# *Criminalising Bribery in a Corporate World*

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***Abstract***

This article explores how society defines acts of bribery and whether the demarcation between acts of official bribery and acts of commercial bribery retains any relevance in a world where public services are increasingly privatised and delivered by corporate actors. It examines the modern construction of bribery offences through the lens of legal moralism and liberalism to determine whether there are sufficient grounds to justify the imposition of criminal sanctions on persons and corporations who engage in such conduct. Next, it outlines the bribery laws in the United Kingdom compared with laws in Australia and discusses possible law reforms to tackle commercial bribery, as distinct from official bribery, in Australia.

**Keywords:** official bribery – commercial bribery – bribery offences – criminal justice – secret commissions – corporate crime – white-collar crime – Australia – United Kingdom

## Introduction

Bribery is not a new phenomenon. But what is *commercial* bribery and how do we define it? Where is the line drawn between commercial bribery and opportunistic or aggressive business practices? This article explores how society defines bribery, the harms caused by bribery to society and how the law deals with such conduct. Here, 'official bribery' is defined as an act of bribery involving a public or foreign official. By contrast, 'commercial bribery' involves only commercial or corporate actors. This article examines modern bribery offences through the lens of legal moralism and liberalism to determine whether there are sufficient grounds to justify the imposition of criminal sanctions on persons and corporations who engage in commercial bribery. It discusses the bribery laws of the United Kingdom ('UK') compared with current laws in Australia, and proposes law reforms to tackle commercial bribery, as distinct from official bribery, concluding that commercial bribery in Australia is best addressed via reform at the federal level and a strengthened commitment to the enforcement of existing laws.

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## Social construction of bribery

In the 14th century poem, *Inferno*, Dante descends through the nine circles of hell. As Dante descends, the gravity of the sin or crime committed by the persons condemned increases. The gravity of the sin or crime is measured by its moral blameworthiness as perceived by Dante. In the ninth, innermost circle of hell are those who betrayed their benefactors: Brutus, Cassius and Judas Iscariot. Dante perceived fraud and betrayal as the most serious sins or crimes because those acts required the most deliberate exercise of free will and did the most damage to society's fabric of political and ethical obligation (Chevigny 2001:790). Dante perceived bribery as more grave or blameworthy than acts of violence due to the intrinsic breach of trust and betrayal involved in such conduct.

To the modern reader it may seem alien to perceive crimes of betrayal as more morally blameworthy than crimes of violence, such as homicide or rape. Under the modern criminal law, the moral culpability of a crime is ordinarily reflected by the sanction that is imposed in respect of the relevant crime. Australian law does criminalise conduct involving a betrayal of trust, such as fraud or bribery. However, the Australian criminal justice system imposes harsher penalties for crimes of violence than for crimes involving a breach of trust. For example, in Victoria, the maximum penalty that may be imposed upon an individual convicted of a secret commission (bribery) offence is 10 years' imprisonment or a fine of approximately $170 000 (*Crimes Act 1958* (Vic) s 176). In contrast, the maximum penalty that may be imposed on an individual convicted of homicide is life imprisonment (s 3). There is no discretion to impose a fine upon an individual for intentional homicide in Victoria. This suggests that, unlike in Dante's time, crimes of violence are perceived as more morally blameworthy than crimes of betrayal by Australian society.

Chevigny (2001) undertook an analysis of crime as perceived in *Inferno* against the contemporary criminal law of the United States ('US'), which demonstrated how grading the seriousness of crimes is socially constructed. Chevigny posits that the underlying Christian basis of political and social obligation, as it existed in Dante's time, has largely faded in the contemporary world and that social obligation instead derives from the protection of the rights of the individual (2001:790). He argues that crimes of betrayal are treated as less morally culpable in contemporary society, and are therefore penalised less than crimes of violence, because the law does not accommodate the importance of the social capital that is expended through a breach of trust (2001:811). White-collar crimes, such as bribery, often emanate from legitimate business and society as a whole has an interest in encouraging business to continue (Chevigny 2001:808). He concludes that this leads to white-collar crimes, such as bribery, being treated as a cost of doing business rather than a harm to society. Chevigny's argument is persuasive; for example, until 1999 it was permissible in Australia to claim bribes paid in the course of conducting business as a tax expense (*Income Tax Assessment Act 1997* (Cth) ss 26-52 and 26-53). If modern society views crimes of betrayal as less morally repugnant than crimes of violence as posited by Chevigny (2001), is there a case to justify criminalising acts of commercial bribery?

### *Legal moralism*

Legal moralism asserts that people refrain from committing crimes because it is morally wrong to do so and not because they fear sanctions that may be imposed for non-compliance with the law. Legal moralists argue that the state should impose criminal sanctions to prohibit conduct that is immoral, but not necessarily directly harmful to society (Green 2006:43).

Australian legislators continue to be persuaded by legal moralist principles when debating and enacting criminal laws. For example, in 1999, Parliament amended the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') to increase the penalties applicable to the offence of bribing Commonwealth public officials in Australia. In his second reading speech to the bill enacting the legislation, the then Attorney General, Daryl Williams MP, referred to the need to address international corruption in business as a moral response. The Minister stated:

> I believe this bill will make a significant contribution to Australia's ability to influence the conduct of international business transactions to ensure that decisions are made on the basis of the merits of the product or service and not on the basis of extraneous matters which have no place in development of trading and business relationships. In any case, the bill is also morally right and should be enacted on that basis alone (Commonwealth 1999a:6044–5).

These comments suggest that the idea of a universal or ubiquitous morality continues to influence Australian legislators when enacting laws. To assess whether commercial bribery should be a crime for the purposes of Australian law under a legal moralist framework, it is necessary to understand how acts of commercial bribery are publicly perceived and whether those perceptions may be described as universal or, rather, whether they are reflective of transient, popular opinion.

Empirical evidence suggests that bribery is viewed as morally repugnant by global society, despite the increasing preference of the criminal law to penalise crimes of violence rather than crimes of betrayal. There is not a country in the world that does not treat bribery, at least *official* bribery, as a criminal act (Martin 1999:1402; Noonan 1984:702). Managers of firms worldwide generally consider bribery an ethically offensive practice regardless of their background or nationality (Martin 1999:1402; Noonan 1984:702; Husted et al 1996; World Values Study Group 2000).

In 2011, Green and Kugler conducted a study to test how people view the relative blameworthiness of various bribery-related acts. The study assessed how the subjects would regard a bribe paid to a government official in comparison to a bribe paid to a businessperson (Green et al 2011). The results revealed that the participants regarded both scenarios as blameworthy and appropriate of punishment. However, while 95.9 per cent of participants believed a payment accepted by a government official should be criminalised, only 79.6 per cent considered the payment accepted by a businessperson should be criminalised (Green et al 2011:11). If the results of this study reflect the broader views of society as a whole, then criminalising commercial bribery may be consistent with the tenets of legal moralism because the enactment of criminal sanctions merely reflects a commonly held view of the moral blameworthiness of the conduct.

To determine whether a legal moralist analysis provides sufficient grounds to justify criminalising particular conduct, it is necessary to consider the validity and relevance of the theory to modern liberal democracies such as Australia. In support of reasoning associated with legal moralism, Robinson and Darley (2007) have argued that the criminal justice system's reputation for accurately representing those violations worthy of condemnation depends upon the law having moral credibility in the community. That is, criminal laws should reflect a discernible common morality. However, this raises whether it is possible to determine, with certainty, society's shared morality and whether an objective or ubiquitous morality exists.

There are inherent risks associated with attempting to attribute a common morality to Australian society. Any attempt to identify a shared morality, if it exists, will always be coloured by the views of those responsible for identifying it. Socioeconomic disparity may also influence any judgment of the common morality and it would be imprudent to layer one

particular set of cultural or religious values on a multicultural society as complex as modern Australia.

It is questionable whether legal moralist principles are compatible with liberal ideology underpinning the fabric of contemporary democracies such as Australia. Green (2011) has argued that legal moralism necessarily imports an anti-liberal view that the state may criminalise arguably 'victimless' conduct, such as incest, prostitution and obscenity, where that conduct takes place between consenting adults. Under liberal principles, the criminal law system must respect the individual freedoms of persons to arrange their private affairs without interference from private moral judgment (Thorburn 2011:26). This reflects the trend noted by Chevigny (2001:790) that the source of social obligation has moved away from its basis of Christian values, such as in Dante's time, towards a liberal basis of obligation founded on the protection of the rights of the individual. While legal moralism does provide a framework to, in part, ensure that the criminal law reflects society's expectations, that framework is not without its faults. For example, formulating criminal laws on the basis of legal moralism alone could lead to unjust results where the views of the majority are preferenced to the detriment of the minority.

Given the limitations of the theory, it is difficult to assess whether the results of Green and Kugler's (2011) study reflect a common and universally held view of society or whether they are influenced by more transient, popular opinions. It may never be possible to discern society's universal morality, if it exists, prospectively. Such determinations can only ever be made retrospectively, based on past experiences, limiting the utility of the theory's application. The results of Green and Kugler's study are valuable to determine past and current public opinions, while recognising that such views are likely to be subject to change in the future and may not be universally held depending on the sample size and background of those taking part in the study. Accordingly, determining whether the criminalisation of certain behaviours is justified should not be determined based on legal moralism principles alone.

### *Liberalism and the harm principle*

In Australia, the state's right to exercise authority over individuals, and to curtail personal liberties and freedoms, is derived from the social contract. The social contract provides that individuals consent to rule by the state in exchange for the protection by the state of those individuals' natural rights (Hobbes 1651; Locke 1689; Rousseau 1762; Rawls 1971). It is a tenet of libertarian liberalism that an individual's personal rights only extend up to the point where the exercise of those rights may infringe upon the rights of others. The role of the state is to protect the infringement of individual rights. This concept is derived from the writings of liberal philosopher, John Stuart Mill, who wrote that 'the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others' (Mill 1959). For the purpose of criminal law theory, this liberal view is described as the *harm principle*. Liberalism and the harm principle overcome one of the major shortcomings of legal moralism, which is that, regardless of whether there are objective moral values in a society, different individuals and groups will have different and often conflicting values (Jacobs 2001:174).

Applying the harm principle to commercial bribery is problematic as it will not always be possible to identify the harm caused. Feinberg (1988) defines 'harm' as a lasting or significant setback to a person's interests. In the case where the bribery involves a clear violation of an employee's obligation of trust to his or her employer, the harm suffered by the employer is evident. For example, consider a case where a manager of a company receives a bribe from a

supplier in exchange for that manager approving the supplier's tender for the company's office supply contract. The harm suffered by the company is the employee's failure to account to his or her employer for the amount of the bribe received. There may also be harm suffered by the company if another party tendering for the contract was offering more competitive prices than the party that offered the bribe. There is also a cost to the other parties who tendered for the contract — the loss of an opportunity to also offer a bribe in order to secure the contract.

It is difficult to determine the precise economic costs of commercial bribery. Studies focusing on the harms of bribery tend to examine official bribery, rather than the harms caused by commercial bribery. Research has identified that corruption adversely affects local and foreign direct investment, economic growth, the allocation of public spending on education, health and public infrastructure, and that it increases inequality and poverty (Mauro 1995; Keefer and Knack 1995; Wei 2000; Baughn et al 2010; Tanzi and Davoodi 1997; Ryvkin and Serra 2012; Gupta, Davoodi and Alonso-Terme1998). Commercial bribery may similarly impact economic growth due to increased costs of conducting business caused by the conduct. In 1979, Weber estimated that kickbacks paid by business in the US exceeded US$5 billion annually or one per cent of gross national product (Weber 1979:1147). However, Weber did not define how these figures were compiled or what types of payments can be described as a 'kickback' in the commercial setting. In 2000, it was estimated that British companies spent approximately £700 million per year on corporate hospitality (Khashoggi 2000). It is not clear what proportion of that spending equates to legitimate corporate hospitality and what proportion may relate to illegitimate activity, such as the payment of bribes.[1] Further, the 2016 Global Economic Crime Survey conducted by PriceWaterhouseCoopers ('PWC') found that companies that experienced incidences of bribery and corruption also reported losses of US$50 000 or more, with more than 14 per cent of respondents reporting losses in excess of US$1 million (PWC 2016). The study did not distinguish between the types of economic crime experienced. However, it noted that companies that experienced economic crime also experienced additional, non-monetary damage, such as morale and reputational damage.

Some theorists have considered in greater detail the indirect economic harms caused by commercial bribery. Youxiang (2012) argues that commercial bribery both disrupts the market order of fair competition and hinders the rational allocation and normal circulation of market factors and resources. Weber and Getz (2004) contend that commercial bribery has an opportunity cost because money paid as bribes is not put to productive use. Zamansky (1978) proposes that bribery of a purchasing agent in order to sell a product is a trade restraint because the motivating force behind the sale is merely the consideration flowing between the parties to the bribe without regard to the competitive worth of the product in question. In effect, commercial bribery may be described as tax on the conduct of business. For example, in the case of the bribe paid in relation to the office supply contract described above, that payment is effectively a tax paid by the victim company because the bribor will seek to recoup the costs of its bribe. As a result, it is likely the cost of the bribe will be built into the payments that the company will ultimately make to the bribor over the life of the contract.

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[1] In relation to the *Bribery Act 2010* (UK), the UK Ministry of Justice released a Guidance Paper, which states:

> Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotion or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes (UK Ministry of Justice 2011:[26]).

While it is difficult to discern with precision the economic loss caused by commercial bribery, the direct harm caused to commercial organisations through the offer and receipt of bribes by its employees involves a significant setback of the organisation's interests. Accordingly, criminalising acts of commercial bribery may be consistent with the harm principle because the criminalisation seeks to avoid the direct harms caused by commercial bribery.

**Bribery or opportunistic business practice?**

Under both a legal moralist and liberal framework, there is a case for the criminalisation of commercial bribery. However, as Jacobs (2001) argues, a risk of expansive criminalisation is that, as the law intrudes upon more aspects of the private sphere, its normative authority may be perceived as weaker as its focus becomes blurred. The law must also reflect the specific aims of criminalisation, specifically the need for general and specific deterrence, restitution (where applicable) and the protection of the community. If the state is considered to have overreached in its criminalisation of conduct, the perceived significance of some offences may be diminished and the moral credibility of the law undermined (Robinson and Darley 2007:21; Green 2006:12). The result is a decrease in the efficacy of the criminal law as a deterrent of certain behaviours. While there is justification for the criminalisation of commercial bribery, it is important to ensure that the type of behaviour criminalised is clearly defined so that the law does not overreach impermissibly to criminalise otherwise acceptable business practices. There is a role for both legal moralism and the harm principle when determining the scope of the criminal law, even if there are limitations to the application of each theory.

When constructing a definition of 'commercial bribery', the line between what may be construed as criminal behaviour and as ordinary business practice is unclear. Commercial sector actors are expected to advance their own interests. This is a core element of entrepreneurial capitalism. This article posits that the criminal law should only intervene where persons entrusted with the management of the interests of others betray those interests to advance their own (Chevigny 2001:812). This necessarily imports an element of dishonesty, which distinguishes commercial bribery from legitimate business practices. Stevens (1929) describes a 'bribe' as a payment, or otherwise bestowal of consideration, in exchange for accepting a contractual obligation to perform. Under this analysis, conduct would not fall within the ambit of commercial bribery unless it was understood or accepted that the offer of a payment or other consideration was made in exchange for an agreement to perform. If this construction of commercial bribery were accepted, corporate hospitality would not necessarily be captured for the purposes of the criminal law, as the provision of such benefits lacks the essential element of a binding obligation to be performed by the person accepting the benefit. This construction of commercial bribery, as is discussed in greater detail below, is consistent with the construction of bribery offences in the UK and Australia.

## Bribery laws in the UK

### *UK Bribery Act*

The *Bribery Act 2010* (UK) ('*UK Bribery Act*') came into force on 1 July 2011. The Act is intended to combat bribery both within the UK and internationally. It applies to bribery occurring in governmental and private sectors and has potentially broad extraterritorial application. Commentators have noted that its extraterritorial application is wider in many respects than the *Foreign Corrupt Practices Act of 1977* (US) ('*FCPA*') (Maton 2010).

This commentary has arisen in part due to the application of the *UK Bribery Act* to cases of commercial bribery. This section analyses the potential application of the Act to cases of private sector or commercial bribery.

Under the *UK Bribery Act*, conduct falling within the ambit of what is generally accepted to constitute both official and commercial bribery may be captured. It is an offence to offer, promise or give a financial or other advantage to induce or reward a person for the improper performance of a relevant function or activity (*UK Bribery Act* s 1). It is also an offence to request, receive, agree to receive or accept a financial or other advantage intending that a relevant function or activity should be performed improperly (s 1). It is irrelevant that the financial or other advantage is to be received through a third party or for the benefit of another party (s 2(6)). A 'relevant function or activity' is defined to include any function of a public nature, any activity connected with a business, an activity performed in the course of a person's employment or an activity performed by or on behalf of a body of persons (whether corporate or unincorporated) that meets one of the specified conditions (s 3(2)). The specified conditions are that the function or activity is one that the person doing it is expected to perform either in good faith, impartially or where that person is in a position of trust at the time of performing the relevant function or activity (ss 3(3), (4), (5)). What is 'expected' of a person is a test of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned (s 5(1)).

The *UK Bribery Act* has potentially broad extraterritorial application. Conduct may fall within the definition of a 'relevant function or activity' for the purposes of the Act even if it has no connection with the UK or is performed in a country or territory outside of the UK (s 3(6)). The Act applies to British nationals, residents and companies incorporated under the laws of the UK (s 12). Accordingly, any transnational organisation with a subsidiary incorporated in the UK may be subject to the application of the Act.

### *Liability of the corporation*

Both individuals and corporations may be prosecuted under the *UK Bribery Act*. A corporation will be deemed to have committed an offence if it is proven that the act occurred with the consent or connivance of a senior officer of the corporation or a person purporting to act in such a capacity (*UK Bribery Act* s 14(2)). That senior officer or person is also guilty of an offence and liable to be prosecuted. The Act also provides that a commercial organisation is guilty of an offence if that organisation fails to prevent bribery (s 7). This is a strict liability offence. Thus a corporation will be guilty of an offence unless it can prove it had adequate procedures in place designed to prevent persons from offering bribes in order to obtain or retain a business or other advantage for the corporation. Furthermore, the strict liability offence of failing to prevent bribery may also be committed where the bribe, and all steps taken in relation to it, was made outside of the UK, as there is no requirement for a connection between the bribe and the UK business.

The potentially broad extraterritorial application of the *UK Bribery Act* has been the subject of considerable commentary on the potential application of the Act to Australian businesses with UK-based subsidiaries. However, Australia already has a number of laws that may apply to conduct that may be construed as commercial bribery.

## Bribery laws in Australia

### *Legislative prohibitions on bribes and secret commissions*

Under Australian law, there are two broad criminal prohibitions on bribery. The first prohibition is the bribery of public officials, which is separately prohibited both by common law and by federal, state and territory statutes.[2] Under federal law, this also includes an offence for bribery involving foreign public officials, which has a broad extraterritorial application (*Criminal Code* s 70). Both offering and receiving a bribe constitutes an offence under these laws. However, it is a defence to the offence of bribing a foreign public official if the benefit provided was a 'facilitation payment'. The second prohibition relates to the bribery of an agent in order to influence that agent to do or to omit to do anything in relation to the agent's principal's affairs. These offences are commonly referred to as the 'secret commission offences' and are prohibited under common law and by separate state and territory statutes.[3]

Australian lawmakers also propose to strengthen federal laws to create two new offences of false dealing with accounting documents (Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 (Cth) sch 2). Under the new laws, a person is guilty of an offence if he or she makes, alters, destroys or conceals an accounting document, or fails to make or alter an accounting document, with the intention that the conduct would facilitate, conceal or disguise the receiving or giving of a benefit that is not legitimately due or a loss that is not legitimately incurred. The stated objective of the enactment of the new laws is to implement Australia's obligations as a party to the OECD *Convention on Combating Bribery of Foreign Public Officials*. The new laws are part of Australia's response to the *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* issued in October 2012 ('*2012 OECD Report*').

Under the secret commission statutes, it is a criminal offence to offer to an agent, or receive as an agent, a secret commission. A 'secret commission' is broadly defined as a benefit or other valuable consideration.[4] An 'agent' includes, for example, employees of corporations. To prove the elements of the offence, it is necessary to establish that the offeror or agent acted 'corruptly' at the time of offering or receiving the relevant payment or benefit. What it means to act 'corruptly' is not defined, but has been defined in case law. For example, in *R v Gallagher*, the Victorian Court of Appeal affirmed the definition adopted by in *R v Dillion and Riach*, where Brooking J stated (at 436) that:

> an agent does act corruptly if he receives a benefit in the belief that the giver intends that it should influence him to show favour in relation to the principal's affairs. If he accepts the benefit which he believes is being given to him because the donor hopes for an act of favouritism in return, even though he does not intend to perform that act, he is, by the mere act of receiving the benefit with his belief as to the intention with which it is given, knowingly encouraging the donor in an act of bribery or attempted bribery, knowingly profiting from his position of agent by reason of his supposed ability and willingness, in return for some reward, to show favouritism

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2 *R v Whitaker*; *R v Allen* at 402; *R v Glynn* at 142; *Criminal Code* divs 140, 141, 142; *Criminal Code Act* (NT) ss 59, 50, 150; *Criminal Code 1899* (Qld) s 87; *Criminal Law Consolidation Act 1935* (SA) s 150; *Criminal Code Act 1924* (Tas) ss 71, 72; *Criminal Code Act Compilation Act 1913* (WA) ss 61, 81, 96.

3 *Crimes Act 1900* (NSW) s 249B; *Criminal Code Act* (NT) s 236; *Criminal Code 1899* (Qld) ss 442B–442BA; *Criminal Law Consolidation Act 1935* (SA) s 150; *Criminal Code Act 1924* (Tas) s 266; *Crimes Act 1958* (Vic) s 176; *Criminal Code Act Compilation Act 1913* (WA) ss 529, 530.

4 *Crimes Act 1900* (NSW) ss 249A–249B; *Criminal Code Act* (NT) s 236; *Criminal Code 1899* (Qld) ss 442A–442BA; *Criminal Law Consolidation Act 1935* (SA) ss 145, 150; *Criminal Code Act 1924* (Tas) s 266; *Crimes Act 1958* (Vic) s 176; *Criminal Code Act Compilation Act 1913* (WA) s 546.

> in his principal's affairs and knowingly putting himself in a position of temptation as regards the impartial discharge of his duties in consequence of the acceptance of a benefit.

The principle that can be derived from the cases is that a payment or gift is given 'corruptly' if the person receiving the gift or payment knows that it is intended as a bribe (*R v Mills* at 158–9; *R v Gallagher* at 230). Whether the person receiving the bribe intends to hold up his or her end of the bargain is irrelevant (*R v Carr* at 166). However, there is no guidance as to whether Brooking J's construction of the corrupt intention element requires that the accused must *knowingly* possess the requisite intent or whether it will be sufficient for the prosecution to prove that, for example, the accused was *reckless* as to the intent of the person offering the gift or payment. What is clear is that it is the intention of the person receiving the gift or payment that determines whether the gift or payment was given corruptly, rather than the intention of the person offering the bribe. This position is consistent with the construction of commercial bribery adopted below, in that conduct will only be construed as commercial bribery through the existence of a binding obligation, that is, a meeting of minds in relation to the intended effect of the bribe. Whether the bribed agent intends to uphold his or her end of bribe is irrelevant; what is relevant is that the agent knows, or is potentially reckless as to, the intention of the person offering the bribe.

The secret commission offences have a potentially broad application to bribery occurring within the commercial sector. Given the breadth of their application, it will be posited that the existing laws in Australia are sufficient to enable the prosecution of most cases of commercial bribery.

### *Liability of the corporation*

Under the *Criminal Code*, corporations in Australia may be held liable for failing to prevent acts of official bribery committed by an employee, agent or officer of the corporation (*Criminal Code* s 12.2). In relation to the secret commission offences, a corporation may also be liable for the commission of the offence. If a statute does not expressly state that a corporation may be liable for an offence, regard may be had to the relevant interpretation statutes of each relevant state or territory, which provide that a 'person' is defined to include a corporation (for example, *Crimes Act 1900* (NSW) ss 4, 249A; *Acts Interpretation Act 1987* (NSW) s 21). Where the *Criminal Code* varies compared to the state-based statutes regarding corporate liability is in respect of the fault element for the relevant offence. At common law, a corporation may possess the requisite mental element for the commission of an offence if it is possible to demonstrate that the person (or persons) deemed to be the corporation's 'directing mind' had the requisite mental state to commit the offence (*Tesco Supermarkets Ltd v Nattrass* at 170–1; *Hamilton v Whitehead*; *S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia Ltd*). For example, in *Morgan v Babcock & Wilcox Ltd*, the High Court held that a corporation was liable for a bribe paid by its employee to an employee of the Municipal Council of Sydney to secure that employee's recommendation of the company's tender. Chief Justice Knox and Justice Dixon stated (at 173–4): 'An offence involving corrupt intention can be committed by a corporation only through a servant or agent, who, with the necessary *mens rea*, does or causes to be done, the forbidden act for and on behalf of the corporation acting within the course of his employment or authority.'

In contrast, under the *Criminal Code*, a corporation will possess the requisite mental element for the commission of an offence if it can be proven that the corporation expressly, tacitly or impliedly authorised or permitted the commission of the offence (*Criminal Code* s 12.3(1)). One way that this authorisation or permission can be established is by proving that the corporation failed to create and maintain a corporate culture that required compliance with

the law. 'Corporate culture' means an attitude, policy, rule, course of conduct or practice existing within the organisation generally or in the part of the organisation in which the relevant activity takes place. At a federal level, this may mean that a corporation may be liable for failing to prevent and detect official bribery in its ranks. There is no such equivalent provision relating to the secret commission offences established under state and territory statutes. Accordingly, there is no equivalent liability for corporations who fail to prevent and detect commercial bribery in Australia to that in the UK.

## *Repeal of federal secret commission offences*

There has been a move away from the criminalisation of commercial bribery at a federal level in Australia. The *Secret Commissions Act 1905* (Cth) (*'Secret Commissions Act'*) prohibited the offer and receipt of secret commissions by agents at a federal level. However, the Act was repealed in 2000 with the introduction of new offences and penalties for cases of official bribery under the *Criminal Code*.[5] At the time of the amendments, s 70.6 was inserted into the *Criminal Code*, which saves the operation of the state and territory secret commission offences in circumstances of overlapping liability. However, there was no saving of the federal secret commission offences through these amendments. The Explanatory Memorandum to the bill repealing the *Secret Commissions Act* notes that the new offences of bribing a Commonwealth public official under the *Criminal Code* increases the maximum penalty for such conduct from what was previously two years to 10 years (Explanatory Memorandum 1999). However, the Explanatory Memorandum does not discuss the implicit narrowing of the conduct criminalised at a federal level from a prohibition on the offering and receipt of secret commissions, with the potential for application in the commercial sector, to only forms of official bribery. While the state and territory statutes continue to apply and criminalise such conduct, the statutes rely on the common law regarding the importation of the requisite mental element for corporate liability in respect of the relevant offences as discussed above. This important distinction was not discussed at the time of the second reading of the bill in Federal Parliament nor in its Explanatory Memorandum.

### Common law

In Australia, acts of bribery were initially criminalised at common law. The enactment of the secret commission offences in the states and territories effectively codified the prohibition already existing at common law. The common law offence of official bribery in Australia is derived from the judgment of the English Court of Criminal Appeal in *R v Whitaker*. In terms of commercial bribery, the criminal prohibition on offering and giving of bribes and secret commissions to a fiduciary has been settled at common law since the late 19th century (*Boston Deep Sea Fishing & Ice Co Ltd v Ansell*; *Hovenden & Sons v Millhoff*; *Peninsula and Oriental Steam Navigation Co v Johnson*). At common law it is not necessary for the bribe or secret commission to take the form of money payments (*Chameleon* at [191]; *Aequitas Ltd v Sparad No 100 Ltd* at [367]–[370]; *Hovenden & Sons v Millhoff* at 43; *Attorney General (Hong Kong) v Reid* at 330). The common law recognises that other forms of benefits may constitute a bribe or secret commission; for example, the receipt of shares may constitute a bribe or secret commission at common law (*Eden v Ridsdale's Railway Lamp & Lighting Co*; *Chameleon*).

The critical element for establishing that a bribe or secret commission has been offered or paid to an agent in circumstances that are unlawful is that the agent did not obtain his or her principal's informed consent to the receipt of that payment or benefit (*Grant v Gold Exploration and Development Syndicate*; *Chameleon* at 193; *Hovenden & Sons v Millhoff*

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5 The *Secret Commissions Act* was repealed by *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) and replaced by divs 70, 140, 141 and 142 of the *Criminal Code*.

at 43). However, as a common law offence, the provisions relating to the fault element of the offence under the *Criminal Code*, discussed above, do not apply.

**Enforcement**

In the *OECD 2012 Report* it was noted that Australia's prosecution record in respect of foreign bribery offences was low. In the update to that report issued in April 2015, the OECD Working Group noted that while 15 new foreign bribery allegations had surfaced since the *OECD 2012 Report* was issued, only one prosecution had resulted (and that case had been before the courts since the time of the issue of the 2012 report) (OECD 2015:4) However, the Working Group also recognised that the Australian Federal Police ('AFP') had undertaken, at the time of the 2015 report, 17 investigations into foreign bribery allegations (OECD 2015:4). It has been suggested that Australia's low enforcement and prosecution record may be due to a lack of investigatory and prosecutorial resources both in terms of finance and expertise (Davids and Schubert 2011:114). In response to the *2012 OECD Report* the Australian government has taken steps to improve the resourcing dedicated to the investigation and prosecution of official bribery offences. This includes the establishment of an interagency Fraud and Anti-Corruption Centre coordinated by the AFP, with officials seconded from the Australian Securities and Investments Commission ('ASIC'), the Australian Taxation Office and the Department of Foreign Affairs and Trade among others (OECD 2015:4). The AFP Foreign Bribery Panel of Experts was also established to ensure that investigations into bribery allegations do not end prematurely (OECD 2015:15). The Commonwealth Director of Public Prosecutions has implemented a new operating model to ensure adequate resourcing for efficient and effective prosecutions of bribery and corruption offences (OECD 2015:19). Significant resources have also been expended on awareness raising and education regarding the law and engagement with the private sector (OECD 2015:5, 44, 46–8).

The Australian government undertook this range of recent reforms in response to the recommendations made by the OECD Working Group in 2012. While these recommendations and measures were directed towards bribery of foreign officials, similar measures may be appropriate for adoption in respect of commercial bribery, particularly those measures directed towards awareness raising and engagement within the private sector. Increased awareness within the private sector of the laws applicable to commercial bribery may lead to greater compliance and a culture of self-reporting potential contraventions.

There have been few prosecutions of commercial bribery pursuant to the secret commission statutes in Australia.[6] The prosecution record in Australia suggests that law enforcement authorities prefer to rely on civil enforcement by private litigants to deter cases of commercial bribery, rather than on the criminal sanctions available under the secret

[6] Examples of commercial bribery prosecutions in Australia include: *Lewis v The Queen* (accused conspired to defraud his employer with the assistance of Mr Simcock. Accused charged with a number of offences in relation to the series of events. One charge related to a conspiracy to receive a secret commission, being the installation of air conditioning at his private residence by Mr Simcock); *R v Gallagher* (accused was the secretary of the Builders Labourers' Federation. It was alleged that he built two homes, one for himself and one for his son, and that those houses were substantially built with corrupt gifts of labour and materials from various big building companies); *Director of Public Prosecutions v Bulfin* (accused engaged in mortgage industry and received secret commissions in respect of fraudulently induced investments); *R v Walter Richie McLean* (accused received secret commissions while an employee of Mobile Oil Australia Ltd. Accused received secret commissions in form of money, from Squires, who in turn became one of Mobil Oil's preferred suppliers); *R v Miller* (accused an employee of Eurovox. Eurovox purchased goods from a Taiwanese company. The accused entered into a secret commission agreement with an employee of the vendor to pay him a commission on the sales). Charges were laid for receipt of secret commissions by marketing managers at Woolworths (Hawthorne and Silvester 2011).

commission statutes.[7] Further study is required to determine whether reliance on private actors enforcing their rights and obligations under the civil law offers an effective deterrent to commercial bribery in Australia. Given the clandestine nature of the conduct, it is unlikely that reliance on the civil regime alone will provide a sufficient deterrent effect. This is because civil litigants lack the investigative powers of agencies such as the AFP or ASIC to detect and investigate potential contraventions. It is likely that many cases go undetected without independent oversight and the ability for whistleblowers to contact an independent agency regarding potential contraventions.

Further guidance on the application of criminal versus civil remedies in respect of cases of commercial bribery is also required. There is currently insufficient guidance to assist law enforcement agencies to determine when a case should be dealt with via criminal prosecution or via civil remedies (for example, in a civil case between the two affected parties). The lack of prosecutions may also suggest a need for the creation of a federal offence of commercial bribery to enable the federal agencies to investigate and prosecute these cases, drawing upon those organisations' superior resources and expertise, especially given that cases of commercial bribery are also likely to involve contemporaneous contraventions of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

## Law reform

A cohesive, international approach to the eradication of commercial bribery is required in order for the laws to effectively reduce the incidence of the conduct. The disparity of bribery laws globally is blamed for creating a situation where it becomes untenable for companies subject to bribery laws to compete with those competitors who will suffer no sanction for offering a bribe. It is estimated that between 1994 and 2000, companies domiciled in the US lost more than 400 international tenders for business contracts due to bribery by foreign competitors (Sung 2005:113).

The harms caused by commercial bribery are most efficiently dealt with by ensuring that the laws in force have a sufficient deterrent effect. As discussed above, the Explanatory Memorandum to the bill repealing the *Secret Commissions Act* noted the increase in the penalty for official bribery. This suggests an attitude on behalf of Australian legislators that harsher penalties will equate to more effective deterrence. However, Beccaria (1764) argues that crimes are more effectually prevented by the certainty of enforcement than by the severity of punishment. The enforcement of anti-bribery laws in China provides a useful example. Youxiang (2012) has noted that China has always imposed severe punishments for bribery, but that its economy remains subject to the 'cancer of commercial bribery' with incidences of the conduct reported to be on the rise. Youxiang largely attributes the rise to the ineffectiveness of enforcement. If the purpose of law reform is to promote effective deterrence, then those reforms must be focused on improving enforcement of the law, rather than increasing penalties for non-compliance.

One means to improve enforcement may be to criminalise commercial bribery at a federal level. If an equivalent of the state-based secret commission offences were introduced into either the *Criminal Code* or the *Corporations Act*, this would empower either the AFP or ASIC to investigate potential contraventions. In October 2013, the AFP and ASIC entered

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7 See, eg, *Chameleon Mining NL v Murchinson Metals Ltd*; *Ardelethan Options Ltd v Easdown*; *Aequitas Ltd v Sparad No 100 Ltd*; and *Morgan v Babcock & Wilcox Ltd*, which involved the bribery of a Council employee by a company in order to win a tender.

into a memorandum of understanding for the purpose of improving collaboration between the agencies into the investigation and prosecution of bribery-based offences. ASIC, in particular, has broad powers to require the production of books and records by companies, to require persons to attend for compulsory oral examinations and to provide reasonable assistance in connection with its activities and investigations (*Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 29, 30, 30A, 31, 32A, 33, 35, 37(9), 49(3); *Corporations Act* ss 912C, 1317, 1317R). Given ASIC's expertise in dealing with other forms of white-collar crime, it is best placed to investigate potential cases of commercial bribery. Further, introducing a commercial bribery offence into the *Criminal Code* would have the effect of creating an additional offence for corporations that fail to prevent or detect commercial bribery. Demonstrating that the corporation in question failed to maintain a corporate culture that required compliance with the law would prove this offence. The creation of this additional offence may also have an effective deterrent effect. The introduction of the *UK Bribery Act* resulted in companies from all around the globe seeking legal advice on their compliance programs. Creating a similar offence in Australia may achieve the same result and a useful deterrent effect through corporations' self-regulation via the enforcement of internal compliance programs.

There are additional enforcement advantages that would flow from placing the responsibility for prosecuting commercial bribery offences with ASIC. In the US, the history of enforcement efforts under the *FCPA* shows that the 'books and records' provisions of that Act have been crucial to its effectiveness (Davids and Schubert 2011:112). In Australia, by contrast, there are presently no similar 'books and records' provisions directed towards preventing bribery. However, legislation is presently before the Commonwealth Parliament to consider the introduction of false accounting offences into the *Criminal Code*, as discussed above. These new offences are directed at cases of official bribery, rather than specifically applying to acts of commercial bribery, and further amendments to the *Criminal Code* would be required to introduce a secret commission offence or similar to capture cases of commercial bribery. That said, there are general obligations imposed upon corporations in Australia in respect of the maintaining and reporting on the financial position of a business. The *Corporations Act* requires corporations to keep accurate financial records of their transactions (s 286). The directors of a corporation are required to sign off on financial accounts on an annual basis, and there are consequences for directors who breach or are otherwise negligent in respect of these obligations (*Corporations Act* ss 295A, 298, 298, 344(1); *Australian Securities and Investments Commission v Healey*). Compliance with these laws is monitored by ASIC, which is not directly responsible for investigation of possible offences under the state secret commission statutes. As such, placing the responsibility for enforcement with ASIC may improve enforcement efforts through more effective detection of possible offences.

## Conclusion

In a world where public services are increasingly privatised and delivered by corporations, the historical demarcation between official and commercial bribery is no longer relevant when determining whether certain conduct should or should not be criminalised. This is not to suggest that the law should simply be reformed to extend current prohibitions on official bribery to cases of commercial bribery. As Green (2006) argues, official and commercial bribery remain conceptually different. Criminal commercial bribery occurs only when persons entrusted with the management of the interests of others betray those interests to advance their own (Chevigny 2001:812). While Australia's existing laws will be sufficient to deal with most cases of commercial bribery, there has been a lack of enforcement. The introduction of a

federal offence to be enforced by ASIC will be the most effective means to ensure that cases of commercial bribery are detected, investigated and prosecuted given ASIC's existing powers, skills and expertise regulating corporate actors.

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*Chameleon Mining NL v Murchinson Metals Ltd* [2010] FCA 1129 (20 October 2010)

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*Grant v Gold Exploration and Development Syndicate* [1900] 1 QB 233

*Grimaldi v Chameleon Mining NL (No 2)* (2012) 287 ALR 22

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*Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163

*Peninsula and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189

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*R v Glynn* (1994) 33 NSWLR 139

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*R v Mills* (1978) 68 Cr App R 154

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*S & Y Investments (No 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia Ltd* (1986) 85 FLR 285

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*Corporations Act 2001* (Cth)

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