for the holding company.

Further, the drafting of section 12.2 suggests that employee, agent or officer status may arise through the conduct of the holding company and/or its putative representatives. Section 12.2 covers acts within a person's 'apparent employment or ... authority' (emphasis added). In this way, it appears to recall the common law rules on ostensible (apparent) authority in situations of corporate contracting.⁷⁷ In a similar way, Australian company legislation

⁷⁷ A body corporate is estopped from asserting that a person lacked actual authority to contract on its behalf in certain situations. The estoppel arises through a representation ('holding out') of a person as a corporate agent by someone who had actual authority to transact for the company, which was relied on by the outside party: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR

provides that ‘officers’ are those individuals who have accepted appointments as directors, company secretaries and external administrators, as well as some persons with substantial real authority within a body corporate and/or capacity to affect its appointed directors or financial status.⁷⁸ The term ‘officer’ in section 12.2 *Criminal Code 1995* (Cth) and section 9 of the *Corporations Act 2001* (Cth) should align (not least because the provisions were enacted in the same year).⁷⁹ Therefore, section 12.2 should be read to enable the imputation of acts to a company that were perpetrated by its ‘de facto’ and ‘shadow’ high-level managers.

It might not be possible to identify a particular individual at fault within the subsidiary’s operations. Could the Crown then argue that the foreign subsidiary itself was the holding company’s ‘agent’? It is clear that one body corporate may appoint another as its agent at general law. In addition, courts may imply that a subsidiary is the agent for its holding company due to the degree of ‘commercial intimacy’ between the two companies.⁸⁰ In *Smith, Stone & Knight Ltd v Birmingham Corporation*, the UK Court of Appeal made this determination by asking and answering six questions about the financial, managerial and commercial relationships between a parent and child corporation.⁸¹ *Smith* was applied in *Spreag v Paeson Pty Ltd* in Australia,⁸² and has been frequently pleaded before Australian courts.⁸³ However, agency arguments are also treated with caution in Australia, judges noting the potential for the exception to undermine the rule of separate legal personality.⁸⁴ The special reasons for the agency finding in *Smith*’s case are also noted, the goal being in *Smith* to compensate the holding company rather than to impose on it an additional

72; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451. See also *Corporations Act 2001* (Cth) ss 128, 129(3).

78 The *Corporations Act 2001* (Cth) s 9 defines ‘officer of a corporation’ to include a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation’s financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act

...

79 On the corporate law reform, see R P Austin and I M Ramsay, *Ford’s Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) [8.020], describing the replacement of the term ‘executive officer’ with that of ‘officer’ under the *Corporate Law Economic Reform Program Act 1999* (Cth).

80 *Premier Building and Consulting Pty Ltd v Spotless Group Ltd* (2007) 64 ACSR 114, 196 [369] (‘*Premier Building and Consulting*’).

81 [1939] 4 All ER 116 (‘*Smith*’). The questions concerned the (1) allocation of profits of the subsidiary, (2) the appointment of the subsidiary’s managers, (3) the taking of management decisions for the subsidiary, (4) especially capital decisions, (5) the method of profit generation within the subsidiary and (6) the degree and consistency of holding company control.

82 (1990) 94 ALR 679.

83 Ian M Ramsay and G P Stapledon, ‘Corporate Groups in Australia’ (2001) 29 *Australian Business Law Review* 7, 28 table 7.

84 *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron* (2005) 54 ACSR 505, 526 [101] (Besanko J); *Premier Building and Consulting* (2007) 64 ACSR 114, 189 [338] (Byrne J).

liability.⁸⁵ Having discussed *Smith* in *Briggs v James Hardie*, Rogers AJA concluded that even ‘complete dominion’ and parental control would not per se justify veil piercing.⁸⁶

A recent series of competition cases indicates the challenges that corporate agency arguments would encounter under part 2.5 of the *Criminal Code 1995* (Cth). In each of these decisions, the Australian Competition and Consumer Commission (‘ACCC’) failed in its attempts to show that local subsidiaries of multinational groups were agents for their overseas parents and, hence, within the extraterritorial jurisdiction of Australian consumer law.⁸⁷ In *Bray v F Hoffman-La Roche Ltd*, Merkel J noted ‘[t]he difficulty with the sweeping assertion that the Australian subsidiaries, being directed and controlled by an overseas parent as part of the parent’s global enterprise, carried on the business of the parent’.⁸⁸ His Honour explained *Smith* as a case where the parent had ‘disregarded the [subsidiary’s] corporate boundaries’,⁸⁹ a situation that was not established on the facts.⁹⁰ Applying *Bray* in *Australian Competition and Consumer Commission v Yazaki Corporation [No 2]*, Besanko J found that even financial dependence of the subsidiary on the parent was not enough to justify a finding of agency.⁹¹ His Honour reached a similar conclusion for similar reasons in *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi SRL [No 12]*,⁹² as did Beach J in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd*, albeit under the misleading and deceptive practices provisions of the consumer law.⁹³ These findings bode ill for a broad interpretation of section 12.2 of the *Criminal Code 1995* (Cth), such as would result in a foreign subsidiary being treated as an agent for its holding company.

2 Conduct within the ‘Scope of Employment’ or ‘Authority’

If the Crown identifies the offender and establishes a relevant relationship to the holding company under section 12.2, it must still prove that the unlawful conduct was within that individual’s authority or employment. There is no

85 *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 20 [70] (Merkel J), upheld by the Full Court in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317; *Premier Building and Consulting* (2007) 64 ACSR 114, 189 [338] (Byrne J).

86 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577 (Rogers AJA).

87 See, eg, *Competition and Consumer Act 2010* (Cth) s 5(1)(g): ‘Each of the following provisions ... extends to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia’.

88 *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 21 [72] (Merkel J).

89 *Ibid* 20 [69] (Merkel J).

90 ‘[T]he Australian subsidiaries... conduct[ed] their business activities in Australia, held their assets (including bank accounts) in their own names and employed employees and purchased and sold products in their own names’. They also had dealings outside the group, contributed to consolidated accounts in accordance legal requirements, and ‘had different boards to the European or regional parent’, some ‘overlapping board appointments’ notwithstanding: *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 22 [77] (Merkel J).

91 (2015) 332 ALR 396, 465–9 [344]–[362].

92 [2016] FCA 822, [283]–[286], with respect to Nexans SA.

93 [2015] FCA 1007, [128]–[157] (‘*Hillside*’).

explanation in the Code of the phrase ‘acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority’, even though ‘agency principles are central to the Code’s vision of actus reus’.⁹⁴ In tort, a corporate employer may be vicariously liable for an employee’s act that it had expressly prohibited.⁹⁵ The test is whether the act was ‘so connected with authorised acts that they may be regarded as modes – although improper modes – of doing them ...’.⁹⁶ Similarly, in contract, a company will be liable for the obligations incurred on its behalf by an agent acting within the scope of his/her (or its) express or implied actual authority or incidental thereto.⁹⁷

The 2016 Queensland Supreme Court decision, *Australian Securities and Investments Commission v Managed Investments Ltd [No 9]*, indicates that the courts may interpret the authority requirement in section 12.2 of the *Criminal Code 1995* (Cth) broadly.⁹⁸ The issue there was whether a subsidiary had violated its obligations as a fund manager by making two payments to other companies within its group of companies.⁹⁹ Reading section 601FC of the *Corporations Act 2001* (Cth) in conjunction with section 12.3(2)(b) of the *Criminal Code 1995* (Cth), the regulator argued that the subsidiary company was itself responsible for the contravention.¹⁰⁰ The court found that all of the individual defendants were persons capable of triggering liability according to a proper construction of that rule, as well as ‘high managerial agents’ under section 12.3(2)(b).¹⁰¹ The individuals had authority, even though the company itself was a ‘victim’ of the transactions. In justifying this conclusion, Douglas J reasoned that ‘[i]t would be problematic if a company, which holds a trust fund for others that is misappropriated by the action of its officers, can avoid liability on the basis that it is the victim of the fraud’.¹⁰² His Honour explained his reasoning by reference to ‘common sense’, as well as the considerations of justice. It was also important that a benefit had accrued to a related company.¹⁰³

In our view, his Honour was correct in adopting a broad construction of the authority requirement in section 12.2; however, he could have drawn support from part 2.5 of the *Criminal Code 1995* (Cth) and more clearly stated his

94 Woolf, above n 73, 259.

95 *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 507 [243] (Beazley JA) (‘*Nationwide News*’).

96 John William Salmond, *Salmond’s Law of Torts* (Sweet & Maxwell, 9th ed, 1936), quoted in *NSW v Lepore* (2003) 212 CLR 511, 536 [42] (Gleeson CJ); *Nationwide News* (2007) 71 NSWLR 471, 506 [241] (Beazley JA). See further Austin and Ramsay, above n 79, [16.050].

97 Austin and Ramsay, above n 79, [13.030].

98 [2016] QSC 109 (‘*Managed Investments Ltd [No 9]*’). See also *Australian Securities and Investments Commission v Managed Investments Ltd [No 10]* [2017] QSC 96 (penalty and final orders) (‘*Managed Investments Ltd [No 10]*’). In late June 2017, the individual defendants filed Notices of Appeal: see Australian Securities and Investments Commission, ‘17-157MR Queensland Supreme Court Imposes Penalties on Dishonest MFS Officers and Funds Manager’ (Media Release, 26 May 2017) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-157mr-queensland-supreme-court-imposes-penalties-on-dishonest-mfs-officers-and-funds-manager>>.

99 *Managed Investments Ltd [No 9]* [2016] QSC 109, [4]–[5] (Douglas J).

100 *Ibid* [600].

101 *Ibid* [610]–[613].

102 *Ibid* [610].

103 *Ibid* [610]–[611].

reasons. A narrow interpretation of the term ‘authority’ in section 12.2 would effectively excuse companies for many of the offences that are connected to business operations. Moreover, it is a general principle of part 2.5 that corporations and individuals should be equivalently liable for an offence.¹⁰⁴

B Attributing the Fault Elements: Section 12.3 *Criminal Code 1995* (Cth)

If the Crown succeeds in attributing the physical elements of the offence to the holding company, it must still show that the holding company was *at fault* for those wrongful acts or omissions. The Final Report on the Model Criminal Code suggests that part 2.5 of the *Criminal Code 1995* (Cth) was not intended to impose strict vicarious liability on corporations for the crimes of their employees, officers or agents,¹⁰⁵ in contrast to the US federal position. Therefore, we ask who will be considered a ‘high managerial agent’ of the holding company so as to have ‘carried out’, ‘engaged in’ or ‘authorised or permitted’ an offence under section 12.3(2)(b). Having done so, we consider how a holding company might become liable through the corporate culture provisions, sections 12.3(2)(c) and (d). We do not consider how board authority or permission could be established under section 12.3(2)(a), which is possible though unlikely in practice.¹⁰⁶ We also leave for another day section 12.4, which is the attribution rule for negligence.

1 *Fault through the High Managerial Agent: Section 12.3(2)(b)*

Section 12.3(2)(b) provides that corporate authorisation or permission may be established by ‘proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence’. Section 12.3(6) defines ‘high managerial agent’ to mean ‘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’. Recalling the identification approach to corporate criminal liability at common law, the section raises questions about which ‘agents’ are high enough in a corporate management structure so as to act for (or as) the company.

With *Managed Investments Ltd [No 9]*, there is judicial guidance as to the meaning of the concept in part 2.5 of the *Criminal Code 1995* (Cth) in a complex corporate structure.¹⁰⁷ There, as noted above, ASIC pleaded section 12.3(2)(b) in conjunction with section 601FC of the *Corporations Act 2001* (Cth).¹⁰⁸ The regulator would appear to have argued that all of the individual defendants were the high managerial agents of the defendant company and, hence, that their states

104 *Criminal Code 1995* (Cth) s 12.1.

105 Criminal Law Officers Committee, above n 74, 111, 113, commenting on s 501 of the Model Criminal Code. See also *Criminal Code 1995* (Cth) s 3.2.

106 Clough and Mulhern, above n 65, 141.

107 *Managed Investments Ltd [No 9]* [2016] QSC 109. Cf *Australian Competition and Consumer Commission v Davies* (2015) 339 ALR 436, 444 [41] (for a sole director and shareholder company).

108 See also *Corporations Act 2001* (Cth) s 1308A, establishing the general rule that ‘Chapter 2 of the *Criminal Code* applies to all offences against this Act’.

of mind were attributable to the company.¹⁰⁹ On the facts, most individuals were officers by appointment of the subsidiary.¹¹⁰ However, one individual (Mr King) was only appointed as an officer of the ultimate holding company at the time of the payments. He was held to be an officer of the defendant subsidiary by virtue of his participation in significant business decisions for the subsidiary and his capacity to affect its financial standing.¹¹¹ Another defendant (Ms Watts) was not alleged to be an officer of the subsidiary; rather, she was employed by the subsidiary as the manager of relevant fund.¹¹² Their different capacities notwithstanding, Douglas J found that all of the individual defendants were ‘the people closely and relevantly connected with the company and its actions’: due to ‘their significant roles in the company’, they were also ‘high managerial agents’.¹¹³ ‘The terms of [section] 12.3(2)(b) in particular of the *Criminal Code* (Cth) reinforce[d] [his Honour’s] conclusion that their conduct and intentions should be attributed to MFSIM [the defendant subsidiary] in respect of the two payments’.¹¹⁴ Thus, in interpreting section 12.3(2)(b) in conjunction with section 601FC of the *Corporations Act 2001* (Cth), the judge in *Managed Investments [No 9]* would appear to have considered both the formal roles of the individual defendants and their effective functions with respect to the defendant company.

This interpretation of section 12.3(2)(b) is consistent with the Privy Council decision, *Meridian Global Funds Management Asia Ltd v Securities Commission*.¹¹⁵ Reinterpreting the common law identification rule in *Tesco Supermarkets*, Hoffman LJ there held that a company may think and act through a variety of individuals and organs. The relevant category of persons will change depending on the nature and source of the relevant duty.¹¹⁶ ‘The company’s primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations’.¹¹⁷ However, there are ‘exceptional cases’. Some criminal statutes, in particular, seem to enable a company to be held liable for

109 *Managed Investments Ltd [No 9]* [2016] QSC 109, [600] (Douglas J).

110 *Ibid* [16]–[17] (regarding Mr White); [19]–[20] (regarding Mr Anderson); [21] (regarding Mr Hutchings).

111 *Ibid* [13]–[14], [651]–[652], [679]:

On my analysis of the evidence of the frequent interactions between Mr King and Mr White, including Mr King’s admissions about the nature of his role as the overall boss of the MFS group, I have concluded that the evidence is sufficient to establish at least that he participated in the making of decisions that affected the whole or a substantial part of MFSIM’s business and had the capacity to affect significantly its financial standing. ASIC also assembled a significant number of examples in its written submissions showing his capacity to affect decisions within MFSIM in particular or as part of the MFS Group. Therefore he was an officer of MFSIM.

See also *Managed Investments Ltd [No 10]* [2017] QSC 96, [71]–[103] (Douglas J).

112 *Managed Investments Ltd [No 9]* [2016] QSC 109, [12]–[22], [37], [1486], [1499] (Douglas J). See also *Managed Investments Ltd [No 10]* [2017] QSC 96, [199]–[231], [299] (Douglas J).

113 *Managed Investments Ltd [No 9]* [2016] QSC 109, [613].

114 *Ibid*.

115 [1995] 2 AC 500 (‘*Meridian Global Funds*’). For a review of the rules of attribution identified by Lord Hoffman in *Meridian Global Funds*, see Jennifer Payne, ‘Corporate Attribution and the Lessons of *Meridian*’ in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffman* (Hart Publishing, 2015) 357–76.

116 *Meridian Global Funds* [1995] 2 AC 500, 507.

117 *Ibid*.

more than the acts of its organs but not simply for an offence committed by its agents or employees. ‘In such a case, the court must fashion a special rule of attribution for the particular substantive rule’.¹¹⁸ Its task is one of statutory interpretation: ‘given that [the act] was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?’¹¹⁹

In *Managed Investments [No 9]*, Douglas J asked and answered Hoffmann LJ’s question before applying section 12.3(2)(b).¹²⁰ The judgement in *Managed Investments [No 9]* thus provides useful confirmation about the status of part 2.5 as a special attribution rule within Hoffman LJ’s schema. But, for the question in this article, the message is mixed. On the one hand, the decision could be read to suggest that the scope of section 12.3(2)(b) of the *Criminal Code 1995* (Cth) varies both in accordance with the particular offence provisions and the ‘real’ distribution of powers in a company – or within a corporate group. ‘High managerial agent’ may cover both appointed and de facto officers of a company and lower-level decision-makers with duties relevant to the contravention. On the other hand, *Managed Investments [No 9]* could be read to indicate that a holding company will only be responsible if it is shown that the individual was a high managerial agent *of that holding company* and that he/she provided the authorisation or permission as an officer *for the holding company*.¹²¹ Perhaps for this reason, ASIC did not allege that the ultimate holding company in *Managed Investments [No 9]* committed an offence, even though the ‘overall boss of the ... group’ had engaged in conduct that gave rise to the contravention.¹²²

2 *Fault through the Corporate Culture: Section 12.3(2)(c) and (d)*

Where a corporate mental state cannot be established via sections 12.3(2)(a) and (b), sections 12.3(2)(c) and (d) are alternatives. They say that corporate authorisation or permission exist when there is proof that:

- (c) ... a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (d) ... the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

In the group context, there are questions about whether and, if so, how a company’s culture may be linked to another company, like a foreign subsidiary. Can the ‘culture’ of one company direct, encourage, tolerate or lead to non-compliance by another? Can a holding company be found guilty of an offence due to its ‘fail[ure] to create and maintain a corporate culture that required compliance with the relevant provision’ in its foreign child corporation? More broadly, to what extent does control determine culture? In a case about MNE

118 Ibid.

119 Ibid (emphasis in original).

120 *Managed Investments Ltd [No 9]* [2016] QSC 109, [612].

121 See also *Hillside* [2015] FCA 1007, [148] (Beach J).

122 *Managed Investments Ltd [No 9]* [2016] QSC 109, [679] (Douglas J); see above n 111 and accompanying quotation.

liability, much will depend on the breadth or narrowness of the definition of ‘corporate culture’ in section 12.3(6).¹²³ There are two possible readings.

On the one hand, the concept of corporate culture could be narrowly construed as company specific. Section 12.3(6) of the *Criminal Code 1995* (Cth) defines culture 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’ (emphasis added). As the law firm, Allens Arthur Robinson, noted in its report to John Ruggie, this type of language ‘would certainly seem to encompass culture within different divisions of the same company, but it is not clear whether it would cross the veil between different companies within the same group’.¹²⁴ Further, in gauging culture, section 12.3(4)(b) allows the courts to take into account reasonable beliefs or expectations that ‘a high managerial agent *of the body corporate* would have authorised or permitted the commission of the offence’ (emphasis added). This language also links culture to a person with authority from the offender company. The Criminal Law Officers’ Committee of the Attorneys-General also emphasised that the relevant section of the draft Model Penal Code was designed to respond to ‘flatter structures’ within ‘modern’ companies and the greater degree of ‘delegation to relatively junior officers’ within a single company.¹²⁵ The Committee did not mention corporate groups, much less the problem of MNE regulation. Therefore, on the first view, the holding company is only at fault under subsections (c) and (d) if the attitudes, policies, rules, courses of conduct or practices resulted from the conduct of those who formally act for that corporation; the holding company would only be liable through its corporate culture for acts that concern those people and its operations.

On the other hand, corporate culture could be a social fact that transcends the doctrinal rules of attribution and the boundaries of particular companies. This broad view finds support in the concept of culture advanced by the Criminal Law Officers. Their committee quoted Field and Jorg to the effect that ‘regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation’.¹²⁶ The broad view also aligns with other competition and consumer cases. In *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd*, Wigney J found that the absence of a culture of compliance in the foreign branch office of an international bank was relevant to the assessment of a civil penalty on an Australian company.¹²⁷ Conversely, in *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd [No 2]*, the Federal Court looked

123 Allens Arthur Robinson, “‘Corporate Culture’ as a Basis of the Criminal Liability of Corporations” (Report, February 2008) 70 <<https://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>>.

124 Ibid 71.

125 Ibid 12.

126 See, eg, Criminal Law Officers Committee, above n 74, 111, quoting Stewart Field and Nico Jorg, ‘Corporate Manslaughter and Liability: Should We Be Going Dutch?’ (1991) *Criminal Law Review* 156, 159.

127 (2016) 118 ACSR 124, 150 [119]–[122].

favourably on the efforts of a new parent company (Fairfax Media) to improve compliance within its new subsidiary, 2UE.¹²⁸ Extending this reasoning, it could be argued that culture arises through social interactions between ‘insiders’ of one or more companies and that the holding company’s approach to compliance could contribute to misconduct that occurred within the context of a foreign subsidiary’s operations.

Policy considerations support both the broad and narrow readings of the corporate culture concept. The narrow view aligns with the general principle of limited liability and separate personality, as well as the (traditional) proposition that guilt reflects a wrongful exercise of (individual) moral agency.¹²⁹ But it encounters longstanding objections that company law unduly externalises risk,¹³⁰ and may generate new concerns that Australia is not doing enough to ensure respect for international human rights standards by ‘its’ commercial non-state actors. The broad conception aligns with the Code’s object of updating the common law rules and finds some support in competition and consumer law decisions, as well as secondary materials on the Code. However, commercial actors may argue that the broad view allows for too much of a contagion within complex enterprises: ‘if corporate culture can permeate, then there is the risk that one “bad apple” will spoil the entire corporate group’.¹³¹ The broad reading could also have the perverse consequence of discouraging holding companies from imposing standards on subsidiaries, lest they be found to have assumed responsibility for their human rights compliance. In any case, the broad view would not avert the need for prosecutors to show that the officers or servants of the holding company actually engaged in the physical elements of the offence¹³² and that those objective elements coincided with the poor culture.¹³³ This would require voluntary disclosures from the suspect corporation(s) and/or mutual legal assistance from other states.

V CRIMINALISING FAILURE AS AN ALTERNATIVE TO THE CURRENT RULES?

In short, there are few circumstances in which Australian holding companies will be responsible for crimes committed within the context of the extraterritorial

128 (2009) 178 FCR 199, 231–2 (Rares J). See also *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi SRL* [No 13] [2017] FCA 851, [74]–[75] (Besanko J). Cf *J McPhee & Son (Aust) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532, 582 [177] (Black CJ, Lee and Goldberg JJ), finding error in the trial judges’ penalty decision insofar as the judge considered comments by the parent company’s chairman about litigation against another subsidiary as evidence of its attitude towards the importance of compliance with the law.

129 Allens Arthur Robinson, above n 123, 71. Cf Ana-Maria Pascal, ‘A Legal Person’s Conscience: Philosophical Underpinnings of Corporate Criminal Liability’ in James Gobert and Ana-Maria Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011) 33, 43–4.

130 See, eg, Stephen Blankenburg, Dan Plesch and Frank Wilkinson, ‘Limited Liability and the Modern Corporation in Theory and in Practice’ (2010) 34 *Cambridge Journal of Economics* 821.

131 Allens Arthur Robinson, above n 123, 71.

132 Eric Colvin, ‘Corporate Personality and Criminal Liability’ (1995) 6(1) *Criminal Law Forum* 1, 41.

133 Dixon, above n 18, 267.

operations of their foreign subsidiaries. The question thus becomes: what are the options for extending corporate criminal liability so as to achieve Ruggie's background goal of regulating MNEs? We consider one proposal – for a corporate 'failing to prevent' offence – in this Part. The proposal is currently limited to the offence of foreign bribery.¹³⁴ However, its template is the *Bribery Act 2010* (UK),¹³⁵ which has also been mooted as a model for a general corporate human rights offence in the UK.¹³⁶

According to a proposal circulated by the Commonwealth Attorney-General's Department, a 'new corporate offence of failing to prevent foreign bribery' would be added to division 70 of the *Criminal Code 1995* (Cth).¹³⁷ Clause 70.5A would impose liability on certain corporations for conduct attributable inter alia to their subsidiaries and committed wholly outside Australia. Specifically, the draft provides that a 'first person' commits an offence if an 'associate' intentionally or recklessly bribes a foreign public official or engages in equivalent conduct outside Australia.¹³⁸ The 'first person' is defined as a 'constitutional corporation' or a body corporate 'incorporated' or 'taken to be registered in a Territory'.¹³⁹ The term 'associate' covers not only employees and agents, but also contractors, service providers and subsidiaries and persons controlled by a defendant company under the *Corporations Act 2001* (Cth).¹⁴⁰ Liability is absolute (ie, strict) but there is an exception if the defendant corporation can '[prove] that [it] had in place adequate procedures designed to prevent ... the commission' of the offence.¹⁴¹ The Bill foresees the creation of an official guidance on possible preventative measures.¹⁴² It suggests a Category A extension of jurisdiction over the offence in clause 70.5A(1).¹⁴³

As proposed, Australia's failing to prevent foreign bribery offence addresses the principal difficulties identified above with part 2.5 of the *Criminal Code 1995* (Cth). The Crown would still have to prove that an actual or notional foreign

134 Exposure Draft, Crimes Legislation Amendment Bill 2017 (Cth) ('Crimes Legislation Amendment Bill Exposure Draft').

135 Attorney-General's Department (Cth), 'Combating Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the *Criminal Code Act 1995*' (Public Consultation Paper, April 2017) 8. Section 7(1) *Bribery Act 2010* (UK) creates strict liability for 'commercial organisations' that fail to prevent bribery by 'associated persons', defined to include 'subsidiaries' under s 8. A Ministry of Justice Guidance elaborates on 'adequate procedures': Ministry of Justice (UK), 'The Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing' (12 February 2011) <<https://www.gov.uk/government/publications/bribery-act-2010-guidance>>.

136 Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, House of Lords Paper No 153, House of Commons Paper No 443, Session 2016–17 (2017) 57–60. The Joint Committee ceased to exist with the dissolution of UK Parliament on 3 May 2017 and, as of 6 July 2017, was yet to be reconstituted.

137 Attorney-General's Department (Cth), 'Combating Bribery of Foreign Public Officials', above n 135, 8.

138 Crimes Legislation Amendment Bill Exposure Draft cl 70.5A(1).

139 Crimes Legislation Amendment Bill Exposure Draft cls 70.5A(1)(a)(i)–(iii).

140 Crimes Legislation Amendment Bill Exposure Draft cl 70.1.

141 Crimes Legislation Amendment Bill Exposure Draft cl 70.5A(5).

142 Crimes Legislation Amendment Bill Exposure Draft cls 70.5A(2), 70.5B.

143 Crimes Legislation Amendment Bill Exposure Draft cl 70.5A(8); see also cl 70.5D.

bribery offence was committed within the context of a subsidiary.¹⁴⁴ However, the government would not need to establish that the alleged individual offender was an ‘agent, employee or officer’ of the holding company, as is currently required by section 12.2 of the *Criminal Code 1995* (Cth). Similarly, the prosecutor would not need to prove that the holding corporation’s board or the ‘high managerial agent’ authorised or permitted the offence, as per sections 12.3(2)(a) or (b) of the *Criminal Code 1995* (Cth). Clause 70.5A is even an improvement on sections 12.3(2)(c) and (d), in that it places a burden of disproving organisational fault on the company. In other words, the holding company would be liable unless it convinces the court, on the balance of probabilities, that its procedures were adequate to the task of bribery prevention.¹⁴⁵ The state’s remaining evidentiary challenges may also be mitigated through the adoption of deferred prosecution agreements. These agreements between prosecutors and companies encourage corporate self-reporting of violations and cooperation with the investigation, including the disclosure of information about compliance gaps.¹⁴⁶

Hence, the failure to prevent offence appears to be another step towards MNE accountability – at least for foreign bribery. Does that mean that it is a model that should be adopted for other Code offences within the purview of the UN Guiding Principles? The public consultation raised a variety of concerns with the implementation of the offence as currently proposed.¹⁴⁷ Our analysis points to three broad points for consideration by legislators:

- *Ambiguity regarding the rule for corporate action*: It is not clear from clause 70.5A how the subsidiary is to be attributed with the criminality of the offending human person(s). Should the Australian courts apply the corporate criminal liability rules of the state on whose territory the offence occurred? What if corporations lack criminal capacity in that jurisdiction or the rules are narrow relative to the Code’s standards? Should part 2.5 supply the rules? In addition, it is not apparent whether the new offence utilises a broad concept of vicarious liability or simply pierces the veil between the holding company and subsidiary.¹⁴⁸ Much

144 Attorney-General’s Department (Cth), ‘Combating Bribery of Foreign Public Officials’, above n 135, 15 [37].

145 Crimes Legislation Amendment Bill Exposure Draft cl 70.5A(5), read with *Criminal Code 1995* (Cth) s 13.5.

146 See, eg, Attorney-General’s Department (Cth), ‘Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia’ (Public Consultation Paper, March 2017) <<https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx>>.

147 These ranged from concerns with the impact of the draft on small and medium sized enterprises (Export Council of Australia) to the content of the Guidance and its alignment with other equivalent standards (BHP Billiton). See further Attorney-General’s Department (Cth), *Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995* (2017) <<https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx>>.

148 There were differing views in the submissions: see, eg, Australian Institute of Company Directors, Submission to Attorney-General’s Department (Cth), *Consultation on Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, 8 May 2017; Control Risks Group, Submission

will depend on the interpretation of clause 70.5A(1)(c), which requires that the associate (subsidiary) had engaged in foreign bribery ‘for the profit or gain’ of the (holding) company. Does a subsidiary always act for this reason by virtue of the parent’s control? Or is some degree of systemic integration between the companies’ operations required – or even a specific intent to help the holding company on the part of the culpable human actor(s)? How would interpretations of the *Bribery Act 2010* (UK) inform these matters?¹⁴⁹

- *Pragmatism versus principle/panopticon*: There is a tension between the legislative techniques in the proposal and broader principles of criminal procedure. Ashworth and Zedner present strict liability and preventative criminal offences as examples of ‘preventative’ approaches to justice, which may weaken liberal protections for the individual in coercive interactions with the state.¹⁵⁰ Commenting on clause 70.5A, Bronitt and Brereton submitted that there was insufficient justification in the proposal for a strict liability offence.¹⁵¹ But there are other concerns about the place of corporations in the administration of justice. And, these are not just problems of public functions being carried out by private actors. As Backer observes, corporate compliance systems have some features of a Foucauldian technology of government,¹⁵² which is more subtly autonomy-restricting.
- *Conditions and measures of success*: A related consideration is how companies will effectively discharge their duties and how the effectiveness of a failure to prevent offence (and its associated compliance systems) would be measured. Commenting on US civil rights legislation, Edelman documents an apparent failure of laws that require corporate compliance to achieve equal opportunity goals.¹⁵³ Alldridge argues of the *Bribery Act 2010* (UK) that effectiveness would be judged

to Attorney General’s Department (Cth), *Consultation on Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, 1 May 2017.

149 We thank Jonathan Fisher QC for pointing out this possibility.

150 Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’ (2008) 2(1) *Criminal Law and Philosophy* 21, 31–3; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) ch 5.

151 S Bronitt and Z Brereton, Submission to Attorney General’s Department (Cth), *Consultation on Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995*, 10 May 2017. See also Richard Lissack and Fiona Horlick, *Lissack and Horlick on Bribery* (LexisNexis, 2nd ed, 2014) 79–81, commenting on potential tensions between the *Bribery Act 2010* (UK) and *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) arts 6(2), 7.

152 Larry Catá Backer, ‘Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes’ (2008) 15 *Indiana Journal of Global Legal Studies* 101. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 14.

153 Lauren B Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (University of Chicago Press, 2016) ch 1.

by evidence ‘that major corporations [are] includ[ing] these procedures in their corporate-governance compliance procedures and that inclusion [is] impact[ing] significantly upon primary rate of offending by employees’.¹⁵⁴ The documentation problem may not be insurmountable for large undertakings, but the Australian government must perceive the need for inquiry into the bigger issue of effectiveness and expand its mechanisms of (corporate) monitoring and data collection. Academics must react with innovative methodologies for assessing the impacts of cross-border compliance programmes in these internal law enforcement situations. Meantime, if the procedural justice literature is any guide, corporations may need to ensure the perceived fairness and legitimacy of their interventions if they are to ensure stakeholder compliance and (possibly) a broader contribution to community development.¹⁵⁵

VI CONCLUSION

Judged by its federal criminal law, Australia has not yet met the challenge of implementing the UN Guiding Principles with respect to multinational enterprises. The *Criminal Code 1995* (Cth) prohibits a range of behaviours that violate or jeopardise international human rights. Such conduct may be criminal outside the territory of Australia and by a corporation that has not sought to prevent them. However, there are few circumstances in which a holding company would be held to have committed a crime that occurred in the context of its foreign subsidiary’s overseas operations. The individual criminal must have occupied the position of employee, officer or agent within the holding company. Evidence of board approval will be hard to gather and the prosecution may struggle to show that an individual wrongdoer was a ‘high managerial agent’ for the holding company. If there is no board or high managerial authorisation or permission for the offence, the corporate culture provisions are unlikely to enable the relevant mental state to be found in the holding company.

Proposed changes to division 70 of the *Criminal Code 1995* (Cth) offer one – albeit controversial – prospect for reform. Modelled on the corporate offence in the *Bribery Act 2010* (UK), draft clause 70.5A would criminalise a corporation’s failure to prevent extraterritorial foreign bribery by a subsidiary. The parent company’s guilt would be subject to an exception for adequate steps of prevention. The draft offence thus appears to address many of the problems with part 2.5 of the *Criminal Code 1995* (Cth). However, the new offence would raise its own interpretative challenges and problems of effectiveness. This article calls

154 Peter Alldridge, ‘The UK Bribery Act: “The Caffeinated Younger Sibling of the FCPA”’ (2012) 73 *Ohio State Law Journal* 1181, 1209–10; see especially at 1209 n 184.

155 See generally Tom R Tyler and Jonathan Jackson, ‘Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement’ (2014) 20 *Psychology, Public Policy, and Law* 78. For a study of lawyers’ perception of their obligation to advise on corporate adherence to ethical standards, see Milton C Regan Jr and Kath Hall, ‘Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights’ (2016) 84 *Fordham Law Review* 2001.

for further research about the failure to prevent offence as it may be adopted in Australia and elsewhere as a tool for multinational human rights law reform.