Emerging Issues for the Forensic Accountant: Foreign Bribery

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# Table of Contents

EXECUTIVE SUMMARY ........................................................................................................... 4  
A BRIEF HISTORY OF BRIBERY AND CORRUPTION ................................................................. 4  
EFFECTS OF FOREIGN BRIBERY ON SOCIETY AND THE ECONOMY ............................... 5  
FOREIGN BRIBERY AND THE POLITICAL ENVIRONMENT .......................................................... 6  
  OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions .................................................................................................................................................................................. 7  
  United Nations Convention against Corruption ........................................................................ 7  
FOREIGN BRIBERY LEGISLATION ............................................................................................... 8  
  United States .......................................................................................................................... 8  
    The Foreign Corrupt Practices Act ......................................................................................... 9  
  Australia .................................................................................................................................. 10  
    The Commonwealth Criminal Code ..................................................................................... 10  
    Other Relevant Legislation .................................................................................................... 12  
  United Kingdom .................................................................................................................... 12  
    The Bribery Act .................................................................................................................. 12  
THE GLOBAL SCORE CARD FOR FOREIGN BRIBERY ............................................................. 15  
  Transparency Internationals Progress Report on Enforcement of the OECD Anti-Bribery Convention .......................................................................................................................................................................................................................... 15  
    Australia ............................................................................................................................. 15  
    United Kingdom .................................................................................................................. 16  
    United States ....................................................................................................................... 16  
  Transparency Internationals Corruption Perceptions Index .................................................. 16  
A Whole of Government Approach ............................................................................................ 18  
  Education, Prevention and Reporting ..................................................................................... 18  
  Investigation and Enforcement ................................................................................................. 19  
  Recommendations .................................................................................................................. 20  
Legislative and Regulatory amendments .................................................................................... 22  
  Recommendations .................................................................................................................. 23  
Corporate Self Management ....................................................................................................... 24  
  Recommendations .................................................................................................................. 24  
The Role of the Forensic Accountant .......................................................................................... 25  
  Discovery ............................................................................................................................... 25  
  Reporting ............................................................................................................................... 26  
  Education and Prevention ..................................................................................................... 26  
  Recommendations .................................................................................................................. 26
EXECUTIVE SUMMARY

Bribery and corruption are not only corrosive to the free market, but are major obstacles to economic development and the alleviation of global poverty. As a global citizen and member state of both the United Nations and the OECD, Australia has a significant responsibility to help thwart such evils.

The recent emergence of foreign bribery on the Australian psyche is unequivocally the result of Australia’s first ever charges for the offence being issued on 1 July 2011. No doubt it also has a little something to do with the fact that two of those charged were subsidiary companies of one of Australia’s most respectable institutions, the Reserve Bank; and that journalists from Melbourne’s *The Age* newspaper have published such allegations for over a year.

Despite becoming a signatory to the OECD Convention on Combating Bribery of Public Officials in 1997, the charges are the first genuine public foray Australia has made towards demonstrating its true commitment to the convention.

Global reporting body Transparency International, also rates Australia’s bribery enforcement efforts to date as extremely poor. It will take not only a successful prosecution, but a raft of improvements to Australia’s enforcement strategy to make any marked difference to Australia’s current scorecard on foreign bribery.

A BRIEF HISTORY OF BRIBERY AND CORRUPTION

Archaeologists have recorded evidence of employees accepting bribes, dating back some 3400 years (Martin, 1999, p1). This may in fact be evidence of one the first recorded bribery investigations.

The first seeds of bribery are likely to have been sown in the very beginnings of time itself. History demonstrates that ‘offerings’ to the gods and kings were often given in return for the hope of favour or goodwill. Such acts however, were not seen to be against the social or moral rules and values of the day. It was not until around 1300 B.C., that the Egyptian pharaoh Horemheb issued the first recorded law of secular penalty for bribe taking (Martin, 1999, p1).
According to doyen of historical bribery literature, John T Noonan (1984), bribery is divisible into four discernable periods:

- 3000 B.C. to 1000 A.D. – the beginnings of the ideals that reciprocation from rulers in exchange for an offering was against society’s norms. Anti-bribery sentiment is said to have struggled in this period due to the fact that the rulers of the time were both in the position of issuing judgement on social standards and the recipients of the offerings;
- 1000 AD to 1550 A.D. – anti-bribery ideals achieved prominence in religious, legal and literary expression;
- The English Stage (Circa 1600 A.D.) – anti-bribery ideals are domesticated into British religion, literature and law; and
- The American Stage (Circa 1900 A.D.) – anti-bribery norms and legislation is asserted and promulgated worldwide.

Foreign bribery has almost certainly existed in one form or another since the birth of international trade. Unlike domestic bribery, foreign bribery, as the name suggests, involves bribery of officials domiciled outside the country of the briber. This most commonly manifests itself in the form of the briber obtaining an advantage over other parties in an international marketplace, in exchange for a personal benefit being transferred to a public office holder in the country were trade is sought.

**EFFECTS OF FOREIGN BRIBERY ON SOCIETY AND THE ECONOMY**

“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 life and allows organised crime, terrorism and threats to human security to flourish.”

Former United Nations (UN) Secretary General, Kofi Annan (UN 2004, p iii).

Annan claims that although corruption is also found in economically developed countries, it is in the developing world that the effects of corruption are most destructive. Annan has also stated that corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development (UN 2004, p iii).

Wolfgang Kasper, a Professor of Economics at the University of New South Wales (NSW) supports many of Annan’s sentiments. Kasper (2006, p1) claims that poor countries tend to be more corrupt than developed affluent countries. This statement appears to be supported by the findings of the independent global coalition against corruption, Transparency International (TI).
TI’s Corruption Perception Index (2010) measures the extent to which public sector corruption is perceived to exist in some 178 countries. In general the 2010 report indicates that most of the world’s more developed and affluent countries are ranked in the top third of the ratings, being perceived as having the least level of corruption amongst their public officials. In contrast, those countries which are less developed or have experienced recent conflicts tend to occupy the lowest segment of the index, being perceived as having the greatest level of corruption amongst their public officials. It should be of considerable concern to Australia, that a significant number of neighbouring and Pacific Rim countries are rated in the lower third of the index. Many of these countries are also significant trading partners of Australia.

Kasper (2006, p1), states that countries with poorly protected private property rights, over-regulated markets and poor rule of law tend to suffer more from entrenched corruption. Furthermore Kasper (2006, p1) contends that:

- The existence of rich natural resources, such as oil and gas, facilitate corruption and political instability and can lead to failure of the government itself; and
- Traditional methods of delivering foreign aid tend to facilitate corruption, as the disbursement of aid to kleptocratic regimes fails to facilitate the strengthening of institutions essential for economic growth and in turn supports the entrenchment of the corrupt elites.

According to a TI press release (24 May 2011), bribery is said to account for as much as 25 percent of the total cost in government procurement. TI also quote the World Bank as estimating the total corrupt moneys associated with bribes received by public officials in developing and transitioning countries as being between USD 20 billion and USD 40 billion annually, with the cost of corruption in real terms being closer to USD 1 trillion annually.

FOREIGN BRIBERY AND THE POLITICAL ENVIRONMENT

Transparency International’s latest report on the Enforcement of the OECD Anti-Bribery Convention (Heimann, Dell and McCarthy 2011, p2), claims that current global enforcement efforts to counter global bribery are inadequate.

Of the world’s OECD signatory countries, only seven are rated in TI’s top level classification, ‘Active Enforcement’. Australia not only fails to make it into the top category, but is ranked in the lowest classification, ‘Little or No Enforcement’.

TI’s research indicates that lagging enforcement of bribery and corruption is the result of a lack of political commitment by government leaders. TI claim this is particularly dangerous in the current troubled world economy, in which they claim companies are scrambling for orders and business organisations are criticising anti-bribery legislation as a competitive obstacle (Heimann, Dell and McCarthy 2011, p2).
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The Organisation for Economic Co-operation and Development (OECD) was founded in 1961 to stimulate economic progress and world trade. In November 1997, Australia, as one of the 34 OECD member states, became a signatory to the *OECD Convention on Combating Bribery of Foreign Public Officials in International business transactions* (1997 Convention).

Article 1 of the 1997 Convention (OECD 2011) requires member states to take measures to:

“...establish that it is a criminal offence under its law for any person intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business...”

Member states are also required to undertake the necessary measures to establish that:

“...complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign official shall be a criminal offence...”

Article 5 of the 1997 Convention (OECD 2011) requires that investigation and prosecution of matters of foreign bribery:

“...not be influenced by considerations of national economic interest, the potential effect upon relations with another State of the identity of the natural or legal persons involved.”

In 2009, the 1997 convention was updated to include recommendations on bribery related tax measures.

United Nations Convention against Corruption

In December 2005, the UN also committed to denouncing foreign bribery. This commitment formed part of the *UN Convention Against Corruption* (UNCAC). Australia, a member state of the UN, is a signatory to the UNCAC.

Whilst the UNCAC contains a number of similar themes to the 1997 OECD convention, the UNCAC also requires member states to actively promote the prevention of corruption, not merely prosecute against the offences. Moreover, the UNCAC outlines the member states responsibility to battle corruption in the private sector in addition to the public sector (UN 2004).
FOREIGN BRIBERY LEGISLATION

Origins of modern domestic bribery legislation date back to the 17th century. In deed most developed jurisdictions have had bribery legislation in place for a number of centuries. Conversely, legislation preventing foreign bribery in international trade is a relatively recent phenomenon.

The birth of foreign bribery legislation is most often credited to be the result of the US Senate Banking Committee’s 1975 investigation into the Lockheed Aircraft Corporation (Hollingshead 2010). The Committee found that Lockheed had paid hundreds of millions of dollars through ‘consultants’ to government officials in Saudi Arabia, Japan, Italy and the Netherlands (Martin 1999, p5). The Committee identified that the bribes paid to foreign entities had violated as many as nine US laws, including:

- The Internal Revenue Code;
- The Foreign Assistance Act;
- The Bank Secrecy Act;
- The Travel Act; and
- The Racketeer Influenced and Corrupt Organisations (RICO) Act

However, the Banking Committee discovered that the bribes merely constituted peripheral violations of these laws. In addition, the Committee found that no legislation existed which specifically outlawed the payment of bribes to foreign entities (Martin 1999, p6).

In the mid 1970’s the US Securities and Exchange Commission (SEC) also conducted a raft of investigations into bribery related activities. The SEC found that some 400 US companies admitted making questionable or illegal payments, totalling in excess of USD 300 million, to foreign government officials, politicians and political parties (USDOJ 2011, p1). The stage was clearly set for some well needed reform of bribery legislation and matters of international trade.

United States

In 1977, the United States introduced the Foreign Corrupt Practices Act (U.S.C) (FCPA), as a swift and stern response to the findings of both the Senate Banking Committee and SEC investigations. The FCPA was groundbreaking legislation and many believed it would have an enormous impact on the way US businesses operated, particularly in international trade (USDOJ 2011). In essence, the introduction of the FCPA meant that US companies were now prohibited by law from paying bribes to foreign government officials in order to obtain business. The legislation provided penalties for both corporations and individuals found guilty of breaching its provisions.
Whilst the legislation showed some initial signs of success, the US Congress discovered a major fault in the legislation. Whilst US companies could no longer make corrupt payments to foreign officials in order to gain a business advantage over their competitors, corporations domiciled in other countries could not only continue to make such payments, but in some jurisdictions, including France and Germany, domestic legislation allowed companies to deduct the cost of bribes as a business expense on their taxes (Martin 1999) (USDOJ 2011, p2). This placed US companies at a major competitive disadvantage in certain international markets.

In 1979, the US sought assistance from the UN in promoting foreign bribery legislation. Despite drafting an agreement, the UN Council of the General Assembly failed to convene a conference of member states to enable the draft ‘International Agreement on Illicit Payments’ to be ratified (Martin 1999).

Perturbed, but not defeated, in 1981 and again in 1988, the US lobbied the OECD to implement a global agreement amongst its major trading partners to strike out the practice of foreign bribery. In both instances the US failed to gain the full support of OECD member states. After continued lobbying of OECD member states by the US, in 1997, almost ten years after the implementation of the US legislation, the OECD ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (USDOJ 2011). The 1997 Convention is now supported by 34 OECD member states and four non-member country signatories (OECD 2011).

In addition to gaining the commitment of fellow OECD member states to the ethos of the 1997 convention and its obligation on OECD members to implement supporting legislation, the US also made supporting amendments to the FCPA. The FCPA amendments were enacted by means of the International Anti-Bribery and Fair Competition Act 1998 (US). Importantly, the 1998 amendments to the FCPA included the addition of extra-jurisdictional powers, allowing the US to prosecute, in certain instances, corporations and individuals not domiciled in the US.

The Foreign Corrupt Practices Act
In essence, under the FCPA (1998) it is unlawful to commit acts, commit acts in furtherance of, or provide authorisation of any offer, payment, promise to pay, gift, or to provide anything of value to a foreign official for the purposes of:

- Influencing any act or decision of the foreign official in his official capacity;
- Inducing the foreign official to do or omit any act in violation of their lawful duty; or
- Securing any improper advantage.
According to the US Department of Justice (USDOJ) (2011), the FCPA potentially applies to any individual, corporation, director, employee or agent, whose actions satisfy at least one criterion of the acts’ following three subsets:

- Practices by ‘Domestic Concerns’ – being any individual who is a citizen, national or resident of the US, or any corporation, partnership, sole proprietorship or other business organisation or trust, which has the US as its principal place of business;
- Practices by ‘Issuers’ – being any corporation have issued securities registered in the US, or any corporation that is required by the SEC to file periodic reports; and
- Persons other than Issuers or Domestic Concerns - any person other than an issuer or domestic concern that whilst in the territory of the US, makes such an act, promise or offer.

One of the few defences available under the FCPA, is the defence that such acts, promises of offers were lawful under the written law or regulation of the country which the foreign official represents.

The USDOJ is the chief enforcement agency for the FCPA, with assistance provided by the SEC (USDOJ 2011).

**Australia**

As a member state of both the OECD and the UN, Australia has in part fulfilled its obligations to the foreign bribery conventions of both collectives through the introduction of legislation and regulatory support. The predominant legislation in respect of foreign bribery in Australia is the *Criminal Code Act 1995* (Cth) (*Criminal Code*). Legislation outlawing foreign bribery came into effect by virtue of an amendment to the *Criminal Code* issued on 17 December 1999. The *Criminal Code* is supported by a myriad of legislation and regulation including Taxation and Corporations law. The lead investigational agency in relation to foreign bribery matters in Australia is the Australian Federal Police (AFP).

**The Commonwealth Criminal Code**

Division 70 of the *Criminal Code*, ‘Bribery of foreign public officials’ outlines the relevant offence, including jurisdictional qualifications.

Whilst the term ‘Bribery’ is not specifically defined within division 70, nor within the *Criminal Code* generally, an understanding of the term can be gleamed from within the offence provision.
Section 70.2 contains the applicable offence of ‘Bribing a foreign public official’. The essential elements of the offence can be provided as:

- That a person (or company) provides, causes to be provided, offers or promises to provide, a benefit to another person;
- That the benefit is not legitimately due to the other person; and
- That the person does so with the intention of influencing a foreign public official in the exercise of their official duties, in order to obtain or retain business, or a business advantage that is not legitimately due.

Whilst Section 70.2, refers to a ‘person’ and does not specifically include a corporation in the offence provisions, corporations are subject to the offence by virtue of Section 12.1 of the Criminal Code, which provides that code applies to bodies corporate in the same way as it applies to individuals.

Division 70 also provides that the offence will also apply to a person or company where:

- An agent or third party intermediary performs actions on behalf of said individual or company; or
- The payment or offer is made to a person that is either an authorised representative of a foreign official, or holds themselves out to be such.

Under Division 70 jurisdiction applies to:

- Any person or company (be they foreign or domestic) who constitutes the offence either wholly or partly in Australia; or
- In the instance that the offence occurs wholly outside of Australia, it will be said to apply to any person that is an Australian citizen or resident at the time of the offence, or any entity incorporated under a law of the Commonwealth, or a State or Territory of Australia.

Like the FCPA, the Criminal Code offers a defence provision where the action performed or omitted by the foreign official is not contrary to a law of the country which the foreign official represents.

An additional defence is offered by the Criminal Code, in relation to facilitation payments, provided under Section 70.4, as in the instance that:

- The value of the benefit was minor in nature;
- The person (or company’s) conduct was engaged in for the dominant purpose of expediting or securing the performance of a routine government action, which is also minor in nature;
- As soon as practicable after the conduct occurred, the person (or company) made a record of the compliant conduct; and
- That the person (or company) has retained that record at all relevant times.
Severe penalties apply to offences under Division 70 following recent amendments to the penalty provisions. In the case of individuals a maximum penalty of:

- 10 years imprisonment; and/or
- A fine of AUD 1 million

In the case of companies the following maximum penalties apply:

- Either a fine of AUD 11 million; or
- A fine of three times the value of the benefits obtained as a result of the bribery; or
- A fine equivalent to 10% of the annual turnover of the company and related bodies corporate.

**Other Relevant Legislation**

Individuals and corporations should also be cognisant that the commission of an offence under Section 70.2 of the *Criminal Code* may also constitute an offence or breach of a civil provision under numerous other Commonwealth and State/Territory Acts. Apparent contraventions are most likely to occur in relation to:

- The *Corporations Act 2001 (Cth)* – which contains a myriad of provisions for which both criminal and civil remedies apply. Acts of foreign bribery are likely to constitute actions against the fiduciary duties of directors and office holders and corporate reporting provisions; and
- The *Income Tax Assessment Act 1997 (Cth)* – Costs and expense incurred in the act of bribery are not tax deductible, and effort to claims such costs as business expenses would likely to be in contravention to the Act.

**United Kingdom**

A common law offence of bribery in relation to public office holders has existed in the UK for many centuries (Raphael 2011, p252). Bribery of a public official was legislated against in 1889, with this being extended to include the private sector in 1906. In 2001, the *Anti-Terrorism, Crime and Security Act*, introduced provisions which had the application of extending the scope of bribery legislation to instances of foreign bribery, including those committed by UK citizens and companies outside of the borders of the UK.

**The Bribery Act**

On 1 July 2011, The *Bribery Act 2010 (UK)* came into effect, abolishing and replacing all existing UK bribery legislation. The *Bribery Act* contains offences for both domestic and foreign bribery; and a new offence for commercial organisations who fail to prevent bribery. The *Bribery Act* has been heralded by many as the world’s most progressive foreign bribery legislation to date.
Section 6 of the *Bribery Act*, provides the offence of Bribery of foreign public officials. For the most part, the UK legislation largely mirrors the intent of the US and Australian legislation.

Essentially Section 6 provides that:

- A person who bribes a foreign public official is guilty of an offence if the persons intention is to influence the foreign official in their capacity as a foreign official; and
- That the person intends to obtain or retain business or a business advantage; and
- That the person directly or through a third party, offers, promises or gives any financial or other advantage to a foreign official; or another person representing the foreign official; and
- That the foreign official is not permitted by law, to be influenced in their capacity as a foreign official by the offer, promise or gift.

Section 6 is applicable to:

- offences committed wholly or partially in the UK, by individuals or corporations; and
- offences committed wholly outside the UK (by virtue of Section 12), by:
  - British Citizens;
  - British Nationals;
  - An individual normally resident in the UK;
  - A body incorporated under the law of any part of the UK.

Section 7 of the *Bribery Act*, provides the most progressive offence provision. Section 7 imposes an obligation on ‘relevant commercial organisations’ not only to avoid participation in foreign bribery, but to also make efforts to prevent persons associated with the organisation from committing such offences. It is not a necessary requirement of the *Bribery Act* that any action committed by an ‘associated person’ take place within the UK.

Essentially Section 7 provides that:

- A ‘relevant commercial organisation’ is guilty of the offence if an ‘associated person’ bribes another person with the intention of obtaining of retaining business or a business advantage for the ‘relevant commercial organisation’; and
- The ‘relevant commercial organisation’ failed to have adequate provisions in place, designed to prevent the ‘associated person’ from undertaking such conduct; and
- The ‘associated person is, or would be, guilty of a bribery or foreign bribery offence under Sections 1 or 6. It is not a pre-requisite that the ‘associated person’ has been prosecuted for the bribery offence.
A ‘relevant commercial organisation’ is defined as including:

- A partnership or body incorporated under UK law, which carries on a business within or external to the UK; or
- Any other partnership or body corporate which carries on a business, or part of a business, in the UK.

The definition of ‘associated person’ includes any person who performs services on behalf of a ‘relevant commercial organisation’, including employees and agents.

Section 9 of the *Bribery Act*, requires the State to provide a ‘guidance document’ outlining the procedures organisations can put in place to prevent bribery and hence avoid prosecution under Section 7. The ‘*Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing*’, published by the Ministry of Justice in 2011 fulfils this requirement.

The *Bribery Act Guidance* outlines 6 key principles for organisations to fulfil their requirement to prevent bribery being committed by ‘associated persons’. The six principles are:

- Proportionality – to the risks faced (i.e. the overseas market the organisation operates in) and the size of the business;
- Top Level Commitment – A commitment from top level management that foreign bribery will not be tolerated;
- Risk Assessment – Quality risk assessment of the markets within which the organisation operates and those people and organisations it deals with;
- Due Diligence – checks to ensure the credentials and trustworthiness of those the organisation deals with;
- Communication – Communication to and training of staff and ‘associated persons’ about the organisations policies and procedures in relation to foreign bribery;
- Monitoring and Review – Monitoring and reviewing procedures over time.

Under the *Bribery Act*, ‘facilitation payments’, such as those allowed under Australian legislation, are outlawed.

Penalties applicable for offences under the *Bribery Act* include:

- A term of imprisonment up to 10 years and/or an unlimited fine for individuals; and
- An unlimited fine for corporations.

Currently, the Serious Fraud Office (SFO) is the lead investigative body for foreign bribery matters in the UK.
THE GLOBAL SCORE CARD FOR FOREIGN BRIBERY

How do we measure the impact of measures to thwart foreign bribery? As with most crime types, perpetrators rarely confess or report instances of offences for which they have not been discovered or prosecuted. Therefore, the predominant measure of crime variance is based on the number of investigations and successful prosecutions within a given crime type. Whilst most countries maintain their own domestic records in relation to investigations and prosecutions of foreign bribery, the principal reporting organisation on global efforts to combat foreign bribery is Transparency International.

Transparency International was founded in 1993, with its headquarters in Germany (Martin 1999, p9). TI is a worldwide network, with more than 90 national chapters in countries around the world. TI’s website (2011) describes itself as a ‘...global civil society organisation leading the fight against corruption...’.

Transparency Internationals Progress Report on Enforcement of the OECD Anti-Bribery Convention

TI’s 2010 Progress Report on Enforcement of the OECD Anti-Bribery Convention, its seventh such publication, found that current enforcement efforts are inadequate. The report also found little change in enforcement measures globally, a trend which has raised serious concerns that the OECD convention is losing forward momentum (Heimann, Dell and McCarthy 2011).

Australia

TI’s report rates Australia in the lowest of the three available categories, ‘Little or No Enforcement’. At the time of publication, TI claim that in relation to foreign bribery, Australia had:

- No prosecutions
- 1 civil action
- 3 investigations

Given legislation supporting the prosecution of foreign bribery was enacted in Australia over ten years ago, the results of the TI report clearly indicate a deplorable record for Australia and its commitment to eradicating foreign bribery.
The report argues that key inadequacies in the Australian model relate to:

- Inadequacies in the legal framework, which amounts to an effective lack of criminal liability for corporations;
- Inadequacies in the enforcement system. TI suggest that the lack of enforcement to date may be indicative that successful prosecution is unfeasible under the present system;
- Inadequate whistle-blower protection; and
- A lack of specialist skills such as forensic skills needed to investigate such matters.

United Kingdom
The United Kingdom has received TI’s highest rating, ‘Active Enforcement’. UK’s tally to date is:

- 17 cases (encompasses criminal prosecutions, civil actions and judicial investigations); and
- 26 investigations.

According to TI, at the time of their report the greatest concerns for the UK existed in the unknown future of the lead prosecution agency, the Serious Fraud Office (SFO); and gaps in legislation which potentially meant that the use of non-UK nationals as intermediaries to pay by bribes outside of the UK would not constitute an offence. However, the introduction of the new Bribery Act, which came into effect in the UK on 1 July 2011, will undoubtedly have a major impact on the legal framework in relation to foreign bribery.

United States
Like the UK, the US also received TI’s highest rating, ‘Active Enforcement’. Given the US’s foreign bribery legislation dates back to 1977, it is hardly surprising that US figures dwarf those of most OECD member states. However the US has also demonstrated a significant increase of 58 cases since the 2009 reporting period. Clearly, the US can be seen as the yardstick in relation to foreign bribery investigation and resolution. The US figures according to the 2010 TI report are:

- 227 cases; and
- 106 investigations.

Transparency Internationals Corruption Perceptions Index
TI’s Corruption Perception Index (CPI) (2010, p4), measures the extent to which public sector corruption is perceived to exist in some 178 countries around the world, marking each country on a scale from 10 (very clean) down to 0 (highly corrupt).

Australia rates very well on the 2010 CPI, at a score of 8.7, whilst the UK and the US rate at 7.6 and 7.1 respectively.
Clearly the CPI does not provide a true measure of the existence of corruption, it is merely an indicative appraisal based on the perceptions of nominated representatives in various countries. The CPI represents an assessment of those countries likely to ask for, or to accept bribes. The CPI does not address those countries whose corporates are likely to attempt to pay bribes in order to obtain a business advantage.

The most practical application of the CPI for foreign bribery is in its use to educate corporations as to the likelihood of bribery influencing market forces for international trade in certain countries. This education allows corporate to either avoid such markets; or if they do elect to conduct business in such markets, to ensure they have implemented sufficient anti-bribery control measures to counter the associated risk.

STAMPING OUT FOREIGN BRIBERY IN AUSTRALIA

Reported incidences of foreign bribery in Australia to date represent the mere tip of the iceberg. It unfathomable to believe that the 1 civil action and 3 investigations recorded in the TI 2010 Progress Report can be truly indicative of the instance of foreign bribery having been conducted in Australia since the introduction of legislation almost twelve years ago. Given some of Australia’s biggest trading partners, particularly in the Asia-Pacific region rate very low (Highly corrupt) on TI’s 2010 CPI, it is highly improbable that Australian corporations are not regularly exposed to at least the possibility of foreign bribery.

Some may argue, particularly in the wake of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme (2006), commonly referred to as the Cole Inquiry, that many Australian corporations are now well aware of foreign bribery issues and legislation and as a consequence they are no longer willing to take such risks.

Conversely, many argue that the continued absence of a successful Australian prosecution over ten years after legislation was enacted has resulted in many now failing to view Australia’s efforts as a serious deterrent to engaging in foreign bribery.

The 2010 TI Progress Report suggests that despite effective legislation and enforcement in the US and the UK, companies within their jurisdictions have continued to participate in bribery in order to gain international business advantages. If this is true, what hope does Australia stand of stamping out foreign bribery under the current structure?

In order to make any attempt at answering this question, we must first understand what efforts Australia is currently making to deter foreign bribery. We may then consider options for enhancing those efforts.
A Whole of Government Approach

Currently the principal line of attack on foreign bribery in Australia is through a so-called Whole of Government Approach (WOGA). According to the Commonwealth Attorney Generals Department (AGD) (2011), this equates to a co-ordinated process involving administrative, enforcement and prosecution agencies. These agencies include: The Australian Taxation Office (ATO); Finance Administration and Trade; the Australian Securities and Investments Commission (ASIC); Austrade; Australian Customs and Border Patrol (Customs); the Department of Foreign Affairs and Trade (DFAT); the Australian Federal Police; and the Commonwealth Director of Public Prosecutions (DPP).

Education, Prevention and Reporting
In 2003, the AGD was charged with co-ordinating a response to the fact that Australia had then not led a single foreign bribery Investigation. The result was a campaign to improve Australia’s track record through:

- An increased public awareness of foreign bribery legislation and penalties;
- The encouragement of organisations to implement internal policies and procedures for reporting suspected instances of bribery; and
- The implementation of strategies aimed at increasing the level of reporting of suspected foreign bribery related activities to law enforcement authorities.

The AGD (2011) implemented their plans predominantly through the distribution of leaflets to corporations and government agencies; training about foreign bribery issues for commonwealth government employees engaged in international trade related matters; and surveying Australia’s top 100 companies on foreign bribery awareness. The AGD and other government entities such as the ATO, ASIC and Austrade also developed ‘fact sheets’ and other guidance on foreign bribery issues, which are available on their respective websites. Whilst these efforts may have had some success in increasing knowledge of foreign bribery issues amongst Australian corporations, there is no indication that this has caused any significant increase in the reporting of foreign bribery matters to authorities.
Investigation and Enforcement

“The conduct of AWB and its officers was due to a failure in corporate culture.”

Cole (2006, Vol 1, p xii)

The AWB Limited (AWB) scandal rocked the reputation of the Australian wheat export industry and for a brief time Australia’s reputation in international trade generally. Whilst most would be well aware of the existence of the scandal, few who have not ventured into the full offerings of the Cole Report, would be versed in the full extent of the failure of key directors, officers and the corporate culture of an organisation which formerly had chief responsibility for one of Australia’s largest export markets.

2006 was described as a catastrophic year for the AWB (Field and Le 2007, p41), following the public shaming dealt out by both the Independent Inquiry Committee into the United Nations Oil-for-Food Program, (the Volker Report) and the Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme (the Cole Report), not to mention a myriad of civil actions against the company. Whilst the weight of the world may have been seen to land on AWB, this simplistic view fails to comprehend the depth of business immorality, deception and a cultural bent which existed amongst some of their highest office holders at least as far back as 1999.

AWB seemingly escaped unscathed by the subsequent investigations of Australian law enforcement authorities, largely due to the fact that many of their indiscretions pre-dated the introduction of Australian foreign bribery legislation. However, it is clear that extensive legal representation and the subsequent loss of their monopoly on the Australian wheat export market bore a heavy toll on AWB and its shareholders.

On 1 July 1999, following a protracted and well publicised investigation, the Australian Federal Police publically announced the laying of charges against two Australian companies and six individuals for offences contrary to Section 70.2 of the Criminal Code (AFP 2011). The charges, Australia’s first under foreign bribery legislation, are alleged to relate to the bribery of foreign public officials in Indonesia, Malaysia and Vietnam between 1999 and 2005, by two subsidiaries of the Reserve Bank of Australia, Note Printing Australia and Securency International; and individuals formerly employed by these companies. The individuals include high level executives and the respective former Chief Executive Officers (CEO) (McKenzie and Baker 2011).

The charges undoubtedly caused feverish discussion amongst the Australian business community, with many, including those in government, questioning how this could happen under the oversight of one of the nation’s most esteemed organisations, the Reserve Bank. However, the full impact of these charges on the way Australian companies do business is not likely to be realised until the subsequent court proceedings in relation to the untested Australian legislation are finalised.
Whilst Australia’s two publicised investigations into foreign bribery matters have achieved mixed results, they share one commonality – a protracted and costly path.

The perpetrators of foreign bribery offences are often highly experienced business executives adept at keeping the detail of their business negotiations clandestine. Similarly the recipients of bribes are often the pillars of the foreign government departments they represent, often gifted with a high level of business and political acumen. It is unsurprising then that both the perpetrators and recipients of foreign bribery are often proficient at disguising the true nature or even the existence of their conduct in facilitating bribery.

It is imperative then, that Australia cultivates a field of investigators with the necessary skill sets to scrutinise the activities of the corporate and political elite. It is equally imperative that these investigators enjoy the resources and support of government and the judiciary to champion the cause.

**Recommendations**

The author recommends the following measures to enhance the current efforts of the commonwealth government to counter foreign bribery:

- An overhaul of the WOGA approach, with focus on the importance of the dual role of government entities, particularly those who have direct interaction with corporations involved in international trade including Austrade, DFAT and Customs. The dual role includes:
  - Prevention of bribery through the provision of further education and advice to the corporate sphere; and
  - The exploitation of industry knowledge and intelligence to help identify and report suspected instances of foreign bribery;

- Improvements in the quality of foreign bribery training provided to ‘front line’ organisations, who have direct interaction with corporations involved in international trade, in order to prevent government employees inadvertently participating in, or promoting, the bribery of foreign officials;

- Greater interaction amongst agencies at Australian diplomatic posts, particularly in countries that rate highly on the TI CPI, in order to encourage the transfer of intelligence on foreign bribery matters and to promote prevention and prosecution;
• Implementation of the appropriate infrastructure to support a national whistleblower and reporting program. A program similar to the National Security Hotline or Crime Stoppers, appropriately scaled is envisaged. A national whistleblower program would provide the following advantages:

  o It would allow individuals who may fear personal repercussions from current and future employers, to report incidences of bribery on a confidential basis;
  o It would provide a means of reporting, feedback and advise that is specific to the crime type, eliciting a greater level of information to be captured to assist investigations; and
  o It would provide for the coordinated collection of single intelligence items that may be collated to provide crime trends for the crime type; and provide evidence of specific instances of bribery;

• The development of specialised teams of Australian Federal Police investigators to deal specifically with foreign bribery and complex corporate fraud matters. Teams should be supported by sufficient resources to conduct protracted national and international investigations; and be provided with training in international business studies, money laundering, data mining/information technology and forensic accounting.

• The training of Australian Federal Police International Liaison Officers in relation to foreign bribery investigations and intelligence gathering techniques;

• The promotion of greater intelligence sharing and co-operation on foreign bribery matters amongst international law enforcement agencies through memorandums of understanding and joint agency agreements.

• The formation of fluid joint task forces to deal with large scale investigations, consisting of specialised members of the AFP, the ASIC and the ATO; and supported by legislation and regulation to support the efficient exchange of information and intelligence amongst agencies towards a common outcome; and

• An increased vigour and support for the ASIC and Commonwealth DPP to investigate and prosecute corporate office holders and directors for both criminal and civil breaches of their legislated requirements under the Corporations Act.
Legislative and Regulatory amendments

Whilst Division 70 of the Criminal Code remains untested by the courts, it is a somewhat challenging and perhaps pre-emptive task, identifying necessary amendments to the division. Given the broad wording of the offence under section 70.2, the courts interpretation of the legislation will provide much direction in terms of the need for any legislative amendment. Likely areas which may be subject to legal discussion and may subsequently require legislative clarification include:

- The definition of ‘benefit’, which currently includes ‘any advantage’, may well be challenged on the basis it is too broad in its application;
- The term ‘not legitimately due’ is not defined in Division 70. Some perspective on this issue is however gained through Defence offered under Section 70.3, suggesting that it is against a law in force in that place;
- The inclusion of a defence under Section 70.4 for ‘facilitation payments’, may in reality offer some level of confusion and blur the line as to what payments to foreign officials may or may not be acceptable. The UK legislation has outlawed such payments all together;
- The limitation to keep records for 7 years under the Section 70.4 defence mechanism may prove insufficient as often such investigations are only reported years after they occur and the investigations themselves can take several years, making the laying of charges within a 7 year period sometimes problematic;
- Section 70.5 (1)(a) in relation to offences conducted wholly or partly in Australia does not specifically indicate who is a ‘person’ for these purposes;
- Also in Section 70.5 (1)(a) in relation to offences conducted wholly or partly in Australia, the act is silent of what may constitute an act that occurs partly in Australia;
- Currently a loophole may exist for organisations whose employees or agents commit offences, with no direct input from the organisation. Legislative amendments consistent with Section 7 of the UK Bribery Act, requiring organisations to actively prevent bribery by their employees and agents, could resolve this potential loophole; and
- There is currently no Commonwealth legislative or regulatory requirement which specifically requires an individual or corporation to report knowledge of foreign bribery having been committed. This is a major issue as the current level of reporting for instances of foreign bribery would suggest that there are far more occurrences than those actually reported to authorities.
Recommendations
The author’s recommends the following legislative amendments, subject to any issues which may arise from judicial interpretation of the current legislation:

- Division 70 to provide clarification of the definition of ‘benefit’;

- Division 70 to provide a definition of ‘not legitimately due’. The definition should be consistent with that contained within the UK Bribery Act and include such elements as the issuing of the benefit not being lawful under:
  - a law or regulation in the country that the foreign official is representing;
  - a law or regulation in the country where the foreign official operates;
  - a law or regulation of a public international organisation (i.e. United Nations), that is applicable to the official;

- Removal or clarification of the Section 70.4 defence provision for ‘facilitation payments’ to foreign officials;

- If the Section 70.4 defence provision remains, an extension of the record keeping requirement to at least 10 years;

- Clarification of the term ‘wholly or partly in Australia’, particularly in relation to non-resident individuals and overseas based corporations, to specifically include those who ‘carry out business activity’ in Australia;

- Division 70 to include a provision consistent with the UK Bribery Act, instituting a positive requirement on Australian corporations; and corporations that conduct business in Australia, to demonstrate measures they have taken to prevent bribe by their employees and agents; and

- An inclusion of a provision in either the Crimes Act, or the Corporations Act, instituting a positive requirement for corporations and their employees/agents to report knowledge of foreign bribery to law enforcement officials. This would need to be supported by a legislated penalty for those who knowingly fail to report bribery.
Corporate Self Management

In financial terms alone, the combined costs of bribes, legal costs and potential fines associated with a prosecution for a foreign bribery offence are likely to outweigh the corporate profits or advantage obtained as a result of paying bribes. In addition there are the potentially significant reputational and personal costs. Consider the losses AWB and some of its executives suffered as a result of their alleged indiscretions; and AWB was not even forced to defend a criminal prosecution.

Recent increases in penalties for both individuals and corporations were aimed at further dissuading corporations from participating in foreign bribery. This is again based on an economic rationale, that the cost outweighs the benefit. The supporting theory is that corporations are more likely to self regulate if there is no financial incentive for them to partake in such activities.

In order to be effective, self regulation needs to operate, not only within an individual corporation, but also at the industry level. Astute business people are commonly aware of significant detail at to what transpires within their industry, including the actions of their competitors. If a corporation is aware that a competitor pays bribes and they themselves do not, it clearly places the corporation at a competitive disadvantage. Ideally, in such a situation the corporation would support the self regulation of the industry by providing information about the suspected bribes to the relevant industry body and to law enforcement authorities. Such self regulation helps to ensure a level playing field for all in the industry.

Recommendations
It is the recommendation of the author that both large and small institutions implement proportionate measures within their organisations including:

- The promotion of an organisational culture that demonstrates intolerance for foreign bribery and related ‘white collar’ offences such as fraud. Such a culture needs to be implemented with a genuine commitment from top level management down. Its ethos must be well communicated to all staff and business partners and should be supported by a demonstrated hardline response to anyone associated with the organisation that is involved in such unethical behaviour;

- The development and communication of dedicated reporting lines for foreign bribery and fraud, including employee protection mechanisms, such as an externally operated whistleblower programs;

- The implementation of mechanisms for the organisation to report suspected activities to law enforcements authorities;

- Due Diligence to be applied at all levels, including for those at the CEO and CFO levels;
• Risk Audits for foreign bribery to be conducted across the organisation, including an analysis of the international markets in which the corporation operates or intends to operate in; and

• The engagement of forensic accountants, who have contemporaneous experience and training in investigating foreign bribery, when a corporation first suspects it is possible that a party associated with the corporation has been involved in facilitating bribery. Any subsequent negative findings of the forensic accountant should be immediately reported to law enforcement authorities for further investigation.

The Role of the Forensic Accountant

Foreign bribery offences are commonly committed ‘behind closed doors’, with the only direct eyewitnesses being the corporation, a select group of employees and the foreign official subject to the bribe. Save the odd disgruntled employee, not many are willing to risk their employment, business or potential imprisonment to report knowledge of or involvement in such activities. As a result of the nature of their work, Forensic Accountants and Auditors are often placed in a unique position to witness and identify evidence of corporate wrongdoings, such as bribery.

As well as identifying instances of bribery, the Forensic Accountant can play a key role in a number of additional areas of foreign bribery prevention and prosecution.

Discovery

As mentioned, with the right training the Forensic Accountant can play a key role in the identification of foreign bribery. Discovery of such instances are most likely to occur whilst engaged to conduct:

• General audits;
• Targeted fraud investigations and other inquiries;
• Risk reviews;
• Due diligence; and
• Investigation of reports from the whistleblower program.

The 2011 Transparency International Progress Report identified a potential lack of forensic skills within Australian law enforcement bodies charged with investigating foreign bribery. Therefore a great opportunity exists for sufficiently qualified Forensic Accountants to fill this void, by assisting law enforcement investigators, particularly in identifying the financial trail associated with foreign bribery.
**Reporting**
Forensic Accountants play a key role in reporting their findings in relation to suspected foreign bribery and fraud related matters to:

- To the engaging corporation;
- To regulatory and law enforcement authorities; and
- To the court, in the form of expert reports and evidence as an expert witness.

**Education and Prevention**
Forensic Accountants with sufficient training, knowledge and experience in relation to foreign bribery matters may also be in a position to educate corporations and their executives through the provision of subject matter reports and recommendations. Additionally, Forensic Accountants can perform a preventative role through:

- Providing foreign bribery risk audits, for both the organisation and the international markets they operate or intend to operate within;
- Conducting due diligence on agents and other entities performing services on behalf of the engaging corporation;
- Facilitating the training of corporate executives in foreign bribery related matters, including the foreign bribery acts of other applicable nations; and
- Identifying bribery related control measures and assisting in their implementation and review.

**Recommendations**
The author recommends that role of Forensic Accountants in relation to foreign bribery matters could be enhanced through:

- Specific training of Forensic Accountants in conducting foreign bribery investigations and the relevant local and international legislation;
- A greater level of reporting and interaction with law enforcement authorities;
- The implementation of industry standards consistent with the theme of Auditing Standard ASA 240 – *The Auditor's Responsibility to Consider Fraud in an Audit of a Financial Report*. Such standards would include a requirement for Forensic Accountants to consider the presence of foreign bribery and fraud; and require mandatory reporting not only to management and board members, but to a relevant investigative authority; and
The development of a profession wide standardised list of key indicators or Red Flags for foreign bribery, to be utilised when engaged to conduct reviews and inquiries. Where more than one indicator is identified in a corporation, it would warrant further investigation. The list of Red Flags should include such indicators as:

- Trade in countries that rate highly for corruption on Transparency Internationals Corruption Perception Index or other corruption indexes;
- Trade in countries which have weak or poorly enforced domestic bribery legislation;
- Trade in developing markets that require significant capital investment in the tender process for little certainty of obtaining business;
- Trade in the resource sector in underdeveloped or lower socio-economic countries which are rich in natural resources;
- Trade in countries suffering government or social instability;
- The use of an Agent where no Agent is necessary. Including where a corporation has the ability to facilitate sufficient resources in the trade country as to not necessitate the use of an agent; trade in a market segment that is well developed and not overly complex; or where there is no legal requirement or cultural/language requirement necessitating the use of an Agent;
- Actions or statements of a corporation indicating that there is no limit on what they are willing to expend to obtain a particular contract or business venture;
- Agency commissions that exceed 5 to 8% of the contract price or other industry standard, without further justification;
- Agency commission rates that are not documented in official contracts or disclosed to all parties involved in the business contracts;
- Agents that require upfront commission or other payments prior to obtaining contracts for business;
- Agents that represent business in multiple, differentiated markets in one country;
- Agents who are based offshore from the trading country;
- The request or payment of Agents commissions to Tax Haven countries;
- The request or payment of Agents commissions to non-related third party entities; and
- Tenders or contracts that require bidders to commit to major infrastructure development or public works as part of the contract. Particularly where the works or distribution of funds is to be the responsibility of an entity based in the trading country.
CONCLUSION

Foreign bribery will not be defeated by acting alone. Only the united resolve of the nations of the world will eradicate this malevolent ailment which prevents free trade and global prosperity. The United States recognised this back in 1979, when it petitioned the United Nations General Assembly to unite against illicit payments to foreign officials. Despite setbacks, the US was steadfast in their resolve and eighteen years later OECD member states adopted their ethos. It took a further eight years for the UN to ratify similar support.

Whilst the majority of OECD member states have now implemented legislation outlawing the bribery of foreign officials, Transparency Internationals’ 2010 Progress Report indicates that many, including Australia, have done little to demonstrate effective enforcement of such legislation.

Despite the recent achievement of issuing the nation’s first charges for foreign bribery offences, Australia has much to do in order to improve its track record on the issue. Such improvements will require the combined efforts of government, corporate Australia and law enforcement authorities. In the midst of these efforts considerable opportunities will emerge for the Forensic Accountant.
LIST OF CITED ACTS:

Anti-Terrorism, Crime and Security Act 2001 (UK)

Bribery Act 2010 (UK)

Corporations Act 2001 (Cth)

Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 (Cth)

Criminal Code Act 1995 (Cth)

Foreign Corrupt Practices Act 1977 (U.S.C)

Income Tax Assessment Act 1997 (Cth)

International Anti-Bribery and Fair Competition Act 1998 (US)

REFERENCES:


