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## Transnational Criminal Law or the Transnational Legal Ordering of Corruption?

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# Transnational Criminal Law or the Transnational Legal Ordering of Corruption?

## Theorizing Australian Corporate Foreign Bribery Reforms

Dr. Radha Ivory\*

*To date, “transnational criminal law” has been the dominant paradigm for explaining and mapping rules on corruption in the international legal literature. Transnational criminal law is presented as a system of law descending from multilateral crime control treaties or a field or order that emerges through international political processes of regime formation. Transnational criminal lawyers identify and describe cross-border legal rules, and seek to evaluate them against liberal norms of democratic governance and individual civil and political human rights. This Article details the limits of transnational criminal conceptions of “anticorruption” through a study of proposed changes to Australian laws on corporate foreign bribery. Drawing on primary and secondary documentary sources, domestic and international, it shows that the emerging antipodean rules are only partially transnational, as that term is understood in transnational criminal law theory. Likewise, multilateral “suppression conventions” and related soft laws are but one impetus for the proposed changes to Australian federal anticorruption legislation. Rather, as the transnational legal ordering literature suggests, a recursive process appears to be at work between international organizations and local legislators, as well as transnational non-state actors, both charities and businesses. This process is marked by*

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*moments of borrowing from (former) patrons, the US and the UK. However, it is also punctuated by themes of modernization, economic efficiency, and reputation. In addition, Australian anti-corruption activities may result not just in changes to national criminal law, but also in the development of “new” – and controversial – techniques of governance.*

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## INTRODUCTION

The bribery of foreign public officials is an inherently transnational offense. But are the rules against foreign bribery best viewed as “transnational criminal law?” For international lawyers, concepts of transnational criminal law are an obvious place to start categorizing supra-state anticorruption controls.<sup>1</sup> As most elaborately theorized by legal academic Neil Boister, “TCL” is “the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects” or “trans-boundary moral impacts.”<sup>2</sup> TCL is a legal system, field, order, or space comprising state-to-state and state-to-person obligations with transnational crime as their focus.<sup>3</sup> The bribery of foreign public officials can be seen as an example of TCL, so conceived, due to the

1. Radha Ivory, *Beyond Transnational Criminal Law: Anti-Corruption as Global New Governance*, 6 LONDON REV. INT’L L. 413, n. 6 (2018) [hereinafter Ivory 2018] (with further references).

2. Neil Boister, “*Transnational Criminal Law*”? 14 EUR. J. INT’L L. 953, 955 (2003) [hereinafter Boister 2003]; Neil Boister, *The Concept and Nature of Transnational Criminal Law*, in ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 11, 13 (Neil Boister & Robert Currie eds., 2014) [hereinafter Boister 2014]; Neil Boister, *Further Reflections on the Concept of Transnational Criminal Law*, 6 TRANSNAT’L LEGAL THEORY 9, 13 (2015) [hereinafter Boister 2015]; NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 17 (2nd ed. 2018) [hereinafter BOISTER 2018].

3. See, further, *infra* Part I.

multiple nationalities of its protagonists and its underlying matrix of international and domestic legal standards.<sup>4</sup> In addition, the international norm against foreign bribery is a relatively recent prohibition that would appear to have resulted from the type of international moral politics that Boister would stress.<sup>5</sup>

However, as I argue elsewhere,<sup>6</sup> there are important discrepancies between Boister's conception of transnational criminal law and international anticorruption standards and practices.<sup>7</sup> Supra-state rules against corruption are not only cross-border or penal in the ways elaborated by transnational criminal lawyers; international standards and domestic obligations are but one modality for global corruption control. More overtly sociological approaches to transnational law are a better fit for the development and patterning of these anticorruption laws. More regulatory or preventive concepts of crime control may better capture the nature of, and problems with, their measures. Thus, I proposed Terrence Halliday and Gregory Shaffer's transnational legal ordering (hereinafter TLO) theory as a more effective tool for explaining and critiquing anticorruption law as it emerges between international institutions, jurisdictions, and non-state organizations.<sup>8</sup>

Extending that analysis, this Article tests the utility of Boister's conception, and of Halliday and Shaffer's alternative approach, by examining an ongoing case of corporate foreign bribery reform from Australia. A federation of former British colonies in the Asia-Pacific, Australia belongs to several international economic crime initiatives, not least the United Nations Convention against Corruption (hereinafter UN Convention) and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development (hereinafter OECD Convention).<sup>9</sup> To date, Australia's federal (Commonwealth) government has implemented these anticorruption treaties *inter alia* with an offense against the bribery of foreign public officials and statutory corporate criminal liability principles.<sup>10</sup> These provisions have been pronounced internationally compliant with duties to hold legal persons liable for foreign bribery.<sup>11</sup> But they have also been questioned for their relative lack of

4. See, further, *infra* Part II(A).

5. *Id.*

6. Ivory 2018, *supra* note 1.

7. See also Sabine Gless, *Bird's-Eye View and Worm's Eye View: Towards a Defendant-Based Approach in Transnational Criminal Law*, 6 TRANSNAT'L L. THEORY 117 (2015); Prabha Kotiswaran & Nicola Palmer, *Rethinking the "International Law of Crime": Provocations from Transnational Legal Studies*, 6 TRANSNAT'L LEGAL THEORY 55 (2015).

8. See, e.g., Gregory Shaffer, *Transnational Legal Ordering and State Change*, in TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 1 (Gregory Shaffer ed., 2013) [hereinafter Shaffer 2013a]; Gregory Shaffer, *Dimensions and Determinants of State Change*, in TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 23 (Gregory Shaffer ed. 2013) [hereinafter Shaffer 2013b]; Terrence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3 (Terrence C. Halliday & Gregory Shaffer eds., 2015) [hereinafter Halliday & Shaffer 2015a]; Terrence Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 475 (Terrence C. Halliday & Gregory Shaffer eds., 2015) [hereinafter Halliday & Shaffer 2015b].

9. Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 ILM 1; United Nations Convention against Corruption, Oct. 31, 2003, 2349 UNTS 41.

10. *Criminal Code Act 1995* (Cth), Sch., §§ 12.1–12.6, 70.2 (Austl.) [hereinafter Code].

11. See, generally, OECD Convention, *supra* note 9, at Arts. 1–3; UN Convention, *supra* note 9,

accompanying prosecutions. In December 2017, just days before International Anti-Corruption Day, the Commonwealth proposed a *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017* (hereinafter CCC Bill).<sup>12</sup> That Bill would repeal and replace the generic foreign bribery offense and create a new corporate crime of failing to prevent foreign bribery, along with a system for negotiating corporate settlements in listed federal criminal matters.

In this Article, I analyze domestic and international documents surrounding the proposed Australian corporate bribery offense so as to compare the TCL and TLO approaches for their explanatory power. I argue that there is a repetition of the global problems with TCL theory in the Australian case and a clear example of the potential for a TLO analysis. First, the Australian case materials indicate a more heterogeneous set of inspirations for the corporate failing to prevent offense than Boister's account suggests. A mixture of drivers—international, multinational, and domestic—are evident behind the proposed offense of corporate omission. This mixture of factors better fits Halliday and Shaffer's conceptualization, which emphasizes the recursivity of transnational law-making processes. Second, the proposed Australian failing to prevent offense can be seen, not only as an instance of criminal law, but also as an example of law reform that deploys a “new” and controversial technique for governance. Transnational legal ordering theory is better able than TCL theory to illuminate these “non-criminal” features for evaluation and categorization. In sum, although the CCC Bill was still before Parliament as of early January 2019, this Australian case already shows the importance of viewing transnational law reform as a *social process* in the setting of *particular* jurisdictions, issue areas, and points in time.

The argument takes four steps towards its core conclusions. Part I summarizes the rival accounts of transnational law in the work of Boister and of Halliday and Shaffer respectively. Part II then provides background to the case study from Australia and my approach to the materials on the Australian case. Part III sets out my two findings from the analysis, examining the “transnational legality” and “transnational criminality” of Australia's potential corporate foreign bribery offense, in turn. I then conclude but, to be clear, not with an estimation of the exact reasons for the proposed offense or a judgement as to whether it would be “good” or “bad” for anticorruption work or Australia. Instead, I summarize some key influences on, and characterizations of, the corporate offense so as to identify the strengths and limitations of the TCL and TLO conceptions of transnational criminal justice.

## I. TWO THEORIES OF TRANSNATIONAL LAW IN CRIMINAL JUSTICE

So, what is “transnational criminal law” and what is the “transnational legal ordering” alternative? In Boister's oft-cited account,<sup>13</sup> transnational criminal law is a composite theory of international and domestic criminal law, which draws on

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at Arts. 16, 26 & 30.

12. *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017* (Cth) (Austl.) [hereinafter CCC Bill].

13. Ivory 2018, *supra* note 1, at n. 9 (with further references and a review of allied concepts and labels in the literature).

positivist and constitutionalist traditions of jurisprudence, as well as on empirical accounts of norm emergence, especially from international relations. According to Boister, some laws are transnational because of their multiple sources and their cross-border crime focus. Hence, TCL consists of multilateral suppression conventions (or other supra-state arrangements) that commit countries to standardizing their domestic laws on particular crime problems and to cooperating with each other in ways that enable the enforcement of those laws.<sup>14</sup> These “horizontal” rules are implemented through “vertical” obligations imposed by states on people.<sup>15</sup> Such a collection of norms forms a legal system linked by analytical relationships and/or a legal order or field constituted by its subject matter (i.e., transnational crime).<sup>16</sup>

That transnational criminal subject matter is both normatively and analytically significant. Boister does not dispute that some crimes or harms cross borders or that legal change is recursive. As he writes, “the traffic” between international and domestic legal systems may go both ways.<sup>17</sup> However, citing Nadelmann’s theory of “prohibition regimes” in international relations, he argues that transnational criminal law tends to reflect the preferences of powerful Western countries, especially the United States and the United Kingdom.<sup>18</sup> The resulting legal instruments are therefore likely to suffer from legitimacy deficits, as well as to authorize disproportionate interferences with individual civil rights.<sup>19</sup> Boister calls for “general” or “ordering” principles that would correct TCL’s negative effects on state sovereignty and the administration of individual justice.<sup>20</sup>

By contrast, “transnational legal ordering” theory is a sociolegal methodology that can be used to examine the interacting “international and domestic determinants of criminal justice policymaking” in particular places and spaces.<sup>21</sup> Like Boister, Halliday and Shaffer foreground the social construction of transnational issues and recognize the influence of international politics in these processes.<sup>22</sup> However, TLO scholars are less concerned with whether a rule pertains to a (perceived) cross-border situation or whether that (perceived) phenomenon is ultimately regulated by an international instrument or regime. Rather, taking off

14. Boister 2003, *supra* note 2, at 962; BOISTER 2018, *supra* note 2, at 21–23. *See also* Boister 2014, *supra* note 2, at 19; Boister 2015, *supra* note 2, at 20–21.

15. Boister 2003, *supra* note 2, at 972; Boister 2014, *supra* note 2, at 14 & 18; Boister 2015, *supra* note 2, at 14 & 19; BOISTER 2018, *supra* note 2, at 18.

16. Boister 2003, *supra* note 2, at 956–57; Boister 2014, *supra* note 2, at 12–13, 21–22; Boister 2015, *supra* note 2, at 25–26; BOISTER 2018, *supra* note 2, at Ch. 1 & 2, esp. 33.

17. BOISTER 2018, *supra* note 2, at 20. *See also* Boister 2014, *supra* note 2, at 14; Boister 2015, *supra* note 2, at 14.

18. *See, esp.* Boister 2015, *supra* note 2, at 25–26; BOISTER 2018, *supra* note 2, at 16 & 20–21 (citing Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society* 44 INT’L ORG. 479 (1990) [hereinafter Nadelmann 1990]). *See also* PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 19–22 (2006) [hereinafter, ANDREAS & NADELMANN 2006].

19. *See, esp.*, Neil Boister, *Human Rights Protections in the Suppression Conventions*, 2 HUM. RTS. L. REV. 199, 200–03 (2002) [hereinafter Boister 2002].

20. *See, esp.*, Boister 2015, *supra* note 2, at 28–30; BOISTER 2018, *supra* note 2, at 422–27.

21. Ely Aarsonson & Gregory Shaffer, *The Transnational Legal Ordering of Criminal Justice: Mapping the Field* (in this issue).

22. Halliday & Shaffer 2015a, *supra* note 8, at 7, 21.

from a new legal realist conception of law,<sup>23</sup> they see transnational law as embodying norms that are transported across national frontiers via cross-border social structures, and which are possibly changed in the process.

A transnational legal order is “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”<sup>24</sup> A TLO may be recorded in an array of instruments on the “soft” to “hard” law spectrum;<sup>25</sup> it may concern an array of socially constructed problems, from the purely domestic to the typically cross-border;<sup>26</sup> and it may change states in their “legal” and “non-legal” dimensions.<sup>27</sup> The extent to which change occurs it is likewise a function of a range of factors. Some of these factors relate to the character (“legitimacy, clarity, and coherence”) of the rules or processes, and others reflect the relative power of the receiving state, as well as its domestic circumstances, exposure to intermediaries, and the occurrence of “historic events.”<sup>28</sup>

Either way, the change-making process is not one-way or one-shot, but recursive.<sup>29</sup> The concept of recursivity “posits that changes and transformations of states will be a function of three processes operating concurrently and cyclically – a politics within international and transnational lawmaking, a politics within domestic lawmaking, and a politics between them.”<sup>30</sup> In contrast to Boister, Halliday and Shaffer give recursivity a central place in their analysis.

## II. COMPARING THE THEORIES IN A CASE OF FOREIGN BRIBERY REFORM

How do these theories of transnational law compare to each other at the global level of anticorruption controls, and how were they compared in this Article through the prism of the Australian case? Before discussing my findings on the heuristic value of the two approaches, I briefly describe the CCC Bill in its wider context, along with my approach to the case analysis.

### *A. Approach to the Comparison*

As stated in the Introduction, this Article proceeds from a parallel work in which I argued that anticorruption departs, in important respects, from transnational criminal law conceptions.<sup>31</sup> Within the broader literature on international and transnational criminal law, Boister’s conceptualization of TCL has contributed significantly to exposing under-theorized and under-researched areas

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23. *Id.* at 17. See also Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT’L L. 189, 193 (2015); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?* 95 CORN. L. R. 61 (2009) [hereinafter Nourse & Shaffer 2009].

24. Halliday & Shaffer 2015b, *supra* note 8, at 475.

25. Halliday & Shaffer 2015a, *supra* note 8, at 16.

26. *Id.* at 7; Shaffer 2013a, *supra* note 8, at 8.

27. Shaffer 2013a, *supra* note 8, at 11–12; Shaffer 2013b, *supra* note 8, at 24–33.

28. Shaffer 2013b, *supra* note 8, at 33–46.

29. Shaffer 2013a, *supra* note 8, at 14.

30. *Id.*

31. Ivory 2018, *supra* note 1.

of state coordination.<sup>32</sup> Nonetheless, his framework for TCL is an uneasy fit with the diversity of supra-state anticorruption standards and practices. These norms and activities have both global and local qualities that escape the transnational criminal lawyers' conceptions of space and their allied concerns about regime legitimacy. Further, the treaties could be considered both criminal and regulatory (newly governmental), insofar as they require states to adopt administrative and civil measures of social control. These non-criminal strategies are praised as pragmatic and participatory, though they pose their own normative and practical challenges. Finally, suppression conventions are not the only, or necessarily the most important, source of supra-state proscription of corrupt behavior. "Anticorruptionism" is equally undergirded by international instruments that are non- or internally-binding and/or diagnostic in nature.

To address these deficiencies, I argued, it is necessary to situate extant conceptions of TCL within a larger set of doctrinal and socio-legal inquiries into new forms of global governance. My approach would mandate studies that deploy "a combination of sociological, historical, and ecological methods to explore the effect of a transnational legal order on corruption within particular countries or organisations, and vice-versa."<sup>33</sup>

#### B. *Selecting Australia*

To begin that undertaking for this Article, I conducted a desk-based study of a proposed federal anticorruption reform in my home jurisdiction, Australia. This research forms part of a larger project of inquiry into corporate foreign bribery laws in the UK and Australia. The choice of Australia as the case study stems from both my existing knowledge of the Australian situation and from Australia's suitability for comparing TCL and TLO approaches.

Australia, it is said, has an ambivalent, if not anxious, relationship with international law.<sup>34</sup> Under its constitution, Australia is broadly a dualist state, its Commonwealth executive concluding agreements at the international level and its legislature transposing those obligations in the domestic realm via legislation.<sup>35</sup> The capacity of the executive to thereby alter the federal balance of power or compromise Australian freedom of action (sovereignty) has been a matter of controversy as relates to criminal justice. Notoriously, Australian governments campaigned for the creation of the International Criminal Court (hereinafter ICC) in the 1990s before declaring Australia's jurisdictional primacy when ratifying the Rome Statute in the 2000s.<sup>36</sup>

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32. Robert Currie, *Neil Boister, An Introduction to Transnational Criminal Law* 13 J. OF INT'L CRIM. JUST. 1166, 1166–67 (2015); Elies van Sliedregt, *International Criminal Law: Over-studied and Underachieving?* 29 LEIDEN J. INT'L L. 1, 2 (2016). See also ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW ¶ 7.204, at n. 415 (2015).

33. Ivory 2018, *supra* note 1, at 438.

34. Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order* 25 SYD. L. REV. 422 (2003).

35. GABRIELLE APPLEBY ET AL., AUSTRALIAN PUBLIC LAW 347 (2nd ed. 2014).

36. HILARY CHARLESWORTH ET AL., NO COUNTRY IS AN ISLAND: AUSTRALIA AND INTERNATIONAL LAW 71–80 (2006) [hereinafter CHARLESWORTH ET AL. (2006)].



In turn, the ICC debate is said to reflect Australia's occasional roles as "good international citizen" or "middle power."<sup>37</sup> With these labels, Australia is ascribed some scope to act through multilateral institutions and as a norm entrepreneur,<sup>38</sup> despite its dependence on great power allies. Hence, Australia's reticence with respect to the ICC is partly attributed to its deference to the United States, which ultimately refused to join the Court.<sup>39</sup> Conversely, in the area of anticorruption, Australia has adopted and promoted key international treaties favoured by the US, but has been criticized for insufficiently implementing those agreements.<sup>40</sup>

Viewed against this backdrop, the CCC Bill has much to offer as a vehicle for comparison. The Bill has the hallmarks of a relatively orderly response to international pressure (a la Boister's theory) and exhibits the more recursive pattern of influence predicted by transnational legal process scholars, Halliday and Shaffer.

### C. Background to the CCC Bill

As put to Parliament by Malcolm Turnbull's conservative coalition government in December 2017, the CCC Bill proposes substantial changes to the Australian rules on corporate liability for foreign bribery.<sup>41</sup> Since the late 1990s, Division 70 Commonwealth Criminal Code (hereinafter Code) has prohibited the intentional provision, etc., of illegitimate benefits to "foreign public officials" within and outside Australia's territory.<sup>42</sup> Under Part 2.5 Code, a "body corporate" may be attributed with the physical elements of an offense that is committed by a corporate "employee, agent, or officer."<sup>43</sup> The mental elements are ascribed to a corporation who "authorised or permitted" the behavior,<sup>44</sup> as determined *inter alia* by analyzing the conduct of its board or "high managerial agent[s]" or assessing the quality of its "corporate culture."<sup>45</sup>

Though notable for these detailed provisions,<sup>46</sup> Part 2.5 still requires the prosecutor to prove all the physical and mental elements of an offense, like foreign bribery, beyond reasonable doubt.<sup>47</sup> Proposed s. 70.5A CCC Bill would depart from this position by rendering certain bodies corporate strictly liable for failing to

37. Melissa Conley Tyler, et al., *Australia's International Personality: Historical, Legal and Policy Perspectives*, in INTERNATIONAL LAW IN AUSTRALIA 1 (Emily Crawford & Donald R. Rothwell eds., 3rd ed. 2017).

38. *Id.* at 9–11, 18–22; Jason Ralph, *The Responsibility to Protect and the Rise of China: Lessons from Australia's Role as a "Pragmatic" Norm Entrepreneur* 17 INT'L REL. OF THE ASIA-PAC. 35, 52 (2017) citing and discussing ANDREW CARR, WINNING THE PEACE: AUSTRALIA'S CAMPAIGN TO CHANGE THE ASIA-PACIFIC (2015).

39. CHARLESWORTH ET AL., *supra* note 36, at 80 (2006).

40. See, e.g., Jo-Anne Gilbert & Jason Sharman, *Turning a Blind Eye to Bribery: Explaining Failures to Comply with the International Anti-Corruption Regime* 64 POL. STUDIES 74, 82–86 (2016) (discussing cases involving the Australian Wheat Board and two subsidiaries of the Reserve Bank of Australia).

41. See, generally, Cat Barker & Monica Biddington, *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017*, Parliamentary Library Bills Digests, No. 105, 2017–18 (2018).

42. Code, *supra* note 10, at §§ 70.1, 70.2, 70.5.

43. *Id.* at § 12.2.

44. *Id.* at § 12.3(1).

45. *Id.* at § 12.3(2).

46. CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 102 (2nd ed. 2001).

47. Code, *supra* note 10, at §§ 13.1–13.2.

prevent their associates from bribing a foreign public official; to avoid liability a defendant firm would have to establish that it had in place procedures adequate to prevent the associate's corruption.<sup>48</sup> A minister must publish a guidance for corporations on possible preventive measures,<sup>49</sup> and corporations may have the option of negotiating with prosecutors for a deferred prosecution agreement (hereinafter DPA).<sup>50</sup>

At the time of writing, it was not clear whether and, if so, when the CCC Bill would be passed into law. Later in December 2017, the Australian Federal Police (hereinafter AFP) and Commonwealth Director of Public Prosecutions (hereinafter CDPP) released a "guideline" on corporate self-reporting of foreign bribery.<sup>51</sup> In June 2018, the Attorney-General opened consultations on a Code of Practice, which would complement the DPA scheme in the CCC Bill.<sup>52</sup> However, by late 2018, the conservative parties had changed their prime minister, and the CCC Bill was awaiting debate in Parliament. In contrast, a roughly contemporaneous bill on protections for private-sector "whistleblowers" had been read a third time; legislation on corporate reporting with respect to "modern slavery" had been enacted.<sup>53</sup>

#### D. Method of Analysis

To compare TCL and TLO theories in the Australian case, I undertook a content analysis of documents justifying and describing the corporate foreign bribery measures in the CCC Bill. My selection of documents was motivated by two questions: (1) What were the international, transnational, and domestic influences on this proposal for reform? and (2) Is the failing to prevent offense an example of criminal, preventive, or "new governance" approaches to behaviour control?

From the domestic sources, I selected three categories of documents to review: (1) the Bill itself;<sup>54</sup> (2) statements on the Bill and its exposure draft from the Attorney-General's Department (hereinafter AGD);<sup>55</sup> and (3) Senate committee

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48. CCC Bill, *supra* note 12, at Sch. 1, cl. 8, § 70.5A(5).

49. *Id.* at Sch. 1, cl. 8, § 70.5B.

50. *Id.* at Sch. 2 (proposing amendments to the *Director of Public Prosecutions Act 1983*).

51. AFP & CDPP, *Self-Reporting of Foreign Bribery and Related Offending by Corporations* (Dec. 8, 2017) (Austl.), <https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf> (last visited Dec. 24, 2018).

52. Media Release, The Hon. Christian Porter MP, Attorney-General, *Consultation on New Measures to Combat Corporate Crime* (Jun. 8, 2018) (Austl.), <https://www.attorneygeneral.gov.au/Media/Pages/Consultation-on-new-measure-to-combat-corporate-crime-8-june-2018.aspx> (last visited Dec. 22, 2018).

53. *Modern Slavery Act 2018* (Cth) (Austl.); *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (Cth) (Austl.).

54. *Supra* note 12.

55. See, esp., AGD, *Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995: Public Consultation Paper* (Apr. 2017) (Austl.), <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx> (last visited Jul. 16, 2018) [hereinafter AGD, *Bribery Consultation Paper*]; *Explanatory Memorandum, Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017* (Cth) (Austl.) [hereinafter CCC Bill EM]; Senator the Hon. James McGrath, *Second Reading Speech: Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017*, Commonwealth, Parliamentary Debates, Senate 9906, 9908 (Dec. 6, 2017) (Austl.) [hereinafter CCC Bill Second Reading Speech]; AGD, *Submission to the Legal & Constitutional Affairs Legislation Committee*,

reports on the Bill and the broader topic of foreign bribery.<sup>56</sup> As my review progressed, I also focused on materials that discussed the failing to prevent offense rather than the DPA scheme.

I then cross-checked my reading of the Bill and related AGD documents against domestic and international sources. As to the domestic sources, I reviewed three years' of annual reports of the AFP, CDPP and the Australian Securities and Investments Commission (hereinafter ASIC) (the corporate regulator) for discussion of anti-foreign bribery work bearing on the proposed reform.<sup>57</sup> For the international materials, I considered OECD and UN monitoring body reports on

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*Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017*, Sub. No. 7 (undated) (Austl.), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/CombatingCrime/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CombatingCrime/Submissions) (last visited Jul. 16, 2018) [hereinafter AGD, *LACALC Submission*]; The Hon. Christian Porter MP, Attorney General, *Letter to Senator Helen Polley, Chair, Senate Scrutiny of Bills Committee*, No. MS18-000369, 10 (Mar. 6, 2018) (Austl.), [https://www.aph.gov.au/senate\\_scrutiny\\_digest](https://www.aph.gov.au/senate_scrutiny_digest) (last visited Jul. 19, 2018) [hereinafter AG, *Letter to Sen. Polley*]; AGD, *Response: Senate Legal and Constitutional Affairs Legislation Committee: Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017: Questions on Notice* (Mar. 7, 2018) (Austl.), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/CombatingCrime/Additional\\_Documents](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CombatingCrime/Additional_Documents) (last visited Jul. 16, 2018) [hereinafter AGD, *LACALC Response* (Mar. 2018)].

56. See, esp., Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 Report* (Apr. 2018) (Austl.), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/CombatingCrime](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/CombatingCrime) (last visited Jul. 16, 2018) [hereinafter Senate, *LACALC Bill Report*]; Senate, Economic References Committee, *Foreign Bribery: Report* (Mar. 2018) (Austl.), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Foreignbribery45th/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report) (last visited Jul. 16, 2018) [hereinafter Senate, *ERC Report*].

57. The reports are available at <https://www.afp.gov.au/about-us/publications-and-reports/annual-reports> (AFP), <https://www.cdpp.gov.au/publications> (CDPP), and <https://asic.gov.au/about-asic/corporate-publications/asic-annual-reports> (ASIC) (all last visited Dec. 26, 2018). See, further, *infra* note 113.

Australia,<sup>58</sup> the UK<sup>59</sup> and US.<sup>60</sup> As relevant, I drew on UK and US corporate foreign bribery laws and associated guidelines on compliance and sentencing.

Analysis of the selected texts yielded data relevant to the research questions in clusters of themes. Using and refining related key words, I searched the PDF documents manually, extracting relevant passages, and organizing the extracts. Through this process, important texts were identified for a second round of data extraction, in which the steps were repeated and larger passages taken out and coded.

### III. TCL AND TLO THEORY IN THE AUSTRALIAN CASE

The content analysis yielded two main answers to the question: How do TCL and TLO theory perform when applied to a specific case of anticorruption reform? The findings of the analysis are grouped around the concepts of “transnational law” (Part III(A)) and “criminal law” (Part III(B)) in what follows.

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58. Organisation for Economic Co-operation and Development Working Group on Bribery in International Business Transactions [hereinafter OECD-WGB], AUSTRALIA: REVIEW OF THE IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION (1999) [hereinafter OECD-WGB, AU-PH1]; OECD-WGB, AUSTRALIA: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Jan. 4, 2006) [hereinafter OECD-WGB, AU-PH2]; OECD-WGB, AUSTRALIA: PHASE 2 FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS, APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Aug. 29, 2009); OECD-WGB, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN AUSTRALIA (Oct. 12, 2012) [hereinafter OECD-WGB, AU-PH3]; OECD-WGB, AUSTRALIA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS (Apr. 3, 2015) [hereinafter OECD-WGB, AU-PH3-FU]; OECD-WGB, PHASE 4 REPORT: AUSTRALIA (Dec. 15, 2017) [hereinafter OECD-WGB, AU-PH4], <http://www.oecd.org/daf/anti-bribery/countryreports/ontheimplementationoftheoecdanti-briberyconvention.html> (last visited Jul.–Sep. 2018).

59. *See, esp.*, OECD-WGB, UNITED KINGDOM: PHASE 1 TER REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND 2009 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Dec. 16, 2010) [hereinafter OECD-WGB, UK-PH1TER]; OECD-WGB, UNITED KINGDOM: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Mar. 17, 2005) [hereinafter OECD-WGB, UK-PH2]; OECD-WGB, UNITED KINGDOM: PHASE 2 BIS REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Oct. 16, 2008) [hereinafter OECD-WGB, UK-PH2BIS]; OECD-WGB, UNITED KINGDOM: PHASE 2 BIS FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 BIS RECOMMENDATIONS (May 23, 2011) [hereinafter OECD-WGB, UK-PH2BIS-FU].

60. *See, esp.*, OECD-WGB, UNITED STATES: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (Oct. 2002) [hereinafter OECD-WGB, US-PH2]; OECD-WGB, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES (Oct. 2010) [hereinafter OECD-WGB, US-PH3].

*A. “Transnational Law” and the Proposed Australian Reforms*

The first finding concerns the extent to which the proposed Australian corporate foreign bribery offense conforms to TCL or TLO pictures of transnational law. In the parallel article just described, I found that supra-state anticorruption laws depart, in subtle but significant ways, from Boister’s concept of norms that cross borders.<sup>61</sup> In the Australian case, the corporate failing to prevent offense would “transcend national frontiers”<sup>62</sup> insofar as the putative bribe-taker is a “foreign public official” to Australia and the Commonwealth’s geographical jurisdiction is extended beyond Australian territory.<sup>63</sup> The new crime also appears to implement Australia’s duties to criminalize foreign bribery, hold legal persons responsible, and punish entities for wrongs under the OECD and UN Conventions.<sup>64</sup> The OECD treaty is cited in the literature, moreover, as the *prima facie* output of a global prohibition regime due to its close association with the US and its *Foreign Corrupt Practices Act 1977* (hereinafter FCPA).<sup>65</sup> The Turnbull government recalled the international consensus when it described foreign bribery as injurious due to its effect on communities, business, and markets.<sup>66</sup> All that said, with the failing to prevent offense, Australia would appear to be responding to soft instruments, as well as changes in other “Anglo” countries and other agentic and structural drivers.

*1. International Standards and Statements*

For a start, neither the OECD Convention nor the UN Convention requires Australia to criminalize corporate failures to prevent foreign bribery. The treaties are silent on the rules for attributing guilt to legal persons other than to say that state parties shall take measures “in accordance” or “consistent with [their] legal principles.”<sup>67</sup> Commentary suggests that the treaties were designed to accommodate the traditional reluctance of some states to recognize the criminal responsibility of legal persons.<sup>68</sup>

Instead, the idea that corporations should be held liable for foreign bribery through managerial omission is mentioned in a non-binding 2009 OECD

61. Ivory 2018, *supra* note 1, at 423–27.

62. PHILLIP JESSUP, *TRANSNATIONAL LAW: STORRS LECTURES ON JURISPRUDENCE* 2 (1956).

63. CCC Bill, *supra* note 12, at Sch. 1, cl. 8, § 70.2 & 70.5A(1)(b). The definition of foreign public official under § 70.1 Code includes persons formally or functionally associated with foreign states, foreign governments, and public international organizations, as well as intermediaries of those persons.

64. See AGD, *Bribery Consultation Paper*, *supra* note 55, at 9; CCC Bill, Second Reading Speech, *supra* note 55, at 9908 (governmental references suggesting the CCC Bill’s compliance with the conventions in general). See also CCC Bill EM, *supra* note 55, at ¶ 7.

65. Pub. L. No. 95–213 (1977), 15 U.S.C. §§ 78dd-1. See, further, Kenneth Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. OF L. STUD. S141, S154 (2002); ANDREAS & NADELMANN 2006, *supra* note 18, at 55–56.

66. CCC Bill EM, *supra* note 55, at ¶ 6; CCC Bill Second Reading Speech, *supra* note 55, at 9906. See also AGD, *Bribery Consultation Paper*, *supra* note 55, at 1.

67. OECD Convention, *supra* note 9, at Art. 2; UN Convention, *supra* note 9, at Art. 26.

68. Mark Pieth, *Article 2: The Responsibility of Legal Persons, in THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 212, 223 & 225 (Mark Pieth et al., eds., 2nd ed. 2014).

Recommendation on the implementation of Art. 2 OECD Convention.<sup>69</sup> According to Annex I of the 2009 Recommendation, member states should ensure that their legal systems allow corporations to be held responsible for the crimes of a range of associated actors, including senior leaders who fail to prevent bribery at “lower level[s].”<sup>70</sup> Previously, the European Commission had utilized a similar concept to harmonize member state rules on corporate liability for certain forms of economic malfeasance affecting the European Union.<sup>71</sup> More recently, G20 leaders borrowed and broadened the language in the OECD’s Annex I in their 2017 High-Level Principles on the Liability of Legal Persons for Corruption.<sup>72</sup>

Numerous international and non-governmental organizations (hereinafter NGOs) complement these state-to-state standards by telling companies themselves what they should do to ensure compliance with anti-bribery laws. For example, the AGD intends to be informed by “ISO 37001” as well as a joint OECD, UN, and World Bank handbook that, in turn, purports to digest six other “internationally recognised business instruments on anti-bribery.”<sup>73</sup> Given this diversity, it cannot be assumed that the OECD or UN Convention is the actual or analytical “match” for the proposed Australian rule. It could also be that Australia responded to a wider understanding—even an emerging general legal principle or custom—on the optimal interpretation of international corporate criminal liability obligations.

Further, neither the international anticorruption watchdogs nor the federal government presents the failing to prevent offence as necessary for Australian compliance with treaty law. Both the UN Implementation Review Mechanism and the OECD Working Group on Bribery in International Business Transactions (hereinafter OECD-WGB) depict Australia as having adequately transposed the conventions’ articles on the criminalization of bribery and corporate liability. The difficulties lie with Australia’s enforcement of its existing legislation. For example, in its Phase 1 review, the OECD-WGB endorsed Australia’s legal framework for

69. OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex I, C(2009)159/REV1/FINAL (Nov. 26, 2009) as amended by C(2010)19 (Feb. 18, 2010) [hereinafter OECD, 2009 Recommendation].

70. *Id.* at ¶ B(b), third intent.

71. Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities’ financial interests, Jun. 19, 1997, 1997 O.J. (C 221), Jul. 19, 1997, 12, Art. 3(2) (requiring states to ensure the liability of legal persons where lack of supervision or control by senior persons made possible fraud, active corruption, or money laundering, as defined). *See also* Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, Jul. 5, 2017, 2017 O.J. (L 198), Jul. 28, 2017, 29, Art. 6(2).

72. G20, Leaders’ Declaration: Shaping an Interconnected World, Annex: G20 High-Level Principles on the Liability of Legal Persons for Corruption, 8 Jul. 2017, [https://www.g20germany.de/Webs/G20/EN/G20/Summit\\_documents/summit\\_documents\\_node.html](https://www.g20germany.de/Webs/G20/EN/G20/Summit_documents/summit_documents_node.html), principle 4. For example, whereas the OECD would have states take a flexible approach to the status of the triggering person, the G20 would have them make the relevant status flexible or disregard status entirely.

73. AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 12 citing International Organization for Standardization [hereinafter ISO], 2016, ISO 37001: Anti-Bribery Management Systems – Requirements with Guidance for Use, <https://www.iso.org/standard/65034.html> and OECD, UNODC, and World Bank Group, *Anti-Corruption Ethics and Compliance Handbook for Business* 15 (2013), <http://www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm> (last visited Sept. 5, 2018). *See also* Senate, *ERC Report*, *supra* note 56, at ¶ 4.76.

prohibiting foreign bribery and attributing guilt to corporations.<sup>74</sup> In Phase 2, the OECD-WGB praised “section 12 [as] ambitious and progressive,” if untested.<sup>75</sup> Only from Phase 3 did the examiners express “serious[] concer[n]” with Australia’s low rate of enforcement.<sup>76</sup> The Phase 4 report, which was released less than two weeks after the CCC Bill, stops short of describing the provisions as necessary, though it “welcome[s]” the failing to prevent offense as an attempt to remove “barriers” to prosecution and “recommend[s] . . . follow-up on . . . enact[ment].”<sup>77</sup> The UN reviewers have not had an opportunity to report on the proposed Australian offense, but they endorsed a related UK model in a review of British implementation of Art. 26 UN Convention.<sup>78</sup>

Australian government documents echo this narrative by asserting that Australia has already executed its international obligations<sup>79</sup> and that the s. 70.5A offense would “[go] beyond the requirements of the [OECD] Convention.”<sup>80</sup> On this account, all changes in the Bill would enhance the Commonwealth’s capacity to enforce international and domestic norms against foreign bribery, particularly with respect to companies in corporate groups and transnational supply chains.<sup>81</sup>

## 2. *Anglo-American Precedents*

In addition, when selecting the failing to prevent offense, Australia would appear to have followed an Anglo-American precedent that was, not so much required, but recommended and perhaps extended through international instruments and processes. Already in the early 2000s, the OECD had described the general US federal corporate criminal attribution rules as “reinforc[ing] the effectiveness of the FCPA [and] also encourag[ing] corporations to implement measures of deterrence throughout their organisations.”<sup>82</sup> The FCPA’s bribery offense may be committed by legal persons,<sup>83</sup> who are strictly vicariously liable, at

74. OECD-WGB, AU PH-1, *supra* note 58, at 23.

75. OECD-WGB, AU-PH2, *supra* note 58, at ¶ 2, 148–53 (incl. recommendation).

76. OECD-WGB, AU-PH3, *supra* note 58, at ¶ 7, 42–43. *See also* AU-PH3-FU, *supra* note 58, at ¶ 2 (noting an increase in the number of investigations, but still only one prosecution for which reporting was then suppressed).

77. OECD-WGB, AU-PH4, *supra* note 58, at ¶ 153–54.

78. CONFERENCE OF THE STATE PARTIES TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION [hereinafter UNCAC-COSP], IMPLEMENTATION REVIEW GROUP, COUNTRY REVIEW REPORT OF THE UNITED KINGDOM, ¶ 32 & 48 (2013), <http://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=GBR> (last visited Nov. 8, 2018). *See also* UNCAC-COSP, IMPLEMENTATION REVIEW GROUP, EXECUTIVE SUMMARY: AUSTRALIA, CAC/COSP/IRG/1/2/1, 3 (2012).

79. AGD, *Bribery Consultation Paper*, *supra* note 55, at 3; CCC Bill EM, *supra* note 55, at ¶ 7. *See also* Senate, *LACALC Bill Report*, *supra* note 56, at ¶ 1.3.

80. AGD, *LACALC Submission*, *supra* note 55, at 7.

81. CCC Bill EM, *supra* note 55, at ¶ 7–8; AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 2–3; AGD, *LACALC Submission*, *supra* note 55, at 7. *See also* AGD, *Bribery Consultation Paper*, *supra* note 55, at 8–9; OECD-WGB, AU-PH4, *supra* note 58, at ¶ 153–54; Senate, *LACALC Bill Report*, *supra* note 56, at ¶ 2.85–2.86.

82. OECD-WGB, US-PH2, *supra* note 60, at ¶ 15 (Oct. 2002). *See also* OECD-WGB, US-PH3, *supra* note 60, at ¶ 98.

83. *See, generally*, Rahul Kohli, *Foreign Corrupt Practices Act* 55 AM. CRIM. L. REV. 1269, 1280–82 (2018).

common law, for an employee acting “within the scope and nature of his employment[] and . . . at least in part, to benefit the corporation.”<sup>84</sup> There is no defense that the corporation prohibited misconduct with internal policies and procedures.<sup>85</sup> Nevertheless, US courts may reduce financial penalties for firms with “effective compliance and ethics program[s].”<sup>86</sup> Prosecutors should consider “the existence and effectiveness of . . . pre-existing compliance program[s]” when making charging and negotiation decisions.<sup>87</sup> Corporations are afforded “insights” into the “hallmarks of effective compliance practice” via a non-binding prosecutorial guidance document.<sup>88</sup>

Back at the OECD, by the start of the 2010s, the Working Group had endorsed a similar UK offense, defense, and guidance model,<sup>89</sup> after having been highly critical of prior British laws.<sup>90</sup> Section 7 *Bribery Act 2010* (UK) made it a crime for “commercial organisation[s]” to fail to prevent bribery by an “associated person,” defined in s. 8 to include an “employee, agent or subsidiary.”<sup>91</sup> Liability under s. 7 *Bribery Act 2010* (UK) is no-fault (strict) but the organization has a defense if it can show that it had implemented procedures adequate to prevent bribery.<sup>92</sup> Adequate procedures are discussed further in a non-binding guidance issued by the Ministry of Justice under s. 9.<sup>93</sup> Separate legislation establishes a system of DPAs for corporations that were, or commit to become, compliant, amongst other things.<sup>94</sup> Therefore, the UK would seem to have created a corporate anti-foreign bribery framework that is broadly similar to the US model, albeit via a strict organizational offense, adequate procedures defense, and negotiated settlement scheme. Whilst the transnational origins of the UK scheme is beyond this Article’s scope, it is at least interesting to note that British examiners had participated in the Phase 2 and 3 OECD reviews of the US.<sup>95</sup>

Returning to Australia, both the OECD and the AGD acknowledge that proposed s. 70.5A is “similar to” the offense in s. 7 *Bribery Act 2010* (UK),<sup>96</sup> if not

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84. See, generally, Blake Weiner, et al., *Corporate Criminal Liability*, 55 AM. CRIM. L. REV. 961, 964–65 (2018).

85. Weiner et al., *Corporate Criminal Liability*, *supra* note 84, at 966, 968.

86. U.S. SENTENCING GUIDELINES MANUAL (2018) §§ 8B2.1, 8C2.5(f) (2018).

87. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL, §§ 9-28.300 (2018).

88. CRIMINAL DIV., U.S. DEP’T OF JUSTICE & ENF’T DIV., U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES, 57–65 (2015).

89. See, esp., OECD-WGB, UK-PH1TER, *supra* note 59, at ¶ 79–80, 83; OECD-WGB, UK-PH2BIS-FU, *supra* note 59, at ¶ 2.

90. OECD-WGB, UK-PH2, *supra* note 59, at ¶ 195–206; OECD-WGB, UK-PH2BIS, *supra* note 59, at 4, ¶ 65–92.

91. *Bribery Act 2010*, § 8(1) & (3) (Eng.).

92. *Id.* at § 7(2).

93. *Id.* at § 9; Ministry of Justice, Guidance about Procedures which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Eng.) (Mar. 2011), <https://www.gov.uk/government/publications/bribery-act-2010-guidance> (last visited Feb. 27, 2018).

94. *Crime and Courts Act 2013*, Sch. 17 (Eng.); SERIOUS FRAUD OFFICE, DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE: CRIME AND COURTS ACT 2013, Feb. 14, 2014, ¶ 2.8.1(iii), 2.8.2(iii), 7.10(iii), <https://www.sfo.gov.uk/?wpdmdl=1447> (last visited Nov. 7, 2018).

95. OECD-WGB, US-PH2, *supra* note 59, at ¶ 2; OECD-WGB, US-PH3, *supra* note 59, at ¶ 6.

96. CCC Bill Second Reading Speech, *supra* note 55, at 9907; AGD, *LACALC Response* (Mar. 2018), *supra* 55, at 3; AGD, *LACALC Submission*, *supra* note 55, at 7; OECD-WGB, AU-PH4, *supra* note



“modeled on” that provision.<sup>97</sup> The AGD cites both the UK “guidance” and US Department of Justice compliance questionnaire among the standards it shall consider when devising the Australian compliance principles under s. 70.5B CCC Bill.<sup>98</sup> Its proposed DPA regime is “consistent with” and a “hybrid of” US and UK practice.<sup>99</sup>

### 3. Australian and Multinational Drivers

Looking finally from text to subtext, the CCC Bill shows signs of influence from other less public international actors and factors than predominate in the TCL model. First, the Bill appears to be a means for government to maintain status and meet evolving demands for performance of sovereign functions. Thus, the AGD describes its review of the Code as “appropriate” given that “[i]t has been 18 years since the foreign bribery offence was introduced” and there is a need “to ensure [that] the law reflects community expectations and does not present unnecessary barriers to effective prosecution.”<sup>100</sup> Discussing the final version of the Bill, the executive describes foreign bribery as a danger to Australia’s “reputation” and “international standing,” amongst other things.<sup>101</sup> The documents do not mention any particular source of threat to Australia’s relative position; however, the country’s performance on the Transparency International Corruption Perceptions Index had suffered in previous years.<sup>102</sup> An earlier governmental press release mentioned that NGO’s rankings in connection with Australia’s pride in its “position and reputation . . . as one of the least corrupt countries in the world.”<sup>103</sup>

Second, the surrounding documents indicate that the AGD detected support for the failing to prevent offense among multinational businesses within Australia’s jurisdiction. For example, when discussing the s. 70.5B guidance, the AGD notes that benchmarking against the UK governmental compliance guidelines “is in line with the preference Australian industry expressed during the 2017 consultation process and will ensure minimal impact on Australian corporations that have already framed their anti-bribery policies on international guidelines.”<sup>104</sup> In other statements, the AGD indicates that standardized compliance requirements

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58, at ¶ 153. See also AGD, *Bribery Consultation Paper*, *supra* note 55, at 8.

97. AGD, *LACALC Submission*, *supra* note 55, at 4.

98. AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 12.

99. *Id.* at 26, 35; AGD, *LACALC Submission*, *supra* note 55, at 3, 12. See also CCC Bill EM, *supra* note 55, at 9907.

100. AGD, *Bribery Consultation Paper*, *supra* note 55, at 3.

101. CCC Bill EM, *supra* note 55, at ¶ 6; CCC Bill Second Reading Speech, *supra* note 55, at 9906. See also AGD, *Bribery Consultation Paper*, *supra* note 55, at 1, 9.

102. See, e.g., *Media Release: Corruption Perceptions Index (CPI) 2017 Shows Australia Falls again in Corruption Perceptions Index Scores*, TRANSPARENCY INTERNATIONAL AUSTRALIA, <http://transparency.org.au/corruption-perceptions-index-cpi-2017-shows-australia-falls-corruption-perceptions-index-scores> (last visited Sep. 5, 2018).

103. Media Release, The Hon. Michael Keenan MP, Minister for Justice, *AFP-Hosted Anti-Fraud and Anti-Corruption Centre* (Jul. 31, 2014) (Austl.), <http://pandora.nla.gov.au/pan/143276/20141001-1307/www.ministerjustice.gov.au/Mediareleases/Pages/2014/ThirdQuarter/31July2014-AFPHostedFraudAndAntiCorruptionCentre.html> (last visited Dec. 22, 2018).

104. AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 12.

would confer efficiency gains (rather than impose compliance burdens) on Australian firms, which “operat[e] overseas.”<sup>105</sup> Multinational businesses, in other words, would need to make a lesser investment of resources to gain equal or greater confidence that their internal systems and procedures meet the Australian standards. The Senate Economics References Committee, somewhat by contrast, recorded private sector concern about the strict liability offense in proposed s. 70.5A CCC Bill. However, the Committee ultimately formed the view that the burden of proof was justified by the compliance defense and the alignment with longstanding UK practice.<sup>106</sup>

Third, the materials reflect ideas about crime and corporations that predate or parallel the OECD Convention and anticorruptionism. Hence, the CCC Bill is said to address “serious corporate crime.” That category is described by reference to the complexity, opacity, and sophistication of its offenses (and offenders), as well as the cross-border qualities of its investigations.<sup>107</sup> The nomenclature of “seriousness”, as used in the UK, is connected to broader trends towards preventive approaches to justice, which are discussed below.<sup>108</sup> Further, there is a history in Australian federal law of corporate liability norms being addressed to the perceived difficulties of attributing mental states to “modern” business organizations. Already in the early 1990s, less hierarchical corporate structures and greater use of delegation were judged to inhibit the identification of individuals who were sufficiently senior to enable the imputation of guilt to companies.<sup>109</sup> Moreover, it was recognized that particular organizational (“corporate”) cultures could tacitly authorize a wrong.<sup>110</sup> Part 2.5 Code was a reaction to these concerns. But, for extreme and “difficult to detect” dangers, it was always the intention of the Code’s drafters that the burden of proof could be reversed and liability thereby extended.<sup>111</sup>

#### 4. Theorizing Transnational Law Reforms

To summarize, there are interesting questions to be asked about the cross-border qualities of Australia’s proposed “failing to prevent” offense. However, these questions are not only about the alignment of domestic and international standards in the abstract, or the formation of the global rules through a prohibition regime. Of equal concern are the actual processes by which international organizations, foreign states, and other factors and actors contributed to the choice of reform – and whether, when, and in what final form that choice will be enacted.

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105. AGD, *Bribery Consultation Paper*, *supra* note 55, at 9; AGD, *LACALC Submission*, *supra* note 55, at 9. *See also* Senate, *LACALC Bill Report*, *supra* note 56, at ¶ 2.89.

106. Senate, *ERC Report*, *supra* note 56, at ¶ 4.98.

107. CCC Bill EM, *supra* note 55, at ¶ 2, 8; CCC Bill Second Reading Speech, *supra* note 55, at 9906. *See also* AGD, *Bribery Consultation Paper*, *supra* note 55, at 1, 3–4, 8; AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 3, 8. *See also* Senate, *LACALC Bill Report*, *supra* note 56, at ¶ 2.85–2.88.

108. JAMES THOMAS OGG, PREVENTIVE JUSTICE AND THE POWER OF POLICY TRANSFER (2015). *See, further, infra* Part III(B)(2).

109. Criminal Law Officers Committee of the Standing Committee of the Attorneys-General, MODEL CRIMINAL CODE: GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY (FINAL REPORT) 105 (1992).

110. *Id.* at 113.

111. *See Explanatory Memorandum, Criminal Code Bill 1994* (Cth) (Austl.) 2379, 2381 (1994).

Clearly, the AGD responded to OECD critique when it opted to overhaul Division 70 Code. However, the OECD-WGB's criticism concerned Australia's relative lack of anti-bribery investigations and prosecutions – not the duty to criminalize corporate foreign bribery, with which it had pronounced Australia compliant. When choosing the failure to prevent offense, moreover, the AGD borrowed a British model, with its OECD influences and echoes of US law. It appears to have adopted an Anglo-American hybrid, but one with some basis in international standards as these have changed over time. Probing further, proposed s. 70.5A CCC Bill resonates with older governmental understandings of the nature of both “serious” and “corporate” crime, as well as the (perceived) expectations of multinational companies and more diffuse notions of national reputation and modern corporate moral hazards.

While these conclusions are not incompatible with the transnational criminal approach of Boister, they are better illuminated by Halliday and Shaffer's theory of transnational legal ordering. An avowedly sociolegal and process-oriented conception of transnational law avoids the need for analytical matching between domestic and international rules, such as is complicated by the diversity of sources on corporate foreign bribery. From the TLO view, the issues become: To what extent were the OECD and UN Conventions the inspiration for the proposed Australian rules? To what extent did specific international peer review procedures prompt Australian action, compared to more diffuse international norms about the state-of-the-art in domestic corporate foreign bribery legislation?

Next, the core TLO hypothesizes—that transnational law-making is recursive—has more heuristic power in revealing and unpacking the messy motivations for reform, which are apparent in the Australian case. A recursivity approach would problematize the internal processes of decision-making within the OECD and UN, US and UK, as well as capture factors native to Australia and the interactions between these “levels” of law-making institutions. It could raise questions, for example, about how the UK came to adopt the failing to prevent model; how the OECD or US influenced the British (or visa-versa); and whether Australia contributed to OECD, US, or UK preferences with its earlier “corporate culture” rules.<sup>112</sup> Other issues that would come to the fore when adopting the TLO approach would be the medium of influence between the UK, US, and Australia: Was the OECD the “active ingredient” or an epiphenomenon of colonial histories, common law traditions, and ongoing political, economic, and security ties? Already there are reports of anticorruption networks amongst law enforcement officials of “like-minded countries,” the UK, US, Canada, New Zealand, and Australia.<sup>113</sup>

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112. OECD-WGB, AU-PH2, *supra* note 58, at ¶ 148 (describing s. 12 Code as “a commendable development, and well-suited to prosecutions for foreign bribery” and as “ambitious and progressive, with many elements that are not contained in the criminal legal systems of most other countries, in particular liability based on a corporate culture”).

113. *See, esp.*, AFP, AMENDED ANNUAL REPORT 2016–17, 59 & 61 (2017); CPDD, ANNUAL REPORT 2017–18, 53 (2018) (discussing AFP involvement in an International Anti-Corruption Coordination Centre, and CDPP and AFP participation in an International Foreign Bribery Taskforce). *See, further*, National Crime Agency, *International Anti-Corruption Coordination Centre* (Eng.), <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/national-economic-crime-centre/international-anti-corruption-coordination-centre> (last visited Dec. 28, 2018).

Further, TLO theory provides greater scope for considering the role of non-state actors in transnational criminal justice. On the one hand, the Australian materials hinted at the role of NGO indicators in shaping perceptions of states as more or less corrupt.<sup>114</sup> On the other, the materials signalled the importance of perceived business preferences for local laws that reflect emerging de-nationalized standards. This is not to point to an international commercial conspiracy in Australia. Nor is it to downplay the role of the state and, within states, the interests of law-enforcers or more obviously “moral” norm entrepreneurs, like NGOs, in harmonized or amended laws.<sup>115</sup> The claim, rather, is that researchers need to consider the ways in which business actors contribute to a choice of crime control and transpose international crime-fighting obligations.<sup>116</sup> Here too a recursive lens may be apt. For example, which national or international notions of “adequate procedures” or “effective compliance” have Australian companies internalized? Where did those conceptions originate and to what extent are such private transpositions affecting public and/or non-state understandings of “best practice”? Do they align with, or do they depart from, each other?

Finally, TLO theory is better suited to placing internationally salient law reforms in their local historical contexts. In the Australian case, a TLO lens would prompt an examination of Australia’s past failures to enforce its foreign bribery laws, as well as any future failure of the legislature to pass the CCC Bill into law. TLO theory affords this additional explanatory power because it prompts questions about whether norms have been institutionalized within states and how those rules have impacted human behavior. TCL theory does conceive of transnational law as the product of an international process of regime formation that affects people through domestic law. However, Boister’s account does not lend itself to a focus on the ways that states implement international rules, or the strength and weakness of those rules in aligning social practice. My first finding is therefore that TCL theory is comparatively less able to expose and account for variations in how states and non-state actors respond to international standards.

### B. “Criminal Law” and the Proposed Australian Reforms

My second finding concerns the challenge of applying the concept of transnational *criminal* law with respect to the proposed Australian corporate foreign bribery controls. Is the failing to prevent offense an example of a criminal approach to behaviour control and, if not, why should this matter?

In recent work, Boister acknowledges that the suppression conventions also recommend or require non-criminal forms of intervention: civil and administrative, “preventive and regulatory.”<sup>117</sup> Yet his attention remains on the

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114. See, generally, Kevin Davis et al., *The Local-Global Life of Indicators: Law, Power, and Resistance*, in *THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW* 1 (Sally Merry, et al. eds., 2015).

115. Senate, *ERC Report*, *supra* note 56, at ¶ 4.69, 4.75 (the Senate Economic References Committee also citing an Australian church group as being in support of the failing to prevent offense and adequate procedures defense).

116. See, generally, Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework* 42 *CONN. L. REV.* 1 (2009).

117. BOISTER 2018, *supra* note 2, at 29.

criminal law—implicitly conceived of as a relatively discrete system of prohibitions, procedures, and punishments with particular risks of stigmatization and coercion.<sup>118</sup> This focus would appear to be justified insofar as all but one of the anticorruption treaties require states to criminalize certain behaviors.<sup>119</sup> The crime control treaties also authorize incursions into the private sphere and encourage states to reduce protections for persons subject to international judicial cooperation.<sup>120</sup> Be this as it may, notionally non-criminal measures against corruption may also be a source of tension or conflict with individual civil liberties.<sup>121</sup> The non-criminal features of the anticorruption treaties may indicate an alternative approach to behavior control.<sup>122</sup> The Australian case materials indicate that there are “new” or “non-criminal” qualities to the failure to prevent offense that are central to its categorization, historicization, and appraisal.

### 1. An Example of “New Governance”?

From one angle, the proposed Australian corporate foreign bribery reforms take a stance on criminalization that is characteristic of “new governance” approaches to business risk regulation.<sup>123</sup> The term “new” (“regulatory” or “experimental”) governance describes a broad range of public sector “tools” deployed to motivate private sector self-regulation and cooperation in community problem-solving.<sup>124</sup> Criminal sanctions are not disregarded in this conceptual framework and mode of intervention, but they are placed towards the tip of a regulatory pyramid.<sup>125</sup> There, they serve to deal with more egregious violations and to motivate compliance with less coercive enforcement activities.<sup>126</sup>

Read with the surrounding documents, the CCC Bill recalls this collaborative and staged approach to governmental intervention. Granted: the AGD rejects a suggestion that the failing to prevent offense is a “regulatory breach” that should attract lesser penalties.<sup>127</sup> Proposed s. 70.5A is to be made punishable

118. So much is apparent from the general principles as most recently presented: BOISTER 2018, *supra* note 2, at 422–27.

119. See, e.g., OECD Convention, *supra* note 9, Arts. 1, 7; UN Convention, *supra* note 9, Arts. 15–25. The exception is the Civil Law Convention on Corruption, Nov. 4, 1999, 2246 UNTS 3 (2005).

120. See, esp., RADHA IVORY, CORRUPTION, ASSET RECOVERY AND THE PROTECTION OF PROPERTY IN PUBLIC INTERNATIONAL LAW: THE HUMAN RIGHTS OF BAD GUYS Ch. 4 (2014).

121. *Id.* at Ch. 5 & 6 (e.g., on non-conviction based confiscation). See, further, JOHAN BOUCHT, THE LIMITS OF ASSET CONFISCATION: ON THE LEGITIMACY OF EXTENDED APPROPRIATION OF CRIMINAL PROCEEDS (2017).

122. Ivory 2018, *supra* note 1, at 427–32.

123. See also, NICHOLAS LORD, REGULATING CORPORATE BRIBERY IN INTERNATIONAL BUSINESS: ANTI-CORRUPTION IN THE UK AND GERMANY 44–47 (2014) [hereinafter Lord 2014].

124. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINNESOTA L. REV. 342 (2004) [hereinafter Lobel 2004]; Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 1, 2–3 (Gráinne de Búrca & Joanne Scott eds., 2006); Orly Lobel, *New Governance as Regulatory Governance*, in OXFORD HANDBOOK OF GOVERNANCE 65, 65 (David Levi-Faur ed. 2012) [hereinafter Lobel 2012].

125. See, e.g., IAN AYES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 35–39 (1992).

126. *Id.* See also ARIE FREIBERG, REGULATION IN AUSTRALIA 423 (2017).

127. AGD, *LACALC Submission*, *supra* note 55, at 8.

with a fine equal to that in s. 70.2 Code<sup>128</sup> so as to “ensure . . . deterre[nce]” of willful blindness in companies.<sup>129</sup> However, by its terms, s. 70.5A would excuse corporations that “had in place adequate procedures designed to prevent” foreign bribery. The government will tell corporations the steps they may take,<sup>130</sup> using “principles-based” guidance rather than a “prescriptive checklist”<sup>131</sup> that establishes a presumption of (non-)compliance.<sup>132</sup> The Senate Legal and Constitutional Affairs Legislation Committee, which examined the Bill in 2018, recommended that “corporate stakeholders” be permitted to comment on an exposure draft of the “adequate procedures” guidance.<sup>133</sup> The very opportunities for self-governance justify the no-fault offense,<sup>134</sup> the reversal of the burden of proof,<sup>135</sup> and the broad concept of associates.<sup>136</sup>

## 2. *The Prospects and Pitfalls of New Governance*

Considered as an example of new governance approaches, the CCC Bill could entail regulatory risks and returns other than just those emphasized by Boister. For its advocates, new governance is an innovative response to socio-economic complexities, “a third-way vision between unregulated markets and top-down government controls.”<sup>137</sup> Viewed in this way, the Bill provides an adequate procedures defense as means to motivate compliance. The DPA scheme is an alternative to punishing past acts of foreign bribery through corporate conviction and monetary sanctions. The AGD acknowledges that lengthy court battles are an economic cost for defendant companies, whilst indictments may themselves create possibly fatal corporate stigmas.<sup>138</sup> The CCC Bill offers an alternative to that top-down enforcement model insofar as proposed s. 70.5A would motivate corporate harm prevention, and the DPA provisions would allow the deferment of corporate prosecutions in exchange *inter alia* for compliance reforms.<sup>139</sup> On an appreciative

128. Code, *supra* note 10, at § 70.2(5); CCC Bill, *supra* note 12, at Sch. 1, cl. 8, § 70.5A(6).

129. AGD, *LACALC Submission*, *supra* note 55, at 8; AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 3. *See also* Senate, *LACALC Report*, *supra* note 56, at ¶ 2.89.

130. CCC Bill, *supra* note 12, at Sch. 1, cl. 8, § 70.5B.

131. *Addendum to the Explanatory Memorandum, Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017* (Cth) (Austl.) ¶ 5; AG, *Letter to Sen. Polley*, *supra* note 55, at 10. *See also* AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 10, 13–14.

132. AG, *Letter to Sen. Polley*, *supra* note 55; AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 13.

133. Senate, *LACALC Bill Report*, *supra* note 56, at ¶ 2.93.

134. AGD, *Bribery Consultation Paper*, *supra* note 55, at 8.

135. AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 16; CCC Bill EM, *supra* note 55, at ¶ 30.

136. AGD, *LACALC Response* (Mar. 2018), *supra* note 55, at 6; CCC Bill EM, *supra* note 55, at ¶ 95. *See also* Senate, *LACALC Bill Report*, *supra* note 56, at ¶ 2.86; Senate, *ERC Report*, *supra* note 56, at xiii.

137. Lobel 2012, *supra* note 124, at 65.

138. *See, e.g.*, CCC Bill EM, *supra* note 55, at ¶ 11; AGD, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia: Public Consultation Paper*, 9–10 (Mar. 2016) (Austl.), <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx> (last visited Jul. 16, 2018) [hereinafter AGD, DPA Consultation Paper (2016)]. *See also* Ivory 2018, *supra* note 1, at 430–31 (with further references).

139. CCC Bill, *supra* note 12, at Sch. 2, cl. 7.

assessment, this “carrot and stick” approach maximizes opportunities for ethical expression within for-profit organizations and minimizes the threat to communities from corrupt enterprises – and overzealous prosecutors. The CCC Bill may thus respond to the complexity of cross-border corporate regulation in ways that utilize private resources or expertise, and reduce the costs or risks of enforcement.

Equally, the scheme could be liable to elite manipulation of various sorts, such as emerges from a contemporary Australian corporate governance inquiry, and is evident in the international academic literature. Within Australia, there has been high-level disapproval of conciliatory corporate regulatory practices in the interim report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry (hereinafter Hayne Royal Commission).<sup>140</sup> Prepared by a retired High Court judge on the basis of televised witness testimony and major institutional disclosures, the report does blame financial services entities themselves for misconduct and poor behavior.<sup>141</sup> However, the Commissioner also provisionally concluded that Australian corporate and prudential regulators had enabled improper industry practices by being too reticent to prosecute contested allegations of wrongdoing.<sup>142</sup> ASIC, in particular, was criticized for prioritizing the commercial interest in reaching agreement over the public interest in penalty proceedings.<sup>143</sup>

Within the academy, legal sociologists, political scientists, and criminal lawyers problematize compliance approaches to corporate ethics controls. First, Lauren Edelman illustrates some of the functional problems with her studies of American anti-discrimination law. Through a process of “legal endogeneity”, she argues, corporations have used ambiguous legal provisions to shape judicial understandings of compliance in their favor.<sup>144</sup> She sees a similar process at work within US corporate criminal liability and ethics rules,<sup>145</sup> as have been influential in the transnational regulations on foreign bribery. Applying her insights, it could be argued that the defense of “adequate procedures” is overly broad, as it appears in proposed s. 70.5A CCC Bill. The breadth (ambiguity) of that concept would not likely be moderated by a guidance that is also general (“principles-based”) and developed with input from the corporate sector. Moreover, if US practice is any guide, the concept of adequate procedures will be interpreted, not by courts, as a rule, but by prosecutors and defendants in negotiations for settlements (DPAs).<sup>146</sup> To the extent that DPAs result from executive discretion and a process of

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140. THE HON. KENNETH M. HAYNE A.C. Q.C., 1 INTERIM REPORT: ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY xix (Sep. 21, 2018), <https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf> (last visited Dec. 24, 2018).

141. *Id.* at 268.

142. *Id.* at 269–70.

143. *Id.* at 277.

144. LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 12–16 (2016).

145. *Id.* at 223, 226–29.

146. Kevin T. Abikoff et al., *The International Perspective: Lessons from US Authorities’ Enforcement of the Foreign Corrupt Practices Act*, in LISSACK & HORLICK ON BRIBERY 429, ¶ 12.2 (Richard Lissack & Fiona Horlick eds., 2nd ed. 2014); BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 6–7 (2014).

bargaining, one could hypothesize greater potential for prosecutorial accommodation of corporate preferences. The question would then become: To what extent is the risk of legal endogeneity offset by prosecutorial codes of practice and review procedures as proposed in Australia?

Second, deploying Foucault, Baker, Liss, and Sharman configure compliance activities as a form of governmentality<sup>147</sup> or technique of governance (surveillance).<sup>148</sup> Taking this view of the CCC Bill, corporate duties of care shift some of the state's responsibility for policing onto organizations, which then become instruments for monitoring "dangerous" populations of employees, contractors, and intermediaries, and encouraging, among them, greater self-control.<sup>149</sup> This style of account is not explicitly normative but it does encourage critical reflection on the "contemporary scheme of things,"<sup>150</sup> its underlying assumptions and effect on social relations. In the case of the CCC Bill, a "knowledge-power" lens could prompt inquiry into the logic and impact of corporate foreign bribery laws that favor compliance. Could the failing to prevent offense reflect a neo-liberal rationality, in that it utilizes profit driven-actors and market processes to achieve a public ethical good? How do transnational compliance obligations affect the distribution of risk for wrongdoing between small and large businesses in exporting states, like Australia? To what extent do privatized corporate surveillance duties actually enhance economic freedoms and other forms of autonomy in Australia's globally southern trading partners?<sup>151</sup>

Critical versions of criminology have also struck a chord with domestic criminal lawyers. In this way, third, Andrew Ashworth and Lucia Zedner problematize the trend away from fault-based punishment towards coercive harm reduction strategies in England and Wales.<sup>152</sup> Such "preventive justice" measures may have a justification in the need to ensure community safety. However, they must be carefully reconciled with liberal protective principles, in those authors' views.<sup>153</sup> So far, Ashworth accepts s. 7 *Bribery Act 2010*, despite the private performance of public functions and criminalization of omissions that it foresees.<sup>154</sup> However, his earlier argumentation (with Zedner) was deployed to query the strict nature of the failing to prevent offense in at least one academic response to the CCC Bill when it was issued as a consultation draft.<sup>155</sup>

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147. Carolin Liss & Jason Sharman, *Global Corporate Crime-Fighters: Private Transnational Responses to Piracy and Money Laundering*, REV. INT'L POL. ECON. 22 (2015).

148. Larry Catá Backer, *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101, 119–20 (2008).

149. See also LORRAINE MAZEROLLE & JANET RANSLEY, *THIRD PARTY POLICING*, Ch. 1 (2006).

150. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 3 (2001).

151. See, e.g., World Bank, *De-risking in the Financial Sector*, Oct. 6, 2016, <http://www.worldbank.org/en/topic/financialsector/brief/de-risking-in-the-financial-sector>, (last accessed Jan. 3, 2019). See, further Ivory 2018, *supra* note 1, at 438–39.

152. ANDREW ASHWORTH & LUCIA ZEDNER, *PREVENTIVE JUSTICE* 13 (2014).

153. *Id.* at Ch. 11.

154. Andrew Ashworth, *Positive Duties, Regulation and the Criminal Sanction* 133 L.Q.R. 606 (2017).

155. Professor Simon Bronitt & Ms Zoe Brereton, *Submission to the Attorney-General's Department, Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995 (Cth) Public Consultation Paper*, ¶ 5.4 (May 10, 2017) (Austl.), <https://www.ag.gov.au/Consultations/Documents/Proposed->



### 3. Theorizing Non-Criminal Law Reforms

How would TLO theory, in contrast to TCL theory, accommodate these alternative characterizations and critiques of the Australian failing to prevent offense? In light of the above, I argue that a TLO approach is better suited to illuminating the qualities and consequences of the CCC Bill, if it is passed.

The advantage of TLO theory here is its analytical openness. Belonging to the “contextualist” branch of the New Legal Realist tradition, TLO theory departs from the “Jamesian/Deweyan” position that “theory must come from the world.”<sup>156</sup> Hence, scholars deploying the TLO approach do not privilege criminal law as the most important means by which societies approach transnational criminal problems.<sup>157</sup> Further, unlike transnational criminal lawyers, TLO theorists do not provide a framework for evaluating transnational legal orders as such.<sup>158</sup> Instead, they emphasize the perceived legitimacy of a law as a variable in compliance,<sup>159</sup> as well as the way that “ideological contradictions” within a TLO can spark recursive processes, which affect the settlement of legal meanings and practices.<sup>160</sup>

Neutrality vis-à-vis legal taxonomies and fundamental rights enables a reform, like the CCC Bill, to be both described and appraised from a wider range of perspectives. British failing to prevent offenses do raise due process issues for corporations and their workers, even if they are judged acceptable within the attendant frameworks of international human rights law and criminal procedure.<sup>161</sup> Defendants’ rights are also an important constraint on the enforcement of foreign bribery law in Australia, as a recent High Court case has shown.<sup>162</sup> However, as emerges from the above, there is a range of pragmatic and normative challenges embedded in the CCC Bill, which TCL’s focus on the criminal law and procedures may conceal. TLO theory may perform better if it is used to illuminate how measures affect and are perceived by relevant groups, from corporate compliance officers and sales personnel to the legal and allied professionals who act as investigators and advisors. That information could aid reflections on the reasons for the adoption or rejection of the CCC Bill and, if it is adopted, could help determine the CCC Act’s “regulatory performance.”<sup>163</sup>

In addition, TLO and TCL approaches could be combined to probe the operation—for good or for ill—of anti-foreign bribery compliance systems. Such

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amendments-to-the-foreign-bribery-offence-criminal-code-act-1995/Foreign-bribery-submission-Bronitt-Brereton.pdf (last visited Dec. 24, 2018) (citing Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions* 2 CRIM. LAW & PHILOSOPHY 21, 33 (2008)).

156. Nourse & Shaffer 2009, *supra* note 23, at 82, 84.

157. Prabha Kotiswaran, *Transnational Criminal Law in a Globalised World: The Case of Trafficking* (in this issue).

158. Halliday & Shaffer 2015a, *supra* note 8, at 27.

159. Shaffer 2013b, *supra* note 8, at 34; Halliday & Shaffer 2015b, *supra* note 8, at 507–08.

160. Halliday & Shaffer 2015a, *supra* note 8, at 39–40.

161. Liz Campbell, *Corporate Liability and the Criminalisation of Failure* 12 LAW & FIN. MARKETS REV. 57, 61–63 (2018).

162. *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions; Donald Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions; Edmund Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions; Rick Tucker (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53.

163. Lord 2014, *supra* note 123.

studies could start, for instance, with questions about how companies subject to the CCC Bill (or an equivalent law) respond to their duties to prevent, both on paper and through their internal and external counsel and compliance functions. They could then continue to probe how firms discharge their quasi-law enforcement powers (e.g., in trainings and internal investigations) and how those exercises of power are perceived by employees, agents, and contractors in Australia and a range of countries that host Australian investments. These findings could illuminate new opportunities for individual ethical expression or possibilities for domination, when viewed through a liberal-criminal law or a knowledge-power lens.

#### CONCLUSION

What do the findings in the Australian case say about the relative strengths of TCL or TLO theories? Does Boister's "TCL" theory deliver on its promise to match explanatory, descriptive, and normative accounts of transnational crime controls? To the extent that there are difficulties, how does Halliday and Shaffer's "TLO" approach correct the problems with the TCL analysis?

In this Article, I explored these questions via a preliminary study of a proposed corporate foreign bribery reform in Australia. Through a structured reading of Australian government documents and associated international materials, I found that the transnational criminal account struggles to capture the complex history and ambiguous form of the proposed Australian failing to prevent offense. On the one hand, a corporate crime of omission was not required by the UN or OECD Conventions nor was it recommended in the reports of those conventions' monitoring bodies. Rather, the CCC Bill corresponds to "soft" OECD recommendations and other non-binding or non-public international standards on corruption. In particular, the Australian proposal would seem to borrow from the *Bribery Act 2010* (UK), and thus to incorporate the outcomes of earlier battles between the OECD and the British government, as well as US regulatory preferences. On the other hand, the CCC Bill has some of the hallmarks of a new governmental approach to corruption control, with its defense for companies with adequate procedures and its provisions for negotiated corporate settlements (DPAs). In combination, these measures seem designed to enhance the Commonwealth's capacity to prosecute corporate foreign bribery and to engage the corporate sector as partners in law enforcement. Transnational criminal law theory, as framed by Boister, would deemphasize the non-criminal features of the recent Australian proposal and its potential regulatory implications.

This analysis then opened up the way for applying TLO theory in the Australian case. Halliday and Shaffer's approach was useful initially for illuminating the range of actors and factors that seemed to motivate the proposed Australian reforms. For TLO theory not only points to the role of powerful states and non-state moral entrepreneurs in diffusing social norms through international networks and organizations. In addition, it calls for an examination of how agents and structures interact at multiple levels of governance, and with respect to each other, in the context of particular governmental decisions. Hence, in the Australian case, TLO theory draws attention to the processes by which the OECD and UN, US and UK contributed to the CCC Bill, in addition to the role of Australian officials, companies, and policy traditions in shaping the drafters' preferred corporate

criminal liability rules. TLO theory then takes an agnostic stance on the most relevant features of domestic criminal justice reforms and the possibilities of appraising those measures in any absolute sense. In the case of Australia, this agnosticism permits both the new governance and traditional criminal features of the CCC Bill to come to the fore. A TLO approach would allow the CCC Bill to be considered for its possibilities, as well as its pitfalls, and from the perspective of a range of affected parties. In this way, the avowedly sociolegal orientation of TLO theory exposes the challenge of evaluating rules without assuming particular notions of legitimacy or “good” crime governance. It also places questions about rightfulness in the context of questions about a law’s prospects for success or failure, as is important in the case of Australia’s pending corporate foreign bribery reforms.