JONATHAN BARNARD

THEY'RE HERE: ANTI-BRIBERY LEGISLATION AND ITS ENFORCEMENT IN THE UK, USA AND AUSTRALIA

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Friday 1st July 2011 saw dramatic movement in the fight against global corruption. In the UK, a major piece in the jigsaw of global anti-bribery legislation slotted into place as the Bribery Act came into force. Meanwhile, Division 70 of the Australian Criminal Code, a less familiar piece of that same jigsaw, made its debut when Federal police arrested a number of former executives of Securency International Pty Ltd (Securency) for corruption.

Those arrests on the other side of the world in the Securency case, while less heralded than the Bribery Act, are just as significant to those advising companies and individuals on the risks of becoming embroiled in multi-jurisdictional bribery investigations. The facts behind the arrests can be briefly stated. Securency is a joint venture company which is co-owned by the Australian Reserve Bank and Innovia Films, a UK packaging company. Australian prosecutors allege that Securency made corrupt payments of millions of dollars to government officials in Vietnam, Malaysia and Indonesia to secure highly lucrative contracts for the production of polymer banknotes.

The Securency investigation marked yet another milestone in the increasingly co-operative and co-ordinated relationship between international anti-bribery agencies. Reflecting the ownership of Securency, the investigation was also joint: between the Australian Federal Police and the Serious Fraud Office (SFO). That international investigation has borne fruit in both northern and southern hemispheres. While Securency and a number of its former senior executives face trial in Australia, the SFO is prosecuting William Lowther, OBE, CBE, for allegedly funding a degree at Durham University for the son of the Governor of the State Bank of Vietnam as part of the same conspiracy.[1]

In the UK the Securency investigation saw the SFO launch one of its biggest raids to date, with co-ordinated search warrants executed in both Australia and Spain. The then-SFO Director Richard Alderman proclaimed, "*This is an excellent example of how anti-fraud agencies around the world are working together to fight economic crime. It requires much painstaking preparation to co-ordinate action like this and I am delighted that our collective hard work has resulted in successful searches in a number of jurisdictions*".[2]

Those raids were symptomatic of two converging themes: the increasingly international imprint of corruption and the increasing appetite for law enforcement agencies worldwide to overcome the legal and investigative problems historically posed by those international characteristics. In their global web of connections, investigations have come to reflect the very corruption they are investigating. The joint Australian/UK probe into Securency, for example, has now been bolted on to the SFO corruption investigation into Alstom, which now sprawls over much of Europe, since it was discovered that both cases featured the same allegedly corrupt agent.[3]

The greatest significance of the Securency trial in Australia, however, is that it is taking place at all. Astonishingly, the trial represents the first ever prosecution under Australia's twelve year old anti-bribery legislation. Could the State's reluctance to enforce those laws have been instilled by the pragmatic anticipation that even the sunburnt Australian dollar would find life too hot under investigations which would inevitably scrutinise ways of doing business with the

1 Businessman denies bribing Vietnam bank chief, FT, 9 March 2012
2 Coordinated global searches in relation to Securency International PTY Ltd, SFO Press release, 6 October 2010.
3 Alstom at centre of web of bribery enquiries, New York Times, 29 March 2010.

country's major trading partners? It must have been that very fear which motivated federal prosecutors in the Securency trial to take the extraordinary step of applying to have part of the trial heard in private on the basis that an open court would lead to exposure of information that would "damage Australian foreign relations".[4] After the failure of that application, Australian prosecutors may well find it more attractive in their second, third and fourth investigations into corruption to focus on corporates with fewer direct links to their own governmental institutions. They certainly have the legislation to gun for foreign-owned companies and there are positive reasons to train their sights upon them rather than Australian enterprises. As the SFO frequently points out, there is little point in prosecuting one's own companies if the rest of the world is left to secure international trade through ongoing and endemic bribery.[5]

With the sleeping giant of Australia about to wake up on the global anti-corruption stage, this second part of an examination of cross border legislation focuses upon three jurisdictions: the UK, the USA and Australia. Distant are the days when multinationals needed to be wary only of single jurisdictions when assessing compliance with anti-bribery laws. Under the nurturing of the Organisation for Economic Co-operation and Development (of which the UK, the USA and Australia are all members), laws are sprouting around the world whose branches reach far beyond the nation in whose statute books they are rooted. Anti-bribery legislation from those three regimes has been specifically designed to bust through the historic impediments of international boundaries.

With joint ventures between companies increasingly seen as the ideal vehicle to graft together multinational business interests, this article uses the prism of a hypothetical joint venture company to reflect upon the workings of those anti-bribery legislations. Consider, therefore, a Joint Venture Company (JVC) and its parents: one from Australia (Ausco) and one from the UK (UKco). JVC, incorporated in Indonesia where its project is based, is 51% owned by Ausco and 49% owned by UKco. Ausco has shareholders in the UK (the number of whom it is actively seeking to increase) and is also registered as an issuer on the New York Stock Exchange. The JVC board and management committee are both Ausco controlled through majority representation. In addition to being JVC's 49% owner, UKco is also subcontracted by JVC as the project manager. Now let us assume that, one year into the project, Ausco and UKco have uncovered systemic bribery taking place between JVC employees or representatives (JVC perpetrator) and government officials in Indonesia. Should Ausco and UKco be worried that even that past bribery might ensnare them in an internecine bribery investigation from any or all of our chosen three jurisdictions?

UK: BRIBERY ACT 2010

The SFO has indicated that it will seek to minimise any perceived disadvantage to complying UK companies by actively seeking to prosecute non-complying foreign companies where it can. Although in many aspects the Bribery Act 2010 (the Act) reproduces that which it replaced, section 7, pertaining to the failure of commercial organisations to prevent bribery, represents a significant development in the policing of international corporate bribery. First, it has an extraordinarily wide jurisdictional

4 Feds fail to suppress details of bribery case, Sidney Morning Herald, 15 August 2012.

5 Dealing with Bribery, Commissions and Money-Laundering in the Middle East, Richard Alderman, 21 July 2009.

reach and secondly, it criminalises the failure of a corporate to prevent bribery carried out on its behalf. Its precise ambit is untested. Pursuant to section 9 of the Act, the Secretary of State has produced "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing" (the Guidance) in relation to section 7. The Act stands apart from anti-bribery legislation in the USA and Australia in one critical aspect: it contains no carve-out for facilitation payments.

SECTION 7: OFFENCE OF FAILING TO PREVENT

Under section 7, a company will be liable to prosecution if a person associated with it bribes another intending to obtain or retain business or an advantage in the conduct of business for that company (an offence of being bribed under section 2 is excluded). It is therefore an offence of strict liability. The company will have a full defence if it can prove on a balance of probabilities that, despite the assumed offence having been committed, it nevertheless had adequate anti-bribery procedures in place.

The combined effect of section 7(3) and 12(5) is that it matters neither where the offence under section 7(1) took place, nor the nationality of the perpetrator, nor whether the offence has been prosecuted. Jurisdiction is thereby universal. Conduct amounting to bribery committed by a JVC perpetrator in Indonesia would therefore qualify.

Section 7 is engaged by bribery carried out by a "person associated" with a "relevant commercial organisation". Two issues therefore arise:

i. whether either of the companies is a 'relevant commercial organisation' and
ii. whether the JVC perpetrator would be a 'person associated' with either company

within the meaning of the Act.

A relevant commercial organisation includes one that carries on part of a business in the UK (s7(5)(b)). The Guidance makes clear that the courts, applying a "common sense approach", will be the final arbiters as to whether an organisation carries on part of a business in the UK (paragraphs 34 & 36). UKco, self-evidently, carries on part of its business in the UK and thereby falls squarely within the definition of a relevant commercial organisation within the terms of section 7. Ausco, on the other hand, has no business or operations in the UK beyond the fact that the company intends to solicit investors. On this aspect, the Guidance states:

> "...the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a 'relevant commercial organisation' for the purposes of section 7." (paragraph 36)

To a large degree, promotional events are concomitant with being listed on the LSE. Strictly speaking, however, those activities are more than the 'mere fact' of being listed. Large road shows and serial events organised by professional PR companies may tip the balance into being business in the UK *beyond* the mere fact of being listed. The first company to find out where the division lies may

well find itself falling, unwittingly, on the wrong side of that line. Ausco, therefore, may well fall within the definition of a relevant commercial organisation.

We turn to the next issue regarding Ausco and UKco's liability: would the JVC perpetrator qualify as an associated person in relation to Ausco/UKco within the meaning of the Act? As Ausco owns 51% of JVC, JVC can properly be described as a subsidiary of Ausco's, but not UKco's. The Act goes no further than the delimiting and inclusive statement that an associated person may include a company's subsidiary (section 8(3)). The Guidance notes that an associated person can be "an individual or an incorporated or unincorporated body" and that "the concept of a person who 'performs services for or on behalf of' the organisation is intended to give section 7 **broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf**" (paragraph 37, emphasis added).

The Guidance stresses that the issue of whether a person or company is associated with the relevant commercial organisation will be determined in a way that takes account of all the factual circumstances: while the legal or formally-structured relationship between the parties may be a significant factor, it will not be determinative.

The Guidance develops this approach in the context of a joint venture entity (JVE). It states that the existence of a JVE will not of *itself* mean that the JVE is 'associated' with any of its members: a bribe paid on behalf of JVC in our example by one of its employees or agents will therefore not trigger liability for members of the joint venture *simply* by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture (Guidance, paragraph 40). Something more would be needed.

The Guidance also states that where a JVE is a separate legal entity, as is the case in our example, "a bribe paid by [JVC] may lead to liability for [Ausco/UKco] if the joint venture is performing services for [Ausco/UKco] and the

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bribe is paid with the intention of benefiting [Ausco/UKco]" (paragraph 40). Two issues therefore arise:

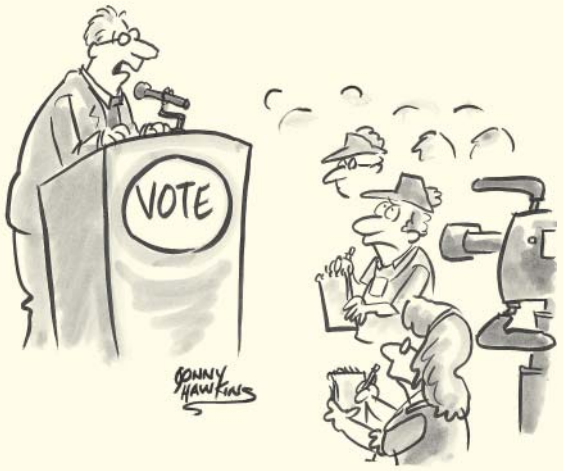
i. would the JVC perpetrator be seen as performing services for Ausco/UKco?
ii. would the JVC perpetrator's bribe be paid with the intention of benefiting Ausco/UKco?

In a strict sense, it could be properly argued that an employee or representative of the project would be performing services for JVC as the party with whom he contracted, not Ausco/UKco, with whom he has no contract. But the answer may not be that simple. The Guidance continually refers to the "degree of control" one party has over another to aid determination of whether one is performing services on behalf of the other. At paragraph 39, the Guidance addresses the relationships between parties in a supply chain, stating that "an organisation is likely only to exercise control over its relationship with its contractual counterparty...it is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain". At paragraph 41, the Guidance states that the degree of control exercised by one participant in a joint venture over the contractual arrangement within the JVC "is likely to be one of the relevant circumstances that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was performing services for or on behalf of" that participant.

UKco's position as project manager may bring a JVC perpetrator within the definition of an associated person. Bearing in mind the considerable degree of control which is likely to be exercised by UKco as project manager over the JVC perpetrator and in light of the deliberately broad scope of section 7, it seems likely that the JVC perpetrator will be deemed to perform services for or on behalf of UKco and therefore qualify as an "associated person" in relation to UKco, despite the lack of a contractual relationship. Ausco's considerable control of JVC through its dominance of the JVC board and management committee is the route by which it might be established that a JVC perpetrator is a person associated with Ausco.

However, it is not enough to prove that a JVC perpetrator is an associated person through structure alone: there is also the *mens rea* element to consider. Paragraphs 42 and 43 of the Guidance are of particular significance in relation to the requisite *mens rea* of the associated person (section 7(1)(a) and (b)):

> "42. Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the



"When I took the special-interest money, it didn't *seem* all that special "

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organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. **The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent**. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, **liability for a parent company could arise where a subsidiary is the 'person' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa**." [emphasis added]

It would therefore seem that this segregation of an intention to provide *indirect* benefit to an organisation would be enough to insulate Ausco against being defined as associated with the JVC perpetrator. Ausco is therefore likely to be saved by this last hurdle and be (relatively) safe from prosecution. However, UKco, as Project Manager with responsibility over the day to day running of JVC, could very easily benefit directly from bribes paid by a JVC perpetrator (facilitation payments being but one generic and significant example). It therefore seems likely that a JVC perpetrator would be an associated person in relation to UKco.

The next issue, then, is whether UKco could bring itself within the section 7(2) defence. That matter is highly fact specific, being determined by the company's adherence to the principles set out in the Guidance, and therefore not amenable to the broad brush strokes of this hypothetical example. It should be noted, however, that UKco's application of the six principles would not only be assessed in relation to activity internal to the company but also that which is external, including its influence over JVC. Even though JVC is not a subsidiary of UKco, the proper application of the principles would likely demand that UKco use its minority holding in and contractual relationship with JVC to influence JVC's anti-bribery compliance.

MAIN BRIBERY OFFENCES: SS1, 2 & 6

It is important not to overlook the main bribery offences (i.e., sections 1, 2 and 6) when analysing a corporate body's exposure to the Act. The Guidance reminds the reader that:

> "The section 7 offence is in addition to, and does not displace, liability which might arise under sections 1 or 6 of the Act where the commercial organisation itself commits an offence by virtue of the common law 'identification' principle."

Section 12 sets out the Act's jurisdiction. As UKco is incorporated under the law of the UK, 12(4)(h) would bite. However, jurisdiction could be engaged in relation to Ausco in either of the following ways:

i. If any act or omission which forms part of the offence takes place in the United Kingdom (s12(1));
ii. One of perpetrators falls within one of the categories 12(4)(a) to (g).

Therefore if the JVC perpetrator, for example:

i. Made or received a telephone call in the UK which formed part of the bribery, for example seeking authority from a UKco executive acting as project manager or
ii. Sent or received an email in the UK which formed part of the bribery, or
iii. Transferred funds forming part of the bribe to or through the UK, or
iv. Is or was a British subject

the Act would be engaged and the offence could be prosecuted in the UK. Importantly, the conferring of jurisdiction over the offence in this manner would bring with it jurisdiction over any alleged perpetrator of the offence, including Ausco.

Were the matter to be prosecuted by the UK authorities, the next question is whether liability of the JVC perpetrator could be used to incriminate the companies for one of the main bribery offences. The starting point (in all three jurisdictions) is that Ausco and UKco are both legal entities which are separate from the JVC perpetrator. Liability for the act of the JVC perpetrator could therefore not flow from the JVC perpetrator to the companies by virtue of their various relationships (i.e. as owner or manager) **alone**.

In our example, Ausco and UKco have already formed the view that the JVC perpetrators are bribing Indonesian government officials. These facts may expose the companies to the allegation that they either did an act which formed part of the offence or did an act in preparation for it. As is illustrated by the examples set out in paragraph 26 (above), the former bracket is very wide indeed.

Consideration of whether the companies aided or abetted the JVC perpetrator casts the net still wider. The mechanical paying of a bribe that goes to benefit a large corporate usually leaves a trail (paper or electronic) in its wake going back up the bureaucratic chain that authorised it. Therefore if the JVC Board approved payment, for example, or the release of specific funds to JVC employees or representatives which they realised *might* be used to pay a bribe, they could be prosecuted for the offence as a secondary party, subject to jurisdiction and proof of the requisite *mens rea*.

Inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England are justiciable in England and Wales (see Lord Diplock in the *Privy Council's decision in Somchai Liangsiriprasert v. Government of the USA* [1991] 1 A.C. 225, at p251). Therefore either of the companies could be convicted as secondary parties if either knew of the facts which constituted the bribery and did an act which actively assisted or encouraged the JVC perpetrator (*Johnson v Youden* [1950] 1 K.B. 544, DC). Either company would have to contemplate that it was a 'real possibility' that the JVC perpetrator would commit an offence of bribery (*R. v. Powell & English* [1999] 1 A.C. 1, HL), not a fanciful possibility (see *R. v. Roberts*, 96 Cr. App. R. 291).

Moreover, knowledge of the JVC perpetrator's offence, coupled with a deliberate decision not to control his actions despite the ability to do so could be a further route to constituting secondary party liability in relation to the companies: through encouragement (see *Tuck v. Robson* [1970] 1 WLR 741, DC - licensee convicted of aiding and abetting customers who consumed alcohol after permitted hours; *R v Webster* [2006] 2 Cr. App.R. 6, CA - W's failure to take the opportunity of intervening to stop the driver of the car (which W owned) from driving dangerously when W was the passenger thereby exercising his right as owner would lead to the inference that he was associating himself with the dangerous driving).

Ausco, having de facto control over the governance and UKco over the management of JVC, could both be susceptible to the accusation that they knew about the JVC perpetrator's bribery, had a right to implement adequate anti-bribery procedures to stop it but failed to do so, thereby incriminating themselves as secondary parties. The key issue would be the knowledge of the directing mind and will of each company.

To fix either UKco or Ausco with the requisite *mens rea* under the main bribery offences (as principals or secondary parties), UK law uses the doctrine of identification, proving the guilt of the 'the directing will and mind' of the company. This is usually done by proving what was in the mind of one of the company's directors (see Lord Reid's opinion in *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153 and Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, at p. 172). However, the parameters of the company's mind are not limited to that of the directors. The doctrine of identification is flexible enough to allow for a company to delegate tasks, in whole or in part, to its agent, thereby fixing the company with the knowledge of that agent. This has been taken to include a senior manager who concealed his fraud from the board and was prepared to lie to any director who had asked him about it (*Bank of India v Morris* [2005] BCC 739 (CA); also see *Greener Solutions Ltd v Revenue & Customs* [2012] UKUT 18 (TCC) where the knowledge of an agent also applied to the company despite the agent having acted in breach of his duty and *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 A.C. 500, from 506-511, in which the knowledge of the chief investment officer of the company was attributed to the company although he had kept what he knew from the directors). Therefore if the senior officers themselves do not know sufficient detail, it may be that those managing the project, lower down the corporate structure, have the requisite level of knowledge to fix UKco with culpability, providing they have sufficient delegated authority.

"How would you like the books cooked – Cajun blackened, stir fried, or poached in a light cream sauce?"

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A conspiracy to commit bribery seems a less likely eventuality in our example, depending on the specific facts.

It would also be highly unlikely that the issue of lifting the corporate veil would be raised in the circumstances of our example because:

i. JVC is not a 'mere sham' but a significant joint venture company with a material product (see *Trustbor AB V Smallbone* (no.2) [2001] 1 W.L.R. 1177 and *Adams v Cape Industries plc* [1990] Ch 433 , 536)
ii. JVC's joint ownership structure would be a significant complication to piercing the corporate veil: it is for this reason that cases in which the corporate veil has been pierced tend to be those

involving just one owner behind the 'mask' company (see *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, 96).

It also seems unlikely that the relationship between the JVC perpetrator and either company could be construed as one of agent and principal. The JVC perpetrator would be contracted to JVC and therefore be acting in accordance to duties owed to JVC, not Ausco or UKco.

US: FEDERAL CORRUPT PRACTICES ACT 1977 (FCPA)

There is no enforcement regime in the world more aggressive than that in the USA when it comes to prosecuting companies with a link to acts of bribery. The Department of Justice (DoJ) and Securities Exchange Commission (SEC) fully deserve their Rotweiller reputation for their unremitting pursuit of corporate targets perceived to be behind unearthed acts of bribery. Once bribery has been exposed, the real battleground for companies in command of the structure that fostered it is almost always over the method of disposal (i.e., anything from a deferred prosecution agreement to a full-blown criminal conviction). Part of the reason for the overwhelming power enjoyed by these bodies is that much of it is wielded beyond the eyes of judicial oversight in the form of deferred prosecution agreements.

The FCPA is part of the Securities Exchange Act of 1934. It has two main provisions: the anti-bribery provisions on the one hand and the books and records and internal control provisions on the other. The anti-bribery provisions make it unlawful to bribe foreign government officials to obtain or retain business (private persons are excluded). Unlike the ACT, it contains a carve-out for facilitation payments. US jurisdiction depends upon whether the violator is a "domestic concern", a "foreign business" (an "issuer" pertains to the books and records offences and is dealt with below). A "domestic concern" includes a corporation which has its principal place of business in the United States (see 15 U.S.C. §78dd-2.(h)(1)), and therefore has no application to either UKco or Ausco. Each, however, undoubtedly qualifies as a "foreign business".

MAIN BRIBERY OFFENCE

The first issue is whether the FCPA would have jurisdiction over the offence. §78dd-3 (a) sets out the prohibition against bribery for a foreign business:

> "It shall be unlawful for **any person**... or for **any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States**, corruptly to make use of the mails or any means or instrumentality of interstate commerce or **to do any other act in furtherance of** an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization

"Taking bribes is understandable Senator, but you really shouldn't keep billing records."

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of the giving of anything of value to –

(3) **any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official**, to any foreign political party or official thereof, or to any candidate for foreign political office, **for purposes of** –

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, **any person**." [emphasis added]

The person who does the bribing can be "any person" (beyond a US registered issuer or a US company, both of which have their very own sections of the FCPA): a company's nationality is therefore irrelevant to the application of the FCPA. The JVC perpetrator, Ausco and UKco all qualify as "any person".

The FCPA's threshold for territoriality is extremely low, being engaged by "any other act in furtherance of" the corrupt payment "while in the territory of the United States". Whether the FCPA is engaged will therefore be a matter of fact, specific to the circumstances of the individual case, but it should be noted that the wording deployed by the statute, i.e., "any act of furtherance of", casts an extremely wide net likely to scoop up those which in the UK would more comfortably be described as preparatory acts. In 2010, the Department of Justice relied on an act as seemingly minor as money transferring through US bank accounts as a jurisdictional nexus against Daimler, specifying in the Information: "wire transfers as sent from Daimler accounts in Germany to financial institutions in the United States and elsewhere, via international and interstate wires, in furtherance of corrupt payments to Russian government officials" (See http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerrussia-info.pdf). Against Panalpina, a foreign based non-issuer company, the relevant US nexus was specified as being one e-mail sent from the US and one conference call between the US and Switzerland in which a certain Nigerian payment was discussed (see paragraph 57 of the Information at http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-info.pdf). Therefore a bank transfer or a telephone call or an email from or to the USA by either of the companies in furtherance of the corrupt payment would establish FCPA jurisdiction.

Subsection (3), above, prohibits payments to "any person" (such as the JVC perpetrator) "while knowing that all or a portion of such money or thing of value" will be paid as a bribe. The routing of the payment through intermediaries, including joint venture partners or agents, therefore provides no defence.

Any payment to the JVC perpetrator would therefore be unlawful while *knowing* that all or a portion of the payment was going directly or indirectly to a foreign official as a corrupt payment. The FCPA defines the term "knowing" as including conscious *disregard* and *deliberate ignorance*: see §78dd-3(f)(3):

"A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—
(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."

Having discovered the endemic bribery within JVC, Ausco and UKco would be highly vulnerable to having it proved that they knew of a 'culture of corruption' at JVC were they to allow it to continue. The phrase 'culture of corruption' appeared in the *Panalpina* case (above): the Information accused the non-US parent company, PWT, of knowing of a 'culture of corruption' that pervaded Panalpina, its wholly-owned US subsidiary company: "the highest levels of PWT's leadership, including a former member of PWT's Board of Directors, knew of and tolerated Panalpina's payments of bribes" (see Information, paragraphs 14 and 15).

The companies would have to know that the payment would be *intended* to induce the eventual recipient to misuse his official position to direct business wrongfully to the payer or to any other person (see *Stichting v. Schreiber*, US Court of Appeals, Second Circuit, 327 F.3d 173:

"44. We thus conclude that the word "corruptly" in the FCPA signifies, in addition to the element of "general intent" present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position. But there is nothing in that word or anything else in the FCPA that indicates that the government must establish that the defendant in fact knew that his or her conduct violated the FCPA to be guilty of such a violation."

If the matter is being prosecuted criminally, § 78ff(a) of the FCPA requires proof that the violation was *wilful* in addition to the corrupt intent. Justice Stevens in *Bryan v US*, 524 U.S. 184 (1998) at pp 191-200, held that this meant that the defendant must know that his actions were unlawful (not that he knew of the particular law that made his actions so).

One critical difference between the FCPA and the Act is that attribution under the FCPA is far simpler and easier. Instead of the doctrine of identification, the FCPA uses that of *respondeat superior*, in which the companies could be fixed with the requisite knowledge through an "officer, director, employee, agent... or any stockholder". Therefore if an Ausco or UKco employee had a hand in authorising or even discussing a payment, part of which was destined to a JVC employee, knowing that there was a high probability that some of that payment would be used to bribe an Indonesian official, Ausco or UKco would be guilty of an offence under the FCPA.

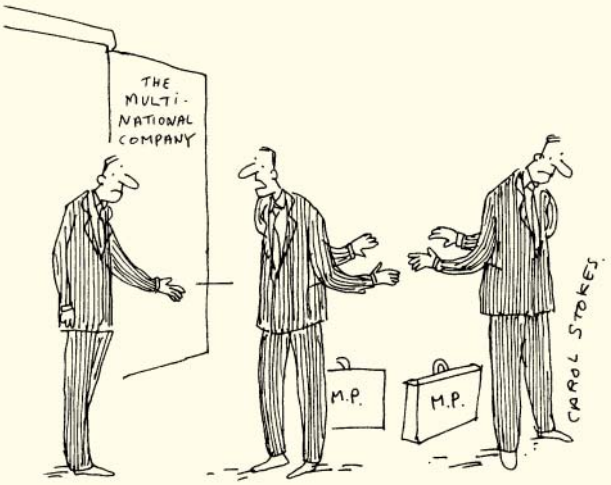
BOOKS AND RECORDS

As a foreign company that raises capital in the US, Ausco is also fully subject to the terms of the FCPA as an "issuer", regardless of nationality. Issuers are subject to the books and records provision requiring them to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and

dispositions of the assets of the issuer." If Ausco, as a foreign issuer, failed in its SEC filings to disclose bribes it paid anywhere outside the US, it could be found to have violated the accounting provisions of the FCPA (i.e., a 'books and records' offence). Those engaged in bribery tend not to disclose them as such in their accounts. A foreign issuer, such as Ausco, that holds a majority interest in a joint venture, such as JVC, will be expected not only to enforce FCPA accounting standards, but also to control, and take full responsibility for all of the actions of the minority joint venture partner (i.e., UKco).

"§78m. (2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall –

(a) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;



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"It's called repetetive strain syndrome"

(b) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that –

i. transactions are executed in accordance with management's general or specific authorization;

ii. transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

iii. access to assets is permitted only in accordance with management's general or specific authorization;"

The offence is civil, not criminal. The enforcement agencies often charge parent companies for the books and records and internal control violations of indirect subsidiaries and affiliates, even without alleging that the parent company lacked good faith or participated in or had knowledge of the conduct at issue. The complexion of the offence is therefore one of strict liability. Consequently, US registered companies with a controlling interest in a joint venture are compelled to impose on their partners all of the obligations imposed by the US FCPA, including the right to terminate the joint venture in the event of a violation.

An example is *SEC v Comverse Technology Inc*, United States District Court Eastern District of New York Civil Action No. 11-CV-1704-LDW. Comverse Limited was the Israeli operating subsidiary of Comverse Technology. Comverse Limited devised a bribery scheme in which payments were made through an offshore entity in Cyprus specifically set up for this purpose. All of this was done without the knowledge of Comverse Technology. However, Comverse Limited did not accurately record

these improper payments in its books and records, which, in turn, caused them to be improperly classified in Comverse Technology's consolidated financial statements. Comverse Technology was thereby guilty of failing to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions at all levels of the organization were recorded properly (see the DoJ's Statement of Facts at http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11 comverse-npa.pdf).

Applying the same reasoning, it is highly likely that Ausco, as an issuer, would be guilty of a books and records offence in relation to the bribery activities of JVC, the JVC they control, even before they knew anything of those bribery activities.

Moreover, knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account, can be the basis for *criminal* liability (for example, USA v Damler AG, US DC for the District of Columbia http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerag-info.pdf). Therefore a failure to respond to JVC's bribery, once discovered, could lead to a criminal prosecution of Ausco through use of duties imposed by the books and records requirements of the FCPA (very much akin to incrimination through a failure to prevent known bribery under the UK common law).

AUSTRALIA: CRIMINAL CODE 1995 (CTH) (THE CODE)

Last year, Transparency International noted this of Australia's anti-bribery stance: "The continued absence of prosecution for the past decade under the Criminal Code, as well as the absence of cases reported under the taxation law for this type of bribery offence, makes it difficult to demonstrate that successful prosecution is feasible under the present system." Part of the problem may have been that, unlike in the UK and the USA, there is no clear path for self reporting: the only body to which a company could self report is the Australian Federal Police, whose only remit is to investigate, not to prosecute. Further, there is no protection afforded to whistleblowers under Australian law.

Whatever the problem was, it certainly did not lie in the statute books. Throughout twelve long years of waiting, Australia's bribery offences within Division 70 of the Criminal Code 1995 (Cth) (the Code) lay untouched under the dust covers. A company can be criminally liable if the corporate culture directs, encourages, tolerates or leads to non-compliance with the criminal provisions proscribing the bribery of foreign public officials. Like the Act, the Code significantly extends the principles relating to corporate criminal responsibility beyond direct bribery by a company of a foreign public official by allowing the prosecution to prove that the

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company's unwritten rules tacitly authorise non-compliance or fail to create a culture of compliance. It captures situations where, despite formal documents creating a veneer of compliance with laws prohibiting foreign bribery, the reality is that non-compliance is expected. Like the FCPA, there is a carve-out for facilitation payments. The Code applies only to the bribery of public officials; the bribery of non-public figures is left to state laws.

Section 70.2 of the Code sets out the offence of bribery. It states:

"(1) A person is guilty of an offence if:

(a) the person:

i. provides a benefit to another person; or

ii. causes a benefit to be provided to another person; or

iii. offers to provide, or promises to provide, a benefit to another person; or

iv. causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person; and

(c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:

i. obtain or retain business; or

ii. obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person)."

The legislation therefore anticipates that a benefit may be provided, offered or promised either directly or through an intermediary, all of which is prohibited. The foreign public official need not be the recipient of the benefit although the actions must be committed with the intention of influencing the foreign public official in the exercise of his or her duties as a foreign public official.

Jurisdiction is established through section 70.5 if at least part of the bribery occurs in Australia (or on board an Australian aircraft or ship) or if committed by "a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory" (s70.5(1)(b)(iii)). Ausco is therefore caught by jurisdiction over nationality, regardless of where the bribery took place. UKco and JVC are not Australian companies, but would come within the jurisdiction of the Code territorially if part of the bribery occurred in Australia (examples of actions which could be viewed as constituting at least part of the bribery (i.e. bank transfers, emails etc.) have already been set down in the sections under the Act and the FCPA).

Establishing liability for any party, as previously discussed, will be a highly fact-specific exercise. It may be that the companies would be vulnerable as principals to an allegation that they "caused" the JVC perpetrator to commit the bribery offence through, for example, making available to him funds from which the bribe was paid.

Corporate liability is governed by section 12. Section 12.2 sets out the means by which criminal responsibility for the *actus reus* ('physical element') attaches to a company:

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

attributed to the body corporate."

This approach is therefore much more akin to the widely implicating net of the doctrine of *respondeat superior* under the FCPA rather than that of identification under the Act. Therefore if one of the companies' employees during the course of his employment made those funds available to the JVC perpetrator, that act would be attributable to the company as a principal to the offence.

The companies could also be liable for a JVC perpetrator's acts of bribery as a complicit party. The Code determines that a party will be guilty if the company's conduct in fact aided, abetted, counselled or procured the commission of the offence by the other person and

> " 11.2 (3) the person must have intended that:
> (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
> (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

Therefore as either principal or complicit party, a *mens rea* of intent is required. To be liable as a secondary party, the Code states that either of the companies would at least have to be aware that in the ordinary course of events its conduct would aid or abet the JVC perpetrator's bribery (section 5.2(3)). Liability for secondary parties is therefore very similar to that under UK law.

It is with the translation of the required intent into the

corporate field that The Code soars into its own as a piece of clear and coherent legislation that shames the vagueness and uncertainty of the Act and the FCPA. That translation is carried out under Section 12.3:

"(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non compliance with the relevant provision; or

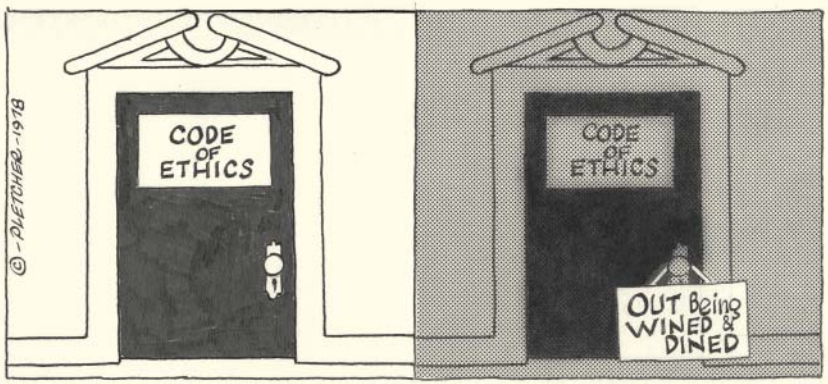
(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2)(c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate



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would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence."

Sections 2(b) and 3 therefore operate in much the same way as section 7 under the Act: a strict liability offence of failing to prevent bribery with a defence of having exercised due diligence to prevent. The difference is that an offence under section 2(b) has to have been committed by a "high managerial officer" under the Code, while any associated person could have carried out the bribery to put the company at risk under section 7 of the Act. The Code therefore maintains its focus on bribery which is committed by those individuals close to the heart of the company, while the Act sweeps up bribery committed on the outskirts.

The high managerial agent makes a further appearance in the interworkings of sections 2(c), 2(d) and 4. The Code's recourse to this figure avoids abstract theories, instead focussing criminality on those individuals vested with high responsibility by the company, constructing an elegant new web with which to capture corporate liability. The emphasis on whether a company tolerated bribery or failed to stop it is not on the theory of book-learned compliance procedures but on the real, tangible activities of the company's high managerial agents and the way those activities were perceived by the person who in fact did the bribing.

Ausco and UKco are vulnerable to at least being found to have tacitly permitted bribery (12.3(2)(a)) by the JVC perpetrator if operations continue unchecked: each would be aware that bribery would occur in the ordinary course of events and there is no evidence that either has exercised the control available to them in a manner designed to stop it. Such omission could properly be described as having permitted JVC's bribery. Section 4.3 of the Code specifically states that an omission to perform an act can be a physical element to the offence if "the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform". The language of section 12 implies a clear duty on a company to create and maintain a corporate culture of compliance with the anti-bribery provisions of The Code.

It also seems likely that UKco could similarly be caught by section 12.3(2)(b) in its capacity as manager of the Project. Those managing the Project are certainly employees of UKco and are likely to have "duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy" thereby qualifying as a 'high managerial agent' within the meaning of the section. Again, if the known bribery were to continue unabated, it is difficult to see how the company could defend an allegation of tacitly permitting that bribery.

Therefore under 12.3(2)(c), without anything being done to address the discovered bribery, both Ausco and UKco could properly be described as tolerating it. When assessing whether that is so, section 12.3(4)(b) includes as a relevant factor the JVC perpetrator's reasonable belief or expectation that a high managerial agent of the body corporate would have authorised or permitted the bribery. This is a particularly dangerous source of

potential evidence against the companies as the JVC perpetrator could (invariably in such cases) point to myriad nefarious activities taking place on the ground which he reasonably took to be evidence of permission by the company.

The companies would appear to be particularly vulnerable to a charge put forward on the basis that they failed to create and maintain a corporate culture that required compliance with section 70 of the Code (12.3(2)(d)). A corporate culture is defined as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."

Australia has a recognised standard for compliance programmes which covers the structural, operational and maintenance elements to be included in any program: Australian Standard AS3806 (the Australian Standard). Because it applies to programs across all areas of compliance, the Australian Standard is couched in generalised terms and does not prescribe the actual elements of an international corruption compliance program. Like the guidance issued under the ACT, therefore, the Australian Standard serves as a framework to signpost the essential components of an effective compliance program. In order to prove successfully the defence that they "exercised due diligence to prevent the conduct, or the authorisation or permission" (12.3(3)), the company would have to ensure that such due diligence measured up to the Australian Standard.

The Federal Court has looked at the sufficiency of a corporate compliance culture in *Re Chemeq Ltd* (ACN 009 135 264). Although the facts centred around the disclosure requirements of the Corporations Act 2001, French J took the opportunity to set out principals for the way in which the court will approach this positive legislative requirement:

> "[85] The court will consider the form and content of the policies and procedures and also the measures adopted by the corporation to ensure that they are understood and applied. A well drafted set of policies and procedures will mean little if there is no follow up in terms of training of company officers (including directors) and, where appropriate, refresher training. In the present case there is provision for induction training but no clear evidence of follow-up and refresher training.
>
> [86] Compliance policies and procedures will not be effective unless there is, within the corporation, a degree of awareness and sensitivity to the need to consider regulatory obligations as a routine incident of corporate decision-making. This kind of general sensitivity to the issues underpins what is sometimes called a "culture of compliance". It does not require a risk-averse mentality in the conduct of the company's business, but rather a kind of inbuilt mental check list as a background to decision-making. This may be more difficult to achieve where, as in the present case, there is a positive obligation that is not related to any particular decision. The conduct of corporate business may involve consideration of the many shifting circumstances that make up a dynamic business environment. To identify those matters, including changes in circumstance, which attract the obligation of continuous disclosure, may not always be a straightforward exercise. There will be clear cases, and not so clear cases. There should be some process for ensuring that changes in circumstances or market information requiring disclosure are identified. Absent a positive monitoring mechanism, the company's compliance system may leave open the risk of non-disclosure by oversight."

CUT OR RUN?

JVC's bribery therefore draws the cross hairs of investigative agencies from multiple jurisdictions wielding powerful anti-bribery legislation on Ausco and UKco. Ausco and UKco face a series of highly sensitive, significant decisions that require swift making. The companies might:

i. Seek to distance themselves from JVC's bribery
ii. Self-report and seek to eradicate JVC's bribery
iii. Seek to eradicate JVC's bribery without self-reporting
iv. Sell JVC or close it down.

The first option, to distance JVC's bribery by, for example, tweaking the management or ownership structure, is often the first port of call for companies in the first throes of discovering a serious bribery problem in an overseas joint venture. However, its comforts are illusory as the mechanics of such distancing usually serve only to multiply the dangers for the parent company.

Case Study 3 within the UK Bribery Act Guidance has particular resonance with our example. Case Study 3 concerns a joint venture between "a medium sized company ('D')" and "a local mining company ('E'). It is proposed that D and E would have an equal holding in the joint venture company ('DE'). D identifies the necessary interaction between DE and local public officials as a source of significant risks of bribery." The Case Study suggests that part of D's compliance programme would be considering 'parity of representation on the Board of DE' and a representative on the audit committee. This flows from the expectation that D will take responsibility in order to implement an effective anti-bribery programme, not evade it by allocating the job to someone else. Similarly, in our example, Ausco and UKco as co-owners will retain the ability to insist upon more effective anti-bribery procedures and therefore will remain vulnerable to a charge of having encouraged the bribery offence by failing to prevent it (as set out above). The decision of the companies to evade responsibility for known and continued acts of bribery by divesting themselves of considerable control could constitute part of an allegation that either company thereby tacitly encouraged the bribery. The comment made by French J in Re Chemeq (at paragraph 87) is a salutary reminder of this danger: "Certainly those who play calculated risk games... in the shadow of the rules cannot expect indulgence from the courts if their assessments are not accepted".

The classic, insoluble problem of money laundering arches high over options three and four. Once the parent company becomes aware, even suspicious, of the bribery within JVC, it is wide open to charges of laundering the proceeds of that crime. If even part of those proceeds flow into the parent company and into general funds, entire operations can be contaminated with possible criminality implicating both the company and individuals within it. A detailed analysis of that problem filtered across the various jurisdictions is beyond the scope of this paper, but it is important not to lose sight of the towering significance of such potential criminality, which can so easily be lodged within the heart of the parent company itself.

Beyond money laundering, tax returns become problematic where bribery is concerned. To the company which is either ignorant of the true reason for the payments or indeed the company which is carrying out an active cover-up of those reasons, bribery payments are usually lumped in as some form of legitimate cost to the company and therefore tax deductible. This inaccurate portrayal of bribery payments can be an offence in itself, offering a further angle of attack to enforcement bodies.

CLOTH FAIR KALISHER SCHOLARSHIP 2012

By Alice Cole Roberts

I have always been fascinated by how the society in which we live shapes us, as I was myself brought up in a foreign country, France. This interest led me to study anthropology for my first degree. I was concerned with discovering how societies work and I developed a particular interest in people's capacity to shape their cultural and political environment. I first considered law when I studied the anthropology of rights. I found this course very refreshing as it highlighted the similarities between societies rather than their differences. I was intrigued by how international standards of human rights interact with domestic legal and social structures in order to be effective worldwide. I pursued this interest by doing a Master's in Human Rights. My interest in the law therefore derived initially from international law but I soon realised that the legal profession provides an important channel for individuals to participate in the regulation of their society. The more I learned about the law the more I wanted to be involved in it. I was interested in how the law structures the world we live in and I believed it was a field in which I could have a positive impact on people's lives by defending their entitlement to fair procedures.

To find out what a lawyer's work involves, I completed work experience at Bindmans law firm and mini-pupillages in various chambers. I shadowed barristers in public and criminal law cases. I was in awe of the barrister's ability to construct persuasive and concise arguments making sense of an often bewildering pile of documents. I found the public law cases very interesting as they often dealt with intricate legal principles, which appealed to my academic side. At the same time, I was drawn to the criminal cases as the barristers appeared to me to be more engaged in understanding the individual client and making sense of their actions. I have always been interested in comprehending people's behaviour, especially when it deviates from social norms, so the day to day work of a barrister at the criminal Bar appealed to me. Furthermore, I realised that guaranteeing procedural fairness is of the utmost importance in criminal law, which often deals with the most vulnerable members of society facing the fiercest punishments from the State. Barristers not only provide individuals with access to justice, but by articulating their client's concerns they are directly involved in proceedings that may generate new perspectives on the law and on society.

The interview for this scholarship was in reality a most enjoyable experience. The panel put me at ease, to the extent that I was enjoying an interesting discussion about the criminal Bar, rather forgetting that I was being interviewed for a substantial award. In particular, I was asked about my experiences as a volunteer at the Personal Support Unit in the Royal Courts of Justice. A couple of

months after the interview I was contacted by the Director of the Personal Support Unit, asking me to join their team as their Volunteer Officer. I look forward to starting this position in September, and to being immersed in the day-to-day activity of the courts whilst I continue to seek pupillage.

Receiving the Kalisher Cloth Fair Scholarship is an incredible honour and I am extremely grateful to the Kalisher Trust and Cloth Fair Chambers, not only for relieving me of a heavy financial burden, but for demonstrating their trust in my ability to succeed at the criminal Bar. Given the competition, searching for pupillage can be a fairly disheartening process, but knowing that such a distinguished panel of criminal barristers thought me worthy of this award greatly reassures me that my perseverance in pursuing my goal of becoming a criminal barrister will not be in vain.

Nicholas Purnell QC
John Kelsey-Fry QC
Timothy Langdale QC
Ian Winter QC
Alison Pople
Jonathan Barnard
Clare Sibson

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