

NOTE

STATUTORY TOOLS FOR ENHANCING MULTINATIONAL CORPORATION COMPLIANCE WITH ANTI-BRIBERY LAWS: RECOMMENDED CHANGES TO AUSTRALIA'S FOREIGN BRIBERY OFFENSE

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INTRODUCTION

Koala Bean, a coffee shop in Australia, is known locally for its high quality coffee, ethically produced supply of fresh beans, and fair pricing. Koala Bean was so successful in its first five years that owner Catherine Caffeine expanded the coffee chain throughout the country. More recently, Caffeine made Koala Bean a global coffee phenomenon, opening locations throughout Europe and the United States. Koala Bean established regional offices in London, England, and Philadelphia, Pennsylvania to conduct its operations in the European and U.S. markets.

Koala Bean imports its coffee beans from Ethiopia to Australia. Due to the newly established sales locations, Koala Bean CFO, Cory Crook, is tasked with renegotiating the contract with the supplier to have coffee beans delivered to its locations in Europe and the United States. To get into Ethiopia quickly, Crook pays a small sum to a friendly government official to expedite his visa.¹ Upon arrival, Crook successfully establishes deliveries to Koala Bean's international shops from the Ethiopian supplier. Within a year, Koala Bean quickly becomes the most popular coffee shop in each of its new regional locations.

After returning to Australia, Crook becomes concerned that the cost of the shipments may financially impair Koala Bean. Crook arranges for the regional heads in London and Philadelphia to meet with high-ranking Ethiopian government officials in each

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1. Ethiopia requires tourist visas for one- or three-month single entry, or a residence card/work permit for business travelers staying in Ethiopia for more than ninety days. See *U.S. Passports & International Travel: Ethiopia*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/passports/en/country/ethiopia.html> [<https://perma.cc/H4YA-A44K>] (last updated Feb. 3, 2015).

region. Each regional head takes an Ethiopian official to dinner, and casually suggests during dinner that the officials consider providing additional subsidies to Koala Bean's Ethiopian supplier. Later that year, the supplier is awarded more subsidies to produce coffee beans, preventing Koala Bean's price of shipping to Australia, Europe, and the United States from rising. This allows Koala Bean to maintain its coffee prices.

Coincidentally, at this time there is a global shortage of coffee beans resulting from a poor harvest that causes a spike in coffee prices at most other major coffee chains. Noticing that Koala Bean has kept its costs down, investigators in the United Kingdom and the United States seek to understand the disparity in pricing. When she learns of these investigations, Caffeine immediately fires the responsible employees—Crook, the European regional director, and the U.S. regional director.

The U.K. investigators find that Caffeine had not implemented adequate procedures to prevent bribery and corruption throughout Koala Bean's international locations, and they decide to press charges against Caffeine and Koala Bean under the United Kingdom Bribery Act (UKBA).² Caffeine had not thought to implement any such procedures, as Australian law does not require these. Additionally, the U.S. Department of Justice has decided to prosecute Koala Bean and Caffeine, in addition to Crook and the two regional directors, under the U.S. Foreign Corrupt Practices Act (FCPA).³ After widespread consumer outrage, Australia decides it, too, must bring charges.

Caffeine is shocked to find herself and her company party to lawsuits in the United Kingdom, United States, and Australia. The U.S. Department of Justice is willing to defer prosecution via a deferred prosecution agreement (DPA), if Caffeine implements

2. Discussed in greater detail *infra* Section I.B.2, the adequate procedures defense (APD) protects companies from prosecution under the United Kingdom Bribery Act (UKBA) where the company can show it had implemented procedures aimed at preventing bribery. See Bribery Act 2010, c. 23, § 7 (Eng.).

3. The Foreign Corrupt Practices Act (FCPA) grants the United States jurisdiction over any acts of bribery committed in the United States. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1977). Furthermore, the extraterritorial reach of the FCPA provides jurisdiction to prosecute: (1) U.S. persons and businesses undertaking corrupt conduct anywhere in the world; (2) issuers of securities on the stock exchange who use U.S. mail or other method of interstate commerce to undertake corrupt conduct anywhere in the world; and (3) non-U.S. persons who use U.S. mail or other methods of interstate commerce or any other act in furtherance of an offer, payment, promise to pay, or authorization of payment of money, offer, gift, or anything of value to a foreign official. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78-dd-1, 78-dd-2, 78-ff (1977).

additional safeguards against corruption, pays a fine, and agrees to be monitored by the U.S. government for a fixed term. The United Kingdom also agrees to a DPA, and requires Koala Bean to implement extreme measures to prevent future cases of corruption.⁴ The United Kingdom separately decides to prosecute Crook and Koala Bean for making a facilitation payment in Ethiopia to expedite Crook's visa.⁵ Australia has no procedure for deferring prosecution nor does it recognize the adequate procedures defense (APD) to prosecution, and it finds Caffeine and her employees liable.⁶ However, prosecution of Koala Bean fails both because there was no proof of a corporate culture that promoted acts of bribery and because Koala Bean invoked the facilitation payments defense (FPD).⁷ Ultimately, Koala Bean is able to continue to operate in Australia, but its operations are devastated in its international locations.

The fictional Koala Bean account is representative of two real-world difficulties faced by multinational companies (MNCs). First, MNCs are subject to differing anti-corruption standards internationally.⁸ One of the largest challenges for MNCs is how to operate in countries where commercial bribery is not illegal.⁹ Second, a country's laws can fail its own MNCs by not providing the same standards and protections that are part of another country's laws. The latter issue has gained attention in Australia, and the Senate Standing Committee on Economics has begun to scrutinize the

4. See discussion *infra* Section I.B.1.

5. Facilitation payments are strictly illegal in the United Kingdom. See discussion *infra* Section I.B.3.

6. See discussion *infra* Section I.C.1.

7. Commonwealth Criminal Code Act (CCA) Section 12.3 states that multinational companies (MNCs) can be held liable for actions of its employees if the company's board of directors or management "expressly, tacitly or impliedly authorized or permitted the commission of the offense" or there is a demonstrated corporate culture of looking the other way or encouraging bribery to facilitate business. See *Criminal Code Act 1995* (Cth) s 12.3 (Austl.). However, the CCA also provides an affirmative defense for facilitation payments under Section 70.4 for payments of minor value or benefit. See *id.* s 70.4; see also *infra* Section I.C.1.

8. For a detailed discussion of the need for a global standard for anti-bribery laws, see Meg Beasley, *Note: Dysfunctional Equivalence: Why the OECD Anti-Bribery Convention Provides Insufficient Guidance in the Era of Multinational Corporations*, 47 GEO. WASH. INT'L L. REV. 191 (2015).

9. For example, countries including Argentina, Ecuador, Italy, Japan, Mexico, and Vietnam do not expressly prohibit or do not enforce bribery laws, or have significant exceptions that render the law relatively toothless. See Sam Winston, *5 Ways to Combat Commercial Bribery in Countries Where It Is Not Illegal*, INSIDE COUNS. (Dec. 31, 2015), <http://www.insidecounsel.com/2015/12/31/5-ways-to-combat-commercial-bribery-in-countries-w> [<https://perma.cc/3DHH-RYG5>].

effectiveness of the Foreign Bribery Offence law and consider measures to improve the law.¹⁰ For Australia, and governments globally, providing a business market with lower risks of corruption will lead MNCs to increase investment in that country.¹¹

This Note focuses on U.K. and Australian legislation to emphasize the impact national statutes can have on MNCs. More specifically, this Note considers the benefits of two “safe harbor”¹² provisions for MNCs utilized by the United Kingdom—DPAs and the APD—as well as the need to eliminate the FPD, and demonstrates the applicability of these changes to Australia’s bribery laws at a critical development point in Australian bribery legislation. Australia should revise provisions in its bribery laws to protect

10. The Senate Standing Committee on Economics was set to report in July 2016, but the report is still forthcoming as of the time of publication, due to the dissolution of the 44th Parliament in May 2016. See *Foreign Bribery*, SENATE STANDING COMMITTEE ON ECON. PARLIAMENT OF AUSTL. [hereinafter *Foreign Bribery, Australian Standing Committee, 44th Parliament*], http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery [<https://perma.cc/J7YX-SJNQ>] (last visited Dec. 1, 2016) (“At the dissolution of the Senate and the House of Representatives on 9 May 2016 for a general election on 2 July 2016, the parliamentary committees of the 44th Parliament ceased to exist. Therefore inquiries that were not completed have lapsed and submissions cannot be received.”). The Senate agreed to re-open this inquiry in the 45th Parliament, utilizing submissions from the 44th Parliament, as well as new submissions, to craft a report that is expected in June 2017. See *Foreign Bribery*, SENATE STANDING COMMITTEE ON ECON. PARLIAMENT OF AUSTL. [hereinafter *Foreign Bribery, Australian Standing Committee, 45th Parliament*], http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ForeignBribery45th [<https://perma.cc/HMY6-U7PT>] (last visited Nov. 27, 2016) (“In October 2016, the Senate agreed to the committee’s recommendation that this inquiry be re-adopted in the 45th Parliament. The committee is to report by 30 June 2017. All correspondence and evidence previously received for this inquiry has been made available to the new committee.”).

11. See Lawson Caisley, *Tackling Corruption – Now a Truly Global Initiative?*, ALLEN & OVERY (Nov. 3, 2015), <http://www.jdsupra.com/legalnews/tackling-corruption-now-a-truly-global-26860> [<https://perma.cc/F42W-UGKZ>] (arguing additionally that “[f]or national governments, a policy of greater transparency and less tolerance of corruption can make commercial and financial sense for the national economy”); see also *Exiger to Launch Next Generation Anti-Corruption Platform at ACI’s 32nd International Conference of the Foreign Corrupt Practices Act*, BUS. WIRE (Nov. 13, 2015), <http://www.businesswire.com/news/home/20151113005769/en/Exiger-Launch-Generation-Anti-Corruption-Platform-ACI%E2%80%99s-32nd> [<https://perma.cc/HM8X-RS4L>] (“The major challenge for compliance professionals operating in this environment is to develop cost-effective, sustainable compliance programs that provide a complete picture of risk in the face of anti-corruption laws.”).

12. “Safe harbor” refers to statutory provisions that specify that certain conduct is not a violation of a rule. MERRIAM WEBSTER, <http://www.merriam-webster.com/legal/safe%20harbor> [<https://perma.cc/6DSX-8UYM>] (last visited Nov. 3, 2016). For ease of explanation, in this Note, safe harbors include provisions that specify that certain conduct is not a violation (particularly as relates to the APD) or that certain conduct will not be prosecuted under certain circumstances (particularly as this relates to deferred prosecution agreements (DPAs)).

MNCs, including the adoption of DPAs and an APD, and eliminate the FPD, because these changes will increase corporate compliance with the strictest transnational bribery (TNB) laws and decrease the potential liability of businesses operating internationally.¹³

Part I of this Note provides a brief history of the development of major anti-corruption schemes, an in-depth look at the laws of the United Kingdom (with a particular focus on the current position of DPAs, the APD, and the FPD), and a discussion of the current law in Australia. Part II discusses the best solutions for MNCs and applies these within the Australian context to demonstrate how these tools can protect MNCs from potential liability, while concurrently increasing the implementation and use of anti-bribery compliance programs. The Note concludes that although these are only some of the measures countries can take, if all countries implement these types of provisions it will decrease corruption globally and enable protections for MNCs.

I. BACKGROUND

A. Contextualizing Anti-Corruption Legislation

MNCs are an integral part of international trade in goods and services.¹⁴ However, in order to effectively compete in a transnational market, these businesses are also prone to corruption and bribery.¹⁵ Corporate corruption is a serious global issue estimated to cost MNCs over US\$2.6 trillion per year, with over US\$1 trillion paid in bribes.¹⁶ It is estimated that there is a five percent reduction in gross domestic product each year due to TNB.¹⁷

13. See discussion *infra* Section II.B.

14. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS (3d ed. 2015).

15. See *Helping Countries Combat Corruption: The Role of the World Bank*, WORLD BANK GROUP [hereinafter *Helping Countries Combat Corruption*], <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> [<https://perma.cc/FZ4F-ZDDZ>] (last visited Dec. 1, 2016) (Some argue that corruption can enhance market efficiency, because a foreign official who is allocating resources and receives a bribe will be incentivized to give those resources to the party that would use them most efficiently. However, this is criticized as a short-term view that does not consider long-term efficiency. Corruption, in the long term, harms economic growth and efficiency, political legitimacy, and notions of fairness.)

16. See Adam Graycar, *How the Commonwealth Should Tackle Corruption*, SYDNEY MORNING HERALD (Feb. 29, 2016), <http://www.smh.com.au/comment/how-the-commonwealth-should-tackle-corruption-20160229-gn6cvt.html> [<https://perma.cc/NA6M-3WFH>].

17. See *id.*

Moreover, there has been increased acceptance of unethical business practices following the economic crisis of the late 2000s.¹⁸ This trend is not solely the fault of MNCs.¹⁹ Rather, widely varying TNB²⁰ laws lead MNCs to believe it is more advantageous to engage in behavior that is considered bribery in some—but not all—nations in which they operate, instead of attempting to comply with numerous TNB standards.²¹

The four largest schemes related to anti-corruption are the United States' FCPA,²² the Organization for Economic Co-Operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention),²³ the United Nations Convention Against Corruption (UNCAC),²⁴ and the United Kingdom's UKBA.²⁵

The United States passed the FCPA, the first legislation to combat TNB, in 1977.²⁶ The FCPA aims to create an international standard of fairness for MNCs to follow and targets the bribery of foreign officials (i.e., supply-side corruption, or the offer of bribes).²⁷ The two main features of the FCPA are its accounting guidelines and its criminalization of bribery of foreign officials.²⁸ The U.S. Securities and Exchange Commission and U.S. Depart-

18. See ERNST & YOUNG,]GROWING BEYOND: A PLACE OF INTEGRITY: 12TH GLOBAL FRAUD SURVEY 12 (2013), [http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/\\$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf](http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf) [<https://perma.cc/37KL-F5ZU>].

19. See *Helping Countries Combat Corruption*, *supra* note 15.

20. See *id.* (noting acts that constitute transnational bribery (TNB) are the bribery of government officials, or actions intended to influence government officials in order to gain government contracts, government benefits, lower taxes, or licenses; intention to extort; and intention to change the outcome of a legal proceeding).

21. See David Heifetz, *Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective than the U.S. Foreign Corrupt Practices Act*, 11 PAC. RIM. L. & POL'Y J. 209, 223 (2002).

22. See Foreign Corrupt Practices Act §§ 78-dd-1, 78-dd-3, 78-ff.

23. See Organization for Economic Co-operation & Development (OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Letter of Submittal, Dec. 17, 1997, Hein's No. KAV 5210 [hereinafter OECD Convention Combating Bribery].

24. See G.A. Res. 58/4, United Nations Convention Against Corruption, Detailed Analysis, U.N. Doc. A/RES/58/4, at 2 (Oct. 31, 2003) [hereinafter UNCAC].

25. See Bribery Act 2010, c. 23, § 7 (Eng.).

26. See INT'L BAR ASS'N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 221 (2009), <http://tinyurl.com/taskforce-etj-pdf> [<https://perma.cc/ZX45-U6NL>].

27. See U.S. DEP'T OF JUSTICE, CRIM. DIV. & SEC. & EXCH. COMM'N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012) [hereinafter GUIDE TO FOREIGN CORRUPT PRACTICES ACT].

28. See Foreign Corrupt Practices Act §§ 78-dd.

ment of Justice handle these sections, respectively.²⁹ In 1998, the FCPA was amended to expand its jurisdiction.³⁰ Specifically, the “foreign official” section was expanded to include anyone involved in a foreign corrupt practice or transaction that touched or concerned the United States.³¹ The FCPA continues to “shape the behaviors of many transnational businesses” and is one of the most well-enforced TNB laws.³²

Driven by the United States’ passage of the FCPA, the OECD approved the OECD Convention in 1997, the first international effort to fight TNB.³³ The OECD Convention entered into force in February 1999, and thirty-five member nations³⁴ and an additional six non-member nations³⁵ signed the convention. A majority of MNCs globally are subject to the OECD Convention based on their incorporation in a signatory country.³⁶ The OECD Convention was based principally on the language of the FCPA, including, for example, how the convention defines the offense of “bribery” and who qualifies as a “foreign official.”³⁷ Similar to the FCPA, the OECD Convention advocates for functional equivalence,³⁸ provid-

29. See GUIDE TO FOREIGN CORRUPT PRACTICES ACT, *supra* note 27, at 2, 4–5.

30. See Foreign Corrupt Practices Act §§ 78-dd; see also GUIDE TO FOREIGN CORRUPT PRACTICES ACT, *supra* note 27, at 4.

31. See Foreign Corrupt Practices Act §§ 78-dd.

32. Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 360 (2012); see also Jon Jordan, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN. ST. L. REV. 89, 94–95, 104–06 (2012).

33. See Jordan, *supra* note 32, at 99.

34. See OECD Convention Combating Bribery, *supra* note 23 (OECD Convention entered into force in February of 1999); see also *List of OECD Member Countries – Ratification of the Convention on the OECD*, OECD, <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> [<https://perma.cc/NH5U-SYS2>] (last visited Dec. 1, 2016) (Both the United Kingdom and Australia are members of the OECD for a total of thirty-five member countries.).

35. The six non-member countries are Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa. See *OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> [<https://perma.cc/YK2F-UXTR>] (last visited Nov. 13, 2016).

36. See Gemma Aiolfi & Mark Pieth, *How to Make a Convention Work: The OECD Recommendation and Convention on Bribery as an Example of a New Horizon in International Law*, OIL GAS & ENERGY L. INTELLIGENCE J. 1, 3 (2003) (This expansive coverage is important, because the OECD member countries account for fifty-nine percent of world gross domestic product, seventy-five percent of world trade, and ninety percent of foreign direct investment.).

37. See A. Keith Thompson, *Does Anti-Corruption Legislation Work?*, 16 INT’L TRADE & BUS. L. REV. 99, 106 (2013) (reprinted in 7 WORLD CUSTOMS J. 39, 43 (2013)).

38. Functional equivalence is the theory that “signatory countries would prosecute bribery of foreign public officials in the way they were already prosecuting bribery of their national officials.” It acknowledges that national, legal contexts differ, but “[f]unctional

ing a universal standard for TNB laws in the signatory countries.³⁹ Furthermore, the OECD Convention requires signatories to cooperate with other countries that may conduct criminal investigations by providing “to the fullest extent possible under [each party’s] laws . . . prompt and effective legal assistance.”⁴⁰ The OECD Convention has had success in galvanizing the most powerful economies into legislating against TNB.⁴¹ An example of this success is the United Kingdom’s passage of the UKBA in 2010, discussed in greater detail below.⁴²

Following the enactment of the OECD Convention, the U.N. General Assembly increased its own focus on TNB by passing the UNCAC in 2003, which entered into force in 2005.⁴³ To date, the UNCAC has 140 signatories and 180 parties.⁴⁴ The UNCAC requires signatories to criminalize various forms of corruption, including bribery, and discusses methods by which MNCs can prevent bribery.⁴⁵ Its goal is expansive, seeking to eradicate all forms of corruption,⁴⁶ and has already succeeded in generating increased international commitment to fighting TNB.⁴⁷

In recent years, a number of trends in TNB legislation have emerged, in large part due to countries’ implementation of their

equivalence allows harmonization without actually having to work on the basis of a single legal format.” *Functional Equivalence at the OECD – Anti-Corruption Conferences – Compliance in Russia & NIS*, ETHIC INTELLIGENCE (Jan. 6, 2016), <http://www.ethic-intelligence.com/compliance-tools/anti-bribery-and-anti-corruption-strategy/newsletter/3336-oecd-anti-corruption-convention-changed-way-companies-business> [<https://perma.cc/X3UQ-KTMV>].

39. See OECD Convention Combating Bribery, *supra* note 23, art. 1.1. This provision embodies the concept of functional equivalence, with requirements for TNB laws:

Each [p]arty shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to 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.

Id. art. 1.1.

40. See *id.* art. 9.

41. See Thompson, *supra* note 37, at 107.

42. See discussion *infra* Section I.B.

43. See UNCAC, *supra* note 24, at I.

44. See *United Nations Convention Against Corruption*, U.N. OFFICE ON DRUGS & CRIME (Nov. 5, 2015), <https://www.unodc.org/unodc/en/treaties/CAC/> [<https://perma.cc/BA5A-KD79>].

45. See UNCAC, *supra* note 24, arts. 12, 15–28.

46. See *id.* art. 1.

47. See Thompson, *supra* note 37, at 111.

obligations under the OECD Convention and the UNCAC.⁴⁸ Methods of TNB regulation vary by country and include: adoption of new legislation that criminalizes bribery, clarification of the scope of existing legislation, adoption of stronger penalties, addition of corporate and agent (also referred to as “associated persons”) liability to existing statutes, and the exercise of extraterritorial jurisdiction.⁴⁹ Countries that have recently enacted stricter anti-corruption statutes include Brazil, Colombia, Germany, and Russia.⁵⁰ These changes have been made largely in response to annual OECD Convention Reports that detail the status of corruption in each signatory country.⁵¹ Most prominently, the United Kingdom passed the UKBA in 2010 to combat TNB,⁵² in response to an OECD Convention Report in 2008.⁵³ The UKBA is now regarded as the strictest TNB legislation, because it not only criminalizes the offer of bribes (supply-side corruption), as do the FCPA and OECD Convention, but also criminalizes the request or agreement to receive bribes (demand-side corruption).⁵⁴

48. See *Trends in Anti-Bribery Laws*, TRANSPARENCY INT’L 1 (Mar. 7, 2012), http://www.transparency.org/files/content/corruptionqas/24_Trends_in_Anti-Bribery_laws.pdf [<https://perma.cc/M8A6-GUDK>] [hereinafter *Trends in Anti-Bribery Laws*].

49. See *id.* at 2, 6–7.

50. For a more complete list of recent developments submitted as of Feb. 22, 2012, see *id.* at 1–3.

51. See, e.g., Press Release, OECD, Brazil Closes Loophole on Foreign Bribery: OECD Hopes This Will Now Translate Into Stepped Up Enforcement (Oct. 29, 2014), <http://www.oecd.org/daf/anti-bribery/brazil-closes-legal-loophole-on-foreign-bribery-oecd-hopes-this-will-now-translate-into-stepped-up-enforcement.htm> [<https://perma.cc/FKB2-DZ8D>] (explaining how Brazil’s new anti-bribery law is pursuant to OECD obligations and increases foreign bribery regulation); Matteson Ellis & Alice Hsieh, *The “TSA:” Colombia’s New Foreign Bribery Law*, FCPAMERICAS (Apr. 22, 2016), <http://fcpamericas.com/english/anti-corruption-compliance/tca-colombias-foreign-bribery-law/#> [<https://perma.cc/U3VR-6YMR>] (noting Colombia’s new law is pursuant to OECD obligations and fixes previously noted deficiencies); Julie DiMauro, *Germany’s Anti-Bribery Laws Go the Distance (Part 1)*, FCPA BLOG (Apr. 14, 2014), <http://www.fcpablog.com/blog/2014/4/14/germanys-anti-bribery-laws-go-the-distance-part-1.html> [<https://perma.cc/T2TV-YTNZ>] (noting Germany’s new anti-corruption law is pursuant to OECD); *Trends in Anti-Bribery Laws*, *supra* note 48, at 4 (In 2011, Russia passed legislation to comply with OECD obligations.).

52. Martin Polaine, *A Guide to the U.K.’s Bribery Act 2010*, LONDON CTR. INT’L LAW PRAC. 2–3 (Feb. 16, 2015), <http://www.lcilp.org/wp-content/uploads/2015/02/A-Guide-to-the-UK%E2%80%99s-Bribery-Act-2010.pdf> [<https://perma.cc/CT2Q-TGA7>].

53. See *OECD Group Demands Rapid U.K. Action to Enact Adequate Anti-Bribery Laws*, OECD (Oct. 6, 2008) [hereinafter *OECD Group Demands Rapid U.K. Action*], <http://www.oecd.org/daf/anti-bribery/oecdgroupdemandsrapidukactiontoenactadequateanti-briberylaws.htm> [<https://perma.cc/98YN-9KLB>].

54. See discussion *infra* Section II.B; see also Bribery Act 2010, c. 23, §§ 1-2 (Eng.).

B. *A Closer Look at the United Kingdom's Anti-Corruption Scheme*

Passed in 2010 in reaction to an OECD Convention Report that criticized the United Kingdom's lack of progress in thwarting TNB,⁵⁵ the UKBA is the most comprehensive anti-corruption legislation currently in force.⁵⁶ The UKBA is considered one of the strongest anti-corruption statutes both substantively and procedurally, because of its content and jurisdictional reach,⁵⁷ as well as its commitment to enforcement.⁵⁸ Unlike other anti-corruption statutes, such as the FCPA, the UKBA criminalizes both the offering of bribes (supply-side corruption) and requesting or agreeing to receive bribes (demand-side corruption).⁵⁹ Furthermore, the UKBA applies to both acts committed in the United Kingdom and acts committed by persons or companies with a "close connection" to the United Kingdom.⁶⁰ The U.K. government proposed additional standards in 2014 to strengthen the UKBA.⁶¹ Specifically, the proposals recommended extending corporate liability to include failure to prevent *any* type of financial crime by staff, rather than the current standard of liability, which includes only failure to prevent acts of bribery by staff.⁶² However, this proposal

55. See Polaine, *supra* note 52; see also *OECD Group Demands Rapid U.K. Action*, *supra* note 53.

56. See Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1, 21 (2013).

57. See Sam Eastwood & Holly Quinnen, *Differences Between the U.K. Bribery Act and the U.S. Foreign Corrupt Practices Act*, NORTON ROSE FULBRIGHT (June 2011), <http://www.nortonrosefulbright.com/knowledge/publications/52195> [<https://perma.cc/DS9L-QTZ3>] (comparing the UKBA and FCPA).

58. See Nichols, *supra* note 32, at 366; see also Stephen J. Kobrin, *Globalization, Transnational Corporations and the Future of Global Governance*, in HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP 249, 253, 255, 259 (Andreas Georg Scherer & Guido Palazzo eds., 2008).

59. See Bribery Act 2010, c. 23, §§ 1–2 (Eng.).

60. "Close connection" for individuals means citizenship or residency, and for companies means incorporation or a presence in the United Kingdom. See Bribery Act 2010, c. 23, § 12 (Eng.); see also Transparency Int'l U.K., 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES 8 (2010) [hereinafter 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES], <https://www.transparency.org.uk/publications/adequate-procedures-guidance-to-the-uk-bribery-act-2010> [<https://perma.cc/3S9U-KYNZ>] (last visited Dec. 1, 2016).

61. See Richard M. Tolan & Jennifer Colegate, *Beefing up the U.K. Bribery Act 2010*, MAYER BROWN (Feb. 5, 2014), <https://www.mayerbrown.com/Beefing-up-the-UK-Bribery-Act-2010-02-05-2014> [<https://perma.cc/NW97-4Q69>] (The significance of this proposal is that it would "broaden the range of offences for which a corporation may be held liable, without the [Serious Fraud Office] having to satisfy the onerous 'controlling mind' test," as the standard for corporate liability under the UKBA is strict liability.).

62. See *id.* As of May 2016, the U.K. government decided to reconsider extending corporate liability for failure to prevent bribery to failure to prevent other financial crimes as well, such as money laundering and fraud. See also *Legislative Reform on "Failure to Prevent"*

was rejected because there is “little evidence of corporate economic wrongdoing going unpunished.”⁶³

MNC liability is found in UKBA Section 7, Failure of Commercial Organisations to Prevent Bribery.⁶⁴ In order to apply UKBA Section 7 to a MNC, the prosecution must first prove an “associated person” committed a Section 1 (General Bribery) or Section 6 (Bribery of Foreign Public Officials) offense.⁶⁵ Subsection 7(a) holds MNCs guilty of an offense if a person associated with the MNC bribes another person; the associated person must have intent to obtain or retain business or an advantage in the conduct of business of the MNC.⁶⁶ Although the “associated person” must satisfy an intent standard, Article 7 is a strict liability offense, and the MNC can be held liable without any mental element.⁶⁷ However, Section 7(b) provides a full defense for MNCs with proof of adequate procedures designed to prevent such conduct by associated persons.⁶⁸ Facilitation payments, which are payments of minor value to government officials to expedite an administrative

Economic Offenses, EVERSHEDES (Sept. 28, 2016), http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=EN/Fraud_and_financial_crime/Legislative_reform_on_failure_to_prevent_economic_offences [<https://perma.cc/CJ43-DRWB>].

63. See Ellen Rosen, *U.K. Abandons Move to Broaden Its Criminal Laws*, BLOOMBERG BNA (Sept. 29, 2015), <https://bol.bna.com/u-k-abandons-move-to-broaden-its-criminal-laws> [<https://perma.cc/8EP4-VHGN>] (The accuracy of such claims is debatable; the Crime Survey for England and Wales conducted by the United Kingdom's Office of National Statistics estimates that there were 5.1 million incidents of fraud between June 2014 and June 2015.); see also Fani Gamon, *Beware – Fraud Cases on the Rise!*, EDMONDS, MARSHALL, McMAHON (Oct. 16, 2015), <http://www.lexology.com/library/detail.aspx?g=3dd094e2-e3e7-42a4-a911-f3c5b2e50a2c> [<https://perma.cc/W74Z-74QS>] (explaining at the same time that fraud estimates have increased, prosecutions for fraud have decreased between 2011 and 2014).

64. See Bribery Act 2010, c. 23, § 7 (Eng.). Section 7 is necessary because the United Kingdom does not recognize *respondere superior*. See Peter Alldridge, *The U.K. Bribery Act: “The Caffeinated Younger Sibling of the FCPA”*, 73 OHIO ST. L.J. 1181, 1200 (2012). Furthermore, Section 7 significantly broadens corporate liability from the prior statute, the Prevention of Corruption Act 1906. See also *International Law Advisory – U.K. Parliament Passes Anti-Bribery Reform Law*, STEPTOE & JOHNSON LLP (Apr. 10, 2010), <http://www.steptoec.com/publications-6777.html> [<https://perma.cc/B6JA-628F>].

65. See Bribery Act 2010, c. 23, § 7 (Eng.). Because the UKBA overhauled the United Kingdom's entire TNB scheme and addresses all types of domestic and international bribery, multiple sections of the UKBA have to be read in concert. See MICHAEL FINE, COORDINATING U.K. BRIBERY ACT AND FCPA COMPLIANCE 5 (2011).

66. See Bribery Act 2010, c. 23, § 8(a) (Eng.). The addition of “associated persons” to the UKBA closed a prior loophole, in which MNCs could “outsource” payment of bribes to persons connected with the company. See *Trends in Anti-Bribery Laws*, *supra* note 48.

67. See Tollan & Colegate, *supra* note 61.

68. See Bribery Act, 2010, c. 23, § 7(b) (Eng.).

process,⁶⁹ were illegal in the United Kingdom prior to the UKBA, and remain so after its passage.⁷⁰

The Serious Fraud Office (SFO), an independent branch of the U.K. government, investigates and prosecutes offenses under the UKBA.⁷¹ Due to its relative infancy, the UKBA has only been used in a relatively few number of cases.⁷² At the end of 2015, the SFO concluded two Section 7 cases. The first, against ICBC Standard Bank PLC, ended with the first DPA in the United Kingdom.⁷³ In the second case, Sweett Group pled guilty in December 2015 for bribes paid to secure a contract to build a hotel in Dubai.⁷⁴ Additionally, in September 2015, Scottish company Brand-Rex Limited reached a civil settlement agreement with the Crown Office's Civil Recovery Unit for £212,800⁷⁵ after the company conducted an internal investigation and self-report under Section 7 that revealed that an employee offered travel tickets to a customer's employee.⁷⁶

69. See *Governments Agree to Step Up Fight Against Bribery*, OECD (Dec. 12, 2009), <http://www.oecd.org/corruption/governmentsagreetostepupfightagainstbribery.htm> [https://perma.cc/4DHS-F9LC].

70. See Bribery Act 2010, c. 23 (Eng.).

71. See *About Us*, SERIOUS FRAUD OFFICE, <https://www.sfo.gov.uk/about-us> [https://perma.cc/44LC-YKXQ] (last visited Nov. 6, 2016).

72. See John Doherty & Nicole Finlayson, *The U.K. Bribery Act 2010: Is Its Bite Worse Than Its Bark?*, PENNINGTONS MANCHES LLP (Aug. 12, 2015), <http://www.lexology.com/library/detail.aspx?g=6bc04f05-819f-4387-9472-dc598273c897> [https://perma.cc/8K5K-F5H6] (“Until recently, the Act had only been deployed in a handful of cases which generally involved bribery on a small scale and not in a commercial context.”).

73. See Charles E. Duross et. al, *Top Ten International Anti-Corruption Development for December 2015*, MORRISON & FOERSTER LLP (Jan. 14, 2016), <http://www.lexology.com/library/detail.aspx?g=5c2f890d-490d-4e28-a56d-98d7c47cdd41> [https://perma.cc/4TDG-XP2U] [hereinafter *Top Ten International Anti-Corruption Developments*]; see also discussion *infra* Section I.B.1. The DPA conditions included payment of US\$6 million plus interest to the government of Tanzania, disgorgement of US\$8.4 million in profits, a US\$16.8 million penalty, required cooperation with authorities in any matter arising out of the conduct, making an independent review of its anti-bribery policies in relation to existing laws such as the UKBA, and payment of the Serious Fraud Office's (SFO) costs. See Simon Airey, Tony Katz & Sam Miller, *Serious Fraud Office – First Conclusion of a Case Under Section 7 of the Bribery Act 2010 – First Deferred Prosecution Agreement*, DLA PIPER LLP (Dec. 3, 2015), <http://www.lexology.com/library/detail.aspx?g=4f6fa334-3003-4ce9-95f0-41ddb8d73c1e> [https://perma.cc/S3KW-CZ5Y]; see also Charles M. Thomson et. al, *U.K. Serious Fraud Office Secures Second Deferred Prosecution Agreement*, LEXOLOGY (July 19, 2016), <http://www.lexology.com/library/detail.aspx?g=23080527-9469-491e-8645-27115945eb9f> [https://perma.cc/9ATJ-AHMF].

74. See Duross et. al, *supra* note 73.

75. This value is equivalent to approximately US\$328,000 (calculated as of Mar. 2016).

76. See *Crown Office Recovers Over £200,000 From Company That Benefited From Illegal Conduct*, SCOTTISH LEGAL NEWS (Sept. 28, 2015), <http://www.scottishlegal.com/2015/09/28/crown-office-recovers-over-200000-from-company-that-benefited-from-illegal-conduct> [https://perma.cc/8CXT-KH4Q]. Note that the SFO operates in England and Wales,

Two other cases were brought successfully by the SFO under the UKBA in late 2014, although these were mainly focused on employee, rather than MNC, liability.⁷⁷ In one case, two former directors of Arck, an unregulated investment scheme, pled guilty to fraud after an investigation that began in 2012 exposed misleading and false representations made to investors.⁷⁸ The other case involved the prosecution and conviction of two employees of the Sustainable Growth Group for giving and accepting bribes.⁷⁹

Likewise, since its passage, only a few investigations have led to charges against corporations under the UKBA.⁸⁰ Most recently, the SFO brought charges against Alstom, a French company, after years of investigations of suspected bribery of foreign officials to win power and transportation contracts from government-owned entities.⁸¹

In addition, the UKBA implements a number of standards that MNCs are required to meet, but that also protect MNCs from liability.⁸² These include, as discussed in the following subsections, engaging in DPAs, implementing and providing guidelines for the APD, and banning the FPD.⁸³

1. Deferred Prosecution Agreements in the United Kingdom

Newly established in the United Kingdom, the UKBA permits the use of DPAs between the government and MNCs.⁸⁴ DPAs allow MNCs to defer prosecution in exchange for the MNC's admission

while the Crown Office operates in Scotland. *See also* Laura Clare & Rob Elvin, *Bribery in Scotland – Civil Settlement Under Bribery Act and the Scottish Crown Office*, ANTICORRUPTION BLOG (Apr. 19, 2016), <http://www.anticorruptionblog.com/united-kingdom/bribery-in-scotland-civil-settlement-under-bribery-act-and-the-scottish-crown-office> [<https://perma.cc/ZM4X-U5BZ>].

77. *See* Matthew Lane, *Two Jailed for Fraudulent Property Investment Scheme*, PROP. INV. TODAY (Oct. 15, 2015), <https://www.propertyinvestortoday.co.uk/breaking-news/2015/10/two-jailed-for-fraudulent-property-investment-scheme> [<https://perma.cc/5VV6-UCKQ>]; *see also* Doherty & Finlayson, *supra* note 72.

78. *See* Lane, *supra* note 77.

79. *See* Doherty & Finlayson, *supra* note 72.

80. *See Our Cases*, SERIOUS FRAUD OFFICE, <https://www.sfo.gov.uk/our-cases> [<https://perma.cc/6NWU-SPRK>] (last visited Nov. 13, 2016) (providing information about ongoing investigations, charges brought against individuals, and charges brought against corporations).

81. *See* Reid Whitten, *They Grow Up So Fast: Alstom and the U.K. Bribery Act at Five Years*, NAT'L L. REV. (May 20, 2015), <http://www.natlawreview.com/article/they-grow-so-fast-alstom-and-uk-bribery-act-five-years> [<https://perma.cc/6VJG-9DAZ>].

82. *See* discussion *infra* Sections I.B.1–I.B.3.

83. *See* discussion *infra* Section I.B.1–I.B.3.

84. DPAs are also widely utilized in the United States. *See* U.S. Attorney's Manual, §§ 9–16.300 (2008).

of its insufficiencies and compliance with a stringent set of conditions that demonstrate good conduct.⁸⁵ The OECD advocates the following:

[S]ettlement procedures should respect the principles of due process, transparency and consistency. For this reason, the outcome of the settlement should be made public[,] . . . especially the reasons why the settlement was appropriate, the basic facts of the case, the legal or natural persons sanctioned, the sanctions agreed, and the terms of the agreement.⁸⁶

MNCs generally have a favorable attitude towards DPAs, and have been willing to accept stringent conditions under DPAs rather than face prosecution.⁸⁷ DPAs are lauded as the most efficient way to resolve cases of TNB, because they save significant time and resources that would be required to prosecute in court.⁸⁸

The United Kingdom adopted DPAs in 2014, after which the SFO began to investigate corporations more aggressively under the UKBA.⁸⁹ The Deferred Prosecution Agreements Code of Practice, established by the Crime and Courts Act of 2013, gives clear instructions on negotiations and terms of agreement⁹⁰ that follow

85. See Louise Roberts, *Is the First U.K. Deferred Prosecution Agreement on the Horizon?*, NAT'L L. REV. (Sept. 8, 2015), <http://www.natlawreview.com/article/first-uk-deferred-prosecution-agreement-dpa-horizon> [<https://perma.cc/233B-VHYK>] (DPAs differ from pleading guilty and paying a settlement, because MNCs can still be prosecuted for failure to comply with the conditions of the DPA.).

86. Elisabeth Danon, *U.K. Bribery Act: Pre-Trial Agreements Are a Turning Point for Global Enforcement*, FCPA BLOG (Feb. 18, 2016), <http://www.fcpablog.com/blog/2016/2/18/uk-bribery-act-pre-trial-agreements-are-a-turning-point-for.html> [<https://perma.cc/233B-VHYK>] (quoting OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials (2014)).

87. See Roberts, *supra* note 85 (Stringent conditions can include fines and other financial penalties, repayment of profits, required cooperation with an investigation, and implementation of internal procedures to prevent corruption.).

88. See Danon, *supra* note 86 (Government investigators of fraud have restricted resources for combating TNB.); see, e.g., *Australian Anti-Bribery & Compliance Trends*, RICHARD BISTRONG (Nov. 4, 2015), <http://richardbistrong.com/australian-compliance> [<https://perma.cc/MFT2-8HSB>] ("Australia's approach to foreign bribery and corruption has been fairly timid. This is due to a lack of agency resources and coordination and laws which are quite narrow and do not focus on controls."); *Serious Fraud Office Requests 'Urgent' £15.5m as Part of £21m Additional Funding*, OUT-LAW.COM (Jan. 11, 2016), <http://www.out-law.com/en/articles/2016/january/serious-fraud-office-requests-urgent-155m-as-part-of-21m-additional-funding> [<https://perma.cc/U6Z4-8QJW>] (The SFO requested an additional US\$24 million to assist the cost of investigations for 2015–2016 because "[t]he SFO continues to be underfunded" and "[a]n underfunded investigator into serious fraud . . . sends the wrong message, encourages fraudsters and risks the reputation of [the United Kingdom] as a good place to do business.").

89. See Roberts, *supra* note 85.

90. See SERIOUS FRAUD OFFICE AND CROWN PROSECUTION SERVICES, DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE: CRIME AND COURTS ACT 2013 (2013).

the OECD's recommendations.⁹¹ In the United Kingdom, for a MNC to get a DPA, the agreement must have fair, reasonable, and proportionate measures, and may include a financial penalty or redress for victims and requirements for compliance.⁹² The SFO may only negotiate with a MNC if it believes it is in the public interest, and the U.K. judiciary must approve the final agreement.⁹³ Additionally, the SFO needs only a "reasonable suspicion" that an offense has been committed, rather than the "realistic prospect of conviction" required to implement a criminal proceeding in the United Kingdom.⁹⁴ Self-reporting by a MNC does not shield it from prosecution, but considerations of public interest weigh against prosecution if a MNC self-reports.⁹⁵

2. The Adequate Procedures Defense in the United Kingdom

The UKBA is the only anti-bribery law offering MNCs the APD to an allegation of failure to prevent bribery.⁹⁶ Under the APD, MNCs can make a showing that they implemented a system to prevent bribery within the company.⁹⁷ The SFO has provided guidance on what meets "adequate procedures" for a bribery prevention system.⁹⁸ Six factors are used to evaluate the sufficiency of internal systems to prevent bribery: (1) proportionate procedures, (2) top-level commitment, (3) risk assessment, (4) due dili-

91. See Danon, *supra* note 86.

92. See SERIOUS FRAUD OFFICE AND CROWN PROSECUTION SERVICES, *supra* note 90, § 7.2; see also Ben Allen, *Deferred Prosecution Agreements: A New Weapon for Australia in Its Anti-fraud and Corruption Armoury?*, NORTON ROSE FULBRIGHT 3, 4 (June 2014), <http://www.nortonrosefulbright.com/files/deferred-prosecution-agreements-117175.pdf> [<https://perma.cc/ZV9D-F8BR>].

93. See Allen, *supra* note 92.

94. See *id.*

95. See Vivian Robinson, *U.K.: U.K. Bribery Act*, MONDAQ (Jan. 15, 2014), http://www.mondaq.com/article.asp?article_id=286122&signup=true [<https://perma.cc/5PYG-Q9TU?type=image>].

96. See Jessica Fisher & Geoffrey Gauci, *The U.K. Bribery Act and the U.S. FCPA: The Key Differences*, ASS'N CORP. COUNS. (June 1, 2011), <http://www.acc.com/legalresources/quickcounsel/UKBAFCPA.cfm?makepdf=1> [<https://perma.cc/U8MU-PB5T>].

97. See Bribery Act, 2010, c. 23, § 7 (Eng.) ("(2) But it is a defence for [the commercial organization] to prove that [it] had in place adequate procedures.").

98. See *The Bribery Act 2010*, MINISTRY JUST. (2011), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> [<https://perma.cc/42HC-XMDN>] [hereinafter *2010 U.K. Bribery Act: Guidance*]; see also 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES, *supra* note 60; *The 2010 U.K. Bribery Act Adequate Procedures Checklist*, TRANSPARENCY INT'L. U.K. (July 2010), <http://www.transparency.org.uk/publications/adequate-procedures-checklist-pdf> [<https://perma.cc/XH98-P2VP>].

gence, (5) communication (training), and (6) monitoring and review.⁹⁹

First, proportionate procedures means that the procedures implemented by a MNC to prevent bribery should be proportionate to the risk that a particular MNC faces, taking into account the nature, scale, and complexity of its activities.¹⁰⁰ Second, top-level commitment requires that the MNC demonstrate its commitment to bribery prevention at its highest levels of management, with a senior person taking responsibility for the program.¹⁰¹ Third, risk assessment compels the MNC to carry out periodic assessments of its potential exposure to bribery and to maintain records of these assessments.¹⁰² Fourth, due diligence requires appropriate checks “on persons performing services for the organization, and those persons should in turn be required to carry out similar checks on the persons they deal with.”¹⁰³ Fifth, communication (training) ensures that bribery prevention policies are communicated internally and externally and that employees receive continuous training.¹⁰⁴ Finally, monitoring and review certifies that the procedures are being followed.¹⁰⁵

3. Illegality of Facilitation Payments in the United Kingdom

The use of facilitation payments has always been illegal in the United Kingdom and is still illegal under the UKBA.¹⁰⁶ Often, these are called “grease” or “speed” payments, and consist of unofficial, small payments made to foreign government officials to secure or expedite a routine government action.¹⁰⁷ Confusion or

99. See DECHERT LLP, *Bribery & Corruption – United Kingdom*, in BRIBERY & CORRUPTION (Jonathan Pickworth & Deborah Williams eds., 2014); see also Christopher David & Michael Roach, *Adequate Procedures – The Current State of Play*, WILMERHALE (Nov. 10, 2015), <http://www.jdsupra.com/legalnews/adequate-procedures-the-current-state-66793> <https://perma.cc/5HRC-563G>].

100. See David & Roach, *supra* note 99.

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.*

106. See 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES, *supra* note 60, at 28. There are only five countries that allow a facilitation payments defense (FPD): Australia, Canada, New Zealand, South Korea, and the United States. See M. Scott Peeler & J. Carson Pulley, *Internationalizing the FCPA: Ending the Facilitation Payments Exception and U.S. Anti-Corruption Hypocrisy*, 24 NO. 19 WESTLAW J. GOV'T CONT., at *4 (Jan. 24, 2011).

107. See Kevin Robinson, *Pressure Gauge: Facilitation Payments Under the U.K. Bribery Act, Fraud Intelligence*, MORGAN LEWIS (Apr. 7, 2014), <https://www.morganlewis.com/pubs/pressure-gauge-facilitation-payments-under-the-uk-bribery-act-fraud-intelligence> [<https://>

intentional blurring of the line between facilitation payments and bribery is eliminated under the UKBA, because the UKBA does not provide individuals or MNCs with a FPD.¹⁰⁸ The SFO will prosecute violations involving facilitation payments if the case is particularly serious or complex, there is sufficient evidence for conviction, and prosecution is in the public interest.¹⁰⁹ Although the SFO has yet to bring a prosecution solely for a facilitation payments violation, it is possible that they will become common once the SFO has brought more successful UKBA cases.¹¹⁰

In the United Kingdom, the issue of facilitation payments is tied to the APD, because the APD can mitigate the risk of prosecution when illegal facilitation payments have occurred.¹¹¹ In addition to internal systems for bribery, a MNC can further protect itself from liability if it has procedures in place to handle incidents involving facilitation payments.¹¹² For example, MNCs can implement policies that require management and employees to reject facilitation payments, record details of who requested such a payment and for how much, and report any incidents.¹¹³ Additionally, the UKBA also recognizes the duress defense if an employee finds himself in an extreme circumstance where there is no alternative but to make a payment, for example when there is a threat to life, limb, or liberty.¹¹⁴

C. *Transnational Bribery in Australia*

1. Current Australian Statutory Scheme

Passed in 1999, the Commonwealth Criminal Code Act (CCA) Section 70, Bribery of Foreign Public Officials, contains Australia's

perma.cc/H5EK-M4A5] (For example, facilitation payments may take the form of expedited permit or visa applications.).

108. See 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES, *supra* note 60, at 11, 29 (The line between facilitation payments and bribery is made even brighter by the UKBA's specific guidance on whether the Crown Prosecution Service will bring action against payments. Factors considered are the frequency of occurrence, whether the solicitation is akin to extortion, and whether courts would impose a nominal fee.).

109. See *id.*

110. See Robinson, *supra* note 107 (More successful cases seem to be inevitable as evidenced by the SFO's increasing scrutiny of illegal payments.).

111. See 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES, *supra* note 60 (Additionally, the FPD is less impactful to MNCs because the use of DPAs "suggest[s] that the [FPD] no longer provides much protection at all.).

112. See *id.*

113. See Robinson, *supra* note 107.

114. See 2010 U.K. Bribery Act: Guidance, *supra* note 98, at 19.

anti-bribery law.¹¹⁵ A person is guilty of bribery committed in Australia when: (1) the person provides a benefit to another person, offers or promises to provide a benefit to another person, or causes a benefit to be provided, offered, or promised to another person; (2) the benefit is not legitimately due to the other person; and (3) there is an intent to influence a foreign public official in the course of his duties to retain or obtain business or a business advantage.¹¹⁶ An Australian citizen, resident of Australia, or company incorporated in Australia may be held liable for extraterritorial corrupt actions under the CCA.¹¹⁷

CCA Section 12, Corporate Criminal Responsibility, applies when there is an intent requirement in a specific provision.¹¹⁸ For example, the bribery provision requires intent to influence a foreign official.¹¹⁹ Section 12.2 states that MNCs can be held liable for actions of their employees, if the conduct was committed in the scope of the person's employment and the company's board of directors or management "expressly, tacitly or impliedly authorized or permitted the commission of the offense,"¹²⁰ or there is a demonstrated "corporate culture of 'looking the other way' or encouraging bribery" to facilitate business.¹²¹

Under the CCA, MNCs have two possible defenses. The first, CCA Section 70.3, provides a defense for conduct that is lawful in the foreign public official's country.¹²² The section provides eleven possible scenarios in which the MNC would not be held liable.¹²³ For example, if a MNC employee's conduct was directed toward an employee or official of a foreign government body, occurred entirely in the place where the central administration of the body is located, and the law in that place permits provision of

115. For purposes of this Note, the abbreviation "CCA" acts as a general reference to the bribery offense unless otherwise specified.

116. See *Criminal Code Act 1995* (Cth) s 70 (Austl.); see also *Foreign Bribery Fact Sheet 2*, AUSTRAL. GOV. [hereinafter *Foreign Bribery Fact Sheet 2*], <https://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/Documents/Factsheet-Theforeignbriberyoffence.pdf> [<https://perma.cc/QEX2-766U>] (last visited Nov. 13, 2016).

117. See *Foreign Bribery Fact Sheet 2*, *supra* note 116.

118. See *Criminal Code Act 1995* (Cth) s 70 (Austl.).

119. See *id.* s 70.

120. See *id.* s 12.

121. *Australia's Anti-Bribery and Corruption Laws May Become More Stringent*, INT'L TRADE ADVISORS [hereinafter *Australia's Anti-Bribery and Corruption Laws*], <http://www.internationaltradeadvisors.com.au/index.php/australiasbriberylaws> [<https://perma.cc/8J33-7BFQ>] (last visited Nov. 13, 2016).

122. See *Criminal Code Act 1995* (Cth) s 70.3 (Austl.).

123. See *id.*

the benefit, then neither the individual nor the MNC can be held liable.¹²⁴

The second defense is the FPD, embodied in CCA Section 70.4.¹²⁵ Under this defense, an individual or MNC is not guilty of a bribery offense if: (1) the benefit was of a minor nature, (2) the conduct was for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature, (3) the individual made a record of the conduct as soon as possible after it occurred, and (4) the individual maintained relevant records, the records were destroyed in a manner that the individual could not prevent, or the prosecution occurs more than seven years after the conduct.¹²⁶

To date, only two prosecutions have been initiated under CCA Section 70.¹²⁷ CCA prosecutions are often expensive, lengthy, and require evidence collection from foreign jurisdictions.¹²⁸ For example, the Reserve Bank of Australia was charged with bribery in 2011, but litigation is still ongoing.¹²⁹ The Australian Federal Police have for years been investigating numerous companies for bribery, including BHP Billiton, CIMIC, and Tenix,¹³⁰ and ten new foreign bribery investigations were initiated between 2012 and 2015.¹³¹ However, prosecutions are likely to increase following the establishment of the Australian Federal Police Fraud and Anti-Corruption Centre (FAC Centre).¹³² The FAC Centre is tasked with

124. *See id.*

125. *See id.* s 70.4.

126. *See id.*

127. *See* Richard Baker & Nick McKenzie, *Companies Investigated for Foreign Bribery Should be Able to Cut Deals: BHP*, SYDNEY MORNING HERALD (Sept. 29, 2015), <http://www.smh.com.au/business/mining-and-resources/companies-investigated-for-foreign-bribery-should-be-able-to-cut-deals-bhp-20150928-gjwb5k.html> [<https://perma.cc/VKD2-E3LW>].

128. *See Criminal Code Act 1995* (Cth) s 70.4 (Austl.).

129. *See id.*

130. *See id.*

131. *See* Nicola Austin, Jessica Azzi & Jamie Nettleton, *Foreign Bribery in Australia and Overseas: 5 Things You Need to Know*, ADDISONS 1, 2 (Dec. 23, 2015), http://www.addisonslawyers.com.au/knowledge/assetdoc/4a15fafeb80deb39/1690533_1%20Foreign.pdf [<https://perma.cc/D7W6-3H9H>].

132. *See Public Interest Disclosure Act 2012* (Cth) ss 32–33 (Austl.); *see also* Henry Belot, *Australian Federal Police (AFP) Launches Fraud and Anti-Corruption Centre in Canberra*, CANBERRA TIMES (Jul. 31, 2014), <http://www.canberratimes.com.au/act-news/australian-federal-police-afp-launches-fraud-and-anticorruption-centre-in-canberra-20140731-zytd7.html> [<https://perma.cc/P5WV-GZVY>] (The Australian Federal Police Fraud and Anti-Corruption Centre brings together agents from multiple federal agencies to better combat fraud and corruption, following over 100 allegations of corruption, crime, and incompetence within the federal government made under a whistleblower provision of the Public Interest

enhancing the response to fraud, investigating corruption by government employees, and investigating foreign bribery and complex identity crime.¹³³

2. Australia's Urgent Need to Reform Its Transnational Bribery Law

Numerous countries have enacted statutory schemes to fight corruption, but they have not been as effective in bribery prevention as the UKBA.¹³⁴ Although a majority of MNCs globally operate in countries that are signatories to the OECD Convention,¹³⁵ in total only 23.1 percent of world trade occurs under active anti-bribery enforcement.¹³⁶ Australia is one country that has been criticized following its decline on the Corruption Perception Index, which indicates an increased risk for MNCs operating in Australia of foreign TNB law violations.¹³⁷ Furthermore, a recent survey estimated the country lost AU\$322.2 million¹³⁸ to fraud in 2012.¹³⁹

Like the United Kingdom, Australia responded to an OECD Country Report's criticism of Australia's TNB law by opening a

Disclosure Act that entered into force in 2014.); Baker & McKenzie, *supra* note 127; Austin, Azzi & Nettleton, *supra* note 131.

133. See *Fraud and Anti-Corruption*, AUST. FED. POLICE, <https://www.afp.gov.au/what-we-do/crime-types/fraud/fraud-and-anti-corruption> [<https://perma.cc/EXD3-HGGM>] (last visited Nov. 14, 2016).

134. See *Trends in Anti-Bribery Laws*, *supra* note 48 (listing countries that have passed new or amended existing anti-bribery legislation); see also OECD, *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, <http://www.oecd.org/daf/anti-bribery/countryreports/ontheimplementationoftheoecdanti-briberyconvention.htm> [<https://perma.cc/AZ3N-64B5>] (last visited Nov. 14, 2016); Spahn, *supra* note 56, at 21 (noting that the UKBA is the "most strict and feared" of foreign bribery laws).

135. See discussion *supra* Section I.A.

136. See Finbarr Bermingham, *Less Than a Quarter of World Trade Meets OECD Anti-Corruption Standards*, INT'L BUS. TIMES (Oct. 23, 2014), <http://www.ibtimes.co.uk/less-quarter-world-trade-meets-oecd-anti-corruption-standards-1471461> [<https://perma.cc/WU5R-WTZX>] (The countries with active anti-bribery enforcement are the United Kingdom, United States, Germany, and Switzerland.).

137. See Kyle R. Bahr & Thomas H. Suddath, Jr., *2015 Corruption Perceptions Index, A Vital Anti-Bribery Compliance Tool, Highlights Global Corruption Risks for Corporations*, REED SMITH (Jan. 28, 2016), <http://www.mondaq.com/unitedstates/x/462182/White+Collar+Crime+Fraud/2015+Corruption+Perceptions+Index+a+Vital+AntiBribery+Compliance+Tool+Highlights+Global+Corruption+Risks+for+Corporations> [<https://perma.cc/8RPL-LQCH>].

138. This loss is equivalent to approximately US\$227 million (calculated as of Mar. 2016).

139. See KPMG, *A SURVEY OF FRAUD, BRIBERY AND CORRUPTION IN AUSTRALIA & NEW ZEALAND* 15 (2013), <http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Fraud-Survey/Documents/fraud-bribery-corruption-survey-2012v2.pdf> [<https://perma.cc/PY6V-S4FD>] (last visited Nov. 6, 2016).

Senate inquiry into its bribery laws.¹⁴⁰ The Senate Standing Committee on Economics began its inquiry on June 24, 2015, and has delayed submission of a report until June 30, 2017.¹⁴¹ The committee is looking at the effectiveness of and presenting potential improvements to CCA Section 70, with an eye toward making Australia's law more comparable to provisions of the FCPA and UKBA.¹⁴² The committee's analysis is based in part on submissions from forty organizations and individuals that have provided comments on the current law.¹⁴³ Many of the submitting organizations and individuals consider the current form of CCA Section 70 inadequate to prevent bribery.¹⁴⁴ Recommendations include: adoption of liability for directors and senior management for not implementing anti-bribery procedures, adoption of liability of parent companies for subsidiaries, removal of the FPD, and creation of protections for whistleblowers.¹⁴⁵ In addition, some have advocated for the use of DPAs as an effective means to "address corpo-

140. See *Australian Senate Announces Foreign Bribery Inquiry*, ALLEN & OVERY (June 30, 2015), <http://www.jdsupra.com/legalnews/australian-senate-announces-foreign-21808> [<https://perma.cc/SC5K-QHP2>].

141. The Senate Standing Committee on Economics was set to report in July 2016, but was not completed prior to the dissolution of the 44th Parliament in May 2016. See *Foreign Bribery, Australian Standing Committee, 44th Parliament*, *supra* note 10. The 45th Parliament has re-adopted the inquiry and is expected to report by June 30, 2017. See *Foreign Bribery, Australian Standing Committee, 45th Parliament*, *supra* note 10.

142. See Austin, Azzi & Nettleton, *supra* note 131.

143. See, e.g., *Submissions Received by the Committee*, SENATE STANDING COMMITTEE ON ECON. REFERENCE, COMMITTEE ON FOREIGN BRIBERY, PARLIAMENT OF AUSTL., http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions [<https://perma.cc/GG6L-F59N>] (showing list of downloadable documents that were submitted to the committee). Because the committee has re-adopted its inquiry into Australia's foreign bribery law, it is accepting additional submissions. See *Foreign Bribery, Australian Standing Committee, 45th Parliament*, *supra* note 10.

144. See Rani John, *Top 4 Potential Changes to Look Out for in Australia's Foreign Bribery Regime*, LEXOLOGY (Dec. 10, 2015), <http://www.lexology.com/library/detail.aspx?g=E7d19ed7-2e98-4785-9fdc-23e42a35b628> [<https://perma.cc/BXX6-J7NL>].

145. Although there are a number of ways to improve the anti-bribery laws in Australia, this Note focuses on DPAs, the APD, and the FPD because they are resources directly related to protecting MNCs. See Austin, Azzi & Nettleton, *supra* note 131; see also John, *supra* note 144. Other reform efforts have already resulted in changes to the law: the Australian Senate passed legislation for new accounting provisions on February 3, 2016, which entered into force March 1, 2016. See *Criminal Code Act 1995* (Cth) pt. 10.9 (Austl.); Andrew Emmerson, *Australia's Anti-Bribery Laws to Get Extra Bite with False Accounting Offense*, GLOBAL COMPLIANCE NEWS (Feb. 11, 2016), <http://globalcompliancenes.com/australias-anti-bribery-laws-to-get-extra-bite-with-false-accounting-offence> [<https://perma.cc/386W-39JP>] (discussing implication of the provisions before they were passed); *New False Accounting Offences Commence Operation in Australia*, HERBERT SMITH FREEHILLS LLP (Mar. 17, 2016), <http://www.lexology.com/library/detail.aspx?g=C15f8415-2058-472e-85f0-377033c38db9> [<https://perma.cc/DM3T-X6KQ>].

rate wrongdoing, fraud, and corruption[, and] assist Australian authorities and enforcement bodies in their endeavours.”¹⁴⁶

II. ANALYSIS

Australia should follow the example of other countries, in particular the United Kingdom, by adopting DPAs and the APD, and eliminating the FPD. These changes will allow companies to know what they must do to comply with Australia's anti-bribery law, increasing corporate compliance and decreasing TNB.

A. *Adoption of New Legislation in Australia*

Australia lacks several safe harbors for MNCs, including DPAs or the APD. First, with the addition of DPAs, MNCs can avoid prosecution by complying with conditions set by the prosecuting agency, and in some cases by judicial approval of conditions.¹⁴⁷ Compliance with DPAs serves a two-fold purpose that furthers both the government's and MNC's objectives: requiring MNCs to observe practices that limit corrupt acts while simultaneously reducing the risk of later prosecution.¹⁴⁸

Second, with the addition of the APD, MNCs can avoid prosecution if they can show they have in place a set of internal procedures aimed at bribery prevention.¹⁴⁹ In Australia, although MNCs may be held liable for the corrupt actions of their employees, that only occurs when the prosecution can show a corporate culture of looking the other way or encouraging bribery.¹⁵⁰ Unlike the UKBA scheme, MNCs in Australia are not required to take any affirmative steps to prevent corruption.¹⁵¹ This is significant for MNCs operating in Australia, because the APD applies only when companies are required to have some system of prevention in place.¹⁵²

Third, Australia still retains the FPD, unlike many other countries.¹⁵³ Because this puts Australian businesses at risk of liability for facilitation payments under other TNB laws, and because facili-

146. See Allen, *supra* note 92.

147. See SERIOUS FRAUD OFFICE AND CROWN PROSECUTION SERVICES, *supra* note 90, §§ 1.1, 1.6; see also U.S. Attorney's Manual, §§ 9–16.300 (2008).

148. See Baker & McKenzie, *supra* note 127.

149. See 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES, *supra* note 60.

150. See *Australia's Anti-Bribery and Corruption Laws*, *supra* note 121.

151. Compare Bribery Act 2010, c. 23, § 7 (Eng.), with *Criminal Code Act 1995* (Cth) s 70 (Austl.).

152. See Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 59–63 (2013).

153. See Peeler & Carson, *supra* note 106, at 4.

tation payments are in effect forms of bribery, Australia should remove the FPD from the CCA.¹⁵⁴ The following subsections address these proposals in turn.

1. Inclusion of Deferred Prosecution Agreements

Currently, Australia does not have a scheme for DPAs with MNCs. Like the United Kingdom, Australia should incorporate a system for DPAs into its anti-corruption laws.¹⁵⁵ The United Kingdom detailed the requirements of DPAs in its Crime and Courts Act of 2013.¹⁵⁶ Similarly, Australia should pass requirements for DPAs through a separate act, or incorporate them into the CCA as new provisions.¹⁵⁷ The language adopted should include conditions that may be imposed, provision for judicial oversight, considerations for self-reporting, and consequences for breach.¹⁵⁸

For example, once the Australian prosecutor and the MNC have negotiated terms of a DPA, the government could be required to get approval from the judiciary to the language of: “(a) entering into a DPA with [a person or MNC] is likely to be in the interests of justice and (b) the proposed terms of the DPA are fair, reasonable and proportionate.”¹⁵⁹ The types of punishments that might be included in a DPA include payment of fines, disgorgement of profits, required cooperation with the investigation, and implementation of internal procedures to prevent corruption.¹⁶⁰ The DPA should also provide for judicial leniency for MNC self-reporting.¹⁶¹

154. See Tanya Rolo, *Note: Retaking the Helm Against International Bribery: The Facilitating Payments Exception and Sovereign Dominance*, 35 FORDHAM INT'L L.J. 1884, 1924 (2012).

155. See *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreement Scheme in Australia*, AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL'S DEPARTMENT 22 (Mar. 2016), <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/Deferred-Prosecution-Agreements-Discussion-Paper.pdf> [https://perma.cc/44PR-SUVH]. The government released a request for responses to fourteen questions related to whether Australia should adopt DPAs in March 2016, and received submissions in May 2016. *Id.*; see also *Australian Government Considers Deferred Prosecution Agreements: Public Consultation Paper*, KING & WOOD MALLESONS (Mar. 18, 2016), <http://www.lexology.com/library/detail.aspx?g=D1ef355c-9676-4926-8f80-a1fe3b91dad3> [https://perma.cc/2L6L-2RH4]. These submissions are currently being considered by the Attorney-General's Department. See *Deferred Prosecution Agreements – Public Consultation*, ATTORNEY-GENERAL'S DEPARTMENT OF AUSTRALIA, <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx> [https://perma.cc/RU33-SX3F] (last visited Dec. 1, 2016).

156. See SERIOUS FRAUD OFFICE AND CROWN PROSECUTION SERVICES, *supra* note 90.

157. In either, Australia may list the applicable offenses under which a DPA may be entered.

158. See Crime and Court Act (2013) c. 22 (Eng.).

159. See, e.g., *Criminal Code Act 1995* (Cth) s 70 (Austl.).

160. See Crime and Court Act (2013) c. 17 (Eng.).

161. See Bribery Act (2010), c. 23, § 7 (Eng.).

Currently, cooperation with law enforcement may be taken into account in sentencing;¹⁶² however, this has not proven effective in encouraging self-reporting.¹⁶³ If the consequence for self-reporting was a DPA, rather than immediate prosecution, MNCs may be more likely to self-report.¹⁶⁴ Finally, the DPA provision should have consequences if a MNC breaches a DPA.¹⁶⁵ This could take the form of judicial approval of an agreement between the prosecutor and MNC to remedy the breach, or judicial approval to terminate the DPA, thus paving the way for prosecution.¹⁶⁶

2. Addition of the Adequate Procedures Defense

In Australia, MNCs may be held liable for the corrupt actions of their employees if the prosecution can show a corporate culture of looking the other way or encouraging bribery.¹⁶⁷ This is in contrast with the UKBA, which requires MNCs to take affirmative steps—implementation of adequate procedures—to prevent corruption.¹⁶⁸ Therefore, for the APD to apply in Australia, Australia must first require MNCs to actively implement procedures to reduce TNB. To do this, liability must be established not for mental elements of knowledge or intent,¹⁶⁹ but for actions taken by persons “associated with” the MNC.¹⁷⁰ Similar to the United Kingdom, Australia could incorporate this requirement under a new offense that would mirror the UKBA’s “failure of commercial

162. See Annette Hughes & Adam Purton, *Australian Senate to Inquire into the Effectiveness of Australia’s Foreign Anti-Bribery Measures*, CORRS CHAMBERS WESTGARTH (July 16, 2015), <http://www.lexology.com/library/detail.aspx?g=372e6454-37e9-4e80-bef5-439a5feff570> [https://perma.cc/DFW3-SLQM].

163. See OECD, PHASE 3 REPORTING ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN AUSTRALIA 28–29, 50 (Oct. 2012), <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf> [https://perma.cc/MA6E-YT2W].

164. See Carter Newell, *Senate Inquiry into Foreign Bribery: Suggestions for Reform of Australia’s Existing Commonwealth Foreign Bribery Laws*, LEXOLOGY (Jan. 31, 2016), <http://www.lexology.com/library/detail.aspx?g=D2b0b583-8937-4caf-83ca-a319e10e3273> [https://perma.cc/XZD6-RJTZ].

165. See SERIOUS FRAUD OFFICE AND CROWN PROSECUTION SERVICES, *supra* note 90, § 12; see also Allen, *supra* note 92.

166. See SERIOUS FRAUD OFFICE AND CROWN PROSECUTION SERVICES, *supra* note 90, § 12.

167. See *Australia’s Anti-Bribery and Corruption Laws*, *supra* note 121.

168. See Bribery Act 2010, c. 23, § 7 (Eng.).

169. As currently required by CCA Section 12.2, prosecutors must show that the MNC had a corporate culture of looking the other way or encouraging bribery, reflecting the need to prove mental elements as compared to the strict liability offense of failure to prevent bribery. Compare *Criminal Code Act 1995* (Cth) s 70 (Austl.), with Bribery Act 2010, c. 23, § 7 (Eng.).

170. Such a standard would reflect the UKBA, in which corporations can be liable if a person “associated with it” commits acts of bribery. See Bribery Act 2010, c. 23, § 7 (Eng.).

organisations to prevent bribery” offense.¹⁷¹ By altering the scope of liability, Australia could adopt the APD, replicating language from the UKBA: “But it is a defence for *C* [commercial organization] to prove that *C* had in place adequate procedures to prevent persons *associated with C* from undertaking such conduct.”¹⁷²

If such a provision were adopted, it would shift the evidentiary burden from the prosecution (to show a mental element) to the MNC (to show adequate procedures).¹⁷³ Thus, although the offense would be strict liability, it would also incorporate the full defense of adequate procedures.¹⁷⁴ To aid MNCs in complying with the new provision, Australia could circulate guidance, like the United Kingdom did, on what constitutes adequate procedures.¹⁷⁵ This could include the six-factor analysis, incorporating the elements of proportionate procedures, top-level commitment, risk assessment, due diligence, communication (training), and monitoring and review.¹⁷⁶

3. Removal of the Facilitation Payments Defense

Most countries do not have a FPD, and Australia should follow this trend by eliminating CCA 70.4 (Facilitation Payments Defense). Critics in Australia have encouraged the removal of this defense, mainly because the existence of the FPD maintains an environment that condones bribery, and MNCs may still be liable under other statutes that do not allow facilitation payments.¹⁷⁷ Although some have suggested that Australia should simply provide greater guidance on what constitutes a facilitation payment versus an unlawful bribe,¹⁷⁸ facilitation payments are still bribery and are therefore bad for business.¹⁷⁹ For example, if a MNC

171. See Bribery Act 2010, c. 23, § 7 (Eng.).

172. See Bribery Act 2010, c. 23, § 7 (Eng.) (emphasis added).

173. See Newell, *supra* note 164.

174. See *id.*

175. See generally 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES, *supra* note 60 (providing example of guidance given in the United Kingdom to explain adequate procedures).

176. See DECHERT LLP, *supra* note 99 (Additionally, there have been suggestions that MNCs should include systems for internal whistleblowing.); see also Newell, *supra* note 164 (Although not within the scope of this Note, amendment to the whistleblowing statute is also ripe for reform in Australia.).

177. See Newell, *supra* note 164.

178. See *id.*

179. See Rolo, *supra* note 154, at 1927 (quoting Erin Reilly Lewis, *Training for Avoidance of Potential Future Criminal Liabilities in PUNISHING CORPORATE CRIME: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS* 91, 92 (2009) (internal citations omitted) (discussing the benefits of creating a culture that does not permit corruption and how facilitation payments have the potential to increase costs in the long term)).

develops a reputation for paying even small amounts, foreign officials are more likely to demand payments for subsequent transactions, which increases the cost of doing business abroad for Australian MNCs.¹⁸⁰ However, to aid MNCs that may have relied on the FPD, Australia could implement a phasing out period for the defense to allow them to alter their corporate procedures.¹⁸¹ Such changes in procedures could include those advanced by the UKBA, such as instructing management and employees to reject facilitation payments, record details of who requested such a payment and for how much, and report any incidents.¹⁸² Similarly, as under the UKBA, if an employee finds himself in an extreme circumstance where there is no alternative but to make a payment—for example, when there is a threat to life, limb, or liberty—the duress defense would be recognized.¹⁸³

4. Reducing Corruption Through Reform

It is imperative for Australia to change its law and “commit[] to ramp up efforts to tackle foreign bribery”¹⁸⁴ in order to reduce TNB. Because MNCs are subject to different anti-corruption laws in different countries,¹⁸⁵ the best outcome would be to have clear standards that MNCs must meet to be eligible for alternatives to prosecution. Each of the recommended reforms necessitates long-term change in MNC corporate culture.¹⁸⁶

DPAs and the APD can benefit both the Australian government and MNC communities because they can prevent long and costly litigation, while simultaneously encouraging MNCs to implement procedures that enhance corporate compliance with TNB laws.¹⁸⁷ Australia’s willingness to consider these options incentivizes MNCs to self-report instances of bribery¹⁸⁸ and to reform their internal

180. See Rolo, *supra* note 154.

181. See Newell, *supra* note 164.

182. See Robinson, *supra* note 107.

183. See 2010 U.K. Bribery Act: *Guidance*, *supra* note 98, at 19.

184. Lisa Main, *Australia Continues to Slide Down International Corruption Index, Perceived as ‘More Corrupt’*, ABC NEWS (Jan. 27, 2016), <http://www.abc.net.au/news/2016-01-27/australia-perceived-as-more-corrupt/7118632> [<https://perma.cc/LMA5-X7UG>].

185. See Beasley, *supra* note 8, at 193.

186. See Newell, *supra* note 164.

187. See discussion *supra* Sections I.B.1–I.B.2.

188. See Leo Shanahan, *Keenan Talks Up New Penalties*, AUSTRALIAN (Mar. 17, 2016), <http://www.theaustralian.com.au/business/legal-affairs/keenan-talks-up-new-penalties/news-story/f0e16e74b7774e22ce8ab80108d4baf7> [<https://perma.cc/65WD-D89C>] (quoting Justice Minister Michael Keenan, “Our agencies face challenges in detecting, investigating and prosecuting serious corporate crime. Identifying bribery and other corporate

requirements,¹⁸⁹ both of which decrease corruption through compliance.¹⁹⁰ Furthermore, removal of the FPD also warns MNCs that they can be held liable for actions that are almost universally considered bribery unless they actively educate employees on procedures for rejection and report of attempted facilitation payments.¹⁹¹ By incorporating provisions of the UKBA into its own law, Australia can provide a comprehensive set of expectations for MNCs operating in the country, decrease TNB, and make its anti-corruption law among the strongest internationally.¹⁹²

B. *A Second Look at Koala Bean*

Turning back to Koala Bean, the above recommendations can be considered in the context of this fictional MNC. If Australia were to adopt DPAs, Caffeine may have been able to enter into a DPA with the Australian Federal Police. Such an agreement would likely consist of requirements similar to those mandated in the United Kingdom.¹⁹³ For example, Caffeine could agree to implement corporate policies that address the recommended factors to better educate employees and prevent bribery: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (training), and monitoring and review.¹⁹⁴ Additionally, Caffeine would likely be required to pay a fine.¹⁹⁵ Finally, Koala Bean would be placed under supervision for a fixed term to ensure compliance with the agreement.¹⁹⁶

Under current Australian law, Caffeine is not required to take any steps, such as may address the six factors above, to create and maintain a corporate culture that promotes compliance with anti-

wrongdoing often depends on companies co-operating or whistleblowers coming forward, but under current arrangements there is little incentive for companies to do so[.]”).

189. See SERIOUS FRAUD OFFICE AND CROWN PROSECUTION SERVICES, *supra* note 90, § 7; see also Roberts, *supra* note 85 (emphasizes the importance of corporations' cooperation with SFO criteria in securing a DPA).

190. See John, *supra* note 144.

191. See Bribery Act 2010, c. 23, § 7 (Eng.).

192. See discussion *supra* Section I.B.

193. See Crime and Courts Act 2013 (2013), c. 22, § 17 (Eng.).

194. See DECHERT LLP, *supra* note 99.

195. See Bribery Act 2010, c. 23, § 7 (Eng.); Crime and Courts Act 2013 (2013) (Eng.).

196. See Bribery Act 2010, c. 23, § 7 (Eng.); Crime and Courts Act 2013 (2013) (Eng.).

Koala Bean could agree to these terms in exchange for three years deferred prosecution, as was the case with ICBC Standard Bank in the United Kingdom. See Riyaz Dattu, Malcolm Aboud & Daniel Fombonne, *Deferred Prosecution Agreement: Standard Bank's Prosecution Under the U.K. Bribery Act Suspended for Three Years*, OSLER (Dec. 11, 2015), <https://www.osler.com/en/resources/cross-border/2015/deferred-prosecution-agreement-standard-bank-s-pr> [<https://perma.cc/C9H8-TBBD>].

bribery regulations.¹⁹⁷ In the hypothetical, Caffeine did not implement adequate procedures, but even if she had, it would not have been an adequate defense.¹⁹⁸ However, if Australia were to create an APD, Caffeine would have been able to raise the defense if she had known that MNCs were expected to implement—and therefore she had—adequate procedures when she created Koala Bean.¹⁹⁹ She would have been more likely to require Koala Bean to meet certain internal compliance standards if she was aware of the defense and the responsibility of MNCs to apply such measures.²⁰⁰ Under this scenario, Caffeine as an individual and Koala Bean as an entity would be able to raise the APD and avoid liability for Crook's wrongdoing.²⁰¹

In contrast, Koala Bean may have been liable for Crook's facilitation payment to the Ethiopian government official if Australia removed the FPD, although it is unlikely that Australia would prosecute based only on the grounds of a small sum made as a facilitation payment.²⁰² Significantly, Caffeine would not have been subject to liability in the United Kingdom under the UKBA if she could have demonstrated adequate procedures or had made clear to her employees that facilitation payments are illegal.²⁰³

CONCLUSION

Preventing internal corruption remains a challenge and a point of exposure for MNCs. By adopting DPAs and the APD and removing the FPD, Australia can provide clearer guidance on MNC responsibilities for compliance with the law. Furthermore, bringing the Australian law in line with the strictest TNB statute, the UKBA, reduces the threat of liability for offenses that are illegal

197. See *Criminal Code Act 1995* (Cth) s 70 (Austl.).

198. As discussed in Part II, this defense only applies where there is a responsibility on MNCs to create such procedures.

199. See *Bribery Act 2010*, c. 23, § 7 (Eng.) (“(2) But it is a defence for [the commercial organization] to prove that [it] had in place adequate procedures.”). This analysis assumes Australia incorporated a similar standard to that quoted here.

200. See *Bribery Act 2010*, c. 23, § 7 (Eng.); see also John, *supra* note 144 (suggesting that one potential change to Australia's anti-bribery regime could be to require corporations to implement anti-bribery procedures).

201. See *supra* note 198.

202. As in the United Kingdom, Australia can analyze whether the case is particularly serious or complex, there is sufficient evidence for conviction, and prosecution is in the public interest. Compare 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES, *supra* note 60, with *Criminal Code Act 1995* (Cth) s 70.4 (Austl.).

203. See *Bribery Act 2010*, c. 23, § 7 (Eng.).

under the UKBA, while also providing alternatives to prosecution for MNCs acting in good faith to improve corporate compliance.

Although Australia is currently focusing its attention on reforming its anti-corruption law, every country can benefit from making the recommended adjustments to their laws. This will enable MNCs to operate globally, recognizing their responsibilities and potential defenses as they relate to potential liability for bribery and corrupt acts of their employees and management. There is room for greater and more expedient progress in corruption reduction. The possibility of deferred prosecutions and a defense for implementation of adequate procedures to promote corporate compliance, as well as the rejection of facilitation payments, are just a few practices that can aid in the fight to reduce corruption globally.

