
Does anti-corruption legislation work?

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Abstract

This article presents a critical evaluation of the anti-corruption legislation existing for the past 15 years and changes to this legislation; turning specifically to discussion of the amendments to the *Foreign Corrupt Practices Act 1977* (US), the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, the United Nations Convention against Corruption, the *Bribery Act 2010* (UK) and relevant Australian legislation. The article discusses the philosophy behind current measures to curb international corruption practices and the consequences and messages sent when corruption cases are settled out of court. The article takes a sceptical view of the future of abolishing anti-corruption practices in countries where corruption is a quantitative issue, unless first world countries provide a strong moral philosophy on anti-corruption enforcement. Finally this article suggests several new measures that could be implemented in order to eliminate corruption practices including incentivised whistleblowing legislation and educational strategies.

I Introduction

In his foreword to the United Nations Convention Against Corruption (UNCAC) in 2003, Kofi Annan said that:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of human life, and allows organized crime, terrorism and other threats to human security to flourish.

This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.¹

For His Excellency, the UNCAC 'complement[ed] ... the United Nations Convention against Transnational Organized Crime'² by implementing 'preventive measures and the criminalisation of the most prevalent forms of corruption in both public and private sectors'.³ The 'major breakthrough' was the requirement that 'Member States ... return assets obtained through corruption to the country from which they were stolen'.⁴

But while the US particularly has had spectacular enforcement success in the last decade if the volume of financial recovery is an appropriate measure of success,⁵ many questions about the effectiveness,

consistency and the morality of that enforcement remain. In part, that is because the US Department of Justice (DoJ) and Securities and Exchange Commission (SEC) have pragmatically preferred to settle the largest cases rather than litigate them.⁶ Sometimes that appears to be because the US Government does not want to lose their best contractors.⁷ Other times, one senses that the US Government does not want to prosecute large multinational corporations into extinction and kill hundreds of thousands of jobs. But there are moral ironies in official US willingness to settle such cases when ‘the price is right’ or when the political or economic cost of a full blown prosecution would be too high.

This essay will suggest that the patchwork of ‘supply side’⁸ international anti- corruption legislation is a good beginning but has a long way to go if the governments of the world are to become effective in stamping out bribery and corruption. Though the flurry of improvements in ‘supply side’ international Anti-Bribery legislation during the last 15 years suggest that the first world has bought into the fight against corruption, selective enforcement practices with little resulting jurisprudence, arguably entrench big business in its historical view that corruption and enforcement expenses are simply a cost of doing business.⁹ The UNCAC addresses the ‘demand side’ of the international corruption equation, but it is submitted that many countries with significant ‘demand side’ problems are receiving mixed messages about international commitment to the elimination of bribery since many of the world’s largest bribers continue to function on a grand scale without visible sanction, despite extensive press releases vaunting successful enforcement. The new supply side enforcement rules also cast an anxiety producing shadow across well intentioned small business and NGOs which fear that their best efforts in difficult environments may yet prove their undoing. The US DoJ and SEC only seem interested in following through with prosecutions where they get good publicity for doing so¹⁰ and where the economic consequences to the US economy are minor. The prosecution of Hollywood movie directors Gerald and Patricia Green provides a case in point. Though prosecution appeals against the six month prison sentences both received were ultimately dropped,¹¹ the Green’s US\$1.8 million dollar payment to the former governor of the Tourism Authority of Thailand in return for \$13.5 million worth of contracts to run the Thai film festival¹² was not significant to the US economy or to that nation’s political and military interests. Prosecuting the Hollywood couple got the DoJ good headlines, but the officers and employees of Johnson and Johnson who were responsible for the *Foreign Corrupt Practices Act 1977* (US) (FCPA) violations in that much larger case, were not even named in the resulting Deferred Prosecution Agreement, nor were they personally prosecuted.¹³

In Part II, I will summarise the most significant changes in international anti- corruption legislation during the last 15 years. I will review the late 20th century amendments to the FCPA, the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention), the UNCAC, the *Bribery Act 2010* (UK) and the relevant Australian legislation including the proposal to follow the UK in abolishing the ‘facilitation payments’ exception to existing anti-bribery law. In Part III, I will discuss the philosophy behind existing measures to curb international corrupt practices and I will highlight the uncertainty and even cynicism that naturally result when such cases are settled out of court. In particular, I will question whether efforts to punish first world offenders who can settle if they have enough money will ever convince third world recipients of graft that there is anything morally wrong with their lesser opportunism. I will suggest that the world is unlikely to succeed in its war against bribery and corruption until it can articulate and demonstrate, a morally coherent and credible philosophy that is convincing in countries where there are larger ‘demand side’ corruption problems. In Part IV, I will discuss new and different ways that the elimination of bribery and corruption could be addressed including education campaigns to criminalise such activity in ‘demand side’ countries and the use of incentivised whistleblower legislation all around the world. I will conclude the essay by suggesting that law and policy makers in the first world have much work to do if they are to convincingly educate hearts and minds through the whole world that bribery and corruption are evil crimes which simply must be eliminated.

II Recent developments in international anti-corruption law

Concern about foreign corrupt practice is at least as old as Cicero's ancient Roman concern that political men and generals were going to dissipate and destroy the empire by their greedy and immoral efforts to make money out of foreign countries. Edmund Burke's long struggle to bring Warren Hastings to trial in connection with the corrupt activities of the British East India Company in the 18th century manifests similar concern. But in both of those cases, the attacks on foreign corrupt practice were prosecuted under laws which envisioned only domestic jurisdiction. Buying into that intellectual template, most modern nations have passed laws which proscribe the corruption of their own public officials. But the US FCPA broke new conceptual ground in 1977 when it sought to extend the reach of its domestic laws into foreign theatres by proscribing certain payments to the officials of foreign countries.

A *The US FCPA*

The US FCPA¹⁴ has two main elements: first it amplifies the transparent accounting requirements which originated in the *Securities Exchange Act 1934* (US) and gives them multinational application where US corporations are concerned and secondly, it criminalises the bribery of 'foreign officials'. While foreign observers may be inclined to dismiss the transparent accounting requirements as generality or mere gloss upon the substantial anti-bribery provisions, in practice they form an integral part of DoJ and SEC prosecution strategy. That is because it can be difficult to prove the bribery offences since many elements of those offences take place overseas and in secretive settings. But all US corporations have to file accounting documents with the SEC and if they have omitted material payments or mis-described those payments, when challenged with accounting or reporting irregularity, they can do little more than defend with 'mea culpa' responses.¹⁵ The SEC uses the transparent accounting requirements as a coverall prosecution backstop, analogous to the use of the 1872 mail and wire fraud statutes,¹⁶ to prosecute all manner of scams since the 1960s and 1970s.

The 1998 amendments to the 'foreign official' section of the statute reflect the practical difficulty the US had encountered in sustaining prosecutions involving foreign players. It also signalled the increased interest which the US federal authorities were to take in combating international bribery in the future. While the 1998 amendments did not add a lot of teeth to the enforcement tools and definitions already provided in the original 1977 legislation, they did extend the reach of the legislation beyond foreign officials to anyone else who was involved in a foreign corrupt practice which touched the US in some way. But the domestic 1998 amendments to the US FCPA were not the primary focus of the change to foreign corrupt practice prosecution and enforcement that year. Rather, those changes were the final step that US enforcement authorities had long perceived were necessary if the US was ever to be effective in its efforts to criminalise and prosecute foreign corrupt practice which touched and damaged US trade and economic interests. Domestic legislation alone would not suffice. The proscription of foreign corrupt practice had to become a legitimate international concern.

The effort to criminalise foreign corrupt practice internationally began with first steps to craft an OECD Convention in 1989.¹⁷ The 1998 amendments to the US FCPA purposely coincided with the US signature and ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the 'OECD Convention'). That Convention is discussed in more detail below. The OECD Convention was the real harbinger of sea change in foreign corrupt practice enforcement and was promoted by the US for that purpose. Since 1998, the US has been able to formally requisition assistance from the foreign countries which have signed the OECD Convention when necessary to prosecute offences under its domestic FCPA legislation. From 1977, it was always an offence for any officer or employee of an issuer of securities (in effect, a US public listed company) to corruptly influence or induce a foreign official in violation of her lawful duty, to give or promise anything of value to obtain or retain business.

The 1998 changes to the existing US legislation:

- extended the definition of foreign official to include an ‘officer or employee of a public international organisation’ instead of just the officers and employees of foreign governments, departments, agencies or instrumentalities’;
- added actually ‘securing any improper advantage’ to the original offences of ‘influencing’ and ‘inducing’;
- clarified that corruption done outside the US was still actionable even if not done through ‘the mails or any means or instrumentality of interstate commerce’;
- extended the availability of the ‘facilitating payments’ and ‘affirmative defences’ previously only available to public companies,¹⁸ to other corporations and individuals resident in the US; and
- enabled the prosecution of overseas corporations and foreign nationals who advanced a corruption plan while they are in the US.¹⁹

What really happened in 1998 is that the US completed an agenda which began in the 1980s; thereafter the DoJ and SEC were finally able to get serious about enforcement. The *International Bribery and Fair Competition Act 1998* was passed and signed by President Clinton on 10 November 1998 after the US signed the OECD Convention on 17 December 1997 and the US Senate approved and advised ratification of that Convention on 31 July 1998.²⁰ Since that time, the assigned FCPA teams within the DoJ and SEC have been strengthened and directed to aggressively pursue offences. But neither of those teams have been given the power to suspend or debar corrupt corporations and individuals from being US government contractors, that power rests with the relevant procuring agencies.²¹ While the suspension or debarment of any contractor by any US government agency adds that contractor to a register maintained by the Excluded Party Listing Service (EPLS)²² and prevents any other US federal agency from contracting with that contractor,²³ exceptions can be, and self-evidently are, negotiated. While the additional US Federal Government’s Federal Awardee Performance and Integrity Information System (FAPIS)²⁴ has been ‘developed to maintain “specific information on the integrity and performance of covered Federal agency contractors and grantees”’,²⁵ it is noteworthy that ‘[s]ix of the 10 most prolific contractors with the US Government, including the Lockheed Martin Corporation, The Boeing Company, General Dynamics Corporation, Raytheon Company, L-3 Communications, and BAE Systems, [have] either violated the FCPA or engaged in activities that allegedly implicate the FCPA’s antibribery provisions’²⁶ and have not been sanctioned with debarment or suspension. The mixed message which flows into the world from this fact will be discussed in Part III.

B *The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

The OECD convention shows the imprimatur of US influence and that was confirmed by President Clinton when he signed his amendments to the US FCPA in 1998. He said:

This Act makes certain changes in existing law to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD) ... The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development ... The OECD Convention – which represents the culmination of many years of sustained diplomatic effort – is designed to change all that. Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions ... The United States intends to work diligently, through the monitoring-process to be established under the

OECD, to ensure that the Convention is widely ratified and fully implemented. We will continue our leadership in the international fight against corruption.²⁷

President Clinton's speech is not empty rhetoric. One cannot read the OECD Convention without being impressed by the US influence. The definitions of the offence of bribery and of who constitutes a foreign public official, mirror the language of the US FCPA, including the correlated adjustment to the US FCPA which added the 'officials or agents of public international organisations' at the time when the OECD Convention was first signed. That correlation is clearly not a fault. If bribery and corruption are to be successfully criminalised around the world in a manner which will best facilitate international cooperation in the resulting enforcement efforts and prosecution, then loopholes will be reduced to the extent that the legislation in different countries is synchronised.

The drafters of the OECD Convention evidently had some difficulty with proposed US prosecutorial technique and discretion. While the core of Article 5 states that nation parties 'shall not be influenced by considerations of national economic influence, the potential effect upon relations with another State or the identity of the natural or legal persons involved', that required commitment is diluted by the opening sentence of the same Article which states that '[i]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party'. It appears that the US did not want the Convention to dictate prosecution methodology, since they already knew that their pragmatic plea bargaining approach was viewed with scepticism in a number of OECD nations.

The cultural difficulty underlying comparative prosecution methodology is highlighted by the official commentary on Article 5 of the Convention adopted by the original Negotiating Conference on 21 November 1997. That commentary confirms the core of the Article by stating that 'the independence of prosecution ... is not to be subject to improper influence by concerns of a political nature'. But despite the concern about improper political influence, both the language of Article 3 about sanctions, and the official commentary on its fourth paragraph, do not require the disqualification of bribers from public procurement processes. Rather Article 3 says only that OECD members should 'consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official'. The commentators explain that 'temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities' were prominent '[a]mong the civil or administrative sanctions other than non-criminal fines which might be imposed upon legal persons for an act of bribery of a foreign public official'. However, such civil impositions are the last sanction listed and the final text of the Convention does not require the imposition of such disqualification and in the US as noted above, the power to impose such bans has not been placed in the hands of the prosecutors.

Still, the OECD Convention has galvanised some of the most powerful economies in the world into legislating against bribery and corruption and into cooperation with the US in multinational prosecutions. Part of the reason why the OECD Convention holds the attention of its member states is its 'system of private peer review [which] ... subjects signatory nations to periodic reviews by teams of specialists from at least two other states'.²⁸ The Munich Prosecutors Office in Germany (Germany being listed in the Annex to the Convention as the second largest exporter in the OECD only slightly behind the US itself), has substantially cooperated with the US in the prosecution of Siemens AG, and both countries shared the \$1.6 billion in penalties that were extracted²⁹ in the largest successful enforcement action in the world so far.³⁰ Similarly, the US DoJ 'worked with British authorities on matters involving BAE'³¹ which resulted in a \$400 million fine, the third largest fine in the world to date.³² However, again, BAE has not been debarred from either UK or US procurement contracts because debarment could 'ruin BAE, which employs more than 100,000 people and is the biggest supplier to the British Armed Forces'.³³

But it was not until after the US arrest of former British solicitor Jeffrey Tesler³⁴ that the UK seem to have committed to update their anti-corruption legislation to the OECD standard. Tesler was arrested in London in February 2009,³⁵ extradited to the US after a long fight³⁶ and eventually signed a plea

agreement with the US prosecutors under which he agreed to disgorge more than US\$148 million from a multitude of international bank accounts.³⁷ He had assisted Kellogg, Brown and Root, a Houston based firm, ‘to steer bribe money ... to Nigerian officials to win more than \$6 billion in contracts for liquefied natural gas facilities’.³⁸ The updated UK legislation, the *Bribery Act 2010* (UK), came into effect in June 2011 and coincided closely with Tesler’s eventual appearance and plea agreement in a Houston court.³⁹

In its core provisions, the OECD Convention obliges signatories, and invites other states to join signatories, in agreeing:

- to criminalise the bribery of foreign officials;
- to punish all legal persons complicit with dissuasive criminal and non-criminal sanctions;
- to enlarge statutes of limitations to allow adequate time in which to investigate and prosecute corruption offences;
- to require transparent accounting by all legal persons and to prohibit the establishment of off-the-book accounts and the use of other false documents to hide bribery; and
- to cooperate with other party nations with extradition treaties to ensure successful prosecutions, bank secrecy practices notwithstanding.

The OECD has not left the fight against Bribery to the words of the Convention since 1997. There have been many different kinds of follow up as anticipated in Article 12, including recommendations adopted since⁴⁰ to further combat the bribery of foreign officials in December 2006,⁴¹ and May⁴² and November 2009.⁴³ Demonstration that the recommendations have been taken seriously is manifest again in the passage of the *Bribery Act 2010* (UK) and in Australia’s 2011 release of a discussion paper to solicit public comment on whether the Australian Government should legislate to remove the facilitation payments defence from its existing foreign anti-bribery legislation. Annexure 1 to the November 2009 Recommendation also shows that the OECD secretariat is alert to the jurisprudential issues which arise as corruption prosecutions are undertaken. By way of example, it now advises party states to implement Article 1 ‘in such a way that it does not provide a defence or exception where the foreign official solicits a bribe’.⁴⁴ However, it is not yet clear whether any form of duress will negative [*sic*] the intent which is still a necessary element of corruption charges under most of the legislation which has been passed in response to state obligations under the OECD Convention. But the clear intent of the Convention is to discourage foreign bribery with a fear factor which will outweigh the intimidation that may be exerted by corrupt officials in countries which have not signed the Convention.

C *The United Nations Convention Against Corruption*

The United Nations Convention was adopted on 31 October 2003 in Yucatan Mexico⁴⁵ and came into force on 14 December 2005; 90 days after Ecuador became the 30th country to ratify it.⁴⁶ The UN Convention is a much more ambitious project than the OECD Convention. It seeks to eliminate every kind of corruption (not just that which involves foreign public officials) and to provide member states with guidance on how to begin their fight both domestically and internationally. It sets out why UN member states should want to fight corruption (see Kofi Annan’s introductory statement when the Convention was first adopted),⁴⁷ describes in general terms the legislative measures so far considered likely to be effective in identifying and criminalising corruption and then encourages and in some cases, obliges State Parties to establish identified criminal offences with the infrastructure considered necessary to make them work. It then sets out how State Parties should cooperate when offenders against the ‘crimes created’ are subtle international conspirators.

Kofi Annan was hopeful when he introduced the Convention, but one senses he was under no illusions that meaningful implementation would be the work of several lifetimes. As mentioned in the introduction to this essay, he considered the requirement that ‘Member States ... return assets obtained through corruption to the country from which they were stolen’ was a breakthrough.⁴⁸ But the fourth session of

the Conference of the State Parties to the Convention convened in Marrakech 24-28 October 2011,⁴⁹ noted many difficulties and implicit slow progress because it is difficult to ‘establish ... [and prove] a link between proceeds of corruption in the requested State and the crime committed in the requesting State’.⁵⁰ Indeed, it is difficult to imagine, no matter how good the international cooperation is, how one could ‘establish title to or ownership of property acquired through the commission of an offence’⁵¹ and ‘to pay compensation or damages to another State Party that has been harmed by such offences’.⁵² This is because when a bribe is paid, the most likely owner of the moneys corruptly paid is the corporation whose executive paid the bribe and not the foreign government whose official received a contractually undisclosed additional payment in return for the influence which resulted in the award of the relevant business. To make either that foreign government or the home government of the corporation whose official gave the bribe, the legal owner of the property which constituted the bribe or the profit that resulted from its payment, requires very careful drafting indeed. It would be easier to agree a regime for recovering the bribe and the resulting profit and the allocation of same between the State Parties involved; such an allocation regime would also do away with the need to prove how the two State Parties concerned were harmed by the relevant offences.

But despite these complexities and the problems one can readily see in the reports of the four succeeding conferences of the State Parties,⁵³ the UNCAC has clearly increased international commitment to fight corruption and the proliferation of Anti-Money-Laundering and Counter-Terrorism instruments around the world since 2003 are well known to all commercial lawyers. Indeed, even lay persons opening new bank accounts since 2003 recognise that they must provide much more personal identification than was required in the 20th century before they could do so. Thus in this respect, Kofi Annan was surely correct when he referred to the United Nations Convention against Transnational Organised Crime as a ‘landmark’⁵⁴ and he was also correct to expect that these instruments together⁵⁵ would make it more difficult for corrupt officials ‘to hide their illicit gains’.⁵⁶

D The Bribery Act 2010 (UK)

Like the UNCAC, the new UK legislation is not limited to foreign bribery, and in the process of creating a national and international bribery code for all the countries comprising the UK, the requirements of the OECD Convention have all been implemented. However, there are some novelties, including an exception which may dilute the overall credibility of the new legislation in the third world; that exception is s 13’s carve out of approved bribery payments by spies and soldiers on active duty. But unlike the practical exemption of high value corporations and military contractors from the reach of all possible sanctions in the US, the carve out in the UK legislation is transparent. The UK has not gone as far with the extra-territoriality of its jurisdiction as the US FCPA since even the new legislation would not have allowed the successful US proceedings against Jeffrey Tesler if he was not British or a British resident.⁵⁷ The difference under s 78dd(3)(f) of the US FCPA is that ‘any natural person other than a national of the United States’ is fair game if that person or anyone acting on her [sic] behalf, ‘ma[d]e use of the mails or any means or instrumentality of interstate commerce’ to further a corrupt payment.⁵⁸ However, the British legislation can still reach corrupt activities that have no connection with the UK⁵⁹ as is the US position.⁶⁰

The requirement that the prosecution prove intent in UK legislation is more obvious than in the US FCPA; s 6(2) of the *Bribery Act 2010* (UK) says that a briber must ‘intend to obtain or retain business or’ (italics added) a business advantage. Under the FCPA, the prosecution must prove the accused ‘corruptly’ offered a bribe ‘in order to assist ... in obtaining or retaining business’.⁶¹ It is arguable that the use of the word ‘corruptly’ begs the question of whether the payer of the bribe intended the payment just a little; it implies that a payment made to a foreign official is either corrupt or not corrupt, whereas there may be other explanations for a payment which are less than wholly corrupt. While good defence lawyers will still be able to insist that intent be proven under the US formulation of the crime, the recent OECD recommendation that Article 1 of the Convention be implemented ‘in such a way that it does not

provide a defence or exception where the foreign public official solicits [the] bribe',⁶² confirms that there is pressure to remove all possible defences including those which may arise by virtue of common law when a defendant can suggest some other motive for a payment than that required by the statute.

Both the reluctance to go all the way and claim US-style extra-territorial jurisdiction and the retention of a requirement to clearly prove good old fashioned criminal intent as an element of crime in the new UK law, manifest either a conservative wish to stick with well established drafting rules, a greater commitment to the rights of a person accused of corruption than exists in the US, or both. The resulting implication that the US is willing to sacrifice even foundational democratic human rights in the quest for 'fair competition'⁶³ is one more irony which will make it harder to convince the developing world that the anti-corruption push is anything more than a Trojan horse to enable the better marketing of imperialist US business interests.

The other novelty in the new *Bribery Act 2010* (UK) is not so much the requirement in s 10 that no prosecution can be launched without the consent of the Director of Public Prosecutions (or equivalent officer), but the repeated requirement that such office-holder must make that decision to prosecute personally. That requirement can be the subject of a number of different interpretations including the most obvious one that the decision to prosecute should not be the mere rubber stamping of a recommendation to prosecute by a subordinate. But in the context of the OECD Convention and subsequent recommendations it seems more likely that this repeated provision is the UK's best effort to ensure that its foreign bribery prosecution decisions are made by officials completely independent of contemporary national political or economic interests; however, it remains to be seen whether the formula will work or not. What seems implicit in the requirement is that the relevant prosecuting office holder is considered to have a fiduciary duty to act in a certain way. The current English Director of Public Prosecution, Keir Starmer QC, is reassuring when he states:

I am separated from Government through the device of superintendence. Ever since the infamous Campbell case in 1924, the right of the Law Officers of the Crown and the DPP to reach their decisions without political interference has been held inviolate ... the Protocol that I and others signed with the Attorney General in July of this year [2009] ... set[s] out publicly for the first time the independence of the public prosecutor to take decisions in individual cases.

No Government may instruct me as to what to do: neither by the same token, can any member of the public. The public prosecutor's sole responsibility is to see justice done and it is this element of impartiality; of independence; of non- alignment with any vested interest; that provides the public prosecutor with the strength to take difficult decisions.⁶⁴

Starmer does admit superintendence by the Attorney-General who is a government officer accountable to parliament;⁶⁵ he notes that he feels a duty to 'public interest factors ... that ... reflect current social attitudes';⁶⁶ and he notes that the discretion necessarily vested in prosecutors 'can mask corruption and malevolence'.⁶⁷

There is however, no requirement that he take account of his country's international economic or political interests when he makes 'prosecute or not to prosecute' decisions. And it is the independence of these decisions which are a large concern when we review the exercise of the prosecutorial discretion manifest in settlement of FCPA cases in the US. Starmer's further talk of 'tempering justice with mercy; acting out of compassion';⁶⁸ his commitment to transparency,⁶⁹ his asserted commitment to and understanding of the human rights set out in the European Convention on Human Rights,⁷⁰ his willing submission to new judicial oversight⁷¹ and his allegiance to justice itself⁷² – all provide one with a sense that the international public can be fairly comfortable with his independence and his separation from national economic and political interest factors. However, just as the DoJ and SEC prosecutors in the US do not have authority to bar corrupt contractors from future government procurement contractors, so in the UK it is not evident that the Director of Public Prosecutions has any significant input into decisions

whether corporations and individuals prosecuted or convicted as bribers should have or retain access to future British government contracts. And it is evident that BAE retains such access though effectively convicted of an FCPA crime which resulted in a US\$400 million fine.⁷³

E *The Criminal Code of Australia and the Bribery of Foreign Officials*

Like the new UK legislation, the Australian Criminal Code covers both domestic and international bribery but Division 70 relates specifically to the bribery of foreign officials and was enacted by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* as Australia's response to its obligations under the OECD Convention.⁷⁴ Like the FCPA and the *Bribery Act 2010* (UK), the Australian legislation 'addresses ... the supply side of the international bribery equation'⁷⁵ but leaves the demand side relatively untouched.⁷⁶ Like the UK legislation, it implements the OECD Convention directives closely and follows the US language in many respects. But unlike the FCPA, the Australian legislation explicitly requires that the objectionable offer of benefit be made 'with the intention of influencing'⁷⁷ (*italics added*) the relevant official 'to obtain or retain business'.⁷⁸

The Australian legislation includes a longer list of those who constitute foreign public officials and includes the employees and office holders of 'public international organisations',⁷⁹ the change made to the US FCPA in 1998 to reflect the heightened requirements of the OECD Convention. But though the Australian definition expressly includes 'member[s] of the ... judiciary or magistracy of a foreign country'⁸⁰ in its more exploded style of definition, such judicial officers are also included in the US and UK definitions.⁸¹ For practical purposes, these differences are only differences in drafting style. The US statute includes bribes to party officials and candidates for future political office⁸² and it is not superficially obvious that bribing such officials would offend either the UK or Australian legislation. For in the UK 'foreign public official' includes only 'an individual who exercises a public function for or on behalf of a country or territory ... or for any public agency or public enterprise of that country or territory'.⁸³ And similarly, the Australian legislation includes only an 'individual who holds *or performs* the duties of an appointment, office or position under a law', (*italics added*) custom or convention 'of a foreign country or of part of a foreign country'.⁸⁴

There are differences in drafting style are when it comes to proving the required intent or corrupt knowledge which constitute the bribery offence. In the US legislation, that is spelled out in the definition of what constitutes 'knowing'.⁸⁵ 'If [a] person is [either] aware ... or ... has a firm belief of corrupt conduct or that it 'is substantially certain to occur', that person 'knows' sufficiently to be proven guilty of corrupt conduct unless 'the person actually believes that [the] circumstances [which enabled the bribery] do ... not exist'.⁸⁶ These rules of interpretation apply whether the defendant is an individual or a corporation.

In Australia, Division 12 of the Criminal Code identifies 'fault elements other than negligence'⁸⁷ which will subject bodies corporate to criminal liability, but with modifications made necessary because they are not individuals.⁸⁸ Thus a body corporate can be criminally liable:

- if it was negligent or reckless in failing to prevent the payment of a bribe;
- if its corporate culture encouraged, tolerated or led to the payment of the bribe, or
- if it simply failed to create and maintain a culture in which compliance with anti-bribery law was required.⁸⁹

These heightened and arguably strict liability⁹⁰ requirements are not imposed on individuals and this again marks a contrast with the US position. The UK anti- bribery legislation is not as harsh towards corporations concerning foreign corrupt practices as the Australian Criminal Code, but it does create an additional corporate offence that does not apply to individuals. That arises when the body corporate has not set 'in place adequate procedures designed to prevent persons associated with [the body corporate] from undertaking' corrupt conduct.⁹¹

Australia has been obedient in following the wishes of its ally, the US, in implementing foreign corrupt practices legislation,⁹² and similarly has not automatically acceded to the OECD suggestion that the facilitation payments defence should be removed from its legislation.⁹³ Rather, it has released a discussion paper for comment from the Australian public before deciding whether and how to implement the OECD recommendation.

The main reason why that discussion paper suggests that the facilitation payments defence should be removed is so that Australia returns to compliance with international treaty obligations and because the continued existence of the defence is inconsistent with other international laws to which Australian companies are now subject.⁹⁴ The reasons for retaining the facilitation payments defence⁹⁵ are all said to be premised in corruption.⁹⁶ Other remedial measures proposed to make the Australian legislation compliant with the UNCAC and the most recent recommendations under the OECD Convention,⁹⁷ all manifest the wish to make the worldwide legislation consistent but also to make successful prosecution easier. In particular, proving foreign bribery would be easier if the prosecution did not have to prove that a bribe was offered to influence a specific individual. That does not seem objectionable, but the discussion paper downplays duress as a factor in some foreign bribery when it says that:

[r]esearch and the reported experiences of a number of companies demonstrate that refusing to pay public officials can result in savings and reduced delays as demands for payment can decline when a business is known to be a ‘non-lucrative’ target.⁹⁸

The discussion paper also acknowledges that ‘large businesses have greater bargaining power to refuse demands’,⁹⁹ but discounts the serious anxiety that can arise when a corporate official is asked for even a small and supposedly legal payment at a third world airport. While a corporate official will probably doubt the legitimacy of the requested payment, the prospect of detention in an unsavoury place surely negatives the moral culpability of such a facilitation payment in lay minds. Yet this natural moral response is ignored in the international drive to make prosecution easier. In the long term, laws need a sound moral base if they are to obtain and retain their credibility with those whom they are enacted to protect and control.

III The philosophical foundations for anti-corruption law

The Preambles to the OECD Convention and the UNCAC and Kofi Annan’s foreword to the latter, adequately set out why the world has come to realise and now fights against the evil of corruption. The OECD Convention Preamble states that:

[B]ribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.¹⁰⁰

The OECD thus ‘consider[s] that all countries share a responsibility to combat’¹⁰¹ corruption. This justification for the Convention was restated word for word in the most recent Recommendation adopted by the OECD’s Council for the Convention’s implementation on 26 November 2009.¹⁰² Before the Convention was adopted in 1996, the OECD’s Development Assistance Committee on 6-7 May 1996 had recorded their ‘concern with corruption’ as follows:¹⁰³

- it undermines good governance;
- it wastes scarce resources for development, whether from aid or from other public or private sources, with far-reaching effects throughout the economy;
- it undermines the credibility of, and public support for, development co-operation and devalues the reputation and efforts of all who work to support sustainable development; and
- it compromises open and transparent competition on the basis of price and quality.¹⁰⁴

The Preamble to the UNCAC says that '[t]he State Parties to the Convention' have prepared it because of many concerns including their:

Concern ... about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

Concern ... about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

Concern ... about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States [and because they were]

... [c]onvinced that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law.¹⁰⁵

The theme is not only that corruption undermines economic growth and the opportunities that proceed from growth, but it undermines human confidence that a truly just society can ever be achieved. If corruption is not systematically addressed, increasing despair that legal and social justice can ever be achieved, could see the whole world descend into a state of endless crime and violence.¹⁰⁶ The case for answering corruption is the more pressing in the 21st century because all nations are increasingly connected in the global village. While some of the least corrupt nations have historically been insulated from the havoc wrought by endemic corruption in other nations, without commitment to spreading the economic virtues which enhance confidence and development, there is significant risk that corruption could spoil the economies of even those nations which have achieved significant levels of law obedience in the past.¹⁰⁷

Certainly the world understands that no nation can achieve significant economic growth to enhance the living standards of the majority of its citizens where a favoured few steal assets and distort genuinely free enterprise with bribes to secure and retain business. But while there is no doubt that the world understands both the danger that corruption poses and the pressing need to eliminate it, this essay has raised questions about the effectiveness of existing supply side international legal efforts to criminalise corruption. Some of those questions may arise as matters of pure cultural difference,¹⁰⁸ but some anti-corruption enforcement practices raise compelling questions about the underlying integrity and legitimate purpose of the OECD and UNCAC Conventions.

At core, as the UNCAC, the *Bribery Act 2010* (UK) and the Australian Criminal Code recognise, corruption is a two part equation; for corruption to prosper there has to be both a bribe supplier and a bribe requestor. While all three of these instruments recognise both sides of the equation, they and the US FCPA have really only tackled the supply side of the equation to date. Certainly the anti-bribery laws of the UK and Australia proscribe domestic demand side corruption as well. But it is the demand side of the corruption equation in foreign countries with a culture of 'grand corruption'¹⁰⁹ that needs to be effectively addressed. Though the OECD Convention is completely focused on supply side corruption, the UNCAC is not and recognises the need for all nations to ratify and adopt its commitments.

Those UNCAC commitments include: promises to develop laws and policies against all corruption;¹¹⁰ the development of law and other measures to criminalise all forms of corruption for corporate and natural persons including the obstruction of justice;¹¹¹ enlarging statutes of limitation to ensure there is adequate time to investigate and prosecute corruption offences which can be notoriously difficult to prove;¹¹² passing laws that enable the freezing, seizure, confiscation and tracing of assets and funds used in or received from offences accepted under the UNCAC;¹¹³ passing laws and developing programs that protect witnesses, experts and victims;¹¹⁴ creating mechanisms that overcome the obstacles created by bank secrecy laws;¹¹⁵ cooperation with other State Parties as they seek to investigate and prosecute their

own laws against corruption;¹¹⁶ and the development of laws and methods that enable the recovery of ill-gotten or ill-used assets.¹¹⁷ The UNCAC also anticipated the need to provide technical support to State Parties that could not do all these things by themselves,¹¹⁸ and the UN Office on Drugs and Crime has even provided a legislative guide to assist all State Parties in the implementation of the Convention.¹¹⁹

But outside the US, there is little evidence that corruption investigation and prosecution is gathering pace. Certainly Germany¹²⁰ and the UK¹²¹ have cooperated with the US in some of their international investigations, but even in those two countries, there have been very few investigations resulting in prosecutions outside of those prompted by the US.¹²² The recent Australian discussion paper which discusses whether Australian foreign corrupt practices law should be tightened, admits that the Australian authorities have commenced only two prosecutions and that they are incomplete.¹²³ In its 2010 Guide to Foreign Corrupt Practices Law,¹²⁴ a British-based multinational law firm discussed the approach taken to enforcement in 15 countries. It reported that investigations into foreign corrupt practices were occurring in Belgium, France, Germany, the Netherlands, Poland, Spain, Sweden, the UK and the US, but that successful prosecutions had resulted in only Germany, Spain, the UK and the US.¹²⁵ In 2006, Poland created 'a new powerful anti-corruption agency to fight corruption and the current government aims to cut back bureaucracy which is seen to be a root of corruption' and though there are 'numerous investigations ... underway ... [Linklaters] are not aware of any successful prosecutions for foreign corrupt practices'.¹²⁶

In The People's Republic of China, 'prosecutions are not uncommon' for 'domestic bribery ... in conjunction with the efforts being made by the Chinese government to build a credible market system', but 'to date, no prosecutions have been brought in the PRC for foreign corrupt practices'.¹²⁷ However this last report predates the successful prosecution of 'four employees of the Australian mining company Rio Tinto (including one Australian citizen). China originally accused the four ... of espionage, but those charges were reduced to allegations of commercial bribery and stealing trade secrets stemming from Rio Tinto's negotiations with Chinese officials over iron ore prices'.¹²⁸ Warin, Diamant and Pfenning report further that:

Chinese authorities are increasingly enforcing laws punishing corruption in business and government. Between 2003 and 2008, China convicted more than 120,000 people for corruption-related crimes. This figure marked a 12% increase from the previous five-year period. Notably, of the 120,000 convicted, 4,525 were government officials above the county level, a 78% increase from the previous five years ... China prosecuted 6,227 cases of domestic commercial bribery involving 1.65 billion yuan (about \$242 million) in 2008, which marked a small decline from 2007, in which authorities handled 7,450 cases of commercial bribery involving 2.12 billion yuan (about \$310 million). In the largely government-owned banking sector, an extensive audit, completed in January 2008, revealed 445 cases of irregularities or misconduct, involving nearly 860 billion yuan (about \$126 billion), and led to termination of 177 bank managers.

Whether these eye-popping figures – all released by the government and largely unverifiable – reveal amplified enforcement, increased corruption, stepped-up public relations efforts, or a combination of these is impossible to determine, but it is clear that the Chinese government continues to roll out new initiatives in its fight against corruption ... the increased prosecution of senior government officials is undeniably the most visible aspect of the Chinese corruption crackdown.¹²⁹

Some will be inclined to discount these reports garnered from PRC government sources as spin designed to reassure the West that China is a safe place to invest. But the perception of spin and the Chinese focus on convincing the West that it is serious about fighting corruption, also demonstrate that there are two sides to the issue of culture in the corruption equation. For just as the West is sceptical about the reliability of the Chinese focus on corruption fighting, so the rest of the world is sceptical about the West's reasons for its war on foreign corruption. In the case of China, sceptics think that China is willing to manufacture statistics to encourage Western business. In the case of the US in particular, many less developed nations will observe President Clinton's transparent endorsement of the OECD Convention

because it encourages ‘fair competition ... [and will oblige] our major competitors ... to criminalize the bribery of foreign officials’¹³⁰ with an understanding nod. That is because, for better or for worse, the US is widely perceived as being obsessed with money and business to the extinction of all other values. But if that perception is fair, and even if it is not, given that ‘perception is reality’, what should the US, other developed nations in the West and the umbrella international institutions which are interested in eliminating foreign corrupt practices do about it?

A *Adverse Perceptions of Anti-Corruption Laws*

The suggestion that ‘corruption is just a culturally different way of doing business’ has been noted previously from Gayle Hill.¹³¹ And there is a sense in which this suggestion resonates with the idea that human rights do not comport with ‘Asian values’ and may thus be regarded as one more example of western cultural imperialism.¹³² But though China and some other countries do not accept that western-style human rights are universal values, China’s war on domestic corruption does seem to demonstrate that it has accepted that corruption is universally bad for business.¹³³ But that does not mean either that China agrees with everything the US and the West do with regard to fighting corruption¹³⁴ or that the rest of the world is *ad idem* with the West and the US on fighting corruption either. Indeed, it is possible that the nations which have not signed on to the OECD Convention in particular are sceptical of the moral integrity of the law and contemporary enforcement practices. Issues likely to promote scepticism include, first that save in the case of the US, foreign corrupt practice investigations and prosecutions do not demonstrate a high degree of commitment to this war. It is not possible to single out a single reason for that lack of commitment, but it does seem reasonable to infer that those nations that have sought to implement the OECD Convention and UNCAC are not finding their resulting laws easy to investigate, prosecute or enforce. Secondly, even though the OECD Convention expressly stipulates that ‘considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved’¹³⁵ are to be excluded from prosecution decisions, it is self-evident that national economic interest is having considerable influence upon enforcement practices. Thirdly, none of the funding realised from fines and disgorgement penalties in the US has been made available to assist other nations with education and enforcement such as might address such corruption from the demand side of the corruption equation. Finally, no major western corporation ‘found guilty’ of foreign corrupt practice has been permanently barred from all government or international procurement contracts, if there was any sanction against procurement contract access at all.

These factors lead not only to scepticism but to cynicism for just as the West is interested in promoting democracy and human rights values most vigorously in those areas of the world where it has significant economic interests, so the West only seems interested in enforcing foreign corrupt practices laws when it is profitable and when it does not compromise their national economic interests – despite the lofty language of Article 5 of the OECD Convention to the contrary.

Justifications for such cynicism abound. Indeed it is submitted that there is not a single US prosecution decision that cannot be explained in purely economic terms. The Green,¹³⁶ Johnson and Johnson,¹³⁷ and BAE¹³⁸ cases have already been mentioned. But there are many other examples. Jessica Tillipman reports that ‘the top 10 most expensive settlements in FCPA history include eight large US Government contractors: Siemens AG, Halliburton/KBR, BAE Systems, JGC Corporation, Daimler AG, Alcatel-Lucent, Panalpina and Johnson & Johnson’.¹³⁹ ‘[T]he companies that settled the three most expensive FCPA enforcement actions to date, and together paid approximately \$1.8 billion in fines (Siemens AG, \$800 million; Halliburton/KBR, \$579 million; BAE Systems, \$400 million), also obtained over \$10 billion in US Government contracts in FY 2010.’¹⁴⁰ Tillipman continues and explains that:

[t]he top 10 corporate settlements total nearly \$3.2 billion in fines and penalties. Fines against individuals are similarly large. Between 1998 and October 2010, more than \$2 billion in criminal fines were imposed against individuals. This number includes several sizable monetary payouts by

individuals, including the eighth most expensive FCPA enforcement action to date against Jeffrey Tesler, totalling \$148,964,568;¹⁴¹

and that

[F]rom 2004 to date, over \$1 billion [in addition to fines] has been disgorged ... FCPA disgorgements can total hundreds of millions of dollars as with Siemens (\$350 million), KBR (\$177 million), and Snamprogetti (\$125 million).¹⁴²

Paul Carrington makes a similar argument. He notes that:

James Giffen, an American citizen, was indicted in 2003 for bribing President Nursultan Nazarbaev of Kazakhstan on behalf of Mobil, Texaco, Phillips/Conoco, and BP. His alleged offense gained public attention in 2000. After four years of investigation, Giffen was charged with thirteen counts of violating the FCPA and thirty-six counts of criminal money laundering. President Nazarbaev, who has been a friend of American foreign policy in the Middle East, was critical of the prosecution, perhaps sensing that he could even lose his office as a result of it. Prospective government witnesses were even said to have received death threats. In his defense, Giffen alleged that he had been regularly debriefed by United States government officials, and claimed that ‘by the time of the transactions at the heart of the indictment, [he] understood himself to be working not only for the government of Kazakhstan, but also for ... United States government agencies’ ... the trial has been repeatedly postponed. It will perhaps be held some day, but maybe Kazakhstan is too important to the United States for the Department of Justice to continue the case.¹⁴³

In their FCPA blog, Richard Cassin and Ethics Media 360 recorded on 13 July 2011 that:

Armor Holdings Inc, a military and law enforcement equipment company formerly listed on the NYSE and now owned by BAE Systems agreed to pay \$16 million to resolve FCPA violations arising from bribes to secure UN contracts and covering up the payments;¹⁴⁴

on 27 July 2011, that:

Diageo PLC agreed to pay the SEC \$16.4 million to resolve FCPA offenses that stretched over six years and involved bribes to foreign officials in India, Thailand, and South Korea. The London-based maker of many top liquor brands – including Johnnie Walker and Windsor Scotch whiskeys – paid \$2.7 million in bribes through subsidiaries for sales and tax benefits;¹⁴⁵

and on 15 September 2011, that:

Bridgestone Corporation agreed to plead guilty and pay a \$28 million criminal fine for its role in conspiracies to rig bids and make corrupt payments to foreign government officials in Latin America. The Tokyo-based maker of marine hose and other industrial products was charged with conspiring to violate the Sherman Act and the Foreign Corrupt Practices Act.¹⁴⁶

But it is not just in the US that political and economic interest can be seen as the driving force behind the decision to prosecute, settle or not. The decision to settle the BAE case noted above was publicly predicated upon the preservation of 100,000 jobs¹⁴⁷ in addition no doubt, to the unstated need to retain BAE as a viable and innovative supplier of essential military technology in the West. Paul Carrington is critical of the political considerations which have influenced the British anti-corruption prosecution efforts despite the prohibition in the OECD Convention. He writes that:

having recently enacted its criminal law as required by the OECD Convention, [in 2004, the United Kingdom] initiated an inquiry into bribes allegedly paid by BAE Systems, the British weapons firm, to secure contracts with the government of Saudi Arabia. In November 2006, it was reported that Saudi Arabia ... threatened to break diplomatic relations with the United Kingdom if the investigation was not dropped. The next month, the investigation was dropped after the British government determined

that ‘the wider public interest’ ‘outweighed the need to maintain the rule of law’ ... on appeal the House of Lords affirmed the Prime Minister’s action in calling off the prosecution.¹⁴⁸

Carrington’s own cynicism is thinly veiled when he observes in conclusion that ‘[t]he Serious Fraud Office [UK] has yet to demonstrate the will to punish the corruption of foreign officials by British firms seeking to gain an advantage for the Office’s fellow countrymen’.¹⁴⁹

Why are these reports which show the influence of political and economic considerations in Western foreign corrupt practice prosecutions likely to lead to scepticism in non-western countries and particularly developing nations? The simple answer is that Western enforcement practices reveal an objective lack of integrity.

First, it is the pursuit of ‘improper advantage’¹⁵⁰ that lies at the heart of bribery; if a payment or other inducement were legal, proper or fair, it would not constitute a bribe. The affirmative defences in the US FCPA¹⁵¹ also show that it is the impropriety of a payment which constitutes the heart of the crime. But to non-Western eyes, the payment of money to settle a bribery case looks just like the payment of another bribe. And from a moral perspective, it is no answer to say that the settlement payment is different because it was legal. Why was it legal? Because it was paid to a government official or department with official approval? How is that morally different to a third-world beholder who thinks a payment to a Prime Minister or his department is similarly a payment to an official? The perceptual inconsistency that results is not helped when there is no non-monetary consequence to the corporation nor punitive personal consequence for the senior corporate executives most directly involved.

Secondly, there is some justification behind the notion that the West can legislate anything it wants if there is significant economic and political justification to do so. While some in the West still subscribe to the theory that law must have a justification in morality to be ‘legal’, or at least to have credibility, the positivist idea that a law is legal if it was enacted in a procedurally correct manner by recognised lawmakers,¹⁵² is regarded as a sign of decadence in some more conservative and religious cultures. This context undermines the general validity of western anti-corruption laws in cultures where law is only valid if it is ‘moral’ and ‘right’.

Thirdly, and in clear deference to the idea that ‘justice must not only be done but be seen to be done’,¹⁵³ Article 5 of the OECD Convention states that the ‘[i]nvestigation and prosecution of ... bribery ... shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.’¹⁵⁴ But how does a third-world beholder perceive the fact that most of the US government’s top 10 procurement contractors are still alive and well despite the fact that six of them have been guilty of the payment of bribes on a scale that few in the third world can even comprehend?¹⁵⁵ And if principle is important, why is it that the English House of Lords would uphold Tony Blair’s decision to call off the prosecution of BAE after Saudi Arabia threatened to suspend diplomatic relations with the UK if the prosecution continued?¹⁵⁶ Though the OECD Convention conceded that investigations and prosecutions must be ‘subject to the applicable rules and principles of each Party’,¹⁵⁷ where there is no trial and no visible punitive consequence to major corporations, no one in the third world is convinced that western corrupt practice enforcement is about justice. While imprisonment has resulted in some cases, it is only ‘the little guys’ and foreigners that seem to take those falls.

Fourthly, if the West is really serious about eliminating bribery and corruption, how is it that so little has been done to combat bribery on the demand side of the corruption equation? It cannot be about money because it is very clear that there is plenty of money which could be tapped to pay for demand side education and enforcement. Why is it that the OECD is not highly visible in promoting for example, education programs that criminalise corruption at all levels all over the world – and why are they not providing expatriate mentors who could help build capacity in third-world prosecution teams feeding off whistleblowers encouraged by rewards flowing from successful prosecutions?

The answer to all these questions lies in the obvious insight that there are economic and political limits to the interests of the West and those limits have little connection with universally recognised standards of morality despite pretensions to the contrary.

IV How can we effectively fight corruption on both the demand and supply sides of the equation?

In the introduction to this essay, I summarised that ‘law and policy makers in the first world have much work to do if they are to convincingly educate hearts and minds through the whole world that bribery and corruption are evil crimes which simply must be eliminated’. The idea that the engineering of successful societal change depends upon popular understanding and acceptance of the relevant laws is well known in the West. There is a large body of literature about the connection between the acceptance of law and its enforceability in many disciplines including legal theory and sociology. But it is more recently well known because of the West’s invasion of Iraq to depose Saddam Hussein so as to neutralise or destroy his weapons of mass destruction. To successfully rebuild Iraqi society with democratic principles overlaid upon traditional values, all the participants in the law reform process recognised it was necessary to win the hearts and minds of the people. But this understanding seems to have been largely ignored where the implementation of the OECD Convention and the UNCAC are concerned.

While the UNCAC fully recognises that corruption has both a supply and a demand side, international enforcement emphasis seems focused on the supply side in the developed OECD nations. That perception may be the simple result of the volume of sensational press reports in West. However, the western nations which have passed anti-corruption legislation are more inclined to cite their OECD obligations than those that arise under the UNCAC. Further, the legislation from the US, the UK and Australia discussed in this article, clearly respond to the mandates of the OECD Convention and all three countries have adopted OECD language with primary focus upon the supply side of anti-corruption enforcement. But at least in part this criticism is unfair. It is unfair because each of these three nations have also ramped up their legislation proscribing domestic demand side corruption during the period since the OECD was passed – and even the US cannot pass legislation with extra-territorial reach sufficient to proscribe demand side corruption in other countries. So what more could be done?

A Education in ‘Demand Countries’

It is submitted that demand countries currently have neither the will nor the resource to educate their citizens about the evils of corruption. Citizens of developed nations can readily understand the connections between corruption and stunted economic growth and between corruption and lawlessness. However, these connections need to be spelled out for the citizens of less developed nations before any legislative and enforcement campaigns could gain traction. Because literacy levels are lower in most demand countries, careful consideration needs to be given to how best to reach the people. Anti-DVD/video piracy advertisements in developed nations are successfully displayed in movie theatres and in the trailers for rental and domestic purchased DVDs and videos. But where the generality of the populace do not have the resource to go to movie theatres or to rent non-pirated DVDs and videos, effective campaigns must rely on billboards and perhaps free to air television campaigns to achieve any degree of target market penetration.

But it is not just market penetration that must be thought about differently in the third world. Since it is very likely that the citizens of less developed nations do not understand that foreign corrupt practices cause extensive damage to their national economies and thus their individual standards of living, clever advertising campaigns will need to be crafted that connect the necessary dots for third world consumers. This is no easy task since for many in the third world, payments that are improper by western standards are an integral part of established culture where most scramble for whatever dollars they can earn as

unlicensed street vendors. This educational task is huge. By comparison, western efforts to criminalise drunk driving by media education are a piece of cake. To be successful, media campaigns designed for the third world consumption should be planned for years and decades rather than days and months. This education is a 'long haul' project and it is self-evident that the developed nations have to be thoroughly committed or it will never get off the ground.

B *Re-Structured Enforcement Emphasis in the West*

Mass educational campaigns will never gain traction in the third world if western enforcement practices continue to send mixed messages. Unless the West moves to honestly implement the OECD prohibition on economic and political influence in their prosecution and enforcement practices, it is doubtful that any education campaign will achieve credibility in less developed nations. Therefore what? Western nations need to start punishing the 'important corporations' which offend foreign corrupt practice laws in convincing and unmistakable ways. The most obvious missing sanction is debarment from any future government procurement contract no matter who the offender is, how important the technology the offending corporation has to sell or how many jobs are at stake. But it seems doubtful that any western government will have the political courage to take such a stand. That unlikelihood and the anxiety the suggestion causes, is a parable for the effort that will be required to change the corruption paradigm in the developing world. For the fact that political leaders in the West would shrink at the prospect of denying Halliburton or BAE any future government procurement contracts, demonstrates that the heart and mind of the West is no more committed to solving the international corruption problem than are the governments of third world countries who are thoroughly daunted by what the West expects of them under the UNCAC. What then can be done realistically?

Paul Carrington adds a number of other suggestions. He begins by citing the Civil Law Convention on Corruption adopted by the Council of Europe in 1999¹⁵⁸ which obliges signatories 'to authorize civil actions for compensation of firms damaged by corrupt practices.'¹⁵⁹ He notes a 'civil action brought by a foreign government in an American court ... in 2009 by the Republic of Iraq ... against ninety-three defendants alleged to have participated in frauds associated with the United Nations oil-for-food program ... [in which] Iraq seeks \$10 billion as compensation'.¹⁶⁰ Carrington speculates that the case was brought by US attorneys contingent upon success¹⁶¹ and suggests that such innovative use of US jurisdictional reach may yet prove a useful pattern to overcome the economic and political anxieties that western states feel when their OECD covenants say they should prosecute cases that their national interest says they should not prosecute.¹⁶²

Carrington's primary idea is that the 'relator claims' allowed under the *False Claims Amendment Act 1986* (US) and also known as 'Lincoln's Law', could be used for foreign cases in the US and/or copied in other countries with corruption problems.¹⁶³ Under this law, private citizens can bring claims on behalf of the government against 'those engaged in corrupt practices for harm resulting from the taking of bribes by its officers'.¹⁶⁴ The law is called 'Lincoln's Law' because it has its roots in legislation President Lincoln passed in 1862 after he dismissed his Secretary of War 'for paying his friends twice the market price for cavalry horses that turned out to be afflicted with 'every disease horseflesh is heir to'.¹⁶⁵ The 1986 update of this old False Claims Act imposes 'treble damages liability on those engaged in corrupt practices causing harm to the federal government'.¹⁶⁶ Carrington says 'such private enforcement proceedings by citizens in civil actions [are] perceived to be more effective in deterring corrupt practices than criminal law enforcement'¹⁶⁷ for a number of reasons. First, the civil standard of proof applies. Relators are only required to prove guilt on the balance of probabilities rather than beyond reasonable doubt.¹⁶⁸ Secondly, 'private citizen-relator[s] like prosecutors can] ... compel disclosure of possible evidence' against parties and non-parties.¹⁶⁹ Thirdly, 'unlike civil plaintiff[s] in England or most other nations, [relators are] ... ordinarily not liable for the legal expenses of the defense even if he and/or the government is unsuccessful in proving the case.'¹⁷⁰ In Lincoln's day, 'numerous relators came forward

in the name of the United States to pursue claims against private contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall.¹⁷¹

Carrington does not address the much greater proof difficulties that arise in modern international foreign corrupt practices cases. For example, it will be difficult for modern relators to produce such tangible evidence as 'triggerless rifles'. It will also be more difficult to prove that a government suffered loss because of corrupt payments involved in the construction of a billion dollar power station than showing the true market price of a horse in Lincoln's Civil War America. But Carrington's point is that whistleblower laws with financial incentives are a credible enforcement tool that have not been significantly explored for potential in the foreign corrupt practices context. He does cite an FCPA case in the US where a senior employee became a witness against his employers in return for a reduced sentence¹⁷² and says there are '[m]ore than a few' recent US relator cases where the 'relators have been able to retire in wealth after revealing frauds on the government ... committed by their former employers'.¹⁷³ And as noted above,¹⁷⁴ Carrington sees foreign corrupt enforcement potential if US-style contingent fee litigation could be exported to other jurisdictions. Certainly the fees flowing to whistleblowers from US false claims prosecutions would seem likely to provide grand incentives to informants from the third world. But maybe not since even the 2007 doubling of the US\$25 million bounty on Osama Bin Laden's head¹⁷⁵ did not produce him and US officials have confirmed that they would not be paying a bounty since 'his death was the result of electronic intelligence and not information from any one informant'.¹⁷⁶

Carrington's fallback position is that even if only the OECD nations experimented with such private law initiatives, '[s]uch empowerment of private enforcement might significantly enhance the deterrent effect of the laws enacted pursuant to the present Conventions'.¹⁷⁷ Alternatively, the already long reach of the US FCPA jurisdiction could be legislatively extended 'to enable a citizen of another nation, such as Kazakhstan, to take on the role of a relator to bring suit in an American court in the name of his government'.¹⁷⁸ 'The United Kingdom, Korea and the Netherlands ... [already] have laws to reward and protect whistleblowers who alert prosecutors to frauds on their governments'¹⁷⁹ so that 'culture shock'¹⁸⁰ need not arise at this suggestion. But Carrington is doubtful that foreign governments would relieve relators of the burden of conducting such litigation, particularly if the targets were high government officials and perhaps even 'the president of the republic'.¹⁸¹ Carrington further concedes that even a successful judgment would only be valuable to the extent that there were assets in the US which could be seized to meet it.¹⁸² And he foresees other problems including that by 'longstanding international tradition ... the courts of one nation do not enforce the public revenue or punitive laws of another',¹⁸³ and that '[s]ome Europeans, Asians and Africans may already resent the pretentiousness of American courts sitting as 'world courts' as they are sometimes prone to do.¹⁸⁴ So Carrington finally retreats to the suggestion that '[t]he World Bank ... with the support of the International Chamber of Commerce or the United Nations, could create a [new] legal forum ... that could enable and reward effective private enforcement of international anticorruption law'.¹⁸⁵

All of this discussion of alternative enforcement methods that could be investigated simply suggests that even the first world has not really committed to eliminating corruption anywhere. For while the US has reaped a harvest of fines and penalties from the cases it has prosecuted particularly since 1998, the failure of even other OECD nations to follow suit and the general failure of the West to explore alternative enforcement methodologies as would occur if there was real moral commitment, witness that the war on corruption has not really started. US apologists may point to the combined DoJ/SEC enforcement results as an answer to this 'not serious' charge. But even their yields at more than \$100 million in 2007; \$850 million in 2008; \$620 million in 2009; \$1.8 billion in 2010 and \$480 million in 2011,¹⁸⁶ pale into insignificance when compared with World Bank's 2002 estimate 'that bribes totalling a trillion dollars were paid' worldwide in just that one year.¹⁸⁷ So long as the largest bribers in the US continue to trade, no amount of education in the third world will ever convince those peoples that there is any reason for domestic culture to change.

V Conclusion

The world is not yet serious about eliminating corruption. If the world was serious and believed that corruption is the ‘insidious plague’ that Kofi Annan condemned in 2003,¹⁸⁸ the governments of wealthy nations together with international institutions around the world, would have studied effective education and enforcement; and the results of implementation on both the supply and demand sides of the corruption equation would be obvious in all manner of countries. Instead the US stands alone in its enforcement efforts and even looks hypocritical since it has not imprisoned or bankrupted anyone who looks important.

While these statements may appear harsh, they are not. The world is bright enough to have made a dent in corruption since the OECD Convention and UNCAC were passed if it had the will and altruism to do so. The truth is that there are enough Conventions, there is enough money and there are enough jails; but sadly there are also plenty of corrupt officials and politicians.

Notes

- 1 *United Nations Convention Against Corruption*, 2004, Foreword, p. iii (UNCAC).
- 2 Ibid.
- 3 Ibid.
- 4 Ibid.
- 5 See for example Tillipman J, ‘The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences’, The George Washington University Law School Legal Studies Research Paper No 548, <http://ssrn.com/abstract=924333> (see also *Briefing Papers*, Thomson West, No 11-9, 2011), http://scholarship.law.gwu.edu/cgilviewcontent.cgi?article=1037&context=faculty_publications) where she says at page 2 that ‘[t]he United States is currently the world leader in foreign antibribery enforcement ... due to a sharp rise in FCPA enforcement activity in the past decade ... breaking records, not only in the number of corporate prosecutions, but also in total penalties imposed’. She cites 2010 FCPA enforcement penalties alone above \$1.7 billion.
US law firm Arnold and Porter note the US\$1.8 billion total of ‘criminal fines, civil monetary penalties, disgorgement, and prejudgment interest levied in 2010 was more than the two previous years combined, US\$645 million in 2009 and US\$901 million in 2008’ but cite a great deal of additional evidence that FCPA enforcement will remain a high priority for the US Department of Justice and Securities Exchange Commission (Arnold and Porter, *FCPA newsletter_FINAL 144* (Summer 2011)).
- 6 Tillipman, above n 5, 2-3.
- 7 Tillipman, above n 5, 2-3; 10-11.
- 8 In her commentary of ‘Australian Laws Prohibiting Foreign Bribery’, Gayle Hill distinguishes between the ‘supply side’ and the ‘demand side’ ‘of the international bribery equation’. Legislation on the supply side criminalises the payment of bribes, but ‘does not address the very real issues that operate on the “demand side” of the bribery equation’ (Hill G, *Australian Laws Prohibiting Foreign Bribery* (2000), Australian Mining and Petroleum Law Association Yearbook, 2, www.transparency.org.au/documents/Australian%20Laws%20Prohibiting%20Foreign%20Bribery.pdf).
In the original commentary on the OECD Convention adopted on 21 November 1997, those drafters distinguished between ‘active’ and ‘passive’ bribery which correspond respectively to Hill’s reference to the supply and demand side of the international bribery equation (*OECD Convention*, (2011), OECD, Preamble, 14, (*OECD Convention*), www.oecd.org/dataoecd/4/18/38028044.pdf).
- 9 Tillipman, above n 5, 7 disagrees with this, citing a Department of Justice press release to the contrary (her nn 8, Department of Justice Press Release No 11-596, 10 May 2011) and notes the size of the fines, the fact that corporations cannot pay the fines imposed personally upon corporate officers, and the disgorgement and forfeiture penalties in addition to fines as evidence to the contrary. The regular use of deferred prosecution agreements in the case of politically and economically important corporate wrongdoers, coupled with the fact that none of the really large government contractors has ever lost its government contractor status, is evidence to the contrary.
- 10 Tillipman, above n 5, 7 citing the remarks of Assistant US Attorney-General Lanny A Breuer at the 24th National Conference on the FCPA on 16 November 2010 that ‘prosecuting individuals – and levying substantial criminal fines against corporations – are the best ways to capture the attention of the business community’.
- 11 Richard L Cassin and Ethics Media 360, ‘A Survey of FCPA Sentences’ on FCPA Blog (28 February 2012), 3-5, 10, www.fcpablog.com/blog/tag/gerald-green.

- 12 Ibid 7.
- 13 Scribd, 'Johnson & Johnson Deferred Prosecution Agreement', Scribd Blog, (11 April 2011), 15, www.scribd.com/doc/52727873/Johnson-Johnson-Deferred-Prosecution-Agreement.
- 14 The *US Foreign Corrupt Practices Act 1977* is Chapter 2B of Title 15 of the *United States Code* (FCPA)
- 15 Warin, Diamant and Pfenning note that 'the SEC does not need to show any corrupt intent to bring enforcement actions against companies for violating the books-and- records provision'. Joseph F Warin, Michael S Diamant and Jill M Pfenning, 'FCPA Compliance in China and the Gifts and Hospitality Challenge' (2010) 5(1) *Virginia Law & Business Review* 34, 47.
- 16 *US Code* Title 18, ss 1341 and 1343.
- 17 OECD, 'Information sheet on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (November 2002), www.oecd.org/dataoecd/52/24/2406452.pdf.
- 18 These defences did not exist in the original 1977 FCPA as enacted during the Carter Presidency. They were inserted during President Reagan's tenure by the *Omnibus Trade and Competitiveness Act 1988*, Title V, and were a compromise. The Reagan administration wanted to decriminalise foreign corrupt practices but instead created affirmative defences and a facilitation payments exception. FCPA Professor, 'President's Day' on FCPA a Forum Devoted to the Foreign Corrupt Practices Act, (21 February 2011) www.fcpaprofessor.com/presidents-day.
- 19 vLex, '15 USC 78 – Sec 78dd-1. Prohibited foreign trade by issuers' (2012), <http://us-code.vlex.com/vid/prohibited-trade-practices-issuers-19231259>. See also www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.
- 20 William J Clinton, 'Statement by the President' (10 November 1998), www.justice.gov/criminal/fraud/fcpa/docs/signing.pdf.
- 21 Tillipman, above n 5, 10.
- 22 Ibid 9.
- 23 Ibid. Tillipman reports that the EPLS is often relied upon by local government as well and can therefore result in a listed contractor losing or becoming ineligible to bid on domestic local government work as well.
- 24 Ibid 10.
- 25 Ibid, quoting Past Performance Information Retrieval System. The site which Tillipman refers to is not functioning properly as of the time of this publication. However another site which explains how PPIRS works and which includes additional hyperlinks may be accessed at <http://govwin.com/knowledge/past-performance-ppirs>.
- 26 Ibid 2.
- 27 Clinton, above n 20.
- 28 Carrington P, 'International Corrupt Practices Law' 32 *Michigan Journal of International Law* 129, 140 quoting Fabrizio Pagani, *Peer Review: A Tool For Co-Operation and Change, An Analysis of OECD Working Method*, OECD SG/LEG (2002) 1 (11 September 2002), www.oecd.org/dataoecd/33/16/1955285.pdf.
- 29 Gail De George, *Capital Thinking Magazine*, Feature Story, 2010, Patton Boggs LLP, www.capitalthinkingmagazine.com/featurestory.html.
- 30 Tillipman, above n 5, 3.
- 31 De George, above n 29.
- 32 Tillipman, above n 5, 3.
- 33 Ibid 13, quoting Power, 'Serious Fraud Office to Reinterview BAE Chiefs Over Alleged Bribes', *The Times*, 18 December 2009, www.armsdeal-vpo.co.za/articles15/serious.html.
- 34 Rob Evans, *The Guardian*, 'UK lawyer admits in US trial to bribing Nigerian officials' (11 March 2011), www.guardian.co.uk/law/2011/mar11/us-extradition-bribery-tesler.
- 35 Michael Graczyk, *Bloomberg Businessweek*, 'Attorney, British lawyer pleads guilty to bribery' (11 March 2011), www.businessweek.com/ap/financialnews/D9LT80O00.htm.
- 36 Samuel Rubenfeld, *The Wall Street Journal*, WSJ Blogs, 'Jeffrey Tesler Pleads Guilty to Two FCPA Counts' (11 March 2011), <http://blogs.wsj.com/corruption-currents/2011/03/11/jeffrey-tesler-pleads-guilty-to-two-fcpa-counts>.
- 37 Ibid. This site includes access to a copy of Tesler's Plea Agreement including reference to 16 foreign bank accounts to be disgorged, all of them in Switzerland and Israel.
- 38 Graczyk, above n 35.
- 39 Ibid.
- 40 The first OECD anti-corruption recommendation predated the Convention itself on 6-7 May 1996 and was focused on the elimination of corruption in bilateral aid procurement, 38, www.oecd.org/dataoecd/4/18/38028044.pdf.
- 41 Ibid 35, obliging signatories to take measures to deter bribery in international business transactions benefiting from official export credit support.
- 42 Ibid 33, requiring explicit legislation by signatory states disallowing the tax deductibility of bribes.

- 43 Ibid 20-32, requiring inter alia, awareness raising initiatives, the elimination of indirect support for foreign bribery, the denial of public procurement contracts, the elimination of the small facilitation payments defence to bribery charges, and heightened financial disclosure requirements of all material contingent liabilities (including the likely legal costs and consequences of anti-bribery prosecutions), and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign officials.
- 44 Ibid 28.
- 45 UN Resolution 58/4.
- 46 UNCAC, Article 68(1). See also http://en.wikipedia.org/wiki/United_Nations_Convention_against_Corruption.
- 47 UNCAC, Foreword, iii, www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
- 48 Ibid.
- 49 United Nations Office on Drugs and Crime, Conference of the State Parties to the United Nations Convention Against Corruption (2012), www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html.
- 50 United Nations Office on Drugs and Crime, Conference of the State Parties to the United Nations Convention Against Corruption, 'CAC/COSP 4 Resolutions and Decisions' (2012) 8, www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4-resolutions.html.
- 51 UNCAC, Article 53(a).
- 52 UNCAC, Article 53(b).
- 53 United Nations Office on Drugs and Crime, Conference of the State Parties to the United Nations Convention Against Corruption (2012), www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html.
- 54 UNCAC, Foreword, iii.
- 55 *The United Nations Convention against Transnational Organized Crime and the United Nations Convention Against Corruption*.
- 56 UNCAC, Foreword, iii.
- 57 *Bribery Act 2010* (UK), c 23, s 12(4).
- 58 US FCPA s 78dd(3)(a). Note that 'Pankesh Patel, a UK citizen ... [avoided US jurisdiction in a 2010 case because the relevant mailing] occurred in the United Kingdom', [and] ... was not 'in the territory of the United States' (Tillipman, above n 5, 6 citing Superseding Indictment, *United States v Gonsalves*, No 09-cr-00338, at 33 (16 April 2010) and Minute Entry No 09-cr-00335 (DDC 6 June 2011) from the same case.
- 59 *Bribery Act 2010* (UK), c 23, s 3(6).
- 60 The US legislation does not require a connection with the US, but s 78dd(1)(g) was added in the Clinton amendment of 1998 and out of an abundance of caution, confirms that no 'United States person' that is an officer of a public company may do any of the corrupt things listed 'outside the United States'.
- 61 US FCPA s 78dd(1)(a).
- 62 OECD, 'OECD Convention' and related documents' (2011) 28, www.oecd.org/dataoecd/4/18/38028044.pdf.
- 63 Clinton, above n 20.
- 64 The Crown Prosecution Service, 'Public prosecution service annual lecture - the role of the prosecutor in a modern democracy' (21 October 2009), www.cps.gov.uk/news/articles/publicprosecution-service-annual_lecture-the_role_of_the_prosecutor_in_a_modern_democracy/index.html.
- 65 Ibid.
- 66 Ibid 11.
- 67 Ibid 4.
- 68 Ibid 2.
- 69 Ibid 3.
- 70 Ibid 5.
- 71 Ibid 4-5.
- 72 Ibid 8.
- 73 Above nn 26, 31-33 and supporting text.
- 74 Hill, above n 8, 1-2.
- 75 Ibid 2.
- 76 Both the UK and Australian legislation criminalise the payment and the solicitation of domestic bribes as well. But neither government has expended significant resource in public education to effectively criminalise domestic corruption in the public mind. What is likely required to achieve that result is discussed in Part III of this essay.
- 77 *Australian Criminal Code* (ACC), Division 70.2(1)(c).

- 78 ACC, Division 70.2(1)(c)(i).
- 79 ACC, Division 70.1, definition of foreign public official subclauses (g)-(j) inclusive.
- 80 Ibid.
- 81 The US definition of foreign official (s 78dd(1)(f)) includes ‘any officer or employee of a foreign government or any department, agency or instrumentality ... or any person acting in an official capacity for or on behalf of any such government department, agency or instrumentality’. In s 6(5) of the *Bribery Act 2010* (UK), ‘foreign public official means an individual who holds a legislative, administrative or judicial position of any kind’.
- 82 US FCPA ss 78dd(1)(a)(2) and 78dd(2)(a)(2).
- 83 *Bribery Act 2010* (UK), c 23, s 6(5)(b).
- 84 ACC, Division 70.1, definition of foreign public official subclauses (c)-(d).
- 85 US FCPA s 78dd(1)(f)(2) and 78dd(2)(h)(3).
- 86 ACC, Division 70.1, definition of foreign public official subclauses (c)-(d).
- 87 Ibid, Division 12.3.
- 88 Ibid, Division 12.1(1).
- 89 Ibid, Division 12.3(2) and 12.4.
- 90 Ibid, Division 12.5. This provision says that ‘[a] body corporate can only rely on s 9.2 (mistake of fact [strict liability]) ... if the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted an offence and the body corporate proves that it exercised due diligence to prevent that conduct.’ Due diligence is then itself strictly defined.
- 91 *Bribery Act 2010* (UK), c 23, s 7(2).
- 92 Note that the 15 November 2011 Discussion Paper released by the Australian Government’s Attorney-General’s Department titled ‘Assessing the ‘facilitation payments’ defence to the Foreign Bribery offence and other measures’ (*Australian Discussion Paper*) states at [21] that the Australian legislation was modelled on the FCPA, www.ag.gov.au/foreignbribery.
- 93 The FCPA retains its ‘facilitation defence’, but US prosecutorial practice including deferred prosecution practices suggest that the defence no longer provides much protection at all.
- 94 Australian Discussion Paper [23].
- 95 Ibid [24]. The reasons cited are ‘competitive disadvantage, duress and uneven playing field’.
- 96 Ibid.
- 97 Ibid [28]-[38] discuss clarifying ‘when a benefit is legitimately due’ (so that a court considering a case can consider whether the amount paid gives the lie to the suggestion that it was legitimate); removing the requirement that the prosecution prove an intent to bribe one particular official as opposed to someone; and removing the arguably duplicative requirement in domestic cases to prove both ‘intent’ and ‘dishonesty’.
- 98 Ibid [23].
- 99 Ibid [24].
- 100 OECD Convention, Preamble, www.oecd.org/dataoecd/4/18/38028044.pdf.
- 101 Ibid.
- 102 Ibid 20.
- 103 Ibid 38.
- 104 Ibid.
- 105 UNCAC Preamble, 5-6, www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
- 106 Hill, above n 8, 1, 16. Gayle Hill notes from the 9th International Anti-Corruption Conference in Durban, South Africa in October 1999, the Durban Commitment to effective action against corruption lest ‘the world beyond year 2000’ experience deepened poverty, ‘the eroded legitimacy of [existing] governments, human rights abuses proliferate[d]; ... [with] the democratic gains of the past 50 years ... destroyed’.
- 107 Ibid 1, where Hill also notes from 9th International Anti-Corruption Conference in Durban, that ‘the problem of corruption has reached such a scale and penetrated institutions to such an extent that policy makers and business people around the world are being forced to confront the issue as a major problem for the developing world as well as the industrialised world’. She continues, ‘[c]orruption bears with special cruelty upon the world’s most poor or peoples. It debases human rights and degrades the environment. It derails development and destroys confidence in democracy and the legitimacy of governments. It undermines human dignity and it universally condemned by the world’s major religions’.
- 108 Ibid where Hill cites a Transparency International Paper as authority for the idea that some defend bribery as ‘a victimless crime ... [which] keeps the wheels of commerce turning and enabling business people to overcome onerous and unnecessarily detailed legal requirements’ ‘The OECD Convention: Sharp Edged Sword or Blunt Weapon?’ (31 March 2000). She also notes that ‘some seek and rationalize corrupt payments as a ‘cultural’ rather than a ‘criminal’ phenomenon which ... citizens

- of western democracies, cannot hope to understand ... [without] ethical re-education to remove [their] prejudices [so as to embrace a different way of doing business'. But she debunks this 'different way of doing business' as a debilitating scourge.
- 109 Ibid, where Hill uses this term to identify both societies which have traditionally accepted corruption as a 'different way of doing business', and corruption which transcends national boundaries.
- 110 UNCA C Chapter II, Articles 5-14.
- 111 Ibid Chapter III, Articles 15-42.
- 112 Ibid Article 29.
- 113 Ibid Article 31.
- 114 Ibid Article 32.
- 115 Ibid Article 40.
- 116 Ibid Chapter IV, Articles 43-50.
- 117 Ibid Chapter V, Articles 51-59.
- 118 Ibid Chapters VI and VII, Articles 60-64.
- 119 Australian Discussion Paper, [19].
- 120 De George, above n 29.
- 121 Ibid.
- 122 Linklaters, 'Your Guide' (2010) 5 and 15, <http://linklaters.com/pdfs/mkt/london/A12659424.pdf>.
- 123 Australian Discussion Paper, [17]. The two companies which are subject to foreign corruption enforcement action are listed as Securrency and Note Printing Australia. Some of the international commentators appear to be misinformed since David Weiss wrote in 2009 that 'major prosecutions' were underway 'in Australia, France, Germany and other OECD Member States'. David Weiss, 'The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence' 30 *Michigan Journal of international Law* 471, 495.
- 124 Linklaters, above n 122.
- 125 Ibid.
- 126 Ibid 9.
- 127 Ibid 8.
- 128 Warin, Diamant and Pfenning, above n 15, 34 and 41-42.
- 129 Ibid 37-38.
- 130 Clinton, above n 20.
- 131 Hill, above n 8, 1.
- 132 See for example Preenboom R (ed.), *Asian Discourses of Rule of Law*, (Routledge Taylor Francis Group, 2004) 113, where Preenboom notes that while Chinese leaders have endorsed the rule of law, they have not sanctioned the liberal democratic version believing instead that stability and economic growth and more important than democracy and civil and political liberties.
- 133 Above nn 127-129 and supporting text.
- 134 Carrington, above n 28, 129 and 141 where the author notes that China was not among the 'thirty-six nations [which] ... ratified the OECD Convention within a decade'. Note however that China is not one of the 34 member countries which comprise the OECD and only four other nations (Argentina, Brazil, Bulgaria and South Africa) have adopted it. Directorate for Financial and Enterprise Affairs 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (May 2011), www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html.
- 135 OECD Convention, Article 5.
- 136 Richard L Cassin and Ethics Media 360, above nn 11, 12 and supporting text.
- 137 Scribd, 'Johnson & Johnson Deferred Prosecution Agreement', above n 13 and supporting text.
- 138 Above nn 31-33 and supporting text.
- 139 Tillipman, above n 5 2.
- 140 Ibid 3.
- 141 Ibid 7.
- 142 Ibid.
- 143 Carrington, above n 28, 129, 138-139.
- 144 Cassin and Ethics Media 360 FCPA Blog, above n 11, 6.
- 145 Ibid.
- 146 Ibid.

- 147 Tillipman, above n 5, 11. See also n 33 and supporting text.
- 148 Carrington, above n 28, 129, 144.
- 149 Ibid 145.
- 150 For example see FCPA s 78dd(1)(a)(1)(A)(iii), s 78dd(1)(a)(2)(A)(iii) and s 78dd(1)(a)(3)(A)(iii) in relation to ‘issuers’. The same provision exactly appears in the respective equivalent sub-sections of s 78dd(2) and 78dd(3) in relation to ‘domestic concerns’ and ‘persons other than issuers and domestic concerns’.
- 151 See FCPA ss 78dd(1)(c), 78dd(2)(c) and 78dd(3)(c).
- 152 The debate about whether natural law or positivist legal theory is a more useful tool in jurisprudential analysis lies well beyond the scope of this essay. That debate which has outgrown the more historical debate as to which of the two theoretical ways on analysing law was the more correct, seems largely to have accepted that both theories are useful in explaining different aspects of the nature and function of law. For a collection of essays which traverse many of the nuances in the current literature, see Coleman JL (ed.), *Hart’s Postscript, Essays on the Postscript to the Concept of Law*, (Oxford University Press, 2001).
- 153 *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256; [1923] All ER 233 (Lord Hewart CJ). A more complete version of what he said is that ‘it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.’
- 154 OECD Convention, Article 5.
- 155 Tillipman, above n 5, 2.
- 156 Carrington, above n 28, 129, 144.
- 157 OECD Convention, Article 5.
- 158 Carrington, above n 28, 129, 146, referring to Civil Law Convention on Corruption, (4 November 1999) European Treaty Series No 174, <http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm>.
- 159 Carrington, above n 28, 129, 146 referring to European Consultative Assembly, *Explanatory Report to the Civil Law Convention on Corruption* 1(a)(6)(1999) <http://conventions.coe.int/Treaty/EN/Reports/Html/174.htm>.
- 160 Carrington, above n 28, 135.
- 161 Ibid. One of the law firms representing the government of Iraq reports that the ‘[d]efendants’ motions to dismiss the complaint, as well as plaintiffs’ opposition to those motions have been fully briefed and are *sub judice*.’ (Bernstein Leibhart LLP ‘Featured Cases - Iraq Complex Litigation, *Republic of Iraq v ABB AG*’, www.bernie.com/featured-cases/Iraq-Complex-Litigation/index.html).
- 162 Carrington, above n 28, 135, 146-147.
- 163 Ibid 150-151, 154.
- 164 Ibid 150.
- 165 Ibid.
- 166 Ibid.
- 167 Ibid.
- 168 Ibid 150-151.
- 169 Ibid 151.
- 170 Ibid.
- 171 Ibid 150.
- 172 Ibid 136-137 where Albert Jack Stanley became a witness in the SEC and Department of Justice cases against Halliburton for bribery in Nigeria.
- 173 Ibid 151-152 citing Department of Justice, *Eli Lilly and Company Agrees to Pay \$1.415 Billion to Resolve Allegations of Off-label Promotions of Zyprexa*, (15 January 2009), www.justice.gov/opa/pr/2009/09-civ-038.html; Nev Office of the Att’y Gen, *Masto Announces \$400 Million Nationwide Settlement with Merck*, (7 February 2008), www.drugfraudsettlement.com/news/Nevada-Media-Release.pdf; Goldbery Kohn, *AMERIGROUP Announces Settlement in Largest Ever False Claims Case*, (22 July 2008), www.goldbergekohn.com/news-firm-1096.html. See also examples in Carrington’s text (above n 28) involving employees of Pfizer and Northrup Grumman corporations where fees of \$51.5 million were awarded to the ‘primary whistleblower’ and ‘perhaps as much as \$100 million’ to ‘nine of its former salesmen’ respectively.
- 174 Above nn 161-163 and supporting text.
- 175 Wikipedia, ‘Osama Bin Laden’.
- 176 *Daily Mail* UK, Online Mail, ‘No one will receive the \$25m bounty placed on Bin Laden’s head, US Officials reveal’ (20 May 2011), www.dailymail.co.uk/news/article-1388820/U-S-officials-said-getting-25m-bounty-placed-Osama-bin-Ladens-head.html.
- 177 Carrington, above n 28, 154.
- 178 Ibid 155.

179 Ibid 154.

180 Ibid.

181 Ibid 157.

182 Ibid.

183 Ibid 158.

184 Ibid.

185 Ibid 164.

186 Arnold and Porter, above n 5, 5.

187 Carrington above n 28, 131 citing Rose-Ackerman S, (Bjorn Lomborg [ed.]) *Governance and Corruption*, in *Global Crises, Global Solutions* 2004, 301, 301.

188 UNCAC, Foreword, iii (above n 1 and supporting text).

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