A CRITIQUE OF THE COUNTER ECONOMIC CRIME REGIME
IN THE UNITED KINGDOM,
WITH REFERENCE TO THE UNITED STATES OF AMERICA AND AUSTRALIA

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Acknowledgements

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Abstract

Economic crime is an important feature of the United Kingdom’s economy and yet it attracts less attention from the media, government and law enforcement agencies than violent crime, even though it is a major drain on the economy, it threatens the reputation of corporations and it poses a threat to national security.

This thesis considers the economic crime components – fraud, bribery and corruption, and financial regulation, taking as the starting position the UK government’s analysis of the prosecution of fraud and regulation of financial services in the 1980’s. In strident terms, these were criticised for an ineffective approach towards the prosecution of fraud and the lack of an adequate system of financial regulation. This thesis critiques the development of government policy, legislation and anti-economic crime institutions over the succeeding 35 years by examining the field of economic crime as a whole, rather than as traditionally looking individually at its component parts. This approach is placed in sharp relief by the 2008 financial crisis and subsequent revelations of conspiracies and fraud and the differencing approaches of separate institutions which serve to emphasise the lack of a cohesive approach.

Economic crime is a global phenomenon and although the UK, geographically, is an island in economic terms it is linked to other countries which have to face the same issues. This presented the research opportunity to consider how two other countries, the United States of America and Australia, coped with the 2008 economic crisis and its aftermath and whether an analysis of their approaches would provide a beneficial template for the UK to adopt.

The conclusion of this thesis is that the Coalition government was correct in its ideal to hold those suspected of financial wrongdoing to account in a day of reckoning, but that this was doomed to failure because the anti-economic crime forces are competitors rather than colleagues. This thesis proposes creation of a cohesive and effective anti-economic crime policy and creation of a single Economic Crime Agency, to encompass existing agencies to remove areas of
overlap and underlap and enabling the single agency to deploy criminal and regulatory powers and sanctions.
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<td>ACLEI</td>
<td>Australian Commission for Law Enforcement Integrity</td>
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<td>NSW</td>
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<td>OAS</td>
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<td>Recognised Professional Body</td>
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<td>Serious Organised Crime Agency</td>
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<tr>
<td>SOE</td>
<td>State Owned Enterprise</td>
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<tr>
<td>SRO</td>
<td>Self Regulatory Organisation</td>
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<tr>
<td>TI</td>
<td>Transparency International</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNCAC</td>
<td>United Nations Convention Against Corruption</td>
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<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>VAT</td>
<td>Value Added Tax</td>
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<td>WB</td>
<td>World Bank</td>
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Chapter 1: Introduction

Economic crime is an important feature of the United Kingdom’s (UK) economy, yet it attracts less attention from the media, government and law enforcement agencies when compared to violent crime, underlining the classic polarity between ‘blue collar’ and ‘white collar’ crime. This thesis is focused on economic crime in the UK and considers whether the current anti-economic crime legislation and enforcement agencies are positioned to meet their objectives. However, since economic crime afflicts all countries, in order to ensure that the UK measures are appropriate, it is important to take advantage of experience in some other jurisdictions by comparing and contrasting their government policy and regulatory responses (both legislative and agencies). For reasons which will be explained below, this research has chosen to compare the UK’s approach with those of the United States of America (US) and Australia. The thesis employs doctrinal and comparative methodologies and will define ‘economic crime’ before examining and analysing, government policy, legislation and anti-economic crime institutions. The thesis also explains why, some 28 years after major reforms into the investigation and prosecution of serious financial crime, combined with the relaxation of controls over financial markets, the time is right for a fresh perspective on the UK’s response to economic crime. This is not an historic review because, fleetingly, the Coalition Government embraced a proposal to create an independent Economic Crime Agency (ECA) but then the proposal mutated into merely being part of a different organisation, the National Crime Authority.

1 The law is at 31 October 2014
4 Serious Fraud Office: ‘Our work is part of the overarching aims and objectives of the criminal justice system and we contribute to: reducing fraud and corruption and the cost of fraud and corruption; delivering justice and the rule of law; [and] maintaining confidence in the UK’s business and financial institutions.’ Serious Fraud Office, ‘What we do and who we work with’ http://www.sfo.gov.uk/about-us/what-we-do-and-who-we-work-with.aspx
5 Financial Conduct Authority, ‘We want consumers to use financial services with confidence and have products that meet their needs, from firms and individuals they can trust. To achieve this, we regulate firms and financial advisers so that markets and financial systems remain sound, stable and resilient.’ Financial Conduct Authority, ‘About us’ http://www.fca.org.uk/about accessed 3 August 2014.
Agency (NCA). Thus, instead of a single agency the outcome in relation to economic crime continues to be regime of individual agencies with overlapping responsibilities that lack a focused approach and a leading institution. This thesis considers the merits of such developments. Since 1986, as the UK emerged from economic recession, there have been many vicissitudes in the economic environment together with the global political change occasioned by the terrorist attacks in September 2001 (9/11) in the US, which resulted in President Bush engaging in the ‘financial war on terror’.

In response to these events, US resources were diverted away from financial crime and towards anti-terrorism. This was followed by the 2008 global financial crisis which brought poor financial practice and fraud to the surface. As a response to fraud emanating from the financial crisis, President Barak Obama introduced the Financial Fraud and Recovery Act 2009 that increased resources to Department of Justice (DoJ) by $330m, whereas in the UK, the government planned reductions in the Serious Fraud Office’s (SFO) budget by 40% to £30m.

The UK is not the only country to face issues over the management, prevention and control of the elements of economic crime since fraud, bribery and corruption...
feature in all countries.\textsuperscript{16} In order to inform the discussion, it is instructive to review how two other countries, the US and Australia, dealt with the same issues. These countries were chosen for comparison because the former is the UK’s most significant trading partner outside Europe\textsuperscript{17} and the latter is regarded as having more successfully withstood the effects of the financial crisis than other leading industrial nations.\textsuperscript{18} Thus, the focus of this research is on the UK where the last major study of investigation and prosecution of fraud was in 1986, presaging the SFO’s creation but, in the field of financial regulation, the institutions of Securities and Investment Board (SIB) and Financial Services Authority (FSA) were established and then disbanded. Responsibility for the regulation of the financial services sector was given to the FSA under the ‘tripartite’ regime,\textsuperscript{19} which was subsequently discredited in the aftermath of the financial crisis. According to Rider, the new Coalition government’s upheaval of financial regulation has restored primacy of regulation to the Bank of England under a new ‘twin peaks’ regime with a new or rebranded regulator,\textsuperscript{20} the Financial Conduct Authority (FCA), taking over some of the FSA’s responsibilities. During this time, fraud, bribery and corruption legislation\textsuperscript{21} was introduced to provide prosecutors with additional powers.\textsuperscript{22}

However, the adverse effect of the financial crisis on the banking sector led to calls for the prosecution of senior executives and for further legislation to criminalise alleged illegal conduct by bankers. This turmoil in the banking sector was exacerbated by the revelation that the key financial market interest benchmark, the

\textsuperscript{16}Transparency International (n 6).
\textsuperscript{17} United Nations, ‘At a glance’ (n 6).
\textsuperscript{18} Note: the European Union was not selected for comparison, primarily because EU directives to establish a common regime across member states are absent, through lack of political will, as evidenced by complaints of patchy adoption of international corruption conventions.
\textsuperscript{19} Several EU Member States have ratified all or most of the existing international anti-corruption instruments. However, three EU Member States (Austria, Germany, Italy) have not ratified the Council of Europe’s Criminal Law Convention on Corruption, twelve have not ratified its additional Protocol (Austria, the Czech Republic, Estonia, Finland, Germany, Hungary, Italy, Lithuania, Malta, Poland, Portugal, Spain) and seven have not ratified the Civil Law Convention on Corruption (Denmark, Germany, Ireland, Italy, Luxembourg, Portugal and the UK). Three Member States have not yet ratified the UN Convention against Corruption (The Czech Republic, Germany, and Ireland ). Five EU Member States (Cyprus, Latvia, Lithuania, Malta, and Romania) have not ratified the OECD Anti-Bribery Convention.’ EU ‘Commission steps up efforts to forge a comprehensive anti-corruption policy at EU level.’ 3 June 2011. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/376&format=HTML&aged=0&language=EN&guiLanguage=en accessed 9 April 2012.
\textsuperscript{22} See chapter 5. For example Bribery Act 2010, s 7 ‘failure of a commercial organization to prevent bribery’.
London Inter-Bank Offered Rate (LIBOR),\(^{23}\) was manipulated by banks for their own benefit, with similar accusations regarding the foreign exchange, gas and petroleum markets were similarly afflicted.\(^{24}\) The LIBOR scandal revealed an initial lack of enthusiasm by the FSA/FCA to take regulatory action against individuals and firms involved or by SFO to investigate and prosecute. This allowed the perception to continue of a lack of accountability of those who contributed to the financial crisis. The rear-guard actions of the regulator of imposing large financial penalties and of the SFO in investigation and prosecution owed much to government and parliamentary pressure, including in the SFO’s case making available ‘blockbuster’ funding from HM Treasury to procure resources.\(^{25}\) This led to the SFO seeking to amend the Bribery Act 2010 (BA2010) to create a new offence of ‘failing to prevent all acts of financial crime.’\(^{26}\) These considerations of multiple change of regulator, the largest financial crisis since the Wall Street Crash,\(^{27}\) and inertia through no one regulator having primacy to address economic crime issues are some of the reasons why this research is of contemporary value.

The importance of placing the UK into an international context has assisted in the redefinition of the doctoral study into the research question: ‘A critique of the counter economic crime regime in the United Kingdom, with reference to the United States of America and Australia.’ The objective is to evaluate the outcome of the comparative research in order inform the discussion as to the most appropriate economic crime model that should be adopted by the UK. The spectrum of possibilities of the most appropriate economic crime model ranges between endorsement of the UK’s current model; wholesale changes to adopt either of those of the US or Australia; or a hybrid model.

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\(^{23}\) The London Inter-Bank Offered rate, hereinafter LIBOR.

\(^{24}\) The Times, 28 July 2014. ‘HBOS ’lowballed’ Libor during crisis, regulators to reveal’ http://www.thetimes.co.uk/tto/business/industries/banking/article4158182.ece

\(^{25}\) For details of SFO finances, see (n 15).


\(^{27}\) In 1929, see J K Galbraith, The Great Crash 1929 (Pelican 1961) 29.
1.1 The research context

Economic crime is a major drain on the UK economy, with fraud alone estimated at approximately £76bn annually, and yet attracts little public attention. This thesis examines the UK counter-fraud system, which is regarded as out dated and complex. It will consider how the current strategy has developed, whether by design or in an ad hoc manner before evaluating whether a new ‘super agency’ that would centralise all counter-fraud, bribery and corruption activities could succeed and, if so, what role would be played by existing agencies. Examination of the literature shows that there has been little evidence of other academic research on the economic crime sector as a whole. This may be explained because until comparatively recently, fraud prevention, detection and prosecution was not considered to be a core policing priority unlike money laundering and counter-terrorism financing. As a consequence, fraud received only minor public...
attention until major cases in the 1980’s. The government’s response was establishment of the Roskill Commission to consider fraud trials, rather than the institutional arrangements. The key issue, according to Honess, Levi and Charman, was that cases were taken to trial but the expected convictions were not obtained, leading to the conclusion that the trials themselves were problematic because juries did not understand complicated fraud. Roskill recommended that non-jury trials should be established but this was not adopted, although the concept was included in later legislation but never implemented and subsequently removed. However, one significant outcome was the creation of the SFO in 1987 as a single investigation and prosecution agency. The SFO has had a troubled life, with a poor reputation and perceived by public and media as a failing organisation which was contra to the original expectations of being the UK’s equivalent of the US Federal Bureau of Investigation (FBI). That the SFO has not succeeded in winning public acclaim is a subject for debate alongside its relationship with the financial services regulators: firstly, the SIB; secondly, the FSA, and lastly, in 2013, the FCA. The outcome of Roskill was recognition that a single investigative and prosecution agency had merit and should be established. Some 20 years later, the SFO appeared to have lost its way by seeming to prefer negotiating civil remedies in preference to seeking criminal sanctions, while the regulator was also focused on income generation from fines.

When the Coalition government entered office in May 2010, it was clear that the counter-fraud organisational arena in the UK was crowded, not just with the SFO, 

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33 ‘The 1980’s provided a number of controversies in both public and private sectors, including the Crown Agents, Johnson Matthey bankers, John Poulson, London and County securities, London Capital Group’. Doig (n 32) 133.


35 Criminal Justice Act 2003, s 43.

36 Protection of Freedoms Act 2012, s 113. ‘Repeal of provisions for conducting certain fraud cases without jury. Omit section 43 of the Criminal Justice Act 2003 (applications by prosecution for certain fraud cases to be conducted without a jury).’


38 R (on the application of Corner House Research and another) v Director of Serious Fraud Office (BAE Systems plc, interested party) [2008] All ER 927.


37 Daily Mail (n 37).

38 US Federal Bureau of Investigation, hereinafter FBI.

Ryder (n 12) 27.

36 Roskill (n 6).
FCA, OFT but 43 Police forces, HM Revenue & Customs, Serious and Organised Crime Agency (SOCA), a myriad of other agencies and Crown Prosecution Service. These organisations, some of which are in varying stages of reorganisation, have different priorities, as does the FCA which is a regulator, with some prosecution powers. Thus, the arena has potential to 'simplify the confusing and overlapping responsibilities (...) in order to improve detection and enforcement.' Such comments support Levi’s view that it was not intended by Roskill ‘that Customs and Excise, DTI, Inland Revenue and the Police / CPS [should be left] to go their separate and perhaps quite divergent ways.' By comparison, the FBI is a nationally organised force, which is part of the DoJ, headed by the US Attorney General.

The recent extension of economic crime criminalisation by the Bribery Act 2010 is regarded by the industry as ‘the single most important development’ in combating white collar crime. The SFO is designated lead agency for investigation

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In England and Wales, HM Inspector of Constabulary reports (21 July 2014) ‘A less fragmented, more structured approach to effective working between forces or between forces and other organisations is required. In particular, there is now a pressing need for greater clarity as to which policing services are best provided by forces at the local, regional or national level.’ ‘Policing in Austerity’ 33. http://www.hmic.gov.uk/wp-content/uploads/policing-in-austerity-meeting-the-challenge.pdf accessed 22 July 2014.


In addition, the FCA has the following powers under Financial Services and Markets Act 2000: s 19 ‘General prohibition’; s 24 ‘False claims to be authorised or exempt’; s 85(3) ‘Prohibition of dealing’; s 21 ‘Restrictions on financial promotion’; s 56(4) ‘Prohibition orders’; s 177 ‘Failing to cooperate’; s 398 ‘Misleading the authority’ Other provisions: ‘insider dealing’ Criminal Justice Act 1993, s 52; ‘Making misleading statements’ Financial Services Act 2012, ss 89, 90 & 91; ‘Terrorist financing or money laundering’, Counter Terrorism Act 2008, Sch 7; ‘Money Laundering Regulations’, Money Laundering Regulations 2007.


46 Salans,’Anti-bribery and Corruption: the UK propels itself to the forefront of global enforcement’ http://www.salans.com/~/media/Assets/Salans/Publications/Salans%20Client%20Alert%20UK%20Bribery%20Act%20Implementation%20Date.ashx
and prosecution, both in UK and overseas. The SFO is experienced but, as with its abandoned investigation into bribery allegations against the defence equipment manufacturer BAE, its reputation has suffered in comparison with US counterparts. The international reputation of the DoJ and the Securities and Exchange Commission (SEC) is of agencies which have a strong determination to prosecute fraud, bribery and corruption, mainly based on the international application of the Foreign Corrupt Practices Act 1977 (FCPA). The DoJ and SEC appear to be more successful than UK agencies because of the headlines generated by firms agreeing to make very large financial settlements in order to dispose of actions against them. The DoJ and SEC were shown by a study initiated by the SFO of itself to achieve higher outcomes in terms of cases successfully taken to trial and convictions obtained, in addition to which the US make heavy use of Deferred Prosecution agreements (DPA) to settle cases without the necessity of a trial but with the generation of significant income. The SFO, too, saw the advantages of DPAs and endeavoured to follow US practice by concluding agreements, though without underpinning legislative support, but these were heavily criticised by the courts. This has been remedied from 2014 when such agreements became permissible in UK but it remains to be seen when and how they are employed. The DoJ and SEC deploy DPAs in a manner whereby the mere threat of litigation causes defendants to wish to compromise with the

49 US Securities and Exchange Commission, hereinafter SEC.
52 This Review [of SFO] compares the Serious Fraud Office (SFO) to two prosecutors’ offices in the US: the US Attorney’s Office for the Southern District of New York (SDNY), a Federal prosecution agency, and the Manhattan District Attorney’s Office (DANY), a local prosecutor’s office. Both offices (whose caseload of serious and complex fraud is comparable to that of the SFO) occasionally work with the SFO.” Both SDNY and DANY are part of US Department of Justice. de Grazia (n 51).
53 R v Dougall [2010] EWCA Crim 1048; R v Innospec (unreported).
authorities (pace UK where defendants seem to be prepared to ‘take a chance’ on SFO prosecution, because of a combination of cases being abandoned before trial, trials collapsing or evidence not being sufficiently strong to cause a jury to convict). The US experience has led to significant income in terms of fines but seemingly relegated the role of the Judiciary into that of a ‘rubber stamp’, something which had been a concern of UK courts. Recent evidence is, though, that the Judiciary is being less compliant and more enquiring in this respect. With the advent of DPAs in the UK, there will be issues over implementation, bearing in mind the perception that white collar crime is treated differently from other crime and, in a post financial crisis era, that banks are ‘too big to prosecute’.

In the meantime, the FSA was considered to have failed in its objective of policing white collar crime and criticised by MacNeil for adopting a ‘light touch’ approach to enforcement. The government’s wish to overhaul the market and prudential regulation was originally intended to leave the FSA’s enforcement responsibilities as part of the ECA, but these plans were abandoned and, instead, the FSA has been re-engineered as the FCA. The FCA has also embraced the OFT, including supervision of 50,000 consumer credit firms, and where, in contrast to its role as regulator and licensing authority, Joshua considers that ‘the failure of OFT’s first criminal trial for cartels and price-fixing, raised particular concerns about its competence, strategy and tactical implementation.’

Although Fisher dealt with some of the issues in 2010 when calling for the establishment of a single economic crime agency, the key contributor to the

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55 de Grazia (n 51).
56 Securities and Exchange Commission, ‘Fiscal Year 2013 Agency Annual report ’ (n 50).
Department of Justice, ‘Attorney General Holder Remarks on Financial Fraud Prosecutions’ (n 50).
57 R v Dougall [2010] EWCA Crim 1048; R v Innospec (unreported).
61 See chapter 6.2.1.
64 Some issues have been overtaken, such as enacting the Bribery Act 2010 and, availability of DPAs, the NFA has been disbanded but the structure of multiple agencies remains. A significant suggestion of making
debate was de Grazia’s critical report on the SFO. Given that the UK does not operate in isolation internationally in its endeavours to counter economic crime, this thesis will research the regulatory response to economic crime in the US and Australia for comparison. The UK is a signatory to international treaties, including OECD Anti-Bribery Convention and the United Nations Convention against Corruption 2003.

1.2 Research importance and contribution to knowledge

The field of economic crime embraces fraud, bribery, corruption and financial regulation, yet examination of the research by Levi shows they are investigated individually rather than the field as a whole. This thesis brings together a study across the spectrum of economic crime as a base for proposing a new institutional structure, thereby providing a contribution to knowledge. This thesis, in chapter four, takes as a base point for research both the state of fraud prosecution and regulatory systems which the government found in 1979. In relation to fraud, Roskill stated ‘[t]he public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book.’ In relation to regulation, ‘[t]he system, if it warrants such a title, up to 1986 was a collection of largely single industry Acts, clustered around the Prevention of Fraud (Investments) Act 1958, supplemented by various Companies Acts provisions.’ Thus, a key part of the research is to critically analyse the parallel regimes and the solutions adopted by government, which over firms vicariously liable for the actions of employees has gained traction in 2013 with engagement by the SFO in this proposal.


de Grazia (n 51).


Levi, ‘Fraud on trial: what is to be done?’ (n 44) 54.55.


Honess, Levi and Charman, (n 34) 17.


The overwhelming weight of the evidence laid before us suggests that the public is right.”

Roskill (n 6) 1.

It was administered by either the Department responsible, often the then Department of Trade & Industry (DTI), or by self-regulating bodies, for example Lloyds or the Stock Exchange.’ House of Commons Library, Research paper 12/08. www.parliament.uk/briefing-papers/SN05934.pdf accessed 14 April 2012. (Emphasis added).
28 years later are clearly shown not to have worked and are not ‘fit for purpose’.\footnote{71}{House of Commons Library (n 70) 13. (Hoban).} This will involve examination, in chapter five, of the legislative changes which saw laws dating back to the nineteenth century replaced by the Fraud Act 2006 (FRA2006)\footnote{72}{Fraud Act 2006, hereinafter FRA2006.} and the BA2010.

The next part of this thesis deals with the current anti-economic crime endeavours in the UK, US and Australia. In chapter six, this thesis considers the current UK landscape because, since 1979, governments have created, reformed or abandoned some institutions in an endeavour to respond to the changing economic climate.\footnote{73}{The landscape has changed since Roskill including the creation of SOCA, the National Fraud Authority, National Fraud Intelligence Bureau. The Government has since created ‘The National Crime Agency’ to absorb the SOCA and establish within it a division, the ‘Economic Crime Command,’ instead of the separate ECA. The fraud and prosecution activities of the (to be) dismembered FSA remain separate, as does SFO. SOCA was short-lived, as was the Asset Recovery Agency which it subsumed in 2007.} This research is timely because the outcome of a change in government was to ‘promote pro-active regulators and the pre-eminence of the Bank [of England].’\footnote{74}{House of Commons Library (n 70) 13.} During the past three decades, the suite of laws available to prosecute economic crime has been considerably improved, by extending and recodifying definitions of fraud and bribery.\footnote{75}{Fraud Act 2006, Bribery Act 2010, Proceeds of Crime Act 2002.} The contrast with the US is marked: whereas the UK has two straightforward statutes to criminalise fraud and bribery, the US has a myriad of laws which are fragmented and rely on some nineteenth century legislation such as the Mail Fraud Act 1872, as discussed in chapter seven.\footnote{76}{For a discussion of other fraud legislation, see Ryder, Financial Crime in the 21st Century (n 11) 102-111.} Nevertheless, the FCPA is important legislation with international impact.

In Australia, discussed in chapter eight, the constitution presents a confusing picture of state legislation to counter fraud while at Commonwealth of Australia level there has been anti-bribery legislation since 1999 but no prosecutions.\footnote{77}{See Chapter 8.4.1. re Securency.} The scope of UK legislation will be considered to evaluate whether it is effective, sufficient for their purpose and compliant with international standards. The comparison with US and Australia will inform consideration of possible deficiencies and consequent need for improvement.

The conclusion of this doctoral thesis, encompassing a review of the current and historic economic crime landscape, makes a contribution to knowledge by
reviewing the reality of the government’s plans and proposing a different model: that of a single ECA, in order to unite the disparate parts of the existing economic crime agencies into one entity. This thesis considers that the government was correct to advance a new ECA as a unified centre for anti-fraud matters, being a positive and exciting development. However, because of political ‘siren voices’ it has lost its will and created yet more confusion, through government’s equivocal attitude to economic crime rather than fulfilling its pledge to be serious about such crime and holding those suspected of financial wrongdoing to account, thus perpetuating the errors of the past. The Coalition government has concentrated its reforms of preventing another financial crisis by its twin peaks model. The key part of this for government was the role of the Bank of England and PRA. The second peak, the FCA, supervises an area which is susceptible to economic crime and, thus, important to this thesis. The contribution which this thesis makes to knowledge is that it is centred on economic crime and not the individual parts where other agencies may be hobbled by conflicting priorities such as the FCA regulating 50,000 financial intermediaries and the NCA diverting resources between its commands to child exploitation and online protection or border controls in contrast to the SFO which has a single focus.

The thesis advocates the positive alternative. An ECA would be a single entity, responsible for countering fraud, bribery, corruption and regulatory failings. It would take key elements of investigation and prosecution away from other agencies, which have a limited interest, and become a national centre of excellence. The ECA would be the national reporting centre for fraud, currently the only legal requirement to report is for authorised firms under the FCA’s


79 '(…) our position as one of the world’s leading global financial centres. I can also confirm that we will fulfill the commitment in the coalition agreement to create a single agency to take on the work of tackling serious economic crime that is currently dispersed across a number of Government departments and agencies. We take white collar crime as seriously as other crime and we are determined to simplify the confusing and overlapping responsibilities in this area in order to improve detection and enforcement.’
HM Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 43).
‘We take white collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading.’
Book, and the single entity would remove the inconsistencies of approach inherent in having so many different separate bodies and fulfil the coalition’s objectives. By joining together the various existing bodies, the new agency would have the critical mass and authority to make a significant contribution to tackling economic crime, thus, demonstrating the importance of this research.

The next chapter discusses the methodological approach adopted to researching the subject area.

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2.1 Introduction

This chapter discusses the methodological approaches adopted in this thesis. The field of economic crime embraces fraud, bribery, corruption and financial regulation. The context of this research is that fraud is a major drain on the United Kingdom (UK) economy.1 The thesis critiques the current UK counter-economic crime strategy and makes proposals for a new approach. This subject area is under-researched, an absence which may be partially explained by fraud not being a core policing priority, unlike money laundering and counter-terrorism financing.2 Fraud at the lower level is thought of as benefit fraud, housing fraud and credit card fraud.3 It is a contemporary subject as indicated by the post 2008 financial crisis clamour to criminalise the alleged illegal misconduct of traders and bankers.4 The central issues the thesis addresses are whether the legislative framework is appropriate for current needs and, if so, whether the UK has the agencies to implement effectively the underlying strategy. The conclusion of this thesis is that the existing suite of legislation is, with some modest additions,5 suitable for their purposes, whereas the agencies are disparate and in real need of unifying into one body. Existing research traditionally investigates the separate areas of fraud, bribery, corruption and financial regulation individually, rather than as a whole.6 This thesis brings together a study across the spectrum of economic crime as a base for proposing a new institutional structure bringing together the disparate parts of the existing economic crime agencies into one entity. The approach taken in this thesis is not to consider the UK as a single universe for study but to embrace comparisons with two other countries and, combining investigations into

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2 ‘Fraud has been propelled from its traditional tertiary position, behind money laundering and terrorist financing, to the top of the government’s financial crime agenda.’ This is due to the publication of the Fraud Review [in 2006] and the introduction of the Fraud Act 2006.’ Nicholas Ryder, *Financial Crime in the 21st Century* (Edward Elgar 2011) 123.
5 Discussed in Chapter 9.
the current context of research with traditional scholarship, examining legislation and case law. This chapter employs the methodologies appropriate to the research: comparative, socio-legal and doctrinal.

For research to be of value, and to be able to withstand critical examination, a systematic approach has to be adopted, working to a plan or system and employing a set of methods. Academic study of law has a long tradition, though this long tradition is focused on one particular type of study, the ‘doctrinal’ or ‘black-letter’ approach. However, ‘[a]lthough ‘traditional’ legal scholarship embraces many forms it is doctrinal research that has been predominant’. Vick stated that:

Doctrinal research treats the law and legal systems as distinctive social institutions and is characterised by a fairly unique method of reasoning and analysis. In its purest form ‘black-letter’ research aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources.

Although doctrinal research has been criticised for being ‘intellectually rigid, inflexible, and inward looking’, it does represent a yardstick by which other approaches can be judged. As an alternative to the pure approach of ‘black-letter’ law, the alternative ‘interdisciplinary’ approach, uses ‘ideas and techniques borrowed from other disciplines’, notwithstanding that these have been described by its critics as ‘amateurish dabbling with theories and methods the researchers do not fully understand.’ The reason given for this is that:

Members of a discipline, like members of other discrete social groups, develop their own distinctive ways of thinking, communicating, and operating. They adopt a common ‘body of learning, a style, a set of approaches, and a mechanism of problem formation, recognition, and solution.’

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7 The phrase ‘black-letter’ refers to black or Gothic type that was traditionally used in formal statements of legal principles or rules at the start of a section, which was typically followed by a descriptive exposition or commentary. M Salter and J Mason, Writing Law Dissertations (Pearson Education 2007) 44.
8 Vick (n 7) 177.
9 Vick (n 7) 178.
10 Vick (n 7) 164.
11 Vick (n 7) 163.
12 Vick (n 7) 163.
13 Vick (n 7) 168.
This means that the primary sources of legislation and conventions relating to economic crime are considered alongside changes in the social landscape where attitudes to practices change over time, as with the City of London. Furthermore, the benefit of using the doctrinal method of research is that ‘[w]ithin the common law jurisdictions legal rules are to be found within statutes’.\textsuperscript{14} Thus, in addition to analysing the law in the UK, any analysis of other countries from a common law tradition will have the same base approach. This assists when posing the research question of ‘what is the law’ in particular contexts.\textsuperscript{15}\textsuperscript{16} This is essential because this thesis explores the counter economic crime regime in the UK, with reference to the United States of America (US) and Australia. The range of possible answers to that question ‘owes more to the subjective, argument-based methodologies of the humanities than to the more detached data-based analysis of the natural and social sciences.’\textsuperscript{16}\textsuperscript{17} There is a fundamental difference in approach employed in doctrinal research compared with empirical investigation, where ‘empirical’ research is defined as ‘based on, concerned with, or verifiable by observation or experience rather than theory or pure logic’.\textsuperscript{17}\textsuperscript{18} Chynoweth stated that:

Scientific research, in both the natural and social sciences, relies on the collection of empirical data, either as a basis for its theories, or as a means of testing them. In either case, therefore, the validity of the research findings is determined by a process of empirical investigation. In contrast, the validity of doctrinal research is unaffected by the empirical world.\textsuperscript{18}

However, ‘[i]n practice, even doctrinal analysis usually makes at least some reference to other, external, factors as well as seeking answers that are consistent with the existing body of rules.’\textsuperscript{19} Thus, whilst this research will not involve its own empirical studies, it recognises external factors by understanding the socio-legal context to economic crime and the comparison with other jurisdictions which will inform the research by the exhibition of alternative approaches.

A key element of the thesis is to devise a structured approach to conducting the research into a contemporary problem which has its roots in past regulatory changes. In considering proposals for the future, it is important to analyse the

\begin{footnotesize}
\begin{enumerate}
\item[15] Chynoweth (n 14)
\item[16] Chynoweth (n 14)
\item[18] Chynoweth (n 14)
\item[19] Chynoweth (n 14)
\end{enumerate}
\end{footnotesize}
landscape at the time of the last structural changes. Chapter four identifies the base points both of the state of fraud prosecution and regulatory systems which the Conservative government created after 1979, considering the public’s lack of belief in the legal system’s ability to bring ‘serious frauds expeditiously and effectively to book’\textsuperscript{20} alongside examining the existing regulatory ‘system, if it warrants such a title’.\textsuperscript{21} A key part of the thesis is to critique the solutions adopted by government, which have been concluded not to have worked leaving a system considered as not ‘fit for purpose’.\textsuperscript{22}

\section*{2.2 Methodology adopted by this thesis}

The methods employed within this thesis are comparative, in combination with doctrinal and socio-legal.\textsuperscript{23} These are developed through the use of interpretation because economic crime is an area of law which is dynamic because attitudes to some behaviours and practices change over time. Although this thesis employs three different methods, they are inter-linked but considered separately to facilitate understanding of the individual components. This thesis adopts a doctrinal approach, because the subject lends itself to examination of existing material, such as legislation including for example the Fraud Act 2006, rather than creation of new research by undertaking empirical surveys. An important point that needs to be addressed here is the interpretation of legislation,\textsuperscript{24} because there is a common view that ‘statutes are precise and accurate, so that anyone can “look up” the law in a statute’,\textsuperscript{25} ‘[o]nce words appear in a statute they are open to all manner of argument and interpretation’.\textsuperscript{26} Thus, courts are invited to discuss and determine the meaning of words in statutes not merely as a dictionary exercise but putting the words in context, using a number of traditional ‘rules’.\textsuperscript{27} This thesis considers the rules of interpretation,\textsuperscript{28} the different approaches which can be adopted,\textsuperscript{29} whether there is a place for qualitative and quantitative analysis, and

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\textsuperscript{20} ‘The overwhelming weight of the evidence laid before us suggests that the public is right.’ Fraud Trials Committee Report. (HMSO 1986) 1 (hereinafter Roskill).
\textsuperscript{21} ‘It was administered by either the Department responsible, often the then Department of Trade & Industry (DTI), or by self-regulating bodies, for example Lloyds or the Stock Exchange.’ House of Commons Library. Research paper 12/08. www.parliament.uk/briefing-papers/SN05934.pdf accessed 14 April 2012.
\textsuperscript{22} Salter and Mason (n 7) 182.
\textsuperscript{24} Holland and Webb (n 9) 252.
\textsuperscript{25} Holland and Webb (n 9) 252.
\textsuperscript{26} Holland and Webb (n 9) 252.
\textsuperscript{27} The Literal Rule, The Golden (purposive) Rule, The Mischief Rule.
\textsuperscript{28} Such as feminist approach, capitalist approach.
comparative law which is ‘the comparison of different legal systems of the world.’

In addition to statutes, there is ‘common Law’,31 ‘soft law’32 and ‘customary law’.33

Comparative methodology is employed because this thesis is directed at the counter economic crime regime in the UK but seeks to investigate and draw conclusions from analysing regulatory responses to economic crime in two other jurisdictions, US and Australia. Taking other countries’ experiences into consideration is not new because:

The aim is to identify better legal solutions in foreign legal systems and then to recommend their incorporation into domestic law. As a result of such an approach to comparative law, for instance, the English law of contract embraced many transplants from Roman Law and Civil Law systems during the nineteenth century. But the traffic was a one way voyage, for French and German laws of contract betray no signs of influence by the Common Law.34

The choice of US and Australia as comparators is precisely because those countries are leaders in their geographic and global economic spheres and have the same Common Law heritage.35 The common law heritage has the benefit that case law can be considered in UK trials, as with Murphy v Brentwood DC, which included consideration of the Australian case of Sutherland Shire Council v Heyman,36 such common law heritage also enables the Australian courts to consider UK cases, as they did in Bell Group v Westpac,37 citing the House of Lords decision in UK case of Twinsectra Ltd v Yardley.38

The third component methodology adopted by this thesis is socio-legal research. This is selected because of the need to place the doctrinal approach and comparative law in the context of ‘law and sociology, social policy and

31 ‘[a]ll those rules of law that have evolved through court cases (as opposed to those which have emerged from Parliament) over the past 800 years.’ Holland and Webb (n 9) 8.
35 Other Common Law countries are: ‘United States, Canada, India, Pakistan, Sri Lanka, Hong Kong, Australia, New Zealand, many African countries and many more elsewhere.’ Francis Bennion, Understanding Common Law Legislation (OUP 2001) 3.
36 ‘We have so far assumed that throughout the length and breadth of the common law world there is, as one would expect, an agreed system of statutory interpretation. Broadly that is indeed the case, but we now need to recognise and deal with the fact that in the United States, a prominent common law country, there is some disunity on this point. It seems largely to arise because the United States has a written constitution whereas England, where the common law was born and first developed, does not.’ Bennion, (n 35) 177.
37 Murphy v Brentwood DC [1990] 3 WLR 414; Sutherland Shire Council v Heyman [1985] 60 ALR 1
Holland and Webb (n 9) 127.
38 The Bell Group Ltd (in Liq) v Westpac Banking Corporation [No 9] [2008] WASC 239
According to Salter and Mason, socio-legal research is difficult to define but ‘[w]hat binds the socio-legal community is an approach to the study of legal phenomena which is multi- or inter-disciplinary in its approach.’ This thesis analyses the regulatory response to economic crime and involves a doctrinal analysis of ‘law in books’ which is enhanced by understanding the financial environment which makes provision of such laws and regulations a requirement.

2.2.1 Doctrinal Methodology

The adoption of the doctrinal methodology, together with comparative and socio-legal, is because the analysis of economic crime is congruent with the ‘black letter’ approach, since it is based upon the study of statutes and cases but will also benefit from employing comparative methodology. Doctrinal methodology applies to researching law in UK, US and Australia, with comparative methodology being employed to evaluate the findings of all three countries. The field of economic crime is active, with new issues emerging on a regular basis, which prompts the authorities to consider both counter measures and penalties. Therefore, the research involves an extensive review of primary and secondary sources, such as legislation, government reports and other scholarly works. ‘Black-letter’ law is used to analyse law ‘since it concentrates on examining
statutory materials and reports of judicial decisions’. However, ‘[m]erely looking at the law in books could only tell us what is supposed to happen’, as with bribery and corruption in the UK post the Bribery Act 2010 (BA2010) because cases have yet (late 2014) to be subject to judicial examination. Furthermore, this thesis also employs a socio-legal approach to consider the how law works in practice and ‘how legal rules are affected by the political, economic and social contexts in which law operates.’ The reason for adopting this approach is that economic crime is an evolving and vibrant topic. For example, bribery was often regarded as playing second fiddle to money laundering and counter-terrorist financing until the enactment of the BA2010. This is no longer the case, yet it was not until 2008 that the UK undertook its first prosecution for overseas bribery. The environment has evolved with technological advances providing opportunities for new methods of crime including e-crime and high frequency trading.

Therefore, economic crime cannot be treated as a self-contained universe for study but as an active subject which is constantly developing and mutating and which represents a challenge for the authorities to counter.

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44 F. Cownie, Legal Academics: Cultures and Identities. (Hart 2004). 35. otherwise referred to as ‘the authorities’. by the term ‘authorities’ we mean primarily statutes and reported cases that can be found in a law library.
Holland and Webb (n 9) xiv.
45 Bradney (n 43) 17.
46 [S]ociolegal studies are a branch of legal studies that are distinguished from doctrinal research through the deployment of one or more research methodologies drawn largely but not exclusively from the social sciences. Salter and Mason (n 7) 132.
47 Bradney (n 43) 21.
50 R v Tobiasen, Southwark Crown Court, 26 September 2008 (unreported).
51 “The term ‘cyber crime’, ‘e-crime’ and ‘computer enabled’ crime are often used interchangeably. (…) we use the term „computer-enabled crime” and this will broadly focus on: Crimes that can only be carried out using the internet – such as malicious viruses and unauthorised access of data; Crimes that can be committed without the internet, but have been transformed in scale by their use of the internet – such as fraud and theft; Crimes facilitated but not dependent on the internet, for instance for communication – such as drug trafficking.” ‘Computer-enabled Crime Stocktake’. http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/home-office-science/ceoi-cecst-hos1147?view=Binary accessed 9 August 2012.
Even the experts can’t quite agree a firm definition of what a high frequency trade is, so let me explain. I think everybody agrees that it is made possible by the harnessing of superior technology. The race for speed has been critical. It usually relies on the ability to capture, process and respond to information more quickly than your rivals. Proximity to the execution engine is often a feature.’ Financial Conduct Authority, ‘Regulating High Frequency Trading’ http://www.fca.org.uk/news/regulating-high-frequency-trading accessed 9 August 2014.
2.2.2 Interpretation

The issue of ‘interpretation’ is important because ‘[l]aw does not operate in a vacuum. Obviously legal disputes only arise out of factual situations’. On the basis that ‘[i]n any legal argument that gets to court someone wins and someone loses,’ it must be clear that the opposing parties to a dispute have differing views of the same facts. Furthermore, the authorities themselves may not be definitive. Thus, although the wording of statute or case law may appear to be clear, there is a paradox in a pure doctrinal approach for whilst:

Most people are willing to believe that case law can present problems because facts are never precisely repeated; at the same time most people believe that statutes are precise and accurate so that anyone can ‘look up’ the law in a statute. For the most part the implementation of statutory provisions will indeed be a routine matter, but this is not universally true.

These positions cannot be reconciled because merely looking up words in a statute or judgment invites interpretation and relation to particular situations the relevance of which is that there has been ‘a clear shift in styles of interpretation used by judges when looking at statutes. There has been a steady move towards what is termed a ‘purposive’ approach to interpreting legislation’. The purposive rule, otherwise known as the ‘Golden Rule’, is one of the three classic means of reading legal documents, the others being, the ‘Literal Rule’ and the ‘Mischief Rule’. The shift in style away from the ‘Literal Rule’, does not view the words used in any way other than their normal plain usage. ‘That rule demands that one looks at what was said, not what it might mean’ as Lord Diplock commented:

Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences of doing so would be inexpedient, or even unjust or immoral.

Textbooks contain examples of the literal rule in action, such as where the court considered the question of whether teeth, real or false, were weapons when

52 Holland and Webb (n 9) 99.
53 Holland and Webb (n 9) 99.
54 Holland and Webb (n 9) 208.
55 Holland and Webb (n 9) xvi.
56 ‘taking words in their usual or most basic sense without metaphor or exaggeration.’ Oxford Dictionaries  http://oxforddictionaries.com/definition/english/literal?q=literal accessed 23 July 2012.
57 Holland and Webb (n 9) 212.
58 Holland and Webb (n 9) 212 citing Duport Steel v Sirs [1980] 1 WLR 142; [1980] 1 All ER 529, 541 (Lord Diplock).
used in an assault. However, courts ‘should take into consideration not merely the literal terms (...) but also the way in which they may be presumed to be understood by a normally experienced [person].’ Sometimes referred to as ‘the man on the Clapham Omnibus’, or ‘man in the street’ is a legal fiction belonging to ‘an intellectual tradition of defining a legal standard by reference to a hypothetical person, which stretches back to the creation by Roman jurists of the figure of the *bonus paterfamilias*.’ Lord Reid, quoting Lord Radcliffe stated ‘[t]he spokesman of the fair and reasonable man (...) is and must be the court itself.’ In the field of economic crime, there can be different interpretations of whether a crime has been committed, as discussed in chapter six where the FCA found market abuse was not a crime but breach of regulations, which some commentators questioned. Furthermore, an outcome of the financial crisis has been a clamour for punishment but where the SFO have merely been able to charge thirteen people with conspiracy to defraud, in the absence of breach of statute, as discussed in chapter five. One person, described as a ‘senior banker’ has pleaded guilty to conspiracy to defraud.

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59 ‘a statute made it an offence to “stab, cut or wound” another person. Harris bit off her friend’s nose in a fight – and then the policeman’s finger’. Holland and Webb (n 9) 213 citing R v Harris (1836) 7 C & P 446.
61 ‘The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.’ *Homecare at Home Limited v The Common Services Agency* [2014] UKSC 49
62 *Homecare at Home Limited v The Common Services Agency* [2014] UKSC 49
63 *Homecare at Home Limited v The Common Services Agency* [2014] UKSC 49
66 Serious Fraud Office, ‘Trader charged in LIBOR investigation. Tom Hayes, a former trader at UBS and Citigroup, has today been charged with offences of conspiracy to defraud in connection with the investigation by the Serious Fraud Office into the manipulation of LIBOR. Tom Alexander William Hayes, 33, of Surrey was one of the three individuals arrested and interviewed on 11 December 2012 by officers from the SFO and City of London Police. He attended Bishopsgate police station this morning where he was charged by City of London Police with eight counts of fraud. He will appear before Westminster Magistrates’ Court at a later date.’ http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/trader-charged-in-libor-investigation.aspx
Serious Fraud Office, ‘Brokers charged in LIBOR investigation. ‘Terry Farr and James Gilmour, former brokers at RP Martin Holdings Limited, have today been charged with offences of conspiracy to defraud in connection with the investigation by the Serious Fraud Office into the manipulation of LIBOR.’ Terry John Farr (41 years) and James Andrew Gilmour (48 years), of Essex were arrested on 11 December 2012 (along with Tom Hayes) by officers from the SFO and City of London Police. They attended Bishopsgate police station this morning where they were each charged by City of London Police, James Gilmour with one count of conspiracy to defraud, and two counts of the same offence for Terry Farr. They will appear before Westminster Magistrates Court at a later date.http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/brokers-charged-in-libor-investigation.aspx
Serious Fraud Office, ‘Further charges in LIBOR investigation. Criminal proceedings by the Serious Fraud Office have commenced today against three former employees at Barclays Bank Plc, Peter Charles Johnson, Jonathan James Mathew and Stylianos Contogoulas, in connection with the manipulation of LIBOR. It is alleged they conspired to defraud between 1 June 2005 and 31 August 2007. http://www.sfo.gov.uk/press-
The ‘Golden Rule’ seeks to consider what the parliamentary draftsman intended his words to convey (but had not achieved because a resultant anomaly had clearly not been apparent) by ‘looking at the purpose of the Act.’ As Lord Blackburn explains:

We are to take the whole statute together and construe it all together, giving the words their ordinary signification unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification and to justify the court in putting on them some other signification which, though less proper, is one which the court thinks the words will bear.

Cases cited as examples of the ‘Golden Rule’ include *R v Allen*, and *Re Sigsworth*. The BA2010 ‘adequate procedures’ defence, discussed in chapter five, might well open scope for such argument.

Thus, examining the purpose incorporates placing legislation into a social, economic or political context. The third interpretive approach, the ‘Mischief Rule’, is concerned with looking at the history of the legislation in order to discover the ‘mischief’ the Act was intended to remedy. This was demonstrated in the case of *Shanning v Lloyds TSB*. In a similar manner, the Supreme Court judgment in

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67 Holland and Webb (n 9) 215.
68 Holland and Webb (n 9) 214 citing *River Wear Commissioners v Adamson* (1876-77) 2 App Cas 743 at 764-5 (Lord Blackburn).
70 Chapter 5.2.5.
71 Shanning International Ltd (in liquidation) v Lloyds TSB Bank plc (formerly Lloyds Bank plc) and others [2001] UKHL 31.
72 ‘acting pursuant to a UN Security Council Resolution. As a matter of construction, even when the freeze is lifted it may impose a permanent prohibition on any claim against a bank which by virtue of the freeze was prevented from performing its payment obligations.’
Perry v SOCA considered the extra-territorial effect of Proceeds of Crime Act 2002 (POCA) Part 5.73

Thus, the employment of doctrinal methodology, whilst providing the bedrock for the thesis, is in the context that primary sources are likely to have been subject to interpretation, ‘as to how and why a particular authority should or should not be applied’.74 This is important for this research because, as will be seen in Chapter four,75 there are differing attitudes towards economic crime in UK.

2.2.3 Comparative Law Methodology

The second methodological element adopted for this thesis is the comparative methodology.76 This is because economic crime is not merely a UK phenomenon since it affects all countries and research into some other countries provides an opportunity to consider whether external experiences might have some beneficial relevance including that ‘[s]ensitive transplants of rules and techniques should be possible.’77

Zweigert and Kotz define comparative law ‘an intellectual activity with law as its object and comparison as its process’.78 Kahn-Freund stated that it is ‘not a topic but a method. Or better: it is the common name for a variety of methods of looking at law, and especially at looking at one’s own law.’79 This thesis compares the counter economic crime regime in the UK with reference to the US and Australia, which are all members of the ‘Anglo-American Legal Family’, a common law tradition. There are other ‘legal families including Romanistic, Germanic, Nordic, together with those of China and Japan, and Islamic and Hindu traditions.80 The difference in legal traditions is an important feature when considering international responses to common issues and may explain the difficulties in establishing common regulations.81 The UK is not insulated from economic or economically

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74 Holland and Webb (n 9) xiv.
75 Chapter 4.2 Socio legal explanation
76 Zweigert and Kötz (n 30) 2.
77 Collins, (n 34) 398.
78 Zweigert and Kötz (n 30) 2.
80 Romanistic (‘France and all the systems which adopted the French Civil Code, along with Spain, Portugal and South America’), Germanic (‘Germany, Austria, Switzerland and a few affiliated systems’), Nordic (or Scandinavian, Norway, Sweden, Finland, Denmark, Iceland).
81 Financial Action Task Force, ‘FATF steps up the fight against money laundering and terrorist financing’ http://www.fatf-gafi.org/document/17/0,3746,en_32250379_32236920_49656209_1_1_1_1,00.html accessed 13 April 2012.
criminal issues from around the globe. Whilst it might be tempting to consider that the whole world should play to British rules and laws, other nations with whom the UK transacts business have their own deeply ingrained attitudes and beliefs.82 In essence, ‘[s]o long as Roman law was the essential source of law on the Continent of Europe, an international unity of law and legal science did exist, and in a similar unity, the unity of the Common Law, can still be found, up to a point, in the English-speaking world.83

Thus, to acknowledge the reality that differing legal and attitudinal systems exist, it is important for this research to understand other viewpoints:

Law can be analysed as the expression of a continual social, political, and economic debate concerning the appropriate balance between the frequently conflicting interests of, for example, employers, employees and the general public.84

The intention behind comparing the law in differing systems is that ‘[o]ne of the virtues of legal comparison (...) is that it allows a scholar to place himself outside the labyrinth of minutiae in which legal thinking so easily loses its way and to see the great contours of law and its dominant characteristics.’85 Thus, as Salter and Mason state, ‘[a] comparative approach facilitates more critical, questioning attitudes towards laws by undermining the “taken for granted” positions on legal provisions and practices.’86 Therefore, the research has to be approached with an open mind, recognising the important role of US and Australia in global anti-economic crime practice. This is explored by considering the institutions designated to deal with economic crime and the legislative measures they can deploy in light of their constitutional structures. These countries share the bedrock of Common Law, which allows comparison on a base of similar conceptual theory which would not be the case with other legal families.

2.2.4 Justification of choice of methodologies and methods

The research embodied in this thesis has been identified and explained but these are not the only methodologies and methods which were available. As a
consequence, the question arises as to how the choices of methodologies and methods used can be justified. As Crotty observes:

The long journey we are embarking upon arises out of an awareness on our part that, at every point in our research – in our observing, our interpreting, our reporting, and everything else we do as researchers – we inject a host of assumptions. These are assumptions about human knowledge and assumptions about realities encountered in our human world. Such assumptions shape for us the meaning of research questions, the purposiveness of research methodologies, and the interpretability of research findings.

The selection of methodologies is a choice made by the researcher but is based upon a theoretical perspective that ‘the philosophical stance informing the methodology and, thus, providing a context for the process and grounding its logic and criteria.’ Further, behind the theoretical perspective lies the theory of knowledge called epistemology. ‘Epistemology is the science of truth; it is “the branch of knowledge concerned with how knowledge is derived”,’ or, simply ‘a way of understanding and explaining how we know what we know.’ The financial ‘crisis arose in part from an excessive reliance on the view that the future would resemble the past (...). [It] was truly complex and is poorly understood even to this day. No one saw it coming,’ thus inviting the inquiry what was known and the unknowns.

There are two main epistemological philosophies: objectivism and constructionism. In the former paradigm, ‘the notion that truth and meaning reside in their objects independently of any consciousness’.

Objective knowledge (facts) can be obtained from direct experience or observation, and is the only knowledge available to science. Invisible or theoretical entities are rejected. Science separates facts from values; it is ‘value-free’.

However, constructionism ‘asserts that social phenomena and their meanings are continually being accomplished by social actors. It implies that social phenomena

88 Crotty (n 87) 17.
89 Crotty (n 87) 3.
91 Crotty (n 87) 3.
93 Robb (n 92)158.
94 ‘A paradigm is “a cluster of beliefs and dictates which for scientists in a particular discipline influence what should be studied, how research should be done, [and] how results should be interpreted.’
96 Crotty (n 87) 42.
and categories are produced through social interaction but that they are in a constant state of revision. This state of revision is demonstrated by the response to the financial crisis where, as Fisher observes, ‘reckless risk-taking on the financial markets does not amount to fraudulent activity because dishonesty is the litmus test of fraudulent conduct and reckless behaviour, however reprehensible it may be, falls short of dishonesty.  The soul-searching which followed the financial crisis sought to find an explanation for the catastrophic outcome demonstrating a moving target, constantly being revised and developing arguments ‘that serious problems were caused because in some cases senior management in investment banks were so reckless they did not even understand the risks they were running. This is important because the regulators are not immune from criticism since '[i]n fairness, the regulators did not fully understand the risks either.' As Crotty observes:

Not too many of us embark on a piece of social research with epistemology as our starting point. 'I am a constructionist. Therefore, I will investigate...’ Hardly. We typically start with a real-life issue that needs to be addressed, a problem that needs to be solved, a question that needs to be answered.

The context for this thesis is a major drain on the UK economy and that the current counter-fraud strategy is ineffective. Thus, this thesis far from considering that fraud and economic crime in general is an object ‘merely waiting for someone to come upon it’, follows the constructionist epistemology that ‘meanings are constructed by human beings as they engage with the world they are interpreting.’ According to Bryman, ‘[t]he study of the social world therefore requires a different logic of research procedure, one that reflects the distinctiveness of human as against the natural order.’ That procedure is interpretivism.

Although the constructionist engages with the world and endeavours to make sense of it, it does not do so with an open mind. As Crotty explains:

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97 Bryman (n94) 19.
101 Crotty (n 87) 13.
102 Crotty (n 87) 43.
103 Crotty (n 87) 43.
104 Bryman (n94) 15.
105 ‘Emphasize the meaningful nature of people’s participation in social and cultural life. The focus is on an analysis of the meanings people confer upon their own and others’ actions.’ Robson (n 96) 527.
it is clearly not the case that individuals encounter phenomena in the world and make sense of them one by one. Instead, we are all born into a world of meaning. We enter a social milieu in which a ‘system of intelligibility’ prevails. We inherit a ‘system of significant symbols’. For each of us, when we first see the world in meaningful fashion, we are inevitably viewing it through lenses bestowed upon us by our culture. Our culture brings things into view for us and endows them with meaning and, by the same token, leads us to ignore other things.\textsuperscript{106}

The ideological stance of this thesis is that of a capitalist society, believing in profit making businesses but with laws and regulations being enforced by the authorities. However, notwithstanding the legislative framework, the principal investigative authorities take little interest in enforcement of economic crime and perpetuates the belief that ‘white collar crime’ is different from violent crime by adopting a ‘light touch’ approach to prosecution, which would be remedied by a single agency taking responsibility for investigation and prosecution.

2.3 Sources of Law

This thesis includes a discussion on the various sources of law, which are then subjected to analysis using the differing methodologies: common law, soft law and customary law.

2.3.1 Common Law

Common Law is defined as ‘[r]ules of law developed by the courts as opposed to those created by statute.’\textsuperscript{107} The genesis of the common law lies in the Norman Conquest of England and ‘emerged in the twelfth century from the efficient and rapid expansion of institutions which existed [in England] in an undeveloped form in 1066.’\textsuperscript{108} ‘The term “Common Law” is thus used as a means of defining all those legal systems in the world whose laws are derived from the English system.’\textsuperscript{109} These countries include, for example: Ireland, the United States, Canada, India, Pakistan, Sri Lanka, Hong Kong and Australia.\textsuperscript{110} In the Western world, there are two dominant ‘traditions’ which we call Civil and Common Law (the latter being the oldest national law in Europe).\textsuperscript{111} In the European Union of 27 nations, only UK and Ireland share the common law tradition. The term ‘legal

\textsuperscript{106} Crotty (n 87) 54.
\textsuperscript{107} A Dictionary of Law (OUP 2003).
\textsuperscript{109} Holland and Webb (n 9) 9.
\textsuperscript{110} Holland and Webb (n 9) 3.
\textsuperscript{111} Holland and Webb (n 9) 9.
tradition’ encompasses history and outlook as ‘a way of understanding the norms and values that make up a particular conception of the legal world’.  

2.3.2 Soft Law

As a source of law, the UK participates internationally in arrangements which impose ‘law-like’ obligations, for example, emanating from the United Nations. This thesis has to consider the social, economic and political environment which gives rise to economic opportunity and its dark side, economic crime. In this environment, measures to combat economic crime are not merely contained in statute nor are they solely the preserve of UK government because, increasingly, the UK subscribes to and is bound by international obligations. The appellation given to non-statutory provisions is ‘soft law’. Soft law and co-regulation have gained prominence ‘in Brussels, as the European Commission seeks to improve lawmaking or “governance” in the EU [European Union].’ The international dimension of ‘soft law’ is demonstrated by the EU as ‘the term applied to EU measures, such as guidelines, declarations and opinions, which, in contrast to directives, regulations and decisions, are not binding on those to whom they are addressed.’ However, to the frustration of doctrinalists, the absence of a clear definition of ‘soft law’ leaves an open end to areas of research. Pierre-Marie took the view that:

"Soft" law is a paradoxical term for defining an ambiguous phenomenon. Paradoxical because, from a general and classical point of view, the rule of law is usually considered "hard," i.e., compulsory, or it simply does not exist.  

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112 Holland and Webb (n 9) 9.
113 The United Nations established the Financial Action Task Force, 'an inter-governmental body whose function is to development and promote AML policies; it consists of 34 countries, two international bodies and several regional organizations. The FATF issued a set of 40 recommendations in1990 which (...) “provide a complete set of anti-money laundering procedures which covers the relevant laws and their enforcement, the activities and regulation of the financial system and matters relating to international co-operation”.’
114 Ryder, Financial Crime in the 21st Century (n 2) 16.
Ambiguous because the reality thus designated, considering its legal effects as well as its manifestations, is often difficult to identify clearly.\footnote{Dupuy (n 32) 420.}

Hard law is defined as ‘measures that contain legally binding obligations, are precise and delegate authority for interpretation and implementation.’\footnote{Dermot Hodson and Imelda Maher, ‘Soft law and sanctions: economic policy co-ordination are reform of the Stability and Growth Pact’. (2004) 11(5) JEPP 800.} There is a debate over whether regulation should be by law (hard) or some other form and this brings to the surface traditional tension between those seeking to have formal, enforceable controls and those who believe conduct can be regulated in another manner. For example, endeavours to strengthen UK banking supervision have revealed concerns that ‘[p]oor clarity over macroprudential tools means the Bank of England could run a ‘soft law’ regime that is incompatible with UK law.’\footnote{Financial Times, Macroprudential tools could create a ‘soft law’.’ 27 July 2012. http://www.ftadviser.com/2012/07/27/regulation/regulators/macroprudential-tools-could-create-a-soft-law-CZmvrd2WW7fn5SDhOARjLyJ/article.html?refresh=true accessed 27 July 2012.}

This is an important area to consider because of the reach of institutions and regulations across the globe has for the regulatory response to economic crime. An example is that UK domiciled banks which have a physical presence in the US or have securities traded on any US Stock Exchange are subject to any prohibition by the US Department of the Treasury’s Office of Foreign Assets Control which prevents dealings with Cuba, even if the transactions do not involve US.\footnote{The Regulations prohibit any person subject to U.S. jurisdiction from dealing in any property in which Cuba or a Cuban national has or has had any interest. Under the Regulations, “property” is very broadly defined and includes such things as contracts and services.’ OFAC. Office of Foreign Assets Control ‘What you need to know about US sanctions against Cuba.’ 15. http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba.pdf accessed 31 July 2012.} This is despite legal protection in UK afforded by Protection of Trading Interests Act 1980, which provides ‘protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom.’\footnote{Protection of Trading Interests Act 1980. Preamble. http://www.legislation.gov.uk/ukpga/1980/11/pdfs/ukpga_19800011_en.pdf accessed 31 July 2012.}

The thesis considers the responses of US and Australia to economic crime, in addition to UK. However, whereas these countries are indirectly affected by each other’s laws, the UK is directly affected by laws from outside, namely from the EU. Here, the EU use of soft law:

reflects a recognition that the challenges of today’s economy and society – digitisation, globalisation, enlargement and monetary union – warrant a hunt
for alternative instruments of government to the traditional EU directive or regulation.\textsuperscript{122}

The advantage of soft law is that it ‘may signify an expectation of change over time, so where frequent negotiation is expected, its use is preferable with capacity for renegotiation built in.’\textsuperscript{123} However, as was seen with the ‘Stability and Growth Pact’\textsuperscript{124} which sought to regulate relationships between the EU countries in Economic and Monetary Union (EMU), '[s]oft law, which dominates the operation of the Pact, can be vague and opaque. Accountability mechanisms can be bypassed with no judicial review and no parliamentary input or scrutiny.’\textsuperscript{125} The increasing use of ‘soft law’ clearly exhibits the advantages that flexibility can bring to effect change in regulation, without formal Directives being adopted. This is in contrast to international treaties which are covered by the Vienna Convention on the Law of Treaties 1969.\textsuperscript{126} The key element of this is that whereas ‘“Treaty” means an international agreement concluded between States in written form and governed by international law,’\textsuperscript{127} an alternative is ‘Non-treaty agreements [which] are concluded, however, because the states involved do not want a full-fledged treaty which, in the event of non-fulfilment, would result in a breach of international law.’\textsuperscript{128}

2.3.3 Customary Law

The field of economic crime is also affected by international obligations created by Convention rather than Treaty, in support of which governments have changed UK law, as with criminalising bribery of foreign public officials through the Anti-Terrorism, Crime and Security Act 2001, in order to implement the OECD\textsuperscript{129} Anti-Bribery Convention.\textsuperscript{130} This represents a further departure from a pure, doctrinal, approach as distinctions are drawn between hard law, soft law and ‘customary law’. Hillgenberg stated that ‘customary law is a form of hard law (...) characterised by an informal and uncertain nature’ such as ‘the 1948 Universal Declaration of

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\textsuperscript{122} Business Europe (n 123) 6.
\textsuperscript{123} Hodson and Maher (n 118) 802.
\textsuperscript{124} Hodson and Maher (n 118) 800.
\textsuperscript{125} Hodson and Maher (n 118) 800.
\textsuperscript{127} Vienna Convention (n 126) Article 2(1)(a).
\textsuperscript{128} Hillgenberg (n 33) 504.
\textsuperscript{130} Anti-Terrorism, Crime and Security Act 2001.
Human Rights, which has in the meantime acquired the force of customary international law'. In this vein, there is increasing influence of the OECD in relation to bribery and corruption and the rise of tax havens, ‘which were seen as eroding the revenue-raising ability of capital-exporting nations.’ The steps taken by OECD included ‘a series of subsequent progress reports that named regimes deemed harmful by the OECD, called for sanctions on uncooperative member and non-member states and later reported on compliance.’ This might be termed ‘customary international law’. Customary international law is characterised by two fundamental elements: that states uniformly comply with it (sometimes referred to as the objective element), and they do so out of a sense of legal obligation (sometimes referred to as the subjective element). The conclusion to be reached is that by their actions in submitting themselves to comply with OECD, states are treating such requirements as a form of law, being analogous to but short of a formal treaty. The mission of OECD is ‘is to promote policies that will improve the economic and social well-being of people around the world,’ being guided by ‘the common thread of our work is a shared commitment to market economies backed by democratic institutions and focused on the wellbeing of all citizens.’

The OECD ‘has the power to adopt legal instruments, usually referred to as "the OECD Acts".’ These ‘acts’ are binding on signatories to the conventions. The UK is a signatory to OECD Anti-Bribery Convention and the United Nations Convention against Corruption 2003 (UNCAC). The OECD Convention, which the United Kingdom signed in 1997 has thirty seven other countries as signatories, including the US and Australia, and ‘establishes legally binding standards to criminalise bribery of foreign public officials in international business

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131 Hillgenberg (n 33) 505.
133 Christians (n 132) 325.
134 Christians (n 132) 325.
136 Ibid
137 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
138 OECD Convention (n 130).
140 OECD Convention (n 130).
141 OECD Convention (n 130).
http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html accessed 15 March 2011
transactions’. In chapter eight, it will be seen that the OECD review is critical of the performance of Australia. The UN Convention is ‘the world’s comprehensive platform for fighting corruption.’ It is the first legally binding, international anti-corruption instrument and provides a unique opportunity to mount a global response to a global problem. As a ‘soft law’, UNCAC is reviewed on a regular basis by other countries to ensure compliance: the UK was reviewed by Austria and Greece in 2009 and by Greece and Israel in 2012. The commitment to, and oversight of, the OECD is important for the thesis because it provides a common reference point for the regulatory responses to economic crime in the UK, Australia and US.

2.4 Conclusion

This thesis examines the UK economic crime landscape, employing doctrinal and comparative methodologies, explaining what is meant by ‘economic crime’, and analysing current government policy, legislation and anti-crime institutions. The thesis also explains why, 28 years after major reforms to the investigation and prosecution of serious financial crime, combined with relaxation of controls over financial markets, the time is right for fresh research into the UK response to economic crime because the government has embarked upon further change. This is not mere historic research because in the course of the first four years of the Coalition government, the proposal to create an independent ‘Economic Crime Agency’ (ECA) appears to have fallen by the wayside and mutated into being part of a different organisation, the National Crime Authority (NCA). This thesis will consider such developments in chapter six.

The importance of putting the UK into an international context has assisted in the redefinition of the research project into a research question: ‘A critique of the counter economic crime regime in the United Kingdom, with reference to the United States of America and Australia.’ The objective is to evaluate the outcome of the comparative research in order to reach a conclusion as to the most

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142 OECD Convention (n 130).
144 OECD Convention, (n 130).
145 Roskill (n 20) 1.
appropriate model that should be adopted by the UK. The spectrum of possibilities ranges between endorsement of the UK’s current model, wholesale changes to that of the US or Australia, or a hybrid model. The next chapter reviews the existing literature.
Chapter 3: Literature Review

3.1 Introduction

This chapter identifies and examines the existing literature in the area of economic crime and discusses their relevance to this thesis. ‘Economic crime’ as a label includes fraud, bribery and corruption and features laws which are enforced by prosecutors and regulators and is distinguished from the label ‘financial crime’, which Ryder describes as having ‘evolved into a multifaceted business or industry with a global reach and is commonly associated with illegal drugs, human trafficking, organized criminals and terrorism’ and includes money laundering. Literature in the arena is historic, predating the development of the United Kingdom’s (UK) fraud strategy since the publication of the Fraud Review 2006.

The chapter identifies and discusses previous studies and highlights the development of the legislative and regulatory responses to economic crime and identifies opportunities for further research.

Although the concept of an ‘Economic Crime Agency’ (ECA) is relatively new, the idea of creating such an entity is not because of the recommendation of the Roskill Committee. The attraction of an ECA is that it provides the opportunity to unite the disparate parts of the existing economic crime agencies into one entity. However, there is a dearth of literature that deals with such a concept which serves to emphasise the under-researched nature of the subject area in this thesis. There is some literature that generally covers the component parts of economic crime, such as the nature of fraud and then analysis of fraud related legislation.

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3 Ryder, Financial Crime in the 21st Century (n 2) 1.
6 Fraud Trials Committee Report (1986 HMSO) (Roskill) 1.
7 Fraud Act 2006 Alan Doig, Fraud (Willan Publishing 2006) see Chapter 3.2.1.
there are no works that deal with the organisation of the anti-crime institutions tasked with the management of the response to economic crime. The Bribery Act 2010 (BA2010) has brought discussion of the provisions of the legislation but the impact of that legislation has yet to be seen in court, apart from three small cases.  

The starting point of the thesis is a period when government dissatisfaction with the workings of ‘the City’, and especially the inability of juries to convict people accused of major fraud, caused the commissioning of two major studies: the ‘Roskill’ Report (Roskill) and the ‘Gower’ Report (Gower). The former reviewed the workings of fraud trials and the latter the role of investor protection. Both reports influenced government policies and resulted in major changes: such as the establishment of ‘the Serious Fraud Office’ (SFO); the enactment of the Financial Services Act 1986 and the creation of the Securities and Investment Board. These reports provided the convenient base because they were broadly concurrent and appeared early in the life of the then new Conservative government. These reports represented two separate streams of research and subsequent legislation. However, these streams became intertwined because of the issues of fraud, insider dealing and market abuse in ‘the City’. The confluence of these streams came in with the new millennium which heralded the possibility of synergy between two ineffective regimes because the new FSA was given a statutory object to reduce financial crime.


FRAUD TRIALS COMMITTEE REPORT (HMSO 1986), hereinafter Roskill.


Financial Services and Markets Act 2000, ss 2(2) and 6(3).

3.2 Themes for Literature Review

This is a wide area of research encompassing four overlapping themes. Firstly, the linear theme of government policy, which is split into three government periods:

1. the Conservative government from 1979 to 1997;
2. the Labour government from 1997 to 2010; and,
3. the Coalition government from 2010.12

The government policy theme is important because governments have been responsible for commissioning research,13 which informed government policy and the enactment of legislation.14 The second theme is analysis of research topics, many of which are inter-related including: white-collar crime; fraud; bribery and corruption; financial markets regulation; terrorist financing; and money laundering. The third theme is an international perspective. The UK is a signatory to international conventions, which establish common global standards.15 The fourth theme is of international comparison because the UK is not the only country to face the challenges of economic crime and it is important to compare the UK strategy with some other countries because such analysis has the potential to reveal alternative courses of action or approaches and their measure of success to determine whether these could be employed with advantage in the UK. Such analysis might alternatively show whether the UK approach could have a reciprocal benefit. The United States of America has been chosen because it has a dominant position as the largest single country in terms of international trade.16

13 Roskill (n 9) 1.
15 Criminal Justice Act 1987 created the Serious Fraud Office; Criminal Justice Act 1993, s 93 - Insider dealing; Financial Services Act 1986 created the Securities and Investments Board; Financial Services and Markets Act 1997 created the Financial Services Authority; Financial Services Act 2012 created the Financial Conduct Authority.
Australia is chosen because it is ‘a significant economy, exporter and international investor’,\(^{17}\) and is regarded as having more successfully withstood the effects of the ‘financial crisis’ than other leading industrial nations.\(^{18}\) As such, since economic crime is a feature of all countries, it is of benefit when reviewing the counter economic crime in the UK to consider the experiences of other important nations.

3.3 Research topics

3.3.1 Fraud

The Roskill Committee Report\(^{19}\) represents a key stage in examining the arena of fraud and is of major importance to this doctoral study. Roskill’s report also invited comment, of whom a principal contemporary contributor was Levi.\(^{20}\) Levi’s view of government attitude to fraud prior to 1979 was of ‘benign neglect’, identifying cynicism in the City of London questioning whether juries could understand the cases put at trial.\(^{21}\) A consequence of this was that ‘commercial fraud was a subject of concern principally to a small group of academics.’\(^{22}\) Levi observed that for politicians and criminologists ‘street and household crime constituted “the crime problem” over which they would do battle.’\(^{23}\) Levi’s observation about street and household crime being the problem and consequently being positioned as a priority serves to act as an entrée to the discussion of ‘white-collar crime’ initiated by Sutherland in 1939,\(^{24}\) to be considered later in this chapter.

Roskill’s initial conclusion,\(^{25}\) which was congruent with Levi’s analysis\(^{27}\) was that:

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\(^{19}\) Roskill (n 9) 1.

\(^{20}\) Levi, ‘Reforming the Criminal Fraud Trial’ (n 4) 117; Levi, ‘Blaming the Jury’ (n 4) 257; Levi, ‘Fraud in the Courts’ (n 4) 394; Levi, ‘The Roskill Fraud Commission revisited’ (n 4) 38.

\(^{21}\) Levi, ‘Fraud in the Courts’ (n 4) 394

\(^{22}\) Levi, ‘Reforming the Criminal Fraud Trial’ (n 4) 117.

\(^{23}\) Levi, ‘Reforming the Criminal Fraud Trial’ (n 4) 117.

\(^{24}\) Levi, ‘Reforming the Criminal Fraud Trial’ (n 4) 1.

\(^{25}\) Roskill (n 9) 1.

\(^{26}\) Levi, ‘Blaming the Jury’ (n 4) 257.
The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right.\textsuperscript{28}

The Roskill Report was commissioned because, Levi confides, ‘informed sources state that the aim was to get rid of the reputational problem caused by “failures” to convict.’\textsuperscript{29} There was contemporary research and comment during the preparation and following the report with Levi’s work being particularly prominent, though now dated.\textsuperscript{30} Wright, argues that Roskill’s conclusions regarding trials are still valid\textsuperscript{31} but, although interesting and well argued, pre-date the Fraud Act 2006 (FRA2006) and BA2010 and subsequent government determination to remove the legislative option to establish non-jury trials for fraud.\textsuperscript{32} In a similar manner, the Fraud Advisory Panel revisited the question of whether fraud should be tried by a non-jury tribunal.\textsuperscript{33} The FAP’s work brings a focus to the anti-fraud debate, yet the research has been overtaken by events and concentrates on fraud whereas this research embraces bribery and corruption in its definition of economic crime. The text by Doig is well regarded, yet it was published in 2006,\textsuperscript{34} which predates the Fraud Review 2006 and FRA2006, both of which are discussed in chapter six. More recently, Button and Gee look at fraud from a business perspective as an enterprise cost and provides a practical analysis for businesses but which differs from this research which has a strategic focus.\textsuperscript{35}

\textsuperscript{28} Roskill (n 9) 1.
\textsuperscript{29} Levi, ‘The Roskill Fraud Commission revisited’ (n 4) 38.
\textsuperscript{30} Levi, ‘The Roskill Fraud Commission revisited’ (n 4) 38.
\textsuperscript{34} Criminal Justice Act 2003, s 43. Protection of Freedoms Act 2012, s 113.
\textsuperscript{36} Doig (n 7). Prior to 2006, the law was contained in the Theft Acts, analysed in Edward Griew, Theft Acts (7th rev edn Sweet & Maxwell 1995).
\textsuperscript{37} Mark Button and Jim Gee, Countering fraud for competitive advantage (Wiley 2013)
3.3.2 White collar crime

The expression ‘white-collar crime’ was first been coined by Edwin Sutherland in 1939.\textsuperscript{36} However, there is some debate as to whether this assessment remains current because his contrast was that white collar crime was ‘committed by a person of respectability and high social status in the course of his occupation’,\textsuperscript{37} as opposed to street crime,\textsuperscript{38} which was committed by lower class people of low economic status.\textsuperscript{39} Strader\textsuperscript{40} stated that although the term is flawed because crime is committed by people of all social levels and by Levi,\textsuperscript{41} who discusses attempts to demonise white collar criminals, nevertheless the expression ‘white collar crime’ is ‘a convenient moniker for distinguishing such crime in the public mind from “common” or “street” crime.’\textsuperscript{42} This label is important because it is congruent with the description of economic crime and subject to contemporary judicial comment\textsuperscript{43} that there is at least a perception of preferential treatment for white collar criminals. Sutherland, Strader and Levi have made important contributions but what they do not include is the court’s view and the significant issue of economic crime and the inter-play between the SFO and regulators. A further aspect is that the type of activity labelled as white-collar crime can also be subject to another categorisation for, as Gurule,\textsuperscript{44} Ryder\textsuperscript{45} and Binning\textsuperscript{46} describe, terrorist financing frequently adopts non street crime methods.

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For a discussion on nineteenth century ‘attempts (...) being made in the public domain to orient financial crimes alongside and against ‘ordinary crime’ a century earlier than Sutherland’s famous work,’ see Sarah Wilson, The Origins of Modern Financial Crime (Routledge 2014) 75-85.
\textsuperscript{38} J Kelly Strader, Understanding White Collar Crime (LexisNexis 2002) 1.
\textsuperscript{39} Sutherland (n 4) 1.
\textsuperscript{40} Strader (n 38) 1.
\textsuperscript{42} Strader (n 36) 1.
\textsuperscript{44} Jimmy Gurulé, Unfunding terror : the legal response to the financing of global terrorism (Edward Elgar 2009) 104.
\textsuperscript{45} Ryder, Financial Crime in the 21st Century (n 2) 53.
\textsuperscript{46} Peter Binning, ‘In safe hands? Striking the balance between privacy and security - anti-terrorist finance measures’ (2002) 6 EHRLR 737.
3.3.3 Bribery and Corruption

The arena of bribery and corruption had the benefit of the BA2010 coinciding with commencement of this research. The BA2010, was accompanied by Raphael's excellent commentary, which provides a good background to and analysis of the Act. These were accompanied by explanatory briefings, reports from international organisations, and other articles. These make valuable contributions. This research uses such sources to establish a base for study of the bribery and corruption, whereas the existing literature is grounded in 2010, this research looks at the implementation of the BA2010 where, surprisingly there have only been three prosecutions and none of those by the SFO. Tellingly, one issue foreshadowed by Aaronberg and Higgins was that the SFO should be properly resourced, an issue considered in chapters five, six and nine.

What none of these sources dealt with were the consequences of the financial crisis, which this research examines. In parallel with the government’s review of fair and effective markets, it was reported that ‘Downing Street has ordered a wide-ranging review of the UK’s ability to tackle bribery and white-collar crime amid concern that repeated scandals are tarnishing London’s reputation as an international financial centre.’ The Home Office stated the imminent publication of ‘a cross-government anti-corruption plan’.

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50 Christopher (n 7) 251.
51 Benstead (n 7) 1291.
52 Aaronberg and Higgins (n 7) 9.
3.3.4 Financial Markets Regulation

The regulation of UK financial services has progressed from 1979 but, unlike the SFO, the regulatory framework has continued to develop. Part of this process of change brought in new regulators in 1986, 1997 and 2013 was because formal regulation was a new feature and because, as Cohrs observes, ‘the international regulatory framework at the moment is complex, particularly on resolution that crosses regulatory boundaries’.55 The way in which the City worked in 1979 was a mix of non-intervention or self-regulation,56 with Irving,57 McRea and Cairncross,58 and Fisher and Bewsey59 putting into perspective the regulatory landscape based on the Prevention of Frauds (Investments) Act 1958. The main study, was by Gower.60 However, neither the 1997 nor 2013 changes were the result of government sponsored reports: incoming governments had already determined to make changes prior to taking office. Thus, whereas Gower and Roskill provided an opportunity to analyse and comment on proposals this practice affords the opportunity for retrospective analysis where Wilson and Wilson61 and Ryder62 explore FSA performance which gives this research an opportunity to consider the effectiveness of its ‘credible deterrence’ policy. Gray’s immediate analysis of the changes described them as controversial.63 This has assumed greater prominence following the announcement of a review into the way wholesale markets operate.64 However, it is not due to report until June 2015.

Financial markets regulation included market abuse and insider dealing. Alexander65 considers insider dealing, described by Ashe as a ‘convictionless crime’66 alongside money laundering in relation to the European Union but,

56 Editorial. ‘How many regulators?’ (1996) 17(2) Co Law. 34.
58 Hamish McRea and Frances Cairncross, Capital City. London as a Financial Centre (Eyre Methuen 1974).
60 Gower (n 10).
66 Ashe and Counsell (n 4) 17.
although very well written, it was published in 2007 before the financial crisis, it concentrates on just two areas, only one of which is in scope for this research and does not cover either US or Australia.

3.3.5 Terrorist Financing

The financing of terrorism is another element in the financial crime arena and since the 9/11 terrorist attacks, which resulted in the instigation of the ‘financial war on terrorism’, there has been much commentary on the subject, in particular detailed analyses from Gurule, D'Souza and Ryder. These are well informed and the first two concentrate on the US. However, terrorist financing is not the focus of this thesis.

3.3.6 Money Laundering

Money laundering is a significant financial crime because of the need to legitimise proceeds of crime, a process in which ‘proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises.’ It is a subject area which is well researched by distinguished scholars such as Alexander, Gallant, Stessens, Blair, and Ryder. The literature covers specific perspectives of banks and money laundering, money laundering and proceeds of crime, financial crime policies adopted by the international community, or is aimed at a

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67 Ryder, Financial Crime in the 21st Century (n 2) 51.
68 Gurulé (n 44) 104.
70 Ryder, Financial Crime in the 21st Century (n 2) 53.
71 ‘Money laundering the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises. It was first criminalised in the United Kingdom in respect of the proceeds of drug trafficking, by means of an offence in the Drug Trafficking Offences Act 1986. Further drug money laundering offences were subsequently enacted, together with separate offences relating to the proceeds of other criminal conduct and terrorist funds. At the time of introduction of the Act, there are five sets of money laundering offences in force, each applying to a different range of predicate offences and/or jurisdictions.’ Proceeds of Crime Act 2002, Explanatory Note 6. http://www.legislation.gov.uk/ukpga/2002/29/notes accessed 5 July 2014.
72 Alexander (n 65).
76 Nicholas Ryder, Money Laundering – an endless cycle? (Routledge 2012).
77 Blair (n 75) 45.
78 Gallant (n 73).
79 Ryder, Financial Crime in the 21st Century (n 2) viii.
particular market.\textsuperscript{80} One of Ryder’s contributions\textsuperscript{81} is especially relevant in relation to this research because it is a comparative analysis of anti-money laundering policies in the UK, US and Australia which are the same countries discussed in this thesis and, furthermore, includes discussion of international conventions and domestic legislation\textsuperscript{82} which overlap into the arena of economic crime. However, notwithstanding these contributions, the focus of this thesis is on economic crime, being fraud, bribery and corruption, rather than the wider aspects of financial crime which does include money laundering.

3.4 Government Policy

3.4.1 Conservative Government

Chapter four analyses the events of 1979-2010, which provides the background to examination of the current state of economic crime in the UK. The first section of this time period was under a Conservative government and notable for a focus on two areas. Firstly, fraud, through the Roskill report,\textsuperscript{83} which has had a lasting impact as a result of the creation of the SFO. Secondly, investor protection in light of the radical changes to financial services and markets, guided by the Gower report.\textsuperscript{84} Whereas the issues researched by Roskill remain current, the field of financial services and markets has remained in a state of flux as three governments have endeavoured to establish the best method of regulation. Key legislation in this period was the Criminal Justice Act 1987, which established the SFO; Financial Services Act 1986, which established the Securities and Investments Board; Criminal Justice Act 1993 which reformed criminalisation of insider dealing.\textsuperscript{85} Money laundering was first criminalised by the Drug Trafficking Offences Act 1986.\textsuperscript{86} Terrorism financing was criminalised by the Prevention of Terrorism (Temporary Provisions) Act 1986.\textsuperscript{87} These are discussed by Ryder,\textsuperscript{88}

\begin{thebibliography}{99}
\item\textsuperscript{80} Jonathan Fisher, \textit{Money Laundering and Practice} (OUP 2009).
\item\textsuperscript{81} Ryder, \textit{Money Laundering – an endless cycle?} (n 76).
\item\textsuperscript{83} Roskill (n 9) 1.
\item\textsuperscript{84} Gower (n 10).
\item\textsuperscript{86} Drug Trafficking Offences Act 1986, s 26B.
\item\textsuperscript{87} Prevention of Terrorism (Temporary Provisions) Act 1986, s 9.
\item\textsuperscript{88} Ryder, \textit{Financial Crime in the 21st Century} (n 2).
\end{thebibliography}
Levi, Alexander, Alldridge, Fisher and Gallant. These are important contributions to the field of financial crime, where proceeds of crime are managed but they are of peripheral relevance to this thesis which concentrates on the crimes of fraud, bribery and corruption rather than following fund flows.

3.4.2 Labour Government 1997 – 2010

The change of government in 1997 saw an immediate and dramatic change to financial regulation with the announcement of a new structure, resulting in the Financial Services and Markets Act 2000 and creation of the Financial Services Authority. In the field of fraud, bribery and corruption, the FRA2006 recodified fraud following the Fraud Review, while foreign bribery was criminalised by the Anti-terrorism, Crime and Security Act 2001, leading eventually to a recodification by the BA2010. Recovery of the ‘fruits’ of criminal activity were aided by the Proceeds of Crime Act 2002 (POCA), Serious Organised Crime Agency (SOCA) and Assets Recovery Agency (ARA), whilst terrorist financing and money laundering legislation were strengthened. The POCA 2002 and the creation of the ARA were important developments and, again, Gallant and Alldridge discussed the relatively new legislation whereas, Alldridge and Ryder provide an up-to-date assessment though with differing conclusions: Alldridge stating that the ARA was an ‘unequivocal failure’; and Ryder that it ‘performed a very important task’. Nevertheless, these show helpful insights into government policy in an area tangential to this thesis but indicative of government capriciousness in creating and then abandoning an agency.

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90 Alexander (n 65).
91 Peter Alldridge, Money Laundering Law (Hart 2003).
92 Fisher, Money Laundering and Practice (n 80).
93 Gallant (n 73).
94 Attorney General’s Office (n 13) 130
97 Gallant (n 73).
98 Alldridge, Money Laundering Law (n 91).
100 Ryder, Financial Crime in the 21st Century (n 2) 211.
101 Alldridge, ‘Proceeds of crime law since 2003 (n 99) 183.
102 Ryder, Financial Crime in the 21st Century (n 2) 211.
3.4.3 Coalition Government 2010 onwards

Within weeks of the 2010 General Election,\(^{103}\) the new Chancellor of the Exchequer, George Osborne MP announced that the government would take white collar crime seriously.\(^{104}\)

We take white collar crime as seriously as other crime and we are determined to simplify the confusing and overlapping responsibilities in this area in order to improve detection and enforcement.\(^{105}\)

The Coalition government announced that it would create an ECA\(^{106}\) but in the event the organisation which was created, the NCA, bore little resemblance to the original proposals. In the arena of fraud, bribery and corruption, there was no attempt to change legislation but the BA2010 was implemented. Financial regulation, though, was subject to immediate change with the FSA being replaced by the Bank of England, together with a new prudential Regulatory Authority and Financial Conduct Authority through the Financial Services Act 2012. In terms of economic crime, a review of the financial crisis revealed unacceptable practices in banking and financial markets that brought about new legislation in the event of a financial institutions failure\(^{107}\) and promised ‘tough new domestic criminal offences for market abuse’\(^{108}\) because of issues with manipulation of LIBOR and foreign exchange and other markets.

Immediately prior to the formation of the Coalition government in 2010, Fisher argued that an Economic Crime Agency should be formed.\(^{109}\) This seemed to have had some attraction for the government but eventually other voices held sway and instead the NCA was created. Fisher, is a regular contributor on topical

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\(^{105}\) H M Treasury, ‘Speech by the Chancellor of the Exchequer, Rt Hon George Osborne MP, at Mansion House’ 16 June 2010, (n 104).


\(^{107}\) Financial Services (Banking Reform) Act 2013


areas, some of which bear on this thesis,\textsuperscript{110} but his works, although contemporary, only briefly deal with some elements of economic crime rather than this research which looks at the different areas in detail. Furthermore, Fisher does not consider whether lessons can be learned from either US or Australia.

3.5 International Conventions

The UK, US and Australia are all signatories to the United Nations Convention against Corruption (UNCAC),\textsuperscript{111} OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Convention)\textsuperscript{112} and the Financial Action Task Force.\textsuperscript{113} The truism highlighted by Carr is that ‘the success of any convention lies in it being ratified, implemented and enforced.’\textsuperscript{114} The organisations themselves provide reviews of implementation\textsuperscript{115} in addition to other international monitoring organisations, such as Trace International.\textsuperscript{116} Carr,\textsuperscript{117} Feldman,\textsuperscript{118} and Christians\textsuperscript{119} have observations concurrent with this thesis which are useful for the research but, although timely, serve only to underline Carr’s point.


\textsuperscript{112} The Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction.’ OECD, ‘Bribery in International Business’ http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm accessed 15 July 2013.


\textsuperscript{114} Indira Carr, Financial Fraud Law Report 4: The UK Bribery Act: Business Integrity and Whistleblowers (Thompson Media 2012) 363.

\textsuperscript{115} OECD, ‘Phase 3 Report on implementing the OECD Anti-Bribery Convention in Australia’ (n 17).


3.6 International Comparisons

3.6.1 USA

A key part of this thesis is to examine the US approach to economic crime in order to determine whether that country’s experience might be of benefit when considering the UK. The US has a range of fraud statutes while bribery is centred on the FCPA enacted in 1977 and there is a considerable wealth of literature on the subject, not least by the DoJ and SEC which provide an up to date guide. Against the background where the UK has a modern FRA2006, the US still uses the Mail Fraud Statute 1867 and its later partner the Wire Fraud Statute 1952. The structure is well analysed by a number of contributors with Podgor pointing to ‘no specific group of statutes designated in the federal code as fraud statutes’, and others such as Henning, Rakoff and, latterly, Zelcer looking at the operation of these two statutes. The importance for the thesis is that the use of these predicate acts explains the US system which contains a variety of fraud acts, rather than the single UK FRA2006 and provides a bedrock to understand the place of other US legislation.

The financial crisis provided the impetus for contemporary comment concurrent with this thesis by Ceresney, Feldman, Ryder, Ryder and Chambers, and Baber but, although helpful in understanding how the US authorities tackle the outcome of the crisis, this thesis is not about the financial crisis per se but is certainly about whether there are any lessons from the US which could be translated with benefit to the UK. The FCPA is a significant piece of US legislation,

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122 Podgor (n 121) 729.
127 Feldman (n 118).
not only because it has domestic application but because it extends US jurisdiction internationally and because it acts as a precedent for international criminalisation of bribery and corruption. As 37 year old legislation, there are some mature analyses such as Sorensen,131 Brown,132 Salbu,133 Griffin134 and Diersen135 but these predate the UK BA2010. The main contribution since 2010 is the DoJ/SEC’s own guide to the FCPA136 with other comment concurrent with this thesis by Cavico and Bahaudin,137 and Hansberry.138 The issue over FCPA permitting small ‘facilitation payments’ separates US (which permits) and UK (which does not permit), but analysis of implementation of UK bribery legislation has to wait for the first prosecutions.

The counter economic crime regime in the UK does not currently include ‘whistleblowing’, although there is a consultation outstanding.139 However, in the US, the Dodd-Frank Act 2010, as a response to the financial crisis, introduced a formal whistleblowing regime analysed by Baber,140 Hansberry141 and Carr142 but is not researched as part of this thesis and where US experience is still developing.143 Thus, the unique part of this thesis is the evaluation of measures taken in the US to combat fraud, bribery and corruption where there is some historic analysis of the US legislation but the value to this research is to assess whether US experience, which is dynamic, can be beneficially applied to the UK.

136 US Department of Justice (n 120).
138 Heidi L Hansberry ‘In spite of its good intentions, the Dodd – Frank Act has created an FCPA monster’ (2012) 102 J. Crim. L & Criminology 195.
140 Baber (n 130) 237.
141 Hansberry (n 138) 195.
142 Carr (n 114) 362.
3.6.2 Australia

The second country to be considered for evidence of a different approach which might be beneficially applied to the UK is Australia. Australia has a significant economy and it appeared to have more successfully withstood the effects of the economic crisis that both UK and US. The adoption of the ‘twin peaks’ plan for managing the regulators in 1998, which was cited with approval by the UK authorities, and where Taylor, the system’s proponent provides the background in 1995 with more contemporary reviews by Cooper and Bakir. These explain the rationale for the Australian system, which is helpful for this thesis, but this research is about economic crime. In this regard, ASIC is in change of financial markets where, although contributors such as Lui, Bakir, Cooper, and Gilligan provide descriptions of the regulator’s role, the manner in which ASIC performs its duties is subject to contemporary press criticism and parliamentary enquiry and is of more immediate interest.

Not only is ASIC criticised but although bribery of foreign public officials has been part of the Commonwealth criminal code since 1999, there has not yet been a prosecution. Davids and Schuster provide a useful summary but the law is plain from the criminal code and to date there are no cases to analyse. In the field of fraud, in addition to government explanations, Tomasic, Smith, and Johns provide references to the regulation of the financial sector which is relevant to the issues discussed in this thesis. The drop in prosecution rates over the last year has been ascribed to the new policy where the ”financial crime” division of ASIC has been axed. This is another area where the research is relevant as it reminds us of the importance of the principle of separation of powers, a core theme in this work.

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148 Bakir (n 146) 910.
149 Cooper (n 145).
154 Cindy Davids and Grant Schubert, ‘Criminalising foreign bribery: is Australia’s bark louder than its bite?’ (2011) 35 Crim L J 98
and Steel\textsuperscript{159} all contribute to an understanding of the fragmented Australian fraud landscape which, when seeking to draw conclusions on the Australian experience in countering fraud enables legislation and institutions to be put into perspective allowing consideration of whether the Australian experience can translate to the UK.

3.7 Conclusion

Economic crime is a field that is not well understood, suffering from variable terminology and overshadowed by the expression ‘white-collar crime.’ The latter is not perfectly understood either but this thesis establishes that economic crime is serious fraud, bribery, corruption and market regulatory failure and, as such, equate to the high ideal set by the coalition government.\textsuperscript{160} The literature reviews the terminology which is further complicated by labels such as terrorism financing, and money laundering, these together demonstrate the need to collate the crimes of serious fraud, bribery, corruption and market regulatory failings into a grouping called economic crime to emphasise the significance to the economy. A further consideration identified is the priority given to terrorist financing, especially in the aftermath of the terrorist attacks in September 2001, which diverted attention towards laundering the proceeds of crime, rather than the underlying criminal activity. Analysis of the three government periods under review shows the progression of financial services regulation from treating the City as a ‘club’ with rules to being regulated by a powerful regulator (FSA), which the 2008 financial crisis revealed to be ill placed to be able to meet its wide remit. Nevertheless, breach of regulations by such as market abuse and insider dealing have been treated as having more of a character of misdemeanour than crime and dealt with by way of civil penalties and fines rather than the criminal law, which is demonstrated by the inertia over prosecuting bankers involved in the LIBOR scandal. While the thesis discusses the various separate streams of

\textsuperscript{158} Rowena Johns Sentencing in fraud cases (Judicial Commission of NSW 2012) 12.
\textsuperscript{160} ‘We take white collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading.’ Cabinet Office, ‘The Coalition: our programme for government’ (n 106).
criminalisation and regulation, analysis of LIBOR has revealed gaps in regulation and underlap and overlap between prosecutors and regulators, which provides further demonstration that a single ECA is required in order to properly counter economic crime.

The 2008 financial crisis highlighted deficiencies in the UK’s fragmented counter economic crime regime but, recognising that the UK has international obligations, the thesis has considered those obligations and then looked at two other jurisdictions to see if their experiences differed from the UK. The existing literature, again, considers each country individually, whereas this thesis draws comparisons with US and Australia and identifies where the UK can learn lessons. Thus, the contribution which this thesis makes is to propose the creation of an ECA and provide a template for adoption.
Chapter 4: UK Historic Context

4.1 Introduction

This chapter critiques the economic crime regime in the United Kingdom (UK) by reviewing the historical context to the establishment of the three important agencies; the Serious Fraud Office (SFO), the Financial Services Authority (FSA)\(^1\) and the Office of Fair Trading (OFT). This is important because these bodies have failed to live up to the high expectations set at their inception, with the consequence that only the former has not been reformed.\(^2\) Thus, it is essential to understand the background to their creation and the powers they were granted to establish whether the original concepts were at fault or whether they were overtaken by events. Furthermore, this analysis will provide the bedrock for the analysis of current UK legislative and institutional frameworks, which will follow in chapter five.

The importance of fighting economic crime cannot be understated. Economic crime is defined as those crimes perpetrated by ‘white collar criminals’, which have a significant and a negative impact upon society.\(^3\) The term ‘economic crime’ is distinguished from ‘financial crime’ which Ryder\(^4\) describes as having ‘evolved into a multifaceted business or industry with a global reach and is commonly associated with illegal drugs, human trafficking, organized criminals and terrorists.’\(^5\) These activities, which include money laundering, do not form part of the thesis, as discussed in chapter three.\(^6\) Over time, UK governments have

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1 Financial Conduct Authority from April 2013.
2 In June 2010 the Chancellor announced changes to the way that financial services will be regulated. These changes include separating the regulation of prudential and conduct operations – both currently regulated out by the FSA – to be carried out by two new organisations: the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). (…) ‘Legal cutover’ is when the PRA and FCA will officially come into existence, and is expected to happen on 1 April 2013. This is dependent on the Financial Services Bill being approved by Parliament’. http://www.fsa.gov.uk/about/what/reg_reform accessed 4 January 2013. Financial Services Act 2012 received Royal Assent on 19 December 2012.
5 Ryder, Financial Crime in the 21st Century (n 4) 1.
6 Chapter 3.2.6.
sought to restrict economic crime by enacting laws that criminalise illegal conduct,\(^7\) giving powers to state prosecutors and by creating a body to regulate, control and discipline financial markets (the FCA). This chapter considers the background to the creation of the current institutional framework of the special prosecutor, to deal with serious fraud, bribery and the financial regulator. This examination illustrates how the endeavours of governments\(^8\) to adapt to changing financial markets and economic conditions, had the unforeseen consequences of providing increased opportunity for ‘white collar crime’,\(^9\) and according to Wright, leading to London being regarded as the ‘financial crime capital’ and the UK being condemned for its weak processes and controls.\(^10\)

The history of regulation of the markets shows that, as they became more vibrant and changing, governments\(^11\) proposed improvements to reflect the changing environment.\(^12\) This thesis takes as its base the changes occasioned as a consequence of the 1979 general election. The new Conservative government presaged a challenge to the status quo, resulting in ‘privatisation’,\(^13\) ‘deregulation’\(^14\) and a tougher response to serious fraud.\(^15\) Hitherto, as Levi notes, the attitude of governments of different political hues towards commercial fraud

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\(^9\) See chapter 4.2.2.


\(^11\) For example: Interdepartmental Committee on Sharepushing (Bodkin Committee). 1937 Cmd 5539. Anderson Committee on Unit Trusts 1936 Cmd 5239. G W Keeton ‘Reports of Committees’ 1938 1(March) MLR 313. (The outcome of these reports was Prevention of Fraud (Investments) Act 1939.). Report of the Committee to Review the Functioning of the Financial Institutions. (Wilson Committee) Cmd 7937 (HMSO 1980).

\(^12\) For example: Report of the Committee to Review the Functioning of the Financial Institutions. (Wilson Committee); Bodkin Committee (n 11); Anderson Committee (n 11); Fraud Trials Committee Report. (HMSO 1986) (hereinafter Roskill Committee); Attorney General’s Office, Fraud Review - Final report (Attorney General’s Office 2006); Financial Services Authority, ‘A regulatory response to the global banking crisis March’ (Turner Review), http://www.fsa.gov.uk/pubs/other/turner_review.pdf accessed 23 September 2014.

\(^13\) ‘Privatisation is a term which is used to cover several distinct, and possibly alternative, means of changing the relationships between the government and the private sector. Among the most important of these are denationalisation (the sale of publicly owned assets), deregulation (the introduction of competition into statutory monopolies) and contracting out (the franchising to private firms of the production of state financed goods and services). J. A. Kay and D. J. Thompson, ‘Privatisation: A Policy in Search of a Rationale’ (1986) 96(3) The Economic Journal 18-32.


\(^15\) to protect society from extensive, deliberate criminal deception which could threaten public confidence in the financial system.’ Serious Fraud Office, ‘SFO Budget 2009-2010’ http://www.sfo.gov.uk/ accessed 7 February 2012.
was of 'benign neglect', which had the effect of fostering apathy among City of London (City) institutions because when cases were prosecuted they failed to achieve the expected convictions, which was attributed to juries not fully understanding the cases. Levi notes that, 'fraud was not part of the law and order agenda', stating that:

Commercial fraud in Britain was a subject that was of concern principally to a small group of academics. For almost all politicians and criminologists, conservative and radical alike, street and household crime constituted 'the crime problem' over which they would do battle.

Levi added that 'the relative immunity from law enforcement agencies has been enjoyed by both professional criminal and criminal professional types engaged in fraud', is because 'criminal types' have been policed more heavily than 'respectable' people. Thus, as Roskill stated, 'it is all too likely that the largest and most cleverly executed crimes go unpunished'. It was reasoned that because the 'legal system' was 'archaic, cumbersome and unreliable', criminals were able to escape without sanction and this was partly due to how cases were tried. Munday concluded, 'perhaps the time has come to admit that the criminal trial ought no longer to resemble a crafty game where one side's strategy may remain artfully concealed until the last moment to no real end other than to frustrate the interests of justice.'

The disquiet about fraud trials centred on the performance of juries. The Fraud Trials Committee (Roskill) was established 'because the government

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17 Levi, 'Fraud in the Courts' (n 16) 394.
19 Levi, 'Reforming the Criminal Fraud Trial' (n 18) 117.
20 Levi, 'Reforming the Criminal Fraud Trial' (n 18) 118.
21 Roskill Committee (n 12) 1.
22 'At every stage, during investigation, preparation, committal, pre-trial review and trial, the present arrangements offer an open invitation to blatant delay and abuse. While petty frauds, clumsily committed, are likely to be detected and punished, it is all too likely that the largest and most cleverly executed crimes escape unpunished.' Roskill Committee (n 12) 1.
24 Levi, 'Fraud in the Courts' (n 16) 394.
25 HC 8 November 1983 vol. 48 Cols. 83-84W.
Lord Roskill. Roskill Committee (n 12) iii.
understands the concern which has been expressed about the range of problems generated by allegations of serious commercial fraud.\(^{26}\) Its brief was:

To consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved, and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious, and economical disposal of such proceedings.\(^{27}\)

Roskill’s key recommendation was to establish ‘a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud’.\(^{28}\) The organisation eventually created was the SFO and its performance is reviewed in chapters five and six.\(^{29}\)

Alongside fraud as a key component of economic crime is protection of investments and markets where the government initiated a separate enquiry into the protection of investors, concurrent with examination of the state’s response to fraud.\(^{30}\) The general approach to financial services regulation in 1981 was non-intervention, or self-regulation.\(^{31}\) This is not surprising since financial services have a long history, dating back to ‘barter markets’ around 1,000 AD.\(^{32}\) These markets and institutions centred on the City have developed their own practices, generally without formal state intervention, as Irving notes:\(^{33}\)

The ways in which the City institutions work are governed by a blend of statutory and self-imposed rules. Standards of behaviours have developed over the years with the growth of the City. Reprisals which can follow the breaking of any institution’s rules are usually sufficient deterrent (...). The Bank [of England] (BoE) exercises its supervisory role in different degrees (...). The Bank itself see no good reason for basically changing the present mixture of statutory and self-regulation. (...) Voluntary rules are much easier to introduce and modify than legal ones, and to operate within the strict letter

\(^{26}\) HL 8 November 1983 vol.444, col. WA 790.
\(^{27}\) HL 8 November 1983 vol.444, col. WA 790.
\(^{28}\) Roskill Committee (n 12) 2, 3, 147.
\(^{29}\) National Fraud Authority (n 3).
\(^{33}\) ‘the FSA had been criticised prior to the financial crisis for being too “heavy and intrusive” and was under pressure to become even more “light touch”.’
The investment markets benefited from light regulation by government,\(^{33}\) as had been the case for centuries, apart from the Prevention of Fraud (Investments) Act 1958 (POFI).
of the law does not amount to the kind of ethical behaviours that the City institutions demand, and the BoE expects.\textsuperscript{34}

Thus, an era, when the most effective regulator was the BoE ‘Governor’s eyebrows’,\textsuperscript{35} serves as a backdrop to the new landscape with which this thesis commences.

Before considering the historic background to this research into economic crime, this chapter reviews the particular aspects of economic crime terminology and then the progression of financial services regulations and fraud criminalisation which provides the base to legislation and analysis of current institutions in chapters five and six.

4.2 Economic Crime Characteristics

4.2.1 Terminology, Inter-changeability of Economic Crime, Financial Crime and White Collar Crime.

Before this thesis considers the historic background to how anti-fraud and financial regulation measures were established, it is appropriate to highlight the perceptions that offenders in this category receive more lenient sentences than other spheres of criminality.\textsuperscript{36} These types of crimes have their own label of ‘White Collar Crime’.

The expression ‘White Collar Crime’ was first used by Sutherland in 1939.\textsuperscript{37} He was examining sociological differences amongst criminals and defined this category as ‘a comparison of crime in the upper or white-collar class, composed of respectable or at least respected business and professional men, and crime in the lower class, composed of persons of low economic status’,\textsuperscript{38} and according to

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\textsuperscript{34} Joe Irving, \textit{The City at Work.} (Andre Deutsch 1981) 26, 27.
\textsuperscript{35} Attributed to Montagu Norman, (Lord Norman), Governor of the BoE 1920 – 1944. See also: L C B Gower, '“Big Bang” and City Regulation' (1988) 51 MLR 21.
\textsuperscript{36} R v Dougall [2010] EWCA Crim 1048; R v Innospec (unreported). (Lord Judge).

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Later, Sutherland refined the definition as ‘“committed by a person of respectability and high social status in the course of his occupation”.’ As cited in Sarah Wilson, ‘“Collaring” the crime and the criminal?’ "Jury
Strader ‘included crimes committed by corporations and other legal entities in his definition,’\(^3\) which he conceded was ‘arbitrary and not very precise.’\(^4\) He concluded that the impact of white collar crime was greatly underestimated in society.\(^5\)

Sutherland drew attention to crimes being a ‘lower class’ activity with a low incidence in the ‘upper class’.\(^6\) He identified ‘robber barons’, ‘merchant princes’, and ‘captains of finance’ from past eras before concluding that ‘white collar crime’ is found in every occupation,\(^7\) citing a range of activities which ‘Al Capone called “the legitimate rackets”.’\(^8\) Furthermore, whilst asserting that ‘white collar crime is real crime’, Sutherland noted the poor criminal conviction rates by explaining preferences of victims for civil damages recovery or restitution or salvage because criminal prosecution would interfere with obtaining financial recompense.\(^9\) In modern times, Sutherland’s definition might appear out-dated because, as Strader notes, white collar crimes, ‘such as securities fraud and tax fraud are committed not just by people of “high social status” but by people of divergent backgrounds.’\(^10\) However, notwithstanding the blurring of Sutherland’s definition, the perpetuation of the term, ‘white collar’ remains ‘a convenient moniker for distinguishing such crime in the public mind from “common” or “street” crime.’\(^11\)

The Department of Justice defines white collar crime as:

Non-violent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by

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6. Although Sutherland does not explain why the impact of white collar crime was underestimated in society, Payne does detail the consequences. ‘Crime, by its very nature, has consequences for individuals and communities. White-collar crime, in particular, has a set of consequences that may be significantly different from the kinds of consequences that arise from street crimes. In particular, the consequences can be characterized as (1) individual economic losses, (2) societal economic losses, (3) emotional consequences, (4) physical harm, and (5) “positive” consequences.’ Brian K Payne, *White-collar Crime* (Sage 2013) 37.
7. Sutherland, ‘White Collar Criminality’ (n 38) 1.
8. Crimes include: ‘murder, assault, burglary, robbery, larceny [sic], sex offences, and drunkenness, but exclude traffic violations.’
9. Sutherland, ‘White Collar Criminality’ (n 38) 1.
10. Sutherland, ‘White Collar Criminality’ (n 38) 1.
11. Sutherland, ‘White Collar Criminality’ (n 38) 1.
anyone having specialist technical and professional knowledge of business and government, irrespective of the person’s occupation.48

Or, as Federal Bureau of Investigation put more succinctly, ‘lying, cheating, and stealing’.49 An alternative approach to a definition is that it may be more convenient to define white collar crime by what it is not: Strader suggests that the prime characteristics of white collar crime do not include violence, drugs, vice, common theft or challenges to national security such as immigration and human rights.50

Public attitude to white collar crime is another consideration.51 Sutherland noted that, clearly, crimes such as murder and rape attracted as much public resentment as felonies but other crimes were categorised as misdemeanours, into which category white collar crime tended to be consigned, furthermore:

The differential implementation of the law as it applies to large corporations may be explained by three factors: namely, the status of the businessman, the trend away from punishment and the relatively unorganised resentment of the public against white collar crimes.52

The importance of public attitude is that it drives government policy. For example, the financial resources of the police are constrained and ‘the allocation of resources is being prioritised towards financial intelligence and money laundering and away from fraud.’53 Doig identifies the competing priorities: ‘[t]his is clearly a consequence of the wider public order, public safety and financial confiscation agendas pursued by successive governments.’54 The outcome of the maxim ‘what gets measured gets done’ is that ‘investigating and prosecuting fraud does not count in terms of measuring the delivery of these agendas or league tables of performance’.55

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50 Strader, Understanding White Collar Crime (n 39) 1.
52 Sutherland, White Collar Crime: The Uncut Version (n 36) 56.
53 Attorney General’s Office (n 12) 130
54 Alan Doig, Fraud (Willan 2006) 133.
55 Doig (n 54) 133.
4.2.2 The Enforcement of law on White Collar Crime

Strader notes that a principal difficulty with white collar crime is that it is often very difficult to detect, relying on circumstantial evidence and complex paper trails with only the occasional obvious clues of a ‘smoking gun’. This is compounded by investigations which can last for years followed by lengthy trials. In the US, government agencies have sought opportunities to stretch existing laws. For example, in the PNP case, prosecutors were able to extend their charges for securities and tax fraud to other charges. Here, PNP having been charged with tax fraud, were also charged with ‘mail fraud.’ This was purely because it had used US Postal Service as part of the fraud by putting the tax returns in the post, something which would have been avoided by hand delivery. Strader explains the consequences:

because it charged mail fraud, the government could bring charges under the RICO statute, [Racketeer Influenced Corrupt Organisations] with mail fraud as the principle predicate acts. And because RICO contains forfeiture provisions, the government could, and did, assume control over PNP’s assets prior to trial.

Blakey and Gettings observe that RICO was the end product of a long process of legislative effort to develop new legal routes by adapting the use of existing legislation to deal with ‘organized crime’. This case illustrates that as white collar crime changes, prosecutors have to respond and in the US, prosecutors looked to adapt existing legislation, unlike the UK approach to create new legislation, and ‘Whatever its weaknesses, RICO gives the government an effective threat against

56 Strader, Understanding White Collar Crime (n 39) 1.
57 Strader, Understanding White Collar Crime (n 39) 1.
59 9 United States v Regan,37 F.2d 823, 826-27 (2nd Cir. 1991).
63 Strader, ‘White Collar Crime and Punishment’ (n 60) 61
sophisticated crime (...). At least for a while, for white-collar criminals as well as gangsters, RICO appears to be evening up the odds. However, Strader reports difficulties created by ‘vagueness of many white collar statutes,’ providing scope for prosecutors to overreach themselves ‘in instances of ambiguous harm and unproven legal theories.’ The conclusion that ‘[m]ore carefully crafted statutes would begin to solve this problem’ is based on the reasoning that:

Apart from being incomprehensible, the RICO statute’s potential application is nearly boundless, principally because of its inclusion of the mail and wire fraud statutes as predicate acts. These statutes can be used just about anytime anyone puts anything in the mail, makes an interstate phone call, or sends an email in suspicious circumstances.

The US system, discussed in chapter seven, has a tradition of multiple statutes to criminalise different varieties of fraud which looks complicated when compared with the Fraud Act 2006 and Bribery Act 2010.

4.2.3 Criminal ‘Upperworld’ and Sentencing

In parallel with examining white collar crime, this thesis also considers the belief held at large that white collar criminals are treated differently from other criminals. Lord Judge CJ provides a reminder of the status of fraudsters, as not being some superior species of criminal:

For all the respectable and reputable fronts that many fraudsters and corrupt businessmen may present, they are criminals. What is sometimes described as white collar crime or commercial crime taking the form of fraud and corruption in particular is crime. And it is not victimless: sometimes identified individuals are victims, and at others, unnamed, unknown individuals in the

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65 Blakey and Gettings, (n 64) 1012. (RICO: The Enforcer, NEWSWEEK, Aug. 20, 1979, at 82, col. 3.).
66 Stating that it refused to engage in the exercise of defining federal "common-law crimes," the court concluded that it would "resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases." This conclusion is all the more valid because the mail and wire fraud statutes are applied in circumstances where there is no discernable harm.
Strader, 'White Collar Crime and Punishment' (n 60) 61, 96. (Footnote omitted).
67 Strader, 'White Collar Crime and Punishment' (n 60) 61, 96.
68 Strader, 'White Collar Crime and Punishment' (n 60) 61, 96.
69 Strader, 'White Collar Crime and Punishment' (n 60) 61, 94.
71 'Attending cases in court, (…) Particularly noticeable is the absence of corporate offenders and the prevalence of small shop keepers restaurateurs, market traders and second hand car salesmen.' Hazel Croall, ‘Who is the White-Collar Criminal?’ (1989) 29 Brit. J. Criminology 164.
entire community are victims, and sometimes the community itself is the victim. 72

Lord Judge warned that, in fraud and corruption cases, the prosecutors should not believe that these are ‘more respectable than other forms of crime,’ 73 or that these criminals ‘should not be ordered to serve prison sentences because such sentences should be reserved for those they regard as common criminals.’ 74 Nevertheless, the reasons why there is an actual or apparent disparity in sentencing are worthy of examination.

Suggestions of underlying reasoning include that: white collar crime is less important; or, that white collar crime is different from other crimes and requires different measures; or the legislators and judges come from the same social demographic groups as the perpetrators and are inherently biased. This was a view supported by Leong who noted that:

the definition of white-collar crime is criticised for being too narrow as it does not include the differential associations between the ‘upperworld’ of corporations and the ‘underworld’ of criminal organisations. At the same time, it is criticised for being too broad as an all-encompassing category. In fact, the distinction between organised crime or ‘business in crime’ and the activities of white-collar offenders blurs, and organised crime often uses and abuses legitimate corporate enterprises. 75

This is an interesting distinction between the familiar organised crime ‘underworld’ criminal activities and ‘upperworld’ criminality, an expression coined by ‘Albert Morris in his textbook Criminology in 1934’, 76 since ‘hardly a day goes by without new scandals coming to light concerning insider trading, money laundering or leveraged buy-outs.’ 77

Robb analyses Sutherland’s definition of white collar crime as being undertaken ‘in the course of his occupation’ and contrasts that:

73 Lord Judge CJ (n 72).
74 Lord Judge CJ (n 72).
77 Robb (n 76) 7.
non-occupational crimes committed by members of polite society, such as murder or rape, would not be considered white collar crimes. Likewise work-related crimes such as larceny by domestic servants or the theft of building materials by construction workers cannot be categorized as white-collar crimes because they were carried out by lower-class persons.78

Croall observes that the label of ‘white-collar crime’ having entered the lingua franca is ‘traditionally associated with high status and respectable offenders.’79 Furthermore, these are considered to be the “crimes of the powerful” and corporate crime.80 However, this stereotype, while convenient when applied to some major cases, does not cover the whole spectrum: ‘[s]ome white-collar offences are committed by offenders clearly not of “high status and respectability”.’81 Croall considers that much crime labelled as ‘white-collar’ is perpetrated by many who ‘could not be described as “powerful”, high status, or even respectable.’82 These include ‘crimes against the consumer’, committed in the course of trade and business by small businesses and where ‘[l]arge legitimate corporations (...) are the victims of such frauds rather than the perpetrators.’83 Croall identifies areas such as food fraud,84 weights and measures, trade descriptions and consumer credit.85

The essential element in this upperworld is that of trust, as Robb notes where ‘[w]hite-collar crime can be further defined as breaches of trust within business or professional communities or between those communities and the general public.’86 Sutherland recognised this by observing that ‘[e]mbarrassment is usually a violation of trust by an employee at the expense of the employer, while most other white collar crimes violations of trust by businessmen at the expense of consumers, investors and the state.’87 Thus, the positioning of white collar crime in this thesis is

78 Robb (n 76) 4.
79 Croall (n 71) 157.
80 Croall (n 71) 157.
81 Croall (n 71) 157.
82 Croall (n 71) 157.
83 Croall (n 71) 157, 164.
85 Croall (n 71) 157.
87 Sutherland, ‘Crime and Business’ (n 40) 112.
that, in relation to economic crime, the ‘upperworld’ is inhabited by respectable people of authority within business, even if not themselves of high social status.

4.3 The Paradoxical Old Lady: The Bank of England

The ‘upperworld’ in the UK is exemplified by the BoE which has had an historically pivotal position as central bank, banking regulator and financial markets regulator: McRea and Cairncross note that the ‘paradoxical Old Lady is the link between the City and the government (…) [this] is an inherent contradiction (…) it is the government’s arm in the City, and the City’s representative in the government – the gamekeeper and the poacher, the foreman and the shop steward.’

The BoE is a traditional looking institution: ‘[t]he Bank’s tall, windowless walls built (…) in 1828, give it the look of an elegant fortress (…) guarded by pink coated doormen,’ providing an emblematic view of the City’s premier club. The BoE, established in 1694 by Royal Charter, operated as a private institution until 1946.

Over time, according to Galpin, it ‘had taken on a regulatory role and it could act flexibly and with understanding, which made it all the more acceptable to those whose affairs it chose to monitor.’ Ritchie notes that ‘The twin aims of the Bank’s controlling activity in the City are regulation of institutions and implementation of policy,’ which includes managing the government’s debt, issuing notes and coin, acting as banker to the government, acting as banker to commercial banks, managing the country’s gold and currency reserves and controlling the monetary system of the UK.

The hallmark of these supervisory arrangements was its flexibility, however as Fisher and Bewsey comment ‘the secondary banking crisis of the 1970s had effectively undermined confidence in the informal system of supervision and the 1979 Banking Act was introduced.’ Thus, after almost three centuries the Bank was given statutory authority for authorisation and supervision.

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89 McRea and Cairncross (n 88) 194.
93 Ritchie (n 92) 25.
94 Galpin (n 91) 5.
95 Fisher and Bewsey (n 33) 201.
of banks. However, this development did not take place in a vacuum, as discussed in chapter six, when the rapidly changing regulatory environment necessitated a review and then the Banking Act 1987.

Between 1946 and 1979, the BoE’s main concern was the provision of liquidity to the UK banking system, which it did through dealings with merchant banks. Thus, the BoE had regular contact with a privileged few banks through which it exercised supervision, although as Robb comments:

The Bank of England Act 1946 gave the Bank powers to ‘request information from and make recommendations to bankers’ and, if authorised by the Treasury, to ‘issue directions to any banker for the purpose of securing that effect is given to any such request or recommendation’. No such directions were ever issued.

The clear inference of this is that the BoE enjoyed informal power because ‘[b]efore the introduction of the first Banking Act in 1979 there was no statutory requirement that a bank or similar deposit-taking institution be authorised to accept deposits or undertake banking business in the UK.’ Existing legislation was the Protection of Depositors Act 1963 but this ‘prescribes the conditions under which companies may advertise for deposits from the general public.’ In 1971, the BoE initiated reforms through ‘Competition and Credit Control’, which had the objective of engendering competition between the banks and, at the same time, provide greater control over monetary policy. Unsurprisingly, as Crockett notes, ‘the new arrangements were arrived at by voluntary agreement with the banks.’ As Robb describes, ‘[t]he status of a banking institution was based in practice on what became known as “ladder of recognitions”, depending on its position under various statutes.’ At the top of the ladder was ‘Authorised status under the

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96 Banking Act 1979
97 Fisher and Bewsey (n 33) 201.
99 Robb (n 98) 29.
100 Robb (n 98) 29.
103 Crockett (n 101) 192.
104 Crockett (n 101) 193.
105 Robb (n 98) 30.
Exchange Control Act 1947” and at the bottom ‘recognition under Income and Corporation Taxes Act 1970’. The BoE’s 1971 reforms looked to take advantage of circumstances which Crockett describes as ‘particularly propitious for a new initiative. The recently elected Government had a commitment to greater competition; there was a slackening in loan demand and little risk that an easing in restrictions would lead to unmanageable growth in borrowing. Such optimism proved to be short-lived, because government action to control the growth of money supply by increasing interest rates led to problems such as those experienced by London and County Securities. Other fringe lenders also faced difficulties and the BoE decided that it was important to rescue those in the sector suffering liquidity (as opposed to solvency) problems.

The BoE mounted a rescue operation, establishing the ‘Control Committee of the Bank of England and the English and Scottish Clearing Banks’ - a joint liquidity support facility that subsequently became known as the ‘Lifeboat’. The Lifeboat was managed by the BoE and the risks shared amongst the committee, the BoE’s exposure being capped at 10%. This was all handled without statutory underpinning.

106 Robb (n 98) 30.
107 http://www.bankofengland.co.uk/publications/Pages/fsr/1997/fsr03.aspx accessed 31 October 2012. The status of a banking institution was based in practice on what became known as “ladder of recognitions”, depending on its position under various statutes. 1 Authorised status under the Exchange Control Act 1947 — the Bank and the Treasury were responsible for establishing a list of banks authorised to deal in foreign exchange. This was regarded as the highest accolade a bank could attain. 2 Companies Act 1948 exemption from disclosure of certain information in company accounts. 3 Exemptions from the Protection of Depositors Act 1963 restrictions on advertising for deposits. 4 Companies Act 1967, section 123 certificate — issued by the Board of Trade to institutions it considered to be bona fide carrying on the business of banking. This certificate secured exemption from the Moneylenders Acts. 5 Recognition under Income and Corporation Taxes Act 1970 — granted by the Inland Revenue to bona fide banking businesses allowing them to pay and receive interest gross of tax. Some of the “lesser” recognitions only required decisions about the type of business carried on (eg section 123 certificates) rather than fitness and properness and soundness of the institution.
108 Crockett (n 101) 195.
110 Robb (n 98) 30.
111 Robb (n 98) 30.
112 ‘Secondary Banking Crisis 1973-75’ (Lifeboat).
113 Dale (n 112) 326-333.
The role of the BoE had evolved over time but the basic tenet was that it exercised its influence without and real form of statutory underpinning. Indeed, it successfully used the ‘Governor’s eyebrows’ not only to regulate but, as with the ‘lifeboat’, cause commercial organisations to risk their own capital to support the BoE’s rescue plan. This is important in the research into economic crime because of the way it held sway over UK institutions. The following section to this chapter, includes areas where the BoE’s influence is evident.

4.4 Dawn of Regulation

The three decades after the end of the Second World War, were labelled as ‘The Welfare State’, which took ‘cradle to grave’ responsibility for British citizens. During this time, there had been little legislative activity in relation to economic crime, save for the Prevention of Fraud (Investments) Act 1958 (POFI). However, at the end of the 1970s, and following the ‘Winter of Discontent’, a general election brought in a Conservative government with a radically different view: ‘that the curse of the British economy lay in restrictive trade practices of every sort, and an overdependence by everyone on the state,’ and introduced many reforms to the regulation of finance, some of which dated back to the Second World War.

The government embarked upon ‘privatisation’, after a slow start (...) the strategy gathered pace under (...) Nigel Lawson, ‘a vigorous free-marketeer’. The range of state assets which were privatised indicates ‘how far the post-war consensus had extended nationalisation across almost every sector of the economy.’ Jenkins noted, ominously, ‘[t]hen in 1986 Lawson moved into the

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115 ‘A strike-bound “winter of discontent” in 1978-9, came close to being a public sector general strike. Frozen rubbish piled up in the streets and there were improbable reports of bodies lying unburied.’ Jenkins (n 114) 322.
116 Jenkins (n 114) 325.
118 ‘Privatisation is a term which is used to cover several distinct, and possibly alternative, means of changing the relationships between the government and the private sector. Among the most important of these are denationalisation (the sale of publicly owned assets), deregulation (the introduction of com- petition into statutory monopolies) and contracting out (the franchising to private firms of the production of state financed goods and services). Kay and Thompson (n 13) 18-32.
119 Jenkins (n 114) 330.
120 Jenkins (n 114) 330.
hitherto sacrosanct territory of financial services,121 ‘because it entailed admitting foreign firms into the most jealously guarded of markets [and] merchant banks.122

The outcome of the Lawson deregulation,123 known as ‘Big Bang’,124 was that the regulation of the City markets and institutions was relaxed. Galpin stated that ‘it is (...) something of a misnomer to describe this process as deregulation. It is rather a process of reregulation, since its effect has been not to do away with regulation but intensify it, albeit in a different way’.125 The explanation of deregulation had less to do with loosening supervision than ‘seeking no more than to convey the freedom to compete.’126 The specialist roles adopted by institutions and their traditional areas of activity became blurred, coinciding with the breakdown of the inherent protectionism of the City, because foreign owned institutions were allowed access to the City markets.127 Marr, though, traces the genesis to international monetary policy in the 1960’s and a change in US government attitude which gave an opportunity for London:

The influence of the Eurodollar and Eurobond market on the culture of the City and by extension British business life general can hardly be overstated. From the early sixties, it was internationalising and shaking up London, introducing more aggression, fatter salaries and less of the old school tie.128

This was significant because, Marr opines that in the 1970’s, there was a ‘Labour government intent on controlling everything’129 and, thus, mainstream domestic investment was controlled by HM Treasury whereas ‘in the side streets’,130 ‘just a whiff of the can-do, devil-may-care Wild West spirit was suddenly felt in the streets of old London.’131 This manifested itself in ‘1982, another slice of American

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121 Jenkins (n 114) 330.
122 Jenkins (n 114) 330.
123 Robb (n 98) 34.
124 The proposals were based on the Gower Report. Gower, Review of Investor Protection (n 30). The phrase 'big bang' was referred to by Professor Gower during the enactment of the Financial Services Act 1986. Gower, "'Big Bang' and City Regulation" (n 35) 1.
125 Galpin (n 91) 8.
126 Galpin (n 91) 8.
127 The Guardian 9 October 2011. ‘Big Bang’s shockwaves left us with today's big bust.’ Twenty-five years on, Lawson is unrepentant, insisting that the benefits of the Big Bang far outweigh the disadvantages. But even he admits to a certain nostalgia for the old City: "The Stock Exchange was run as a kind of private club: no outsiders could come in and it was riddled with restrictive practices. It was a very charming club – I rather liked it – but there was no way in which it could be a strong player in that business in the modern world." http://www.guardian.co.uk/business/2011/oct/09/big-bang-1986-city-deregulation-boom-bust accessed 11 June 2012.
129 Marr (n 123) 423.
130 Marr (n 123) 423.
131 Marr (n 123) 423.
business life came to London in the multi-coloured jackets and raucous bear-pit atmosphere of the new international financial futures market, or LIFFE.\(^{132}\) This analysis is not just of historic interest but will be seen to contribute to the genesis of the LIBOR scandal and allied market manipulations revealed in the 2008 financial crisis.\(^{133}\)

‘Big Bang’ was ‘something which has a claim to be the single most significant change of the whole Thatcher era, on a par with confronting the unions or privatisation.’\(^{134}\) It was, according to Plender:

A scramble in which most of the City's leading brokers and jobbers paired off with clearing banks, merchant banks and a host of other institutions including foreign banks, (...) [which] committed an estimated £1 billion or so to buying the cream of the London broking and jobbing fraternity. (...) Yet the purchasers were making a leap in the dark, because (...) [they did not] know how the regulatory framework might affect future revenues (...). [from] the assets that were being acquired - dealing skills and customer contacts. (...) Perhaps most important of all, the buyers were paying large sums for a stake in a monopoly that was waning very rapidly.\(^{135}\)

This 'leap in the dark' may well be seen to have contributed to the breakdown in City integrity.

Successive Labour governments presided over a period of economic 'boom and bust'.\(^{136}\) This included financial crime issues such as terrorism financing and those emanating from the global financial crisis. This government built a new regulatory structure around the FSA, as a ‘super regulator’,\(^{137}\) which was to have significant consequences, as discussed in this chapter and chapters five and six. The UK recognised that financial crime was a threat to national security when it

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\(^{132}\) Marr (n 123) 423.

\(^{133}\) Discussed in chapter six.

\(^{134}\) Marr (n 123) 424.


criminalised terrorist financing\textsuperscript{138} because of Northern Irish terrorism,\textsuperscript{139} thus being in advance of the US ‘financial war on terrorism, which followed the 9/11 terrorist attacks.\textsuperscript{140} FSA was given a specific objective to reduce financial crime.\textsuperscript{141}

In 1997, the new Labour government announced an ambitious and ground-breaking new financial regulatory regime which Ryder notes ‘would set basic standards and prevent systematic failure.’\textsuperscript{142} This change was not just a matter of political determination to stamp a new regime on the financial markets but ‘like all reforms, this one did not take place in a vacuum.’\textsuperscript{143} Drawing on Blair,\textsuperscript{144} it is clear that global financial markets had been evolving with new technology, market innovation and breakdown of traditional demarcations,\textsuperscript{145} which, as former Federal Reserve Chairman Greenspan remarked, ‘make it virtually impossible to maintain some of the rules and regulations established for a different economic environment.’\textsuperscript{146} Protection of the City was the \textit{raison d’être} because that is how the UK financial markets are judged internationally.\textsuperscript{147} Consequently, effective regulation of the markets was needed to ensure international competitiveness.\textsuperscript{148} Thus, to match the expectation of a ‘super regulator,’\textsuperscript{149} the Government heralded FSA’s creation as ‘a ground-breaking piece of legislation designed to thwart financial criminals, protect consumers and maintain London’s reputation as a global financial centre.’\textsuperscript{150}

\begin{thebibliography}{99}
\bibitem{139}Ryder, \textit{Financial Crime in the 21st Century} (n 4) 79.
\bibitem{140}Ryder, \textit{Financial Crime in the 21st Century} (n 4) 51.
\bibitem{141}The FSA had four equal objectives, one being ‘the reduction of financial crime’, the FCA has ‘a single overarching strategic objective to ensure that markets function well.’ Financial Services and Markets Act 2000, s 6(3).
\bibitem{144}W. Blair, ‘The reform of financial regulation in the UK’ (1998) 13(2) JIBL 43.
\bibitem{145}William Blair later Blair J.
\bibitem{146}Blair (n 143) 43.
\bibitem{149}Blair (n 143) 44.
\bibitem{149}Lomnicka, ‘Reforming U.K. financial Services regulation’ (n 137) 480-489.
\bibitem{150}N Ryder and C Chambers, ‘The Financial Services Act 2010: how will the FSA rise to meet its new challenges?’ FRI 26 May 2010
\end{thebibliography}
The previous regulatory system had an umbrella organisation, SIB, sitting above three SROs. This brought issues with rule books, claims of reductions in standards, structural complexity and demarcations between banking and securities industries being hard to delineate, and was later concluded by Rider to have ‘failed to protect investors.’ In the key area of financial crime, ‘the prosecutorial role of the SIB was limited to breaches relating to the authorisation to conduct investment business and insider dealing.’ The SIB was criticised by Ryder for not tackling financial crime with Rider noting ‘their rose-tinted view of corporate ethics and their devotion to the “facilitative” approach to regulation.’ Against this backdrop Gordon Brown championed the case for bringing financial regulation under the one roof. He argued that this was necessary because firms organise their affairs on a group-wide basis, and this regulatory structure would be in line with ‘the day’s increasingly integrated financial markets.’ The headlines, naturally, highlighted the prudential and regulatory ‘cross-sectorial’ roles, which removed banking supervision from the BoE, but gave the new unified regulator a wide remit. As Blair observes, ‘setting up of a single regulator would be pointless if the existing structure merely continued under a new nameplate.’ The previous approach was based on ‘moral persuasion’ and voluntary codes whereas the new structure was defined as ‘authorisation, supervision and enforcement’. Whereas previously firms were subject to different disciplinary powers depending upon their individual regulator, the FSA presented a single dedicated unit to

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151 The government white paper originally proposed the creation of a parallel organisation, ‘the Marketing of Investments Board’ to regulate pre-packaged investments. In the event, one body (SIB) was formed. ‘The regulation of financial services: art IV -- the marketing of investments.’ The Law Society Gazette, 9 September 1987 http://www.lawgazette.co.uk/news/the-regulation-financial-services-art-iv-marketing-investments accessed 21 November 2012.

152 Below SIB were various SROs (Securities and Futures Authority, Personal Investment Authority, Investment Management Regulatory Organisation). Recognised Investment Exchanges, Recognised Professional Bodies and Recognised Clearing Houses. SIB established by Financial Services Act 1986.

153 Blair (n 143) 43. 45.


156 Ryder, ‘The Financial Services Authority and Money Laundering’ (n 155) 639.


159 Blair (n 143) 43. 45. Gordon Brown, Chancellor of the Exchequer.

160 Lomnicka, ‘Reforming U.K. financial Services regulation’ (n 137) 480, 485.

161 Blair (n 143) 43. 47.

162 Blair (n 143) 43. 47.

163 Blair (n 143) 43. 47.
undertake investigation, enforcement and disciplinary work,\textsuperscript{164} in policing the UK financial services sector.\textsuperscript{165}

The importance of regulation is underlined by Wright because of the ‘threat to the reputation of the UK as an honest trustworthy market where you can safely do business.’\textsuperscript{166} Furthermore, the international ramifications are severe: ‘[a] financial services industry which is known to be riddled with crooks, awash with dirty money, is not the place where investors want to do business. It is not a trusted market.’\textsuperscript{167} Whilst this may seem an axiomatic truth, as Wright notes, in the US there was a view that:

London had become the money-laundering capital of the world. It is an unenviable reputation to have. London’s huge financial markets are not surprisingly a magnet for the launderer; $1,000bn a day is exchanged in the foreign currency markets and the sheer volume of transactions makes it impossible to check every single one. We are also to an extent the victim of our own magnificent reputation: dollars ending up in a bank account in the UK are less likely to be thought to be tainted than if they were put through less reputable offshore banking centres.\textsuperscript{168}

This analysis by Wright, is important because it provides a contemporary view of the risks to the City from economic crime. The City’s ‘magnificent reputation’\textsuperscript{169} depended upon the integrity of the markets and the informal style of regulation led by the BoE but which were suited to a different economic environment.\textsuperscript{170} Thus imposition of greater regulation became an imperative together with a focused approach to dealing with serious fraud in order to protect the City’s integrity.

\begin{footnotesize}
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\item \textsuperscript{164} Blair (n 143) 43. 47.
\item \textsuperscript{165} This comprised: banks, building societies, friendly societies, credit unions; insurance companies, Lloyd’s insurance market; investment and pension’s advisers, fund managers; professional firms; stockbrokers and derivatives traders.
\item \textsuperscript{166} Ryder and Chambers (n 150).
\item \textsuperscript{167} Wright (n 10) 304-307.
\item \textsuperscript{168} Wright (n 10) 304-307.
\item \textsuperscript{169} See also, Nicholas Ryder, \textit{Money Laundering – an endless cycle} (Routledge 2012) 5.
\item \textsuperscript{170} Wright (n 10) 304-307.
\end{itemize}
\end{footnotesize}
4.5 Financial Services Regulation

The regulation of investments and markets has proved to be problematic, as demonstrated by the frequent changes in the structure and institutions, because, according to Cohrs:

the international regulatory framework at the moment is complex, particularly on resolution that crosses regulatory boundaries. As a result, the global financial institutions became experts in ‘global regulatory arbitrage’. While there are still some large gaps between policy makers in different countries on regulatory topics, we are making progress on closing down regulatory arbitrage.

When the Conservative government was elected in 1979, investor protection was regulated by POFI, and the general approach light regulation. In the fraud arena, issues surrounding the failure to convict such criminals for economic crime emerged. However, investor protection came to prominence through events, rather than as part of a grand political strategy.

In 1979, the new government abolished exchange controls. This was a momentous decision since exchange controls established as a defensive measure in the Second World War, limiting investments and travel outside the UK

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174 Which replaced Prevention of Fraud (Investments) Act 1939.
175 Editorial, ‘How many regulators?’ (1996) 17(2)Co Law. 34.
176 Fisher and Bewsey (n 33) vi.
178 Later implemented by Exchange Control Act 1947. ‘Exchange Control, modelled substantially on the system invented by Dr Schacht and the German Reichsbank in 1934, was introduced into Britain as a wartime measure under the Defence (Finance) Regs. 1939 and made permanent by the Labour Governments. Exchange Control Act, 1947. The world was divided into Scheduled Territories and the rest. The Scheduled Territories were the countries of the British Commonwealth and British Protectorates and Trust Territories plus Iceland, Jordan, Kuwait, Libya, South Africa and South Yemen. Foreign currency was defined as currency not issued by the govt. of any of the Scheduled Territories and it became illegal for any resident in the United Kingdom except an authorised dealer to deal in such foreign currency or in gold except with the permission of the Treasury and anyone with such permission had to offer currency or gold in his possession but not needed for his purpose, to an authorised dealer. United Kingdom residents were also forbidden in or outside the United Kingdom to make payments or transfers of securities for the benefit of foreign residents and there were elaborate related provisions about imports and exports. The permissions and orders under the Act put foreign exchange dealings into the hands of a narrow circle of banks and specialist dealers and resulted in due course in the creation of a system of Treasury spies abroad and in the opening of mail at United Kingdom points of entry.’
jurisdiction. At a stroke, the abolition of exchange controls changed the
dynamics of the markets and, as Gower notes:

faced the UK with the full consequences of the internationalisation of
investment business. It made it far easier for the British to invest abroad and
for foreign firms, straight or crooked, to induce them to do so. In particular, it
led to British institutions, such as insurance companies, unit trusts and
pension funds, diversifying their portfolios (...). The weakness of our
indigenous financial services industry was highlighted when it became clear
that the major part of this lucrative business had been undertaken not by it
but by American firms.

One consequence of the internationalisation of the markets was the emergence of
firms which did not share an heritage of compliance with City regulation.

However, it was the collapse of Norton Warburg, which caused the government
to consider amending the then Conduct of Business Rules under POFI, as a
‘stop-gap’ solution because ‘the act itself is based on a pre-war model, and may
well not be best suited to modern conditions.’ Consequently, the government
‘decided to commission a review to recommend proposals for a new legislative
framework of protection for investors in securities and other forms of property.’
The ‘Review of Investor Protection’ (Gower) differed from Roskill: the former
being ‘in house’ research; the latter independent.

Against the background of abolition of exchange controls, which destabilised the
markets, and a regulatory scandal involving the BoE, the investment markets

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179 The Chancellor of the Exchequer announced an ‘immediate easement’ of controls on individuals on 12
June 1979. HC Deb 12 June 1979 vol 968 cc244-5. Exchange Controls were progressively dismantled, with
on 23 October 1979 ‘all remaining exchange control restrictions removed from midnight tonight’ HC Deb 23
October 1979 vol 972 cc202-14
180 Gower, “Big Bang” and City Regulation’ (n 35) 3.
181 The failure of several firms involved in investment management, in particular the failure of Norton Warburg
in February 1981 with losses of large sums by individual investors, drew attention to the deficiencies of the
system.’ The Bank of England, ‘Change in the Stock Exchange and Regulation of the City’
January 2015.
182 HC Deb 20 July 1981 vol 9 cc44-5W
184 HC Deb 23 July 1981 vol 9 cc194W
185 Gower, Review of Investor Protection (n 30).
186 Gower was the Department of Trade’s ‘research advisor on company law, with the assistance of officials.’
HC Deb 23 July 1981 vol 9 cc194W
187 ‘Regulatory responsibilities were divided among the Bank of England, the Treasury, the Department[s] of
J. Global Legal Stud. 660.
themselves were under pressure to break down 'barriers between one class of investment and another,'\(^{188}\) where Gower comments that:

The main difficulty peculiar to the UK has been that despite a remarkable freedom from inhibiting legal regulation (such as the [US] Glass-Steagall Act) there have been restrictive rules of trade and professional associations designed to protect the vested interests of their members.\(^{189}\)

Legislation prior to Gower was the outcome of two reports in 1936 and 1937, which responded to a 'share-pushing' scandal and 'the birth and growth of the unit trust movement and of other new forms of dubious investment media, such as participation in mushroom farms, piggeries and the like',\(^{190}\) which:

accounts for its restricted scope and for its name [POFI] which, though understandably resented by those regulated under it, is an accurate description of its aims. It is in no sense a Securities Act such as (...) [US]. It[']s complicated, and in places obscure'.\(^{191}\)

Gower addressed the question why investors should need protection:

It is sometimes argued that investment necessarily entails risk and that investors should realise this and not expect any special protection over and above the general law of theft and fraud. If they get their fingers burnt that is their own fault. However, this robust affirmation of laissez-faire principles has long since been rejected and it has been recognised that it is the investors' own fault only if they were in a position to judge the extent of the risk.\(^{192}\)

Thus, Gower saw the object of his review as 'to consider whether the existing system of disclosure [with criminal sanctions for failure] plus regulation affords adequate protection in an efficient and economical way'.\(^{193}\) Gower noted the confusion for dealers in securities who took deposits by their BoE license,\(^{194}\) and

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\(^{188}\) Gower, ‘‘Big Bang’ and City Regulation’ (n 35) 1.
\(^{189}\) Gower, ‘‘Big Bang’ and City Regulation’ (n 35) 1.
\(^{190}\) Bodkin Committee (n 11).
\(^{191}\) Prevention of Fraud (Investments) Act 1958.
\(^{192}\) Gower, Review of Investor Protection – A Discussion Document (n 183) 12.
\(^{193}\) Gower, Review of Investor Protection – A Discussion Document (n 183) 12.
\(^{194}\) Gower, Review of Investor Protection – A Discussion Document (n 183) 14.

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Insurance Companies regulated by various insurance acts and EEC Directives, and a plethora of other legislation and bodies and practitioners.195

A key question for Gower was enforcement: ‘[i]t is not much use having regulations unless they are enforced:196

It is not easy to detect any rationale for the choice of one method of regulation than another. (...) the practice has been to avoid any form of regulation until some scandal has shown that it cannot be avoided and then to choose statutory Governmental regulation unless there is a traditional self-regulatory agency in existence to which the task may be left. In the last few years, however, there has been a tendency to encourage the creation of new self-regulatory agencies and assign the task to them, either wholly or partly and either by statute or persuasion.197

Gower concluded198 that there was a trend towards more statutory controls: ‘these, in the main, have been imposed on bodies which create investments rather than on the markets or intermediaries which sell them.’199 Furthermore, the burden placed upon intermediaries was to those ‘that did not bear traditional hallmarks of respectability.’200 As a consequence,’ [t]he result is a regulatory system which is difficult to enforce effectively.'201

The ‘respectability’ attitude resembles paternalism ‘in that it bans activities which are innocuous and even desirable [unauthorised unit trusts] and in others it is excessively lax in that it fails to regulate activities where the public needs protection [investment managers].’202 Gower clearly sympathised with the Department of Trade,203 which ‘though it tries to be a watchdog, cannot be a

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197 Such as the Take-over Panel, the Council for the Securities Industry, the Insurance Brokers Registration Council. Subsequently, the Department of Trade and Industry. Known as the Department for Business, Skills and Innovation since 2009.

198 See also Wilson Committee (n 11).


200 Gower, Review of Investor Protection – A Discussion Document (n 183) 53.

201 Gower, Review of Investor Protection – A Discussion Document (n 183) 53.


203 Gower, Review of Investor Protection – A Discussion Document (n 183) 52.
bloodhound and its powers and ability to detect improprieties (...) are severely limited. It does in fact try to make discrete enquiries.  

Gower then considered ‘[t]he changing face of the securities industry.’ Gower identified the main changes in the previous 50 years as: ‘[t]he movement from direct personal investment to indirect investment’; ‘[t]he distorting effect of tax considerations’; ‘distortions by differing methods of remunerating intermediaries’; ‘[t]he growth of firms of investment managers and advisors’ and ‘multi-purpose firms and multi-national groups; ‘internationalisation of investment; and the ‘influence of EEC.’ Firstly, Gower pointed to a change in the way in which people invested. Whereas, people used to invest directly in Stocks and Shares, Gower observed that indirect investment had branched out from merely investment in ‘with profits’ insurance contracts to ‘a variety of packages such as unit trusts, commodity and futures funds, property or index-linked policies, and occupational pension schemes.’ The issue identified was that although the number of investments made directly by individual investors had declined, which on the face of it reduced the overall risks, the use of an investment packager or intermediary gave rise to different risks, not covered by existing legislation or regulation. Gower considered taxation considerations which created distortion in returns and pace the fine, upstanding, traditions of the City:

it may be more attractive to the investor for his investments to be managed on the basis that the manager is rewarded, not by a fee (which is not tax deductible) but by whatever he can make on the side (for example by retaining interest earned on money awaiting investment and any share of brokers’ commissions that he may be able to extract).

It may be that Gower, perhaps unwittingly, identified the very issue which came to be seen as the trademark of the City. Rather than Probus et Fidelis (‘integrity and

204 Gower, Review of Investor Protection – A Discussion Document (n 183) 72.
205 Gower, Review of Investor Protection – A Discussion Document (n 183) 54.
206 Gower, Review of Investor Protection – A Discussion Document (n 183) 54-60.
207 Gower, Review of Investor Protection – A Discussion Document (n 183) 54.
208 Gower, Review of Investor Protection – A Discussion Document (n 183) 55.
209 For example, one of the great attractions of an investment in a linked-life policy, rather than in the unit trust to which it is linked, is that it attracts life assurance relief.
the assumption of ‘whatever he can make on the side’, perhaps, was a portent of things to come.

Whereas taxation anomalies represent opportunities to be exploited outside the investment itself, the distortion identified by Gower relating to different commissions, acts as a powerful incentive to place an investment in one direction rather than another.212

Gradually, it can be seen that Gower had identified a rich seam of self-interest. The report then turned to the increase in the number of investment managers and advisers,213 which had grown over 50 years from being a minor part of, say, a stockbrokers business it had become significant by 1985. Gower pointed out that investment management was outside the scope of formal regulation.214 Thus, a relatively new business activity of providing investment management services to private investors took place in an environment hardly touched by regulation or legislation and yet affording opportunity for enrichment ‘on the side’.

The abolition of exchange controls exacerbated the issues over Internationalisation, because as Gower notes ‘no balanced portfolio of any size could afford to be restricted to British securities’.215 Thus, British investors were attracted to opportunities in overseas markets which were advertised by labels

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211 ‘The current crisis will not be over until confidence and trust are restored, and the credit channel starts to function fluidly again. This requires greater transparency and a recognition that a sound financial system is one that practises the traditional banking values of integrity and faithfulness. Some of you might recall that these values were captured in the motto of The Chartered Institute of Bankers, ‘Probus et Fidelis’. It is perhaps a sign of the times that the Institute’s [renamed ‘IFS University College] current logo of two overlapping arrows is, we are told, all about its core value: winning, a value which some market players have pursued with excessive zeal with the calamitous results we all know. It is just possible that we might not have been where we are today had the old, but tested values continued to prevail.’


212 For example, ‘unit trust managers found that they were losing business to insurance companies because insurance companies paid 3% commission to insurance brokers whilst they paid only 1½% to their intermediaries.’ Gower, Review of Investor Protection – A Discussion Document (n 183) 57.

What followed was the market adapting its methods to obtain higher rates because, ‘so long as commission rates and commission sharing arrangements continue to differ as between one investment and another, the temptation to temper advice will remain.’

Gower, Review of Investor Protection – A Discussion Document (n 183) 57.

213 ‘Which specialised in managing and advising on investments for individual investors’ Gower, Review of Investor Protection – A Discussion Document (n 183) 57.

214 ‘Unless the way the business is conducted requires the firm to obtain a licence as a dealer or deposit taker (or both),’ Gower, Review of Investor Protection – A Discussion Document (n 183) 57.

such as ‘off-shore tax havens’\textsuperscript{216} with the consequence that this ‘has enormously aggravated the difficulty in providing British investors with effective protection. A regulatory agency, whether it be Governmental or self-regulatory, cannot operate effectively extra-territorially.’\textsuperscript{217} Indeed, UK parent companies have similar difficulties, as reported in \textit{Idmac v Midland Bank}, because overseas subsidiaries (in that case Jersey) were used as a ‘cloak for fraud’.\textsuperscript{218} Just as investment opportunities challenged traditional geographic boundaries, operators became multi-national operating in more than one jurisdiction and multi-faceted by extending their range through engaging in activities undertaken by other firms in other parts of the industry, as Gower comments: ‘and if it has to go to the trouble and expense of acquiring the knowledge [of other investments and markets], why not recoup it by cutting out other intermediaries and by putting clients into their own business rather than someone else’s.’\textsuperscript{219} An example of this is in relation to the London Stock Exchange (LSE) where an investor wishing to buy or sell shares had to do so through a stockbroker, who in turn could only buy or sell through a ‘stock-jobber’,\textsuperscript{220} a process seeming ripe for rationalisation. However, the range of activities and jurisdictions pointed to the possible regulatory problems of ‘overlapping jurisdiction[s] of a variety of regulatory bodies, both domestic and foreign, and may be faced with situations in which its interests while acting in one capacity conflict with those when acting in another.’\textsuperscript{221} Gower’s conclusion was that:

\begin{quote}
It is not surprising that a framework which was erected 50 or more years ago and which has since been plastered over with a patch-work of ad hoc embellishments, but without any examination of its foundations, should have revealed cracks and subsidences. (…) The basic question (…) is whether we can continue to maintain the existing framework, merely papering over the cracks, or whether we should undertake a major structural rebuilding.\textsuperscript{222}
\end{quote}
Gower became the architect of a major structural reform and the reason why this thesis has delved back to this report and subsequent change is that with little change having taken place over a period of 50 years, the following quarter century has seen three major rebuilding exercises (Gower, Brown and Coalition) which will be considered in chapter six. Therefore, it is important for this thesis to survey the foundations.

This analysis is not merely of academic interest, because the contemporary consideration of what constituted a ‘security’ had a bearing on whether they were covered by the POFI or not and ‘if they are not, there may be no control over them’. In a similar way, the 1984 invention of LIBOR, was later discovered to be ‘not designated a qualifying investment for the purpose of the legislation’, with the consequence that a criminal prosecution could not be made following the LIBOR scandal.

Cracks in the foundations, included firms ‘working around’ regulations, ‘failure to treat like with like’, for example insurance policies being exempted from POFI while their underlying investments, acquired directly, are not; the public issue of shares to be traded on the LSE being regulated by the LSE, but any others were unregulated. The regulations were considered inflexible and lacking ‘discretion in many areas, particularly those covered by statutory government regulation’, and pointing to the ‘grey areas in a rapidly developing field of activity.’ The inconsistency of regulation was criticised: ‘the present system is in some respects too paternalistic in that it bans activities which are innocuous and even desirable,

225 ‘198. We recognise that the definition of market abuse punishable by financial penalty under section 123 of the Financial Services and Markets Act 2000 (FSMA) is insufficiently wide to capture the manipulation of the LIBOR rate. The LIBOR rate is not designated a qualifying investment for the purposes of the legislation. It is also not possible for the FSA to commence a criminal prosecution under section 397(3) of the Financial Services and Markets Act 2000 against Barclays, the submitters or derivatives traders for engaging in a course of conduct which created a false or misleading impression as to the market in or the price or value of a relevant investment. LIBOR is not classified as a relevant investment for the purposes of this section of the Act.’ House of Commons Treasury Committee, Fixing LIBOR: some preliminary findings. Second Report of Session 2012–13. Criminal enforcement. Legal lacunae. http://www.parliament.uk/documents/commons-committees/treasury/Fixing%20LIBOR_%20some%20preliminary%20findings%20-%20VOL%20I.pdf Accessed 30 November 2012.
226 See chapter 6.2.2
227 Gower, Review of Investor Protection – A Discussion Document (n 183) 63.
and that in the other it is excessively lax in that it fails to regulate activities where the public needs attention." 231 Furthermore, the way the City worked was to concentrate on the honesty of people employed in investment to the exclusion of competence where Gower notes:

statutory licensing schemes which purport to exclude those who are not ‘fit and proper persons’ generally succeed only in excluding those who are dishonest and, moreover, have been shown to be dishonest by being convicted of serious criminal offences, and that self-regulation all too often achieves no more than weeding out those who are obviously not ‘the right sort’. The investor, it can be argued, is entitled to some protection from ignorant fools as well as from convicted crooks and unfortunates who lack wealth and social graces.232

Gower then addressed a ‘most fundamental question. Have we achieved a satisfactory balance between Governmental regulation and self-regulation?’ 233 From a standpoint of having identified ‘certainly [a] very considerable diversity of regulations and of the agencies which operate them’, 234 and, tellingly, for what subsequently transpired ‘[n]o country that I know of has found it practicable or desirable to regulate insurance, banking, dealings in commodities and dealings in stocks and shares in precisely the same way and through precisely the same agencies.’ 235 Rejecting Wilson’s conclusion 236 that the balance between governmental and self-regulation was about right, 237 Gower pointed to a spectrum of controls between ‘tight statutory regulation’, ‘no effective regulation’, and a broad middle of ‘relatively loose rein’, controlled by the BoE by its ‘statutory authority’, or ‘subject to its surveillance without such authority’, and ‘self-regulation under statutory authority’ and ‘self-regulation without statutory authority.’ 238 Gower identified the ideal solution:

231 Gower, Review of Investor Protection – A Discussion Document (n 183) 68.
233 Gower, Review of Investor Protection – A Discussion Document (n 183) 75.
234 Gower, Review of Investor Protection – A Discussion Document (n 183) 74.
235 Gower, Review of Investor Protection – A Discussion Document (n 183) 74.
236 Wilson Committee (n 11).)
237 Gower, Review of Investor Protection – A Discussion Document (n 183) 77.
238 Gower, Review of Investor Protection – A Discussion Document (n 183) 77.
The ideal would be to weld self-regulation and Governmental regulation into a coherent statutory framework which would cover the whole field that needs to be regulated and which would perform the role which it does best, working harmoniously together.’

While Gower was reaching his conclusions of a mix of statute and self-regulation, the government was not idle. Legislation was enacted to regulate the LSE; consolidate company’s legislation, and put in train to deal with insolvency, pensions, Building Societies and Trustee Savings Banks. These ‘contributed to the extraordinarily rapid transformation in the City.’ Notwithstanding this, though, Gower noted the international dimension: ‘[t]he world-wide trends towards the removal of barriers between the various branches of financial services and the growth of financial supermarkets had hitherto affected the United Kingdom less than other financial centres.’ This was because of the ‘near monopoly of the securities’ markets’ enjoyed by the LSE, an organisation which was ripe for change because its:

rules regarding single capacity, personal unlimited liability of partners or directors of member firms and the restrictions on the extent of outside participation in their ownership and management made it impracticable for those firms to be effectively integrated into financial supermarkets.

Thus, the financial services landscape was recognised to be ready for regulatory change and the Government’s response to Gower was to establish a system of self-regulatory organisations (SRO) under a new ‘SIB, reporting to HM Treasury.’ This major change was subsequently regarded as a failure.

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239 Gower, Review of Investor Protection – A Discussion Document (n 183) 82.
249 Below SIB were various SROs: Life Assurance and Unit Trust Regulatory Organisation (LAUTRO);
250 Financial Intermediaries, managers and Brokers Regulatory Association (FIMBRA); Association of Futures Brokers and Dealers (AFBD); Recognised Investment Exchanges (The Securities Association – formed through the merger of the International Securities regulatory Organisation and The Stock Exchange), Recognised Professional Bodies (Institutes of Chartered Accountants (England and Wales, Scotland, Ireland); Chartered Association of Certified Accountants; The Law Societies (England and Wales, Scotland, Northern Ireland); Institute of Actuaries); Insurance Brokers Registration Council) and Recognised Clearing Houses.
251 SIB established by Financial Services Act 1986.
SIB was criticised for taking a narrow view of its responsibilities and ‘paying little or no attention to its supervisory role towards tackling or even preventing financial crime.’

This major change was viewed as: ‘It is no exaggeration to say that the Financial Services Act 1986 has proved to be one of the most controversial pieces of commercial legislation of recent times.’ It is significant that Gray’s analysis shows that the much heralded de-regulation of the markets was accompanied by greater regulation of investment business. The ‘Big Bang’:

in the narrow sense involved no more than a change in the way shares were traded on the LSE – from trading on the floor of the Exchange to electronic trading. But it reflected other fundamental changes in the City brought about by the increasing competitiveness of the world’s financial system.(…) forming a global system of 24-hour trading. The pressure to open up the London market to competition was a recognition (…) it would have to re-organise and change its methods of doing business.

The controversy was not so much about the Act itself but ‘rather it centred around the way in which the Act was interpreted by the SIB and in turn by the SROs. The issue being that the ‘detailed mass of regulations and rules produced by the SIB (…) had spawned a bureaucratic monster which would wreak havoc with the day to day running of investment business’. Notwithstanding Gower stating that he did not ‘favour regulating for the sake of regulation’, nor was this required by the Act which ‘nowhere requires a highly detailed approach from its lead regulator, it simply charges it to produce rules which embody and promote certain key principles of Investor Protection’. The regulators had ‘sacrificed the objectives of

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Lomnicka, ‘Reforming U.K. financial Services regulation’ (n 137) 480. The SIB structure brought issues with rule books, claims of reductions in standards, structural complexity and demarcations between banking and securities industries being hard to delineate. (Blair (n 143) 43. 45.). and was concluded to have ‘failed to protect investors.’ (Blair (n 143) 43. 45.).

Ryder, ‘The Financial Services Authority and Money Laundering’ (n 156) 639.


Veljanovski (n 247).


Gower, Review of Investor Protection (n 30) 5.

achieving clear and workable investor protection in the interests of an obsessive need for legal certainty’. 257 Not only was this a considerable change from the previous (inadequate) regime, it ran counter to ‘government concern about administrative and legislative cost-effectiveness.’ 258 Chancellor Lawson admitted that ‘what eventually emerged was something far more cumbersome and bureaucratic than I, or, I believe any of us in Government had ever envisaged.’ 259

One feature introduced was a new funding structure for the SIB which Lawrence considered ‘was a constitutional novelty. It was financed by levies on the private financial firms it regulated, but was not accountable either to them or Parliament.’ 260 This was an attractive mechanism for its financing which has been retained (by both FSA and FCA) and which gave SIB, and its successors, considerable financial resources which did not depend on government department budgets. The hybrid nature of the SIB was the result of an ‘uneasy compromise’ between ‘a strong and central regulator modelled along the lines of America’s SEC [Securities and Exchange Commission]’, which was Gower’s preference, 261 and a government ‘known to be ideologically hostile to any extension of government that could be avoided.’ 262 The BoE’s position was that ‘[i]t was reluctant to see the establishment of an SEC-type body that would clearly undercut its pre-eminence as the chief overseer of London’s financial markets.’ 263 The outcome was a body ‘deliberately kept less powerful than the BoE.’ 264 The position of the BoE was to return to the fore, or rather rear, in Chancellor Brown’s 1997 restructuring to create the FSA.

Gray suggests that as a consequence of the disquiet about the SIB regulatory regime, the Companies Act 1989 was used to ‘introduce reforms to the whole regulatory structure to enable SIB’s new approach to regulation [to issue

258 ‘(see eg White papers ‘Burdens on Business (March 1985) and ‘Lifting the Burden’ (Cmnd 9571) 1986’.
260 ‘The original bill consisted of 212 sections, 300 pages and 600 amendments. It had been drafted by lawyers and bureaucrats, and practitioners found it a nightmare to understand, let alone implement.” Lawrence (n 259) 661.
261 Lawrence (n 259) 661.
262 Gower, Review of Investor Protection (n 30) 188.
263 Lawrence (n 259) 661.
264 Lawrence (n 259) 661.
statements of principles] to be employed by the SROs and other regulatory bodies.\textsuperscript{265} This was alternatively seen as watering down and heralding a less onerous system of regulation.\textsuperscript{266} The importance of this episode to the thesis is to highlight that in an endeavour to remedy a deficiency in regulation, the creation of a new over-arching body (SIB) with its offspring (SROs and RPBs) gave scope for significant increase in regulation in a manner considered to be bureaucratic rather than value-adding, with echoes of ‘gold-plating’ seen in implementation of EU Directives.\textsuperscript{267} It is, perhaps, as Gray notes this inability to see ‘the wood for the trees,’\textsuperscript{268} which is a feature of subsequent regulatory changes, discussed in Chapter six.

It is ironic that Gower’s report was entitled \textit{Review of Investor Protection} and yet by 1994 Ashe reported that:

> It is now widely acknowledged – by investors, politicians of all parties, the industry and trade bodies and regulators – that the standard of protection afforded to investors in retail products, and the standard of conduct of firms, advisers, and sales forces in this sector need to be improved.\textsuperscript{269}

This gave rise to the creation of a new SRO, the Personal Investment Authority, to absorb FIMBRA and LAUTRO which had both experienced problems.\textsuperscript{270} Gray is sympathetic to this because ‘[r]ight from the start it was always apparent that the retail end of the financial services markets was going to present the most difficult and intractable problems for regulation.’\textsuperscript{271} Pointing to the ‘angst’ in retail markets (compared with the easier to regulate wholesale markets) and that ‘reconciling disaffected and disappointed ordinary investors to the vagaries of the markets was the ultimate impossible task.’\textsuperscript{272} Thus, with regulations being relatively untouched for half a century, the endeavours to create a new regulatory regime in 1986 led to further significant refinements over the following eight years before Chancellor of the Exchequer Brown initiated a wholesale change to reform financial services

\textsuperscript{265} Gray, ‘Financial Services Act 1986 reforms’ (n 250) 370-373.
\textsuperscript{266} Lawrence (n 259) 661.
\textsuperscript{268} Gray, ‘Financial Services Act 1986 reforms’ (n 250) 661.
\textsuperscript{271} Gray, ‘The Personal Investment Authority’ (n 270) 36.
\textsuperscript{272} Gray, ‘The Personal Investment Authority’ (n 270) 36.
regulation by the creation of a new ‘super’ regulator, taking over all SIB activities and banking supervision, becoming a new FSA.\textsuperscript{273}

However, despite Brown’s intention to strengthen regulation, the FSA, too, is considered to have failed.\textsuperscript{274} This partly stems from its original brief and partly from the manner in which it had, or had not, discharged its duties. In the field of economic crime, Rider notes ‘[t]he City has always had a mixed take on insider abuse,’\textsuperscript{275} and Rider’s perspective is that although officially condemned, City spokesmen have played down the impact and the FSA gave little encouragement to those minded to act.\textsuperscript{276} This gave credence to the view that insider dealing may have been regarded as a ‘naughty perk of the job’.\textsuperscript{277} Ultimately, however, it was the FSA’s range of responsibilities which caused its downfall: ‘[t]he decision to divide responsibility for assessing systemic financial risks between three institutions meant that in reality no one took responsibility.’\textsuperscript{278} The issues over the FSA are analysed in chapter six.

4.6 Fraud

Fraud is a significant constituent of economic crime, alongside bribery, corruption and financial services regulation. To place the current fraud landscape in chapters five and six into perspective, this chapter provides an historical analysis.

4.6.1 Fraud Trials

Fraud is not a new phenomenon. Indeed, history provides many examples from \textit{The Carriers case} in 1473,\textsuperscript{279} \textit{South Sea Bubble} in 1720,\textsuperscript{280} and the share

\begin{footnotesize}
\begin{enumerate}
\item Financial Services and Markets Act 2000.
\item Rider (n 275) 197.
\item Jason Mansell, \textit{The Times} 26 March 2010 Financial Services Authority: can it be saved after the election?’
\end{enumerate}
\end{footnotesize}
scandals resulting in enactment of the POFI. More recently, Staple noted that ‘there is some evidence to suggest that fraud, at any rate, company fraud, like the economy, is cyclical.’ In boom conditions, there is market manipulation and then, when the cycle declines and insolvency approaches, deception emerges alongside false accounting and fraudulent trading. Thus, fraud opportunities are always present but the cycle determines the different types and, on some occasions, whether a fraud has been committed or not can be finely balanced with a small margin between success and failure according to Kirk and Woodcock:

An enterprise, which may be intensely ambitious or of marginally dubious ethical standards, can, with a fair wind, become successful, popularly acclaimed and the recipient of a Queen’s Award. With ill fortune (...) the fragility of the original structure may be exposed and either lead to the commissioning of criminal offences, or to the perception that the whole basis of the business was criminally conceived.

Over many years, the response to fraud, and failure to prevent or convict, has been ‘something must be done’: that is, to set up a committee to examine the claim that ‘the system does not cope with serious frauds, and since they are serious crimes by any standards, effective ways must be found to bring offenders to court.’ Furthermore, Munday comments that ‘the length and complexity of some fraud trials (...) aroused concern’, although Lord Devlin considered that ‘[w]hat causes disquiet, I submit, is not the element of fraud but the length and complexity of the ensuing trial.’

In the years before structural changes to UK markets and regulation took effect in the mid 1980’s, the main issue in the fraud arena was dissatisfaction with the management and outcomes of fraud trials. A 1981 headline in The Times ‘£2½m trial ends with fees inquiry’ typifies the contemporary concerns. In that case, relating to a bogus bank, two trials were involved, both lasting 137 sitting days:

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282 George Staple, ‘Serious and Complex Fraud: A New Perspective’ (1993) 56 (2) MLR 127.
283 Staple (n 282) 128.
284 Kirk and Woodcock (n 281) 3.
285 Kirk and Woodcock (n 281) 7.
286 Munday (n 23) 175.
288 Creation of Securities and Investment Board and Serious Fraud Office
290 Universal Banking Corporation. The Times (n 289).
the first trial being halted because of allegations of jury interference. This case highlighted concerns over the length and cost of fraud trials and whether complex fraud trials should be before a jury or a panel of financial experts.\textsuperscript{291} Levi explains:

As the potential social control risks of the democratisation of the jury have become apparent, in Britain at least, juries have been condemned for their alleged lack of commitment to legal values and susceptibility to bribery.\textsuperscript{292}

This dates back to 1972 when the need for a juror to be a property owner was abolished, giving rise to Levi’s concerns about ‘a reduction not only in the moral standards but also the educational level of jurors,’\textsuperscript{293} And he notes prior to 1979, the attitude of government to commercial fraud was of ‘benign neglect’,\textsuperscript{294} which had the effect of engendering apathy among City institutions towards the prosecution of fraud if juries could not understand the cases.\textsuperscript{295} At that time, ‘fraud was not part of the law and order agenda’,\textsuperscript{296} where:

Commercial fraud in Britain was a subject that was of concern principally to a small group of academics. For almost all politicians and criminologists, conservative and radical alike, street and household crime constituted ‘the crime problem’ over which they would do battle.\textsuperscript{297}

Levi argues that ‘the relative immunity from law enforcement agencies has been enjoyed by both professional criminal and criminal professional types engaged in fraud’, is because ‘criminal types’ have been policed more heavily than ‘respectable’ people.\textsuperscript{298} Thus, Roskill observed that ‘it is all too likely that the largest and most cleverly executed crimes go unpunished’.\textsuperscript{299} Because the ‘system’ was ‘archaic, cumbersome and unreliable’,\textsuperscript{300} criminals were able to escape without sanction and this was partly due to the manner in which cases were tried. As Munday concludes, ‘perhaps the time has come to admit that the criminal trial ought no longer to resemble a crafty game where one side’s strategy

\textsuperscript{291} The Times (n 289).
\textsuperscript{293} Levi, ‘Fraud in the Courts’ (n 16) 394.
\textsuperscript{294} Levi, ‘Fraud in the Courts’ (n 16) 394.
\textsuperscript{295} Levi, ‘Fraud in the Courts’ (n 16) 394.
\textsuperscript{296} Levi, ‘Fraud in the Courts’ (n 16) 394.
\textsuperscript{297} Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
\textsuperscript{298} Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
\textsuperscript{299} Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 118.
\textsuperscript{300} Roskill Committee (n 12) 1.
may remain artfully concealed until the last moment to no real end other than to frustrate the interests of justice.\textsuperscript{301}

In a criminal trial for fraud, the fundamental issue which faced prosecutors was the degree of complexity, which gave scope for counsel, in the UK’s adversarial legal system, to extend the length of a trial by examining the \textit{minutiae}, with the twin consequences of greater risk of confusion, or obfuscation, and increased costs.\textsuperscript{302} Roskill concluded that ‘[t]he present arrangements may even encourage the defence to conduct its case like a prolonged and orderly retreat from the truth.’\textsuperscript{303} Although Levi reports that juries can understand non-complex fraud in line with their ‘life experience’ (such as benefit fraud, cheque and banking fraud), more difficult matters would stretch jurors’ comprehension.\textsuperscript{304} A response to this was exhortations to judges to shorten summings-up and for prosecutors to limit the number of co-defendants to ‘real villains.’\textsuperscript{305}

The disquiet about fraud trials centred on the performance of juries rather than the other actors such as judges, counsel, police and prosecutors, to which was added corruption, and not just of jurors.\textsuperscript{306} As a response, in 1983, the government established an independent Fraud Trials Committee which reported in 1986. The Fraud Trials Committee (Roskill), was established by both the then Lord Chancellor and Home Secretary\textsuperscript{307} ‘because the government understand the concern which has been expressed about the range of problems generated by allegations of serious commercial fraud.’\textsuperscript{308} The brief given to Roskill was:\textsuperscript{309}

\begin{quote}
To consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved, and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious, and economical disposal of such proceedings.\textsuperscript{310}
\end{quote}

\begin{itemize}
\item \textsuperscript{301} Munday (n 23) 175, 177.
\item \textsuperscript{302} Roskill concluded that ‘the average time in fraud cases at all stages is 30 to 40 per cent longer than that found in all cases taken as a whole’. Roskill Committee (n 12) 175.
\item \textsuperscript{303} Roskill Committee (n 12) 3.
\item \textsuperscript{304} Levi, ‘Fraud in the Courts’ (n 16) 394.
\item \textsuperscript{305} Levi, ‘Fraud in the Courts’ (n 16) 394.
\item \textsuperscript{306} Levi, ‘Fraud in the Courts’ (n 16) 394.
\item \textsuperscript{307} HC 8 November 1983 vol. 48 col. 83-84W.
\item \textsuperscript{308} HL 8 November 1983 vol.444, col. WA 790.
\item \textsuperscript{309} Roskill Committee (n 12) 1, iii.
\item \textsuperscript{310} HL 8 November 1983 vol.444, Written Answers, col. 790.
\end{itemize}
This was a wide remit for the enquiry which should have enabled the committee to make radical recommendations.

Roskill summarises the report, by stating that ‘[m]uch of this report, and the majority of the recommendations, are concerned with changes in the procedures to be adopted.’\textsuperscript{311} Although inspired by the need to tackle fraud, Roskill saw that those procedural reforms would have general application to criminal cases as a whole.\textsuperscript{312} These were accepted by the government which said: ‘[t]he report shows that the legal and administrative machinery for this purpose has been creaking badly. We are determined to bring about the changes in law, practice and attitudes which are necessary.’\textsuperscript{313} The three key recommendations were: establishment of a ‘Fraud Trials Tribunal’, being a judge sitting with lay members but not a jury, for serious complex frauds; ‘a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud’; and, ‘[a]n independent monitoring body (“the Fraud Commission”).’\textsuperscript{314} The report was welcomed by the Home Secretary who said:

We intend to create and seize every opportunity for stern action against fraud. We think this is crucial for the City and for the country so that private enterprise can flourish in a clean environment. It is crucial for public confidence, and our competitive position in international markets that the probity of our financial institutions, especially in the City, should be beyond doubt. Those who save and invest, whether grand or small, should be well protected by our law from dishonest practices, however complicated the transaction. We are determined that the pursuit and the bringing to justice of fraudsters should be carried out with commitment and skill. If our present instruments for cutting our fraud are blunt we must manufacture a new carefully directed scalpel.\textsuperscript{315}

The government viewed the report as radical but stated that measures had already been taken to ‘reduce the fragmentation in the investigation and prosecution of complex fraud cases’,\textsuperscript{316} a theme which remains current. That measure was the establishment of the Fraud Investigation Group by the Director of Public Prosecutions, to concentrate on major frauds, discussed in chapter six. The government also pointed to the forthcoming Financial Services Act 1986, which

\begin{itemize}
\item \textsuperscript{311} Roskill Committee (n 12) 1.
\item \textsuperscript{312} Roskill Committee (n 12) 6.
\item \textsuperscript{313} HC Deb 14 January 1986 vol 89 cc925-34
\item \textsuperscript{314} Roskill Committee (n 12) 2, 3, 147.
\item \textsuperscript{315} Mr Douglas Hurd; Home Secretary. HC Deb 13 February 1986 vol 91 cc1148-85.
\item \textsuperscript{316} Hurd (n 315).
\end{itemize}
followed the Gower Report, and established the SIB to regulate investment business and other financial services,\(^{317}\) which was discussed earlier in this chapter and it was clear from the Home Secretary’s comments\(^{318}\) that Roskill’s recommendations should include protection for savers and investors. In the field of economic crime, this is still not embedded since overlap with FSA/FCA remains.\(^{319}\) The Home Secretary observed that ‘[t]he committee’s message to the House and to the Government is that one cannot send a policeman on a bicycle to catch a runaway car. We have to equip those who chase fraud with the same speed already possessed by the fraudster.’\(^{320}\) This endorsement provides an entry to the Roskill Report.

As an early indication of the committee’s findings, Roskill commenced the summary of the report with:

> The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right.\(^{321}\)

Roskill found that the system of investigation and trial was open to ‘blatant delay and abuse and that whilst ‘petty frauds, clumsily committed’\(^{322}\) would be discovered and punished, the same did not apply to ‘large’ and ‘cleverly executed’ frauds. Roskill highlighted the government’s ‘vision of an “equity-owning democracy”,’\(^{323}\) and pointed out that if ‘ordinary families’ invested in the markets then the markets should be properly policed.\(^{324}\) This was further evidence of Roskill’s intention that his report considered financial markets to be with his committee’s purview. Tellingly, because subsequent events revealed significant inadequacies, Roskill foreshadowed the forthcoming self-regulation regime with


\(^{318}\) Hurd (n 315).

\(^{319}\) Hurd (n 315).

\(^{320}\) Hurd (n 315).

\(^{321}\) Roskill Committee (n 12) 1.

\(^{322}\) Roskill Committee (n 12) 5.

\(^{323}\) Roskill Committee (n 12) 5.

\(^{324}\) Roskill Committee (n 12) 5.
the warning that ‘[w]here those mechanisms are abused, the law must deliver retribution, swift and sure.’

At the outset, it might have appeared that the problem with fraud trials would be solved by tackling the issue from the standpoint of reforming or eliminating the involvement of juries. However, as Levi notes, ‘the collapse of most of the lengthy trials that had aroused public comment resulted either from judicial directions to acquit on technical / legal grounds, or from factors extraneous to jury competence.’ Thus, much of the report and recommendations dealt with procedural changes and called for attitudinal changes by those involved in investigation and the courts, including administration, judiciary and the bar.

By the time Roskill reported, the ‘benign neglect’ of fraud had been replaced because ‘business crime in high places [had] become a central political issue’. The committee’s title identifies that fraud trials themselves were the concern and ‘it seemed that its purpose was to decide principally what should be done about the jury.’ However, proposals and submissions made to the committee caused it to ‘broaden out into an examination of the policing and prosecutorial processes’, which led to prosecutions (or decision to discontinue). This ‘system’ is scathingly described by Levi as, ‘if “system” is the appropriate word, given the poor communication between the multiplicity of agencies allegedly involved in the control process (...) of dealing with fraud’.

4.6.2 Complex or Serious Fraud

The Committee addressed their attention to the ‘largest and most cleverly executed crimes’, but failed in their attempt to provide a precise definition of a ‘complex fraud case’. In order to differentiate cases, they produced guidelines

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325 Roskill Committee (n 12) 5.
326 Levi, ‘Fraud in the Courts’ (n 16) 394.
327 Levi, ‘Fraud in the Courts’ (n 16) 394.
328 Roskill Committee (n 12) 1.
329 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
330 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 118.
331 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 118.
332 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 118.
333 Roskill Committee (n 12) 1.
334 Roskill Committee (n 12) 133.
which would identify a case for special treatment. Their view was that neither quantum nor volume of documentation or number of witnesses alone would denote complexity. Roskill opined that ‘complexity’ was found:

In a fraud in which the dishonesty is buried in a series on inter-related transactions, most frequently in a market offering highly-specialised services, or in areas of high-finance involving (for example) manipulation of the ownership of companies.

The relevance is that it was a return to the original perception of the public that juries could not comprehend the issues; that frauds were perpetrated by people who were experts in their field; and that those fields ‘bear no obvious similarity to anything in the general experience of most members of the public.’ The Committee had in mind: LSE; Lloyd’s of London; commodities and financial futures markets; having geographic presence or communication links to the City. This then supported a somewhat bizarre view (looking back over a quarter of a century), which Levi reported, that ‘criticisms from the City institutions were that there was no point in blaming them for failing to tackle fraud when the juries could not understand the cases brought before them.’

In essence, Roskill recognised the difficulties faced by those unfamiliar with such markets, whom they believed would need educating in order to understand the particular markets and appreciate the alleged dishonesty. Roskill believed this was an ‘intellectual challenge, to which only the exceptional could rise’, thus, perhaps, being self-serving in the conclusion that those ‘non-exceptional’ would not be suited to serving on a jury and that trials should be before Judges, who could be trained to have the exceptional financial knowledge required. Notwithstanding Roskill’s belief that better jurors delivered better convictions, the use of ‘bench trials’ is not supported by judges and undermined by prosecution failures.

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335 Roskill Committee (n 12) 133 & 153.
336 Roskill Committee (n 12) 153.
337 Levi, ‘Fraud in the Courts’ (n 16) 394.
338 Roskill Committee (n 12) 153.
339 Roskill Committee (n 12) 153.
340 This is an interesting article which researches attitudes of judges who have conducted serious fraud trials.
4.6.3 Non Jury Trials

The right in England and Wales to trial by jury dates back to the Magna Carta in 1215 when it replaced ‘trail by ordeal’ and any attempt by government to move away from this form of justice evokes strong feelings and outcry from some sectors of the public, ‘on the ground that it would erode a fundamental principle of the justice system — the right to trial by a person’s peers.’ Roskill reported a ‘bitter struggle’ between opponents and defenders and would have been well aware of the heat the proposals would generate. Devlin’s observation that ‘[n]ot since the glorious revolution of 1688 has a citizen been imprisoned for any substantial time (...) otherwise than on the verdict of a jury, is an example of the contra view. However, in the review of the contemporary landscape, Roskill pointed to the total number of criminal cases handled each year of some 3,000,000, of which merely 32,000 were tried by a jury. Roskill concluded that:

In almost every area of the law, society has accepted that just verdicts are best delivered by persons qualified by training, knowledge, experience, integrity or by a combination of those four qualifications. Only in a minority of cases is the delivery of a verdict left in the hands of jurors deliberately selected at random without any regard for their qualifications.

Thus, Roskill advanced the proposition that ‘non-jury trials’, for serious complex fraud, far from being an exception to the norm would be congruent with the overwhelming majority of criminal cases, where the judge or tribunal have to understand or interpret the law and make the decisions themselves. Roskill, in examining the characteristics of a complex fraud case, doubts whether the public appreciate the difficulties faced by the ‘average juror’ outwith their experience or knowledge and speculates that the presence on the jury of someone possessed

342 See Chapter 6.2.2
345 Lord Devlin (n 287) 313. (Baldwin and McConville, Jury trials (Clarendon 1979) 1.)
346 i.e. longer than the short sentence for summary offences.
347 Roskill Committee (n 12) 134-135.
348 Roskill Committee (n 12) 139.
with such knowledge was mere happenstance. Indeed, earlier, Roskill drew attention to something more fundamental and recommended that in any fraud trial ‘it is imperative that as a matter of principle that the members of the jury should be able to read and write English without difficulty.’ This would appear to be self-evident in relation to all trials and not just for fraud, as was concluded by the Morris Committee in 1965.

Roskill was persuaded that the interests of justice in complex fraud cases would be best served by a non-jury trial. The line of reasoning was that complex fraud cases possessed features of complexity, though ‘it is not possible to provide a precise definition’. Thus, because of the presence of such ‘complexities’, it was considered to be asking too much of an ‘ordinary’ juror to comprehend the issues and evidence, especially given the Committee’s perceptions in trial of ‘defence gamesmanship’. Roskill, therefore, recommended ‘trial by judge and two lay members should replace trial by judge and jury. We refer to the new tribunal as the “Fraud Trials Tribunal” (FTT).’

A further significant issue is that those charged with economic crime are often ‘well resourced and lawyered up’ because they have access to considerable financial resources to defend themselves, as the SFO found with Tchenguiz.

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349 Roskill Committee (n 12) 139-140.
350 Roskill Committee (n 12) 122.
352 Roskill Committee (n 12) 133.
353 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
354 Roskill Committee (n 12) 154.
355 ‘These cases require above all else resilience and focus on the part of the investigating team. Vast quantities of digital data have to be obtained, uploaded, searched and assessed. Witnesses need to be identified and traced. Often, we will need to obtain evidence from jurisdictions where that exercise can be problematic. Those we investigate are well resourced and lawyered-up. Claims of privilege can transcend extravagance and amount to a strategy of deliberate obstruction, a strategy we will always challenge. But individuals, corporates and their lawyers need to understand that we will make progress and we will not go away.’ David Green. Serious Fraud Office, ‘Cambridge Symposium 2014’ http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2014/cambridge-symposium-2014.aspx accessed 12 September 2014.
356 See chapter 6.2.2.
357 The SFO has so far spent £8.1m defending the £300m claim by the Tchenguiz brothers, due to go to trial in October, the High Court heard, Financial Times 8 April 2014, http://www.ft.com/cms/s/0/5f0e1f06-bf41-11e3-a4af-00144fesbd0c.html#axzz22yUajxFyc accessed 10 April 2014.
Roskill settled on the proposal of a Fraud Trials Tribunal after considering and eliminating ‘special juries’ comprised of jurors with ‘above standard of education, training and experience’; trial by single judge; and trial by a panel of judges. Rather scathingly, Lord Devlin described this exercise which was rooted in the Committee’s ‘bland’ terms of reference as: ‘seemingly to line up the existing method of trial by jury alongside any other method the committee can think of and to test them all by what is “just, expeditious and economical”’.

The chosen proposal was of a judge sitting with two lay members (assessors or adjudicators), ‘who would play an equal part with the judge in deciding questions of fact but the judge alone would deal with questions of law and procedure.’ The lay members should have business experience and the ‘capacity’ to understand complex transactions. Commentators, such as Levi, point to rather the thin evidence presented by Roskill of lack of jury competence, though acknowledging the difficulties posed by Contempt of Court Act 1981 which made interviewing jurors unlawful. However, evidence from lawyers may have been tainted by their own interests, as Page suggests:

As lawyers never sit on juries, and often have their cherished arguments rejected by them, they tend to under-estimate the intelligence of 12 random people acting as a group. Swapping them for a number of ‘experts’ closely bound to the City is likely to result in even more leniency towards fraudsters than is currently the inclination of confused but impartial judges and juries.

Nevertheless, Roskill accepted the evidence of witnesses that it was the case that many jurors were ‘out of their depth.’

Roskill wanted the Courts to assign cases to judges with ‘appropriate special experience’ as ‘a (thinly disguised) reaction to criticism from police, counsel and

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357 Roskill Committee (n 12) 144.
358 Roskill Committee (n 12) 146.
359 Lord Devlin (n 287) 313.
360 Roskill Committee (n 12) 146.
361 Roskill Committee (n 12) 149.
362 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
363 Roskill Committee (n 12) 201.
364 Page (n 279) 288, 306.
365 Roskill Committee (n 12) 142.
judges that some judges are not capable of handling fraud trials.\textsuperscript{367} Drawing on Levi, the rationale for this is that the complexity of fraud can be distinguished from other complex criminal cases because ‘technology and internationalisation have changed it more radically than other offences, \textit{frequently} creating major jurisdictional and evidentiary problems.\textsuperscript{368} For example, the use of modern communication methods and the easy facility to move monies through the international banking system gives rise to greater reliance on documentary evidence, including audit trails, than in other types of case.\textsuperscript{369} Thus, Roskill wanted to combat economic crime by providing specialist courts but defendants would still have access to their own counsel and the tribunal would still have to evaluate evidence so successful prosecutions would not be a foregone conclusion.

\subsection*{4.6.4 Fraud Commission}

Roskill proposed ‘[a]n independent monitoring body, the “Fraud Commission”,’\textsuperscript{370} because of their concerns over the fragmented nature of the existing system which led to inefficiencies and lack of cost effectiveness. The remit of the Fraud Commission was proposed to be to study and report on the new system and advise on improvements to policy and procedure.\textsuperscript{371} It is a clear conclusion by Roskill that the task of tackling fraud was not aided by the number of bodies involved, leading them to justify the Fraud Commission’s role by observing that ‘[a]part from other advantages, we believe that this would provide a degree of co-ordination of the numerous interests involved which is at present lacking.’\textsuperscript{372} Congruent with this was an expectation that the Fraud Commission would work closely with other bodies in the same field, including SROs.\textsuperscript{373} This recommendation was not implemented because, as Doig shows, ‘the objectives of different bodies were so diverse and their accountability mechanisms were so

\begin{footnotes}
\item[366] Roskill Committee (n 12) 52.
\item[367] Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
\item[368] Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117, 128.
\item[369] Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
\item[370] Roskill Committee (n 12) 37.
\item[371] Roskill Committee (n 12) 27.
\item[372] Roskill Committee (n 12) 27.
\item[373] Roskill Committee (n 12) 28.
\end{footnotes}
fragmented that it was difficult to see how overall supervision could occur.  

The fragmented nature of the anti-economic crime institutions remains a current issue.

### 4.6.5 Creation of the Serious Fraud Office

Roskill recommended ‘a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud should be examined forthwith.’ The context of this recommendation was that investigations into allegations of serious fraud ‘commonly involved long delays’ with the consequence that fraudsters may not have been brought to trial or, if they were, the passage of time weakened prospects of successful prosecution. This was because witnesses might not come up to proof or even upon conviction that sentences handed down were ‘hopelessly inadequate’, based on the elapse of time in bringing a case to trial. Thus, the conclusion reached by Roskill was that the nation and the City’s standing as ‘one of the world’s great financial centres’, was at stake through the lack of detection or prosecution thereby facilitating the growth of fraud.

A particular deficiency which the Committee examined was the significant number of different organisations which could be involved: 43 independent police forces, The Department of Trade and Industry, Fraud Investigation Group, the Inland Revenue, and Customers and Excise. Anyone of those organisations might initiate enquiries ‘but the resources available to each vary both as regards their powers under existing legislation and the quality and range of their staffs.’ Furthermore, in theory, where different departments are involved one department would coordinate, however, Roskill did not find evidence of fully effective co-ordination, rather they found the ‘fragmented nature of the powers of investigation (…) act as

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374 Doig (n 54) 228.
375 Roskill Committee (n 12) 3.
376 Roskill Committee (n 12) 5.
377 Roskill Committee (n 12) 5.
378 Roskill Committee (n 12) 5.
379 In England and Wales, HM Inspector of Constabulary reports (21 July 2014) ‘A less fragmented, more structured approach to effective working between forces or between forces and other organisations is required. In particular, there is now a pressing need for greater clarity as to which policing services are best provided by forces at the local, regional or national level.’ HMIC, ‘Policing in Austerity’ 33. http://www.hmic.gov.uk/wp-content/uploads/policing-in-austerity-meeting-the-challenge.pdf accessed 22 July 2014.
380 Roskill Committee (n 12) 25.
381 Roskill Committee (n 12) 25.
a hindrance and ‘traditional divisions are still part of the scene.’ These are clear and important conclusions: serious and complex fraud is not served by investigation and prosecution being haphazardly undertaken by a variety of agencies, working without co-ordination. Indeed, the implication is that the varying bodies work independently on a ‘traditional’ basis in silos, having little desire to see themselves being part of a team. Roskill’s circumlocution cannot disguise this problem: ‘[w]e recognise that bringing about changes of this kind would not be easy, because it would involve bringing together under one roof organisations who have for historical reasons worked apart.’

Part of this new model was already in place because, concurrent with Roskill’s deliberations, the Director of Public Prosecutions (DPP) had established the Fraud Investigation Group, which was a team of lawyers and accountants.

Roskill proposed that policing and prosecution of fraud should be undertaken by a ‘unified body to investigate and prosecute all frauds’, replacing the Fraud Investigation Group. Investigation and prosecution by one body was different from the ‘independent’ prosecution model established by Crown Prosecution Service (under DPP), which was separate from investigation undertaken by the police.

Roskill also proposed that the new body should have in its armoury the type of inspectorial powers available to DTI Inspectors appointed by Secretary of State. Roskill proposed that the new body would operate with a ‘Case Controller’ from the outset who would control the case and deployment of officers, including early assignment of prosecuting counsel. The intention was to avoid ‘the existing

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382 Roskill Committee (n 12) 9.
383 Roskill Committee (n 12) 9.
384 Roskill Committee (n 12) 26.
385 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
386 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117.
387 although this unified model was already employed by Inland Revenue, Customs and Excise, and Department of Trade and Industry (later, Department of Business, Innovation and Skills).
388 Companies Act 1985, s 432.
389 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117, 121.

tradition of individual and departmental buck-passing’, together with bringing the Bar ‘rules of etiquette’ into the twentieth century.

4.7 Office of Fair Trading

The third agency involved in countering economic crime was the Office of Fair Trading (OFT) which was established by Fair Trading Act 1973 with a ‘mission is to make markets work well for consumers.’ It aims to achieve this by the enforcement of competition and consumer protection legislation and monitoring consumer credit. The mission was further explained as:

> Our goal is competitive, efficient, innovative markets where standards of customer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation. Effective competition and well-functioning markets drive the long term productivity growth vital for economic recovery without adding costs to Government or business.

The establishment of OFT predated the reports which led to the creation of FSA and SFO. It played a different role in relation to economic crime because of its wider consumer focus. As a consequence, this chapter will not review the reasons for establishing OFT but will concentrate on its established role and the working arrangements with SFO and FSA. The role of the OFT in relation to markets is an example of overlapping jurisdictions of institutions. ‘Most obviously, some financial firms presently answer to two different regulators with different powers and approaches.’ According to Lomnicka, the reason for this is that:

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390 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117, 120.
391 Levi, ‘Reforming the Criminal Fraud Trial’ (n 18) 117, 121.
It is an accident of history that, although the FSA currently regulates almost the whole financial services sector under the Financial Services and Markets Act 2000, the regulation of consumer credit presently remains the province of the Office of Fair Trading under the Consumer Credit Act 1974.397

The overlapping responsibilities have led to OFT prosecuting fraud: for example in property sales fraud by prosecuting estate agents;398 and people involved in motor trade fraud.399 The OFT also provides strategic direction to local authority funded Trading Standards bodies which cover a broad area of consumer transactions.400 Lomnicka points to a range of anomalies: a residential mortgage to finance a home purchase is regulated by FSMA while a second mortgage by CCA; payment protection insurance (PPI) premiums covered by CCA although the writing and issuing of the policies by FSMA.401 The OFT’s role in relation to consumer credit is governed by the Consumer Credit Act 1974,402 which:

made it explicit that amongst the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper, for the purposes of considering fitness to hold a consumer credit licence, are practices that appear to the OFT to involve irresponsible lending. (…) It covers the entire lending process from the initial lending decision up to the handling of arrears and defaults.403

The OFT also requires firms which it supervises to register with them under the Money Laundering Regulations 2007.404 Such firms are: Estate Agents and Consumer Credit Financial Institutions (CCFIs) - businesses carrying on consumer credit lending activity who are neither authorised by the FSA nor money service businesses supervised by HMRC.405 This explanation by OFT introduces another

397 Lomnicka, ‘The future of consumer credit regulation’ (n 396) 13.
401 Lomnicka, ‘The future of consumer credit regulation’ (n 396) 13.
402 as amended by the Consumer Credit Act 2006.
element, namely that there are some businesses which are neither regulated by FSA or OFT but by HMRC. This is a further regulatory body in the field of financial markets.

A major role of OFT is competition within markets and part of that role OFT is to investigate cartel offences. ‘In its simplest terms, a cartel is an agreement between businesses not to compete with each other. The agreement is usually secret, verbal and often informal,’406 and where:

The Enterprise Act 2002 (EA02) makes it a criminal offence for an individual dishonestly to agree with one or more other persons that two or more undertakings will engage in certain prohibited cartel agreements, including price-fixing, limitation of production or supply, market-sharing and bid-rigging.407

Since there are two institutions with an interest in prosecuting fraud (OFT and SFO), it is clearly appropriate for there to be understandings between them regarding case management but it is another example of the anti-economic crime responsibilities being split. Joshua notes that the OFT’s first prosecution, against BA for airline fuel price fixing, collapsed in 2010 with ‘OFT’s credibility is deservedly in tatters.’408 This high profile failure by OFT received the same type of press comment as that visited on SFO for its earlier lack of success409 and provides support for the central theme of this thesis that such prosecutions should be in the experienced hands of a single prosecution authority.

money, in any way (just collecting and delivering money as a ‘cash courier’ isn’t transmitting money); cashes cheques that are payable to your customers.’
406 OFT, ‘What is a cartel?’ ‘Typically, cartel members may agree on: prices, output levels, discounts, credit terms, which customers they will supply, which areas they will supply, who should win a contract (bid rigging). These agreements are prohibited by the Competition Act and Article 101 TFEU of the EC Treaty. In addition, the Enterprise Act makes it a criminal offence for individuals to dishonestly take part in certain specified cartels, essentially those that involve price fixing, market sharing, limitation of production or supply or bid rigging. Cartels can occur in almost any industry and can involve goods or services at the manufacturing, distribution or retail level.’ http://oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/what-cartel accessed 7 January 2013.
As will be explained in chapter six, the OFT was to be merged with the Competition Commission to form the ‘Competition and Markets Authority (CMA),’ and the FSA successor, The Financial Conduct Authority (FCA), took over OFT’s consumer credit responsibilities from April 2014. As Lomnicka describes, ‘this will not be a simple process’ because of the differing regulations under FSMA and CCA.410

4.8 Conclusion

The UK’s counter-economic crime landscape has been shaped over many years in a haphazard manner, thus, exhibiting the disadvantages of responding to events rather than as a result creating a formal plan. The UK emerged from the post war ‘welfare state’ era with rudimentary protection for investors and an historic overseer in the form of the BoE without powers to regulate and relying on persuasion rather than force of law. Thus, the traditional ‘old lady’ relying on the ‘Governor’s eyebrows’ could not police the attitudes of ‘whatever he can make on the side’411 or a ‘naughty perk of the job,’412 and had to give way to greater regulation. This process took thirty-one years under two long governments and several iterations of regulatory systems but another new government showed that the lack of a cohesive strategy is still apparent, as will be discussed in chapter six.

The general field of crime is broad but economic crime is a specialised area, based on a contemporary label of white-collar but, regardless of neckwear, is not a new phenomenon. However, although the suggestion of this type of crime being undertaken by people of high social status still pervades, it is the paucity of convictions and inadequacy of penalties for such conduct which remains to be addressed. The review of literature has given an insight into the individual areas of regulation, fraud and the criminal (or regulatory transgressor). What the literature and this chapter demonstrate is the history that brought them the threshold of a new government in 2010, where the SFO had remained unchanged since its inception and the regulator had mutated. Sadly, the broad conclusions of Gower and Roskill remain valid, leading to the conclusion that further change is required.

410 Lomnicka, ‘The future of consumer credit regulation’ (n 396) 13.
412 Mansell (n 277).
The following chapters will review the legislation underpinning the criminalisation of fraud and bribery and regulation of investments and markets together with the performance of the bodies which emerged from Gower and Roskill’s endeavours.
Chapter 5: UK Economic Crime Legislation

5.1 Introduction

Economic crime enforcement in the United Kingdom (UK) is dependent upon specific legislation and enforcement institutions. The previous chapter has explained the historical context to the current economic crime landscape which is reviewed in chapter six. The purpose of this chapter is to analyse the specific legislation deployed to criminalise fraud, bribery and corruption: namely Fraud Act 2006 (FRA2006) and Bribery Act 2010 (BA2010). Enforcement of legislation falls mainly within the purview of the Serious Fraud Office (SFO) and its performance is examined alongside considering the particular external issues bearing on the subject area, which enables a discussion in chapters seven and eight of the approach of the United States (US) and Australia. The purpose of this approach is to understand how the UK has arrived at the current structure and the vicissitudes of prosecution and achievement of the objectives to criminalise economic crime. The conclusion of the thesis is a discussion of the UK experience and approach, informed by a review of US and Australia to determine whether and how UK economic crime enforcement can be improved.

The importance of tackling bribery and corruption is illustrated by the outcry over the selection of Football World Cup venues for 2018 and 2022, with allegations that the English bid failed because of ‘foul play and double-dealing’. Here, the English Football Association is seen as a ‘victim’ but the UK is not immune from such accusations itself, as shown by the opprobrium brought on the government because it pressurised the SFO to cease bribery enquiries into BAE’s Saudi Arabian arms contract. The Tenaris case involving a Luxembourg based Argentina controlled company, with shares traded in Argentina, New York and Milan paying bribes to Uzbekistan government officials, shows the global reach of...
corruption. These examples illustrate that global commerce, be it sport, armaments or commodities, face similar issues and it should not matter in what context bribery takes place. However, the ‘real world’ does not operate in a vacuum and any analysis must include reference not just to legal interpretation but varying global standards, political considerations and national security.

The international context and obligations for the UK in countering economic crime will be discussed but are put plainly by Kofi Annan, explaining the need for transparency in international trade:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.\(^4\)

Lord Woolf emphasised that bribery ‘can paralyse the government and undermine trade and commerce’,\(^5\) however, although the UK enacted legislation\(^6\) more than a century ago to deal with domestic corruption,\(^7\) but it was not until 2001 that bribing foreign officials was criminalised,\(^8\) and that was only in response to criticism by Organisation for Economic Co-operation and Development (OECD).\(^9\)

The underlying reason for lack of action is that the idea persists that local cultural norms were of over-riding importance and that ‘doing in Rome what the Romans do’\(^10\) was acceptable. Some countries\(^11\) try to draw a distinction by making an exception for small payments which they term ‘facilitation payments’ as not really

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\(^8\) Raphael (n 5) 14.

\(^9\) ‘The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world.’ Discussed in this chapter 5.2.1. OECD, ‘Mission’ http://www.oecd.org/about/ accessed 31 August 2014.

For ‘failure to address deficiencies in its laws on bribery of foreign public officials and corporate liability for foreign bribery’ which it considered ‘undermines the credibility of the UK legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or multilateral development banks.’ OECD, ‘Working Group on Bribery’ Annual Report 2008. 43. http://www.oecd.org/dataoecd/21/24/44033641.pdf accessed 19 September 2011.

\(^10\) Raphael (n 5) v.

\(^11\) United States and Australia: see chapters 7 & 8.
bribery. Facilitation payments are ‘unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. Sometimes referred to as “speed” or “grease” payments’. As Raphael notes, these are ‘a particularly insidious problem for undeveloped or less developed countries’, and caused friction between legislators and commercial organisations in framing the BA2010.

The UK has legislated to make bribery and corruption a criminal offence. This chapter considers the provisions of the BA2010 which has four criminal offences, the newest of which is corporate liability: bribing another person; being bribed; bribing a foreign public official; and ‘failure of commercial organisations to prevent bribery.’ The first two offences, can be described as general bribery offences. There is an ‘expectation’ test, which relates the improper performance to the yardstick of UK standards of good faith or impartiality. This means that if the intention is to bribe then it will be an offence in the UK irrespective of whether such a payment might be culturally acceptable in another country. The leads into the new offence where a commercial organisation can be criminalised for failing to prevent bribery, thus underlining the expected standards of good faith.

The second element of economic crime for which there is legislative underpinning relates to fraud. The importance of tackling fraud is illustrated by the instances of fraud which have caused the collapse of multinational corporations. In US,

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13 Raphael (n 5) v. UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. ‘The Least Developed Countries represent the poorest and weakest segment of the international community. They comprise more than 880 million people (about 12 per cent of world population), but account for less than 2 percent of world GDP and about 1 percent of global trade in goods The current list of LDCs includes 48 countries; 33 in Africa, 14 in Asia and the Pacific and one in Latin America.’ http://www.unohrlls.org/en/home/ . accessed 26 September 2011.
14 Bribery Act 2010, It is not the purpose of this thesis to provide a critique of these criminal offences.
15 Bribery Act 2010, s 6.
16 Bribery Act 2010, s 1 and s 2.
18 The then UK Government attitude was expressed by a Minister as: ‘We recognise that many UK businesses still struggle with petty corruption in some markets, but the answer is to face the challenge head-on, rather than carve out exemptions that draw artificial distinctions, are difficult to enforce, and have the potential to be abused. Providing exemptions for facilitation payments, as the US does, is not a universally accepted practice, and not something that we consider acceptable.’ Claire Ward, HC Deb 3 March 2010 Vol 506 Col 981.
Bernard Madoff was found guilty of masterminding a £40bn fraud and sentenced to 150 years imprisonment while ‘Sir’ Allen Stanford was sentenced to 110 years imprisonment for a $7bn Ponzi scheme. The 2008 financial crisis has focused attention on the risks in ‘Casino’ Banking, evidenced by Jerome Kerviel’s illegal transactions which cost Société Générale £3.7bn. On conviction he was imprisoned for three years. Similarly, Nick Leeson’s unauthorised trading presaged the collapse of Barings Bank, a UBS trader Kweku Adoboli, had lost £1.5bn and was sentenced to seven years imprisonment.

Fraud was relatively neglected until the establishment of the SFO in 1987, and the enactment of the FRA2006. The financial regulator had limited prosecution powers under Financial Services Act 1986. However, it has raised its profile ‘bringing criminal proceedings for conspiracy’, thus developing its role ‘as a specialist criminal prosecutor’. Criminalisation of fraud has evolved through various Theft Acts. According to Ormerod, the FRA2006 has simplified the law.

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21 Securities and Exchange Commission, ‘What is a Ponzi Scheme?’ ‘A Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.’ http://www.sec.gov/answers/ponzi.htm accessed 11 October 2011.
22 The Times, ‘Stanford’s bank “made up the numbers for more than 20 years.”’. 4 February 2012. http://www.thetimes.co.uk/tto/business/industries/banking/article3309416.ece accessed 4 February 2012.
26 Criminal Justice Act 1987, s 1.
27 Financial Services Act 1986, s 47.
by providing a new offence of ‘fraud’ instead of a variety of the ineffective offences.\textsuperscript{34} In practice, the range of deception offences created ‘a hazardous terrain for prosecutors’ which, consequently, encouraged reliance on ‘conspiracy to defraud’\textsuperscript{35} retained as a failsafe.\textsuperscript{36} The new criminal offences are seen as being wide enough to meet current and future challenges, by being designed as ‘modern and flexible statutory offences of fraud’.\textsuperscript{37}

5.2 Bribery and Corruption

The importance of tackling bribery and corruption is illustrated by allegations over the Football World Cup venues for 2018 and 2022. It is alleged that the English bid failed because of ‘foul play and double-dealing’ by competing international organisations.\textsuperscript{38} The UK is not immune from such accusations itself, as shown by the opprobrium brought on the government because of the pressure it brought to bear on the SFO to drop bribery enquiries into BAE’s Al Yamamah contract.\textsuperscript{39} The US Tenaris\textsuperscript{40} case shows the global reach of corruption. These examples illustrate that global commerce faces similar issues and, in strict legal terms, it should not matter in what context bribery takes place. This chapter considers the need for transparency in international trade and the steps taken by UK to tackle bribery and corruption, set in the context of actions taken by other countries, including US. The US, as the largest single country in terms of international trade with 9% of global exports and 13% of global imports (UK accounted for 3% and 4% respectively),\textsuperscript{41} it there has an important role to play in tackling bribery and corruption but it has different methods and penalties as discussed in chapter seven.


\textsuperscript{35} Ormerod (n 34) 193-219.


\textsuperscript{39} James Wilson, ‘The day we sold the Rule of Law’ (n 2).

\textsuperscript{40} It involved a Luxembourg based, Argentina controlled company, with shares traded in Argentina, New York and Milan paying bribes to Uzbekistan government officials. Reuters, ‘Tenaris settles U.S. bribery probe’ (n 3).

In the headline grabbing Football World Cup case, English public opinion was outraged that others had not ‘played fair’ or, to mix sports, ‘it’s not cricket’. Whereas, cricket is regarded as a game of personal integrity and high standards in all countries, international trade was considered to be different because it involved local practices which may not be understood, as in the Asian businessmen’s complaint that ‘their American partners often insist on paying a lot of money in bribes because they cannot be bothered to do things in the time-honoured way of endless talk over tea.’

Lord Woolf emphasised that bribery ‘can paralyse the government and undermine trade and commerce.’ In the nineteenth and early twentieth century allegations of bribery brought about public outcry, and legislation to deal with domestic corruption. However, the concept of UK jurisdiction over overseas corruption was informed by the Privy Counsel judgment in 1891: ‘[a]ll crime is local. The jurisdiction over the crime belongs to the country where the crime is committed.’ This state remained and the Law Commission observed that the opportunity was not taken by Criminal Justice Act 1993, which extended the jurisdiction of English courts over a number of offences of dishonesty, to include overseas bribery and corruption. It was not until 2001 that it became a crime to bribe foreign officials, when as a temporary expedient the Anti-Terrorism, Crime and Security Act 2001 (ATCSA2001) was expanded in order to comply with international obligations.

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42 A major investigation involving Europol and police teams from 13 European countries has uncovered an extensive criminal network involved in widespread football match-fixing. A total of 425 match officials, club officials, players, and serious criminals, from more than 15 countries, are suspected of being involved in attempts to fix more than 380 professional football matches. The activities formed part of a sophisticated organised crime operation, which generated over €8 million in betting profits and involved over €2 million in corrupt payments to those involved in the matches. Europol. ‘Update – Results from the largest football match-fixing investigation in Europe’, 6 February 2013. https://www.europol.europa.eu/content/results-largest-football-match-fixing-investigation-europe accessed 8 February 2013. See also (n 1).


44 Raphael (n 5) v.

45 Raphael (n 5) 14. re Metropolitan Board of Works.


The reason for this was that the UK had been strongly criticised by OECD for ‘failure to address deficiencies in its laws on bribery of foreign public officials and corporate liability for foreign bribery’ undermining the credibility of the UK legal framework with the effect that UK companies being subject to increased due diligence. The consequence of responding to local cultural norms on the ‘doing in Rome what the Romans do’ principle turns a blind eye to facilitation payments, ‘unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action.’ In the US, the Foreign Corrupt Practices Act 1977 (FCPA1977) allows ‘modest hospitality expenditure and facilitation payments,’ as does Australia, which would not be permitted in the UK thus it can be seen that some counties seek an advantage for themselves by excusing such payments. These are double standards for none of the countries which permit such payments abroad would allow them at home. However, it ‘is a particularly insidious problem for undeveloped or less developed countries’, as Trace International show in their ‘Global Enforcement Report’ and a matter which has caused friction between legislators and commercial organisations in framing the BA2010 and its guidance. Thus, a key consideration is the UK’s international obligations.

Raphael (n 5) 116.
50 OECD, ‘Working Group on Bribery’ (n 9) 43.
51 OECD, ‘Working Group on Bribery’ (n 9) 43.
52 Raphael (n 5) v.
55 Discussed in chapter 7 & 8.
57 ‘Of the countries that permit these small bribes overseas, none permits them at home. A Canadian or Australian who makes a “grease payment” to a foreign customs official would face criminal penalties for making the same payment to an official at home.’ Trace International. ‘The High Cost of Small Bribes’ 4.. https://secure.traceinternational.org/data/public/The_High_Cost_of_Small_Bribes_2-65416-1.pdf accessed 11 February 2013.
58 Raphael (n 5) v.
59 UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. ‘The Least Developed Countries represent the poorest and weakest segment of the international community. They comprise more than 880 million people (about 12 per cent of world population), but account for less than 2 percent of world GDP and about 1 percent of global trade in goods The current list of LDCs includes 48 countries; 33 in Africa, 14 in Asia and the Pacific and one in Latin America.’ http://www.unohrfls.org/en/home/ . accessed 26 September 2011.
5.2.1 International Conventions

Internationally, the BA2010\(^{59}\) supports the OECD Convention on Combating Bribery of Foreign Public Officials (OECD Convention)\(^{60}\) and the UN Convention against Corruption 2003 (UNCAC), together with Council of Europe and International Chamber of Commerce conventions and rules.\(^{61}\)

The OECD Convention, adopted by forty one countries, including the UK,\(^{62}\) ‘establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions’.\(^{63}\) The OECD Convention is the only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction, the person making the bribe rather than the recipient.\(^{64}\) The OECD feels that their convention is working a point illustrated by over 300 sanctions being imposed.\(^{65}\) Enforcement action is taken by countries themselves, rather than OECD acting as a ‘global policeman’. According to Raphael, the use of ATCSA2001,\(^{66}\) ‘had the twin effects of extending the ‘jurisdiction of domestic

\(^{59}\) The expedient of using ATCSA2001 to combat bribery and corruption was intended to be temporary until introduction of comprehensive corruption legislation. The BA2010 fulfilled that obligation. Raphael (n 5) 116.


\(^{62}\) UK signed in 1997. OECD, ‘Convention’ (n 60).

\(^{63}\) OECD, ‘Convention’ (n 60).

\(^{64}\) OECD, ‘Convention’ (n 60).

\(^{65}\) ‘Highlights from the Working Group on Bribery Enforcement Data, as of December 2012 221 individuals and 90 entities have been sanctioned under criminal proceedings for foreign bribery in 13 States Parties between the time the Convention entered into force in 1999 and the end of 2012. At least 83 of the sanctioned individuals were sentenced to prison for foreign bribery. At least 85 individuals and 120 entities have been sanctioned in criminal, administrative and civil cases for other offences related to foreign bribery, such as money-laundering or accounting, in 5 States Parties. Approximately 320 investigations are ongoing in 24 States Parties to the Anti-Bribery Convention. Prosecutions are ongoing against 148 individuals and 18 entities in 15 Parties for offences under the Convention.’ OECD Working Group on Bribery Annual Report 2013’ http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf accessed 4 September 2014.

\(^{66}\) Raphael (n 5) 20.
courts [UK] to acts of bribery committed abroad by UK nationals’, and ‘ensured that the common law offence of bribery extended to persons holding public office outside the UK.’ UNCAC is ‘the world’s comprehensive platform for fighting corruption, promoting integrity and fostering good governance.’ It is the first legally binding, international anti-corruption instrument and provides a unique opportunity to mount a global response to corruption.’ UNCAC assists countries, particularly those with ‘vulnerable, developing or transitional economies,’ to develop and use solid anti-corruption measures applicable to all spheres of society. Compliance with UNCAC is reviewed on a regular basis.

Prosecutions for bribery have been few in number but it would be stretching credulity to believe that foreign bribery does not take place. By way of comparison, statistics from 2013 illustrated that since 1999 the US brought 139 cases to trial and Germany 88, whereas UK brought seven. There could be a number of reasons for this: such cases may not have been discovered or may not have been reported, which is not unusual in the field of financial crime. A further possibility is that if matters have been reported, prosecutors’ focus may either lie elsewhere, or have been subject to political influence not to take cases to trial; alternatively, the laws which the prosecutors are able to deploy are inadequate.

Here, Wilson notes ‘[t]he fact that the old law was in a slightly jaded state can scarcely be a complete explanation for the dearth of successful prosecutions.’ As Wells remarks, ‘it is hard to think that laws that are rarely invoked are functional.’ However, whatever the reasons for such a small number of UK cases, post-2010 legislation is not to blame. Following ATCSA2001, the UK only achieved its first

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68 Raphael (n 5) 20.
69 Administered by UN Office on Drugs and Crime (UNODC)
70 United Nations, ‘Office on Drugs and Crime, Annual Report 2009’. Integrity and good governance:
At the top of the agenda http://www.unodc.org/documents/about-unodc/AR09_LORES.pdf accessed 7 September 2011.
72 Between the period 1993 and 2003, on average, 21 people were prosecuted each year under the Prevention of Corruption Acts, whereas by comparison 23,000 people were prosecuted each year for fraud between 1997 and 2001. There was, therefore, a significant difference between those prosecuted for public sector corruption and those prosecuted for private sector fraud.’ Saleem Sheikh, ‘The Bribery Act 2010: commercial organisations beware!’ (2011) 22(1) I C L R 2.
73 See Transparency International, ‘Bribe Payers Index 2011’ for an analysis of companies perceived willingness to pay bribes. Australia is 6th least likely, UK (8th) and US (9th).
conviction of bribing a foreign public official in 2008.77 In this case, Tobiasen (a UK national) was convicted under Prevention of Corruption Act 1906 (PCA1906) of bribing a Ugandan government official.78

5.2.2 Bribery and Corruption Definitions

Bribery has been described as ‘a princely kind of thieving’ 79 and has been unlawful since the Magna Carta declared ‘to no one will we sell, to no one deny or delay right or justice.’80 The Bible also states ‘[a]nd you shall take no bribe, for a bribe blinds the clear-sighted and subverts the cause of those who are in the right.’81 Notwithstanding this lineage, as the Law Commission observes, ‘[m]ost people have an intuitive sense of what “bribery” is. However, it has proved hard to define in law.’82 The modern-day cliché is a brown paper bag stashed with cash, but bribes are usually more subtle than that, suggested Benstead.83 Although accepting that ‘at common law, bribery and corruption were criminal offences’,84 in R v J, Lord Thomas CJ observed that a ‘single definition is not easy’85 and then followed the Law Commission stance in using a general statement from Russell on Crime:

Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.86

There are three principal statutes, dating to ‘the end of the nineteenth century and beginning of the twentieth century (…), without abolishing the common law offence’,87 but they have different variations in their definitions of the term ‘reward’.

78 Commonwealth Heads of Government met in Uganda where a government official (Tumukunde) was responsible for security measures and procured training and equipment from a UK firm (CBRN) worth £500,000. Tumukunde demanded extra payments for ‘local taxes’ from CBRN’s director, Tobiasen, who made payments totalling £83,000. Tobiasen was convicted under Prevention of Corruption Act 1906 (PCA1906) s.1 and sentenced to five months’ imprisonment (suspended) and Tumukunde (intercepted at Heathrow airport) convicted for money laundering and sentenced to twelve months imprisonment. Financial Times, ‘Guilty plea to bribery sets legal landmark’ 23 August 2008. http://www.ft.com/cms/s/0/ff993ec6-70ad-11dd-b514-0000779fd18c.html#axzz2HOoOoVvn accessed 8 January 2013.
82 The Law Commission, Reforming Bribery (HMSO 2008).
85 R v J (n 84).
86 Russell on Crime, (12th edn Stephens & Sons 1964) 381.
87 R v J (n 84).
In the Public Bodies Corrupt Practices Act 1889 (PBCPA1889), the nature of ‘reward’ is defined as: ‘any gift, loan, fee, reward, or advantage whatever as an inducement’.\textsuperscript{88} In the PCA1906, the word consideration appeared in ‘any gift or consideration as an inducement or reward’\textsuperscript{89} (with ‘consideration’ being ‘valuable consideration of any kind’),\textsuperscript{90} and then simplified in Prevention of Corruption Act 1916 (PCA1916) as ‘any money, gift, or other consideration’.\textsuperscript{91} The quantum of the reward is explained as: ‘the amount of the reward ‘must be more than a trivial amount’.\textsuperscript{92} A public officer was as ‘an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.’\textsuperscript{93} According to the World Bank (WB) bribery is ‘the abuse of public office for private gain.’\textsuperscript{94} It estimates that bribery costs the world around $1tn a year\textsuperscript{95} and believes that ‘corruption is a product of bad governance and the weaknesses inherent in public sector institutions.’\textsuperscript{96} Transparency International (TI) ‘defines corruption as the abuse of entrusted power for private gain. It hurts everyone whose life, livelihood or happiness depends on the integrity of people in a position of authority.’\textsuperscript{97}

In this context, the BA2010,\textsuperscript{98} which overhauled the UK’s patchwork of archaic corruption laws,\textsuperscript{99} is regarded in the industry as ‘the single most important development’\textsuperscript{100} in combating white collar crime. Salens consider that the BA2010 ‘provides the UK with some of the most draconian and far-reaching anti-corruption legislation in the world,’\textsuperscript{101} with the potential to ‘propel the UK to the forefront’ in

\textsuperscript{88} Public Bodies Corrupt Practices Act 1889, s 1.
\textsuperscript{89} Prevention of Corruption Act 1906, s 1.1.
\textsuperscript{90} Prevention of Corruption Act 1906, s 1(2).
\textsuperscript{91} Prevention of Corruption Act 1916, s 2.
\textsuperscript{92} Paul Cohen and Arthur Marriott, \textit{International Corruption} (Sweet & Maxwell 2010) 3.
\textsuperscript{93} \textit{R v Whitaker} [1914] 3 K.B. 1283.
\textsuperscript{95} William Christopher, ‘Trillion Dollar Bribery’ (2011) 161 NLJ 25.
\textsuperscript{99} Benstead (n 83) 1291.
\textsuperscript{100} Salens (n 54).
\textsuperscript{101} Aaronberg and Higgins (n 56) 5,6-9.
fighting international bribery and corruption. There is a negative consequence of having strict legislation which is the potential to disadvantage UK industry if other countries do not follow suit, as the US discovered when enacting the FCPA1977 (discussed in chapter seven). Other actors, including government ministers and diplomats reside outside UK jurisdiction. Transparency International details an annual index showing the perceptions of corruption in 178 countries. The UK and USA being in 14\textsuperscript{th} and 19\textsuperscript{th} position, well behind Denmark and New Zealand at the head. Bribery and corruption is a wide field with a range of views: from those of the authorities, on one hand, who see it as an anti-competitive blight on trade; and the perpetrators, on the other hand, who see it as a source of competitive advantage if they can use such methods without sanction.

5.2.3 Criminalisation of Bribery and Corruption

When considering the UK’s international obligations, it is important to recall that the UK was late in joining international efforts to criminalise overseas bribery. Prior to the BA2010, the UK prosecuted the crime of bribery under common law\footnote{Bribery at common law has evolved over time, and opinions differ as to whether it is to be regarded as a general offence (applying to a range of different offices or functions) or whether the common law is comprised of a number of offences of bribery (distinguished by the office or function to which a particular offence applies).} and a variety of disparate provisions dating back to the nineteenth century, commencing with PBCPA1889.\footnote{The Law Commission, ‘Legislating the Criminal Code: Corruption’ (n 48).} That Act dealt with bribery of public officials, whereas, the PCA1906 and PCA1916 extended the concept into the private sector (based on the Principal/Agent concept)\footnote{Public Bodies Corrupt Practices Act 1889. Preamble ‘An Act for the more effectual Prevention and Punishment of Bribery and Corruption of and by Members, Officers, or Servants of Corporations, Councils, Boards, Commissions, or other Public Bodies.’ s.1. Corruption in office a misdemeanour. ‘s 1(1). Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person,(...)’ s 1(2). ‘Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person (…).’} and the presumption of corruption relating to any payments to government officials.\footnote{Prevention of Corruption Act 1906 s 1. ‘Punishment of corrupt transactions with agents. (1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, (...) in relation to his principal’s affairs or business.’} The UK law on bribery was left
untouched until the Committee on Standards in Public Life recommended that the government clarify the law on bribery. This was followed by the Law Commission proposals ‘Legislating the Criminal Code: Corruption.’ The ATCSA2001 brought in provisions to strengthen the law on international corruption, putting beyond doubt that the law of bribery applies to acts involving officials of foreign public bodies, Ministers, MPs and judges, and to ‘agents’ of foreign ‘principals’. This gave courts jurisdiction over the crime of bribery committed by UK nationals and UK incorporated bodies overseas. The Criminal Justice and Immigration Act 2008 extended SFO powers to compel production of documents in foreign bribery cases. The BA2010 took effect from 2011 but was not retrospective. The general principle of criminal law being that earlier actions should be prosecuted under the old law. Thus, the existing laws remain operative. The effect of this is that cases continue to brought under the old legislation because the events on which they are predicated took place before July 2011. Thus, it will take some time before cases appear under BA2010 and its provisions are tested in court.

This part of the chapter critically assesses the offences created by the BA2010. There are four criminal offences: ‘Offences of bribing another person’; and ‘Offences relating to being bribed’; ‘bribing a foreign public official’; and failure of commercial organisations to prevent bribery.’ The first two offences, which consolidate existing law are general bribery offences. Offering a bribe consists of providing an advantage to a person in return for that person performing a ‘relevant function or activity’ improperly. This includes making payments such as facility fees, referral fees and commissions. There is an ‘expectation’ test, which

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relates the improper performance to the yardstick of UK standards of good faith or impartiality which a reasonable person in the UK may expect. This means that if the intention is to bribe then it will be an offence in the UK irrespective of whether such a payment might be culturally acceptable in another country. The only exception is if it is permissible by written law.\textsuperscript{118} This goes some way to acknowledge national differences but it is a narrow exception requiring ‘normal business practice’ being permitted by written law. This is in contrast to the US where the FCPA1977 allows ‘facilitation payments’ or ‘grease payments’,\textsuperscript{119} and payments to foreign political parties or officials ‘to expedite or secure the performance of a routine government action.’\textsuperscript{120} The UK Government stated:\textsuperscript{121}

We recognise that many UK businesses still struggle with petty corruption in some markets, but the answer is to face the challenge head-on, rather than carve out exemptions that draw artificial distinctions, are difficult to enforce, and have the potential to be abused. Providing exemptions for facilitation payments, as the US does, is not a universally accepted practice, and not something that we consider acceptable.\textsuperscript{122}

The new offences are: bribing a foreign public official, where the only requirement is an intention to influence a foreign official in their official capacity;\textsuperscript{123} and, failure of commercial organisations to prevent bribery,\textsuperscript{124} which targets situations where a person connected, or ‘associated’, with a commercial organisation is involved.\textsuperscript{125} The term ‘associated person’ is very wide and encompasses employees, agents and third parties, including other intermediaries, suppliers or joint venture partners. It is noteworthy that lack of control over the associated person is not a defence, the precise relationship is irrelevant.\textsuperscript{126} This offence is one of strict liability and has only a defence that the organisation had in place ‘adequate procedures’ to prevent bribery.\textsuperscript{127}

Thus, whereas, US legislation permits payments to secure the performance of overseas ministerial and routine government action (issuance of permits, visas, unloading cargo or releasing goods from customs)\textsuperscript{128} or hospitality associated

\begin{footnotesize}
\begin{enumerate}
\item[{\textsuperscript{118}}] Bribery Act 2010, s 5.
\item[{\textsuperscript{119}}] Discussed in chapter seven.
\item[{\textsuperscript{120}}] Salens (n 54).
\item[{\textsuperscript{121}}] Aaronberg and Higgins (n 56) 5,6-9.
\item[{\textsuperscript{122}}] Ward (n 18).
\item[{\textsuperscript{123}}] Bribery Act 2010, s 6.
\item[{\textsuperscript{124}}] Bribery Act 2010, s 7.
\item[{\textsuperscript{125}}] Salens (n 54).
\item[{\textsuperscript{126}}] Bribery Act 2010, s 8.
\item[{\textsuperscript{127}}] Salens (n 54).
\item[{\textsuperscript{128}}] 15 U.S.C. §§ 78dd-1(b),
\end{enumerate}
\end{footnotesize}
expenditure such as travel and accommodation costs relating to the promotion and explanation of a product, the BA2010 criminalises such actions. The Ministry of Justice (MOJ) and the SFO have indicated that they will treat each case on its merits and the BA2010 vests total discretion in the hands of the SFO, as prosecutors, to decide whether or not to pursue such payments as illegal bribes. Vesting prosecutorial discretion in the hands of the SFO is congruent with an objective to have one single economic crime agency and avoids issues of different bodies making contradictory decisions, which would be the case if the FCA use its regulatory powers to fine breaches of bribery procedures rather than allow the specific prosecutors to institute criminal proceedings.

It is for the commercial organisation to demonstrate that it has in place adequate procedures in order to provide a defence; the consequences of failing to do so risks unlimited fines and imprisonment up to ten years. One particular challenge for a commercial organisation is to ascertain whether or not its foreign counter-party is a government or public body because in other countries key sectors of the economy are not privatised leading to a risk of inadvertently dealing with foreign public officials. Because of the broad scope and disquiet over the strict liability nature of the offence, the government consulted widely before providing guidance.\(^\text{129}\) This is covered in chapter six.

It is important to examine in detail the four offences which the BA2010 created to put into context apprehensions and misapprehensions, particularly of commercial organisations in enforcing the Act. The first offence is: ‘Offences of bribing another person.’ A person is guilty of an offence if he promises or gives a financial or other advantage to another person either with the intention that there should be improper performance of a function or activity or knowing that acceptance would constitute the improper performance: that improper performance being rewarded by the ‘advantage’.\(^\text{130}\) It does not matter whether the advantage is offered, promised or given directly between the parties or through an intermediary. Similarly, it does not matter whether the person receiving the offer is the same person due to perform the activity.\(^\text{131}\) This makes plain that the intention to bribe is paramount, not the mechanism and the provision removes the possibility of those

\(^{129}\) Ministry of Justice, ‘Guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010).’
\(^{130}\) Bribery Act 2010, s 1
\(^{131}\) Bribery Act 2010, s 1(4) (5)
involved distancing themselves by adopting circuitous means to ensure there is no evidence of their involvement.

The counterpart of the first offence is ‘Offences relating to being bribed.’ A person is guilty of an offence if s/he requests, agrees to receive or accepts an advantage with the intention that he should perform a relative function or activity improperly either by himself or by another person, or as a reward for such performance.\footnote{Bribery Act 2010, s 2.} The mere request, agreement or acceptance constitutes the improper performance and it does not matter whether the advantage is received directly or through a third party nor whether the benefit is to those same parties or another(s).\footnote{Bribery Act 2010, ss 2(4)(5)(6).} This includes cases where the improper performance has either been done or is yet to be done by the person or someone acting under his instruction or acquiescence. It does not matter whether the person performing the function or activity knows that it is improper. Improper performance occurs ‘in breach of a relevant expectation’\footnote{Raphael (n 5) 39.} which is of ‘good faith or impartiality’ arising from a ‘position of trust.’\footnote{Raphael (n 5) 40.} The implication of this is that the recipient of a bribe cannot hide behind a third party. The third bribery offence is that of ‘Bribery of Foreign Public Officials.’\footnote{Introduced in 2001 by Anti-Terrorism Crime and Security Act 2001, s 108(1).} A person who bribes a foreign public official is guilty of an offence if he intends to influence the official in performance of his capacity as a public official with the intention of obtaining or retaining business or a business advantage.\footnote{Bribery Act 2010, s 6.} However, there is relief if such payments are permitted by the written law of that country. Mere custom or tolerance will not suffice.\footnote{Bribery Act 2010, s 6(3)(b).} This is not a new offence.

Some bribes are excused as ‘facilitation payments’ but, nevertheless, are still bribes.\footnote{Ward (n 18).} This offence has the effect of penalising those who actively intend bribery as well as those who regard it as an accepted norm to facilitate or ‘oil the wheels of local bureaucracy’ by ‘greasing’ the palm of some public official to expedite performance, such as entry visas, permits, licenses or, say, loading, unloading and release of perishable goods from the docks or provision of a
telephone or electricity service. These payments are small bribes or backhanders made to secure or expedite the performance of a routine or necessary action to which the payer has a legal or other entitlement and believed to be wide-spread in some areas and considered necessary. In effect, ‘[s]mall bribe takers thrive on inefficiency and bureaucratic obstacles.’ The distinction between a bribe and a facilitation payment is illusory. In reality, there is no distinction for ‘if companies pay these small bribes willingly, they are nevertheless bribes. If companies pay these bribes because they believe they have no choice, they are extortionate.’ However, to add to the confusion, some payments of a small, customary nature are commonly made by the private sector: ‘tipping’, where, according to Horder:

“Tipping” of waiters and cab drivers is an example widespread across the world. Such a practice is not regarded as criminal bribery, so long as the tips are small and associated essentially with a display of gratitude rather than an attempt to secure better service than other customers.

The fourth offence is ‘failure of commercial organisations to prevent bribery.’ A relevant commercial organisation is guilty of an offence if a person associated with the organisation bribes another intending to obtain or retain business or a business advantage for the organisation. It is a defence for a relevant commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with the commercial organisation bribing another person. The BA2010 seeks to end the practice of paying bribes through intermediaries while the commercial organisation claims not to be aware that bribery was taking place. The Act makes clear that it does not matter whether the ‘advantage’ is offered, given, requested, or received directly or through an intermediary. It is this new offence which caused concern and generated considerable debate because it is of strict liability, the scope is wide and the


141 ‘Given the widespread practice of making facilitation payments in certain countries, such as Africa, some operators have questioned whether it is appropriate to criminalise them. Indeed, the Australia-Africa Mining Industry Group has recently suggested that anti-bribery laws in this context are counter-productive. They argue that many African governments are not in a position to pay officials the salaries they deserve and facilitation payments are therefore seen as a necessary supplement in such countries’ John Lurie, Nicholas Burkill and Jocelyn Knoll, ‘Bribery and corruption in the construction industry: challenges for international construction and engineering projects’ (2013) Const LJ 26.

142 Trace International (n 57) 4.


144 Bribery Act 2010, s 7.

145 Bribery Act 2010, s 7.
consequences severe. The strict (or absolute)\(^{147}\) liability of the offence removes the opportunity for those not directly involved in making the bribe to avoid liability. This is because normally ‘criminal liability generally rests upon proof of two things – \textit{actus reus} and \textit{mens rea}.\(^{148}\) That is, the ‘guilty act’ and the ‘guilty mind’ and the traditional maxim is: ‘the act is not guilty unless the mind is also guilty.’\(^{149}\) Thus, as Lord Goddard CJ explained:

It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, clearly or by necessary implication, rules out \textit{mens rea} as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.\(^{150}\)

The impact for a commercial organisation is that it is liable for the offence of bribery, if an ‘associate’ of the organisation commits bribery without its knowledge and it is clear that, no matter the circumstances, the commercial organisation cannot deny responsibility. Whatever the organisation did or did not know, it is guilty of the act. Notwithstanding the anxiety over BA2010 s.7, for which the adequate procedures defence is discussed below,\(^{151}\) by mid 2014, no such cases had come to court, although the SFO had announced investigations into bribery at Rolls Royce.\(^{152}\)

Penalties under the BA2010 are split between those for individuals and those for ‘non-individuals’. The maximum penalty for individuals is an unlimited fine or imprisonment for up to 10 years or both.\(^{153}\) An offence committed by a person other than an individual is punishable by an unlimited fine.\(^{154}\) These penalties, which are congruent with those for fraud, nevertheless bear comparison with penalties in other jurisdictions, which will be discussed in chapters seven and eight, where is it clear that penalties are greater in the US. Whether the penalties are appropriate or not is an open question because by mid 2014, there had been just three prosecutions which is not surprising given that the SFO consider that ‘on

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\(^{148}\) Molan (n 147) 93.

\(^{149}\) ‘\textit{actus non facit reum nisi mens sit rea}’. Molan (n 147) 93.

\(^{150}\) \textit{Brend v Wood} (1946) 175 LT 306 in Molan (n 147) 178.

\(^{151}\) Chapter 5.4.3.


\(^{153}\) Bribery Act 2010, s 11.

\(^{154}\) Raphael (n 5) 86.
average, it takes 19 months to investigate allegations and bring a case to

The BA2010 took effect from July 2011 and was not retrospective. The first three cases did not fall within SFO parameters. Munir Patel\footnote{R v Munir Patel. 18 November 2011. http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/munir-patel-sentencing-remarks.pdf accessed 14 February 2012.} had the dubious distinction of being the first person to be convicted in November 2011; the second was Mawia Mushtaq,\footnote{CMS Cameron McKenna, ‘Second prosecution under the Bribery Act, but still no guidance on key issues’ http://www.law-now.com/law-now/2012/Oldhambriberydec12.htm accessed 8 January 2013.} and the third Yang Li.\footnote{BBC, ‘University of Bath student jailed over tutor bribe bid’ 23 April 2013. http://www.bbc.co.uk/news/uk-england-somerset-22269573 accessed 4 March 2014.} Patel was a Magistrates Court clerk who pleaded guilty to being bribed to manipulate the court traffic offence database so that penalty points would not be recorded.\footnote{Eoin O’Shea, ‘Opinion: First conviction proves Bribery Act has sharp teeth’. The Lawyer. 28 November 2011. http://www.thelawyer.com/opinion-first-conviction-proves-bribery-act-has-sharp-teeth/1010398.article Accessed 27 February 2012.} Although guilty of one charge of accepting £500, the prosecution believed there were another 53 occasions.\footnote{R v Munir Patel (n 156).} He was initially sentenced to six years’ imprisonment (later reduced on Appeal to four years) for the BA2010 s.2 offence and Misconduct in a Public Office.\footnote{CMS Cameron McKenna, ‘Second prosecution under the Bribery Act’ (n 157).} In the second case, Mawia Mushtaq failed a driving test for a private hire taxi licence, having failed several times before. He tried to bribe the licensing officer with between £200-£300. He was convicted of ‘Bribing another person’\footnote{Misconduct in public office is an offence at common law triable only on indictment. It carries a maximum sentence of life imprisonment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.’ Crown Prosecution Service, http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/#a016 accessed 8 January 2013.} and sentenced to two months’ imprisonment, suspended for 12 months, and a two-month curfew order.\footnote{BBC, ‘University of Bath student jailed over tutor bribe bid’ 23 April 2013. http://www.bbc.co.uk/news/uk-england-somerset-22269573 accessed 4 March 2014.} In the third case, Yang Li was sentenced to twelve months imprisonment for attempting to bribe, and possession of an imitation firearm, a university professor with £5,000 to pass his master’s degree.\footnote{Bribery Act 2010, s 1.} In the first case, Patel, a public officer, hence the seriousness of the sentence, sought and received a bribe whereas in the second and third cases a bribe was attempted but not made. However, important as these cases are, because they are the first under the BA2010, nevertheless, they are minor crimes in relation to SFO
parameters which is still prosecuting under pre BA2010 legislation. Thus, the theory is that BA2010 contains provisions which should enable the bribery and corruption aspects of economic crime to be prosecuted and convictions obtained. However, four years after enactment, the SFO has not yet taken a case to trial which leaves the Act’s provisions untested in court. This is important because, although acknowledging the SFO’s difficulties in facing a long lead time to bring a case to trial, the new key provision of making a commercial organisation responsible for failure to prevent bribery would benefit from being ventilated in court. The reason this is important is that having adequate procedures offers a complete defence and if the SFO is able to establish the issues to a court’s satisfaction then this offers opportunities for the SFO to engage in Deferred Prosecution Agreements, as discussed in chapter six.

5.2.4 Risk Management and Reporting Bribery and Corruption

The BA2010 extends responsibility for bribery beyond the individuals intimately involved, to include the ‘controlling minds’ and those organisations involved or on whose behalf bribery took place or was contemplated. This can include individuals and organisations which are many steps distant from the organisation itself. Any failure risks the organisation being subject to a fine in addition to any action against the individuals. The wide scope of the Act significantly increases the commercial organisation’s risk management issues. Thus, with there being corporate responsibility for failing to prevent bribery, with criminal consequences, it is vital for the organisation to put in place procedures and be alert so that, if necessary, it can report itself to the SFO.

The ambit of the law is any commercial organisation with a business presence in the UK. This would bring into consideration any part of that organisation, even if the controlling body was overseas and the alleged bribery was also offshore.

This should encourage businesses to review their existing anti-bribery policies and procedures and ensure their ‘associates’ are similarly complaint. Those

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165 Since I took up post in April 2012, we have sharpened the strategic focus of the SFO on the casework for which the Roskill model was designed and intended. This is the topmost tier of serious and complex fraud and bribery. Consequently: (i) We are undertaking fewer but much larger and more complex investigations. Examples include LIBOR, Rolls-Royce, Barclays/Qatar, ENRC, Alstom, G4S Serco.’, David Green, Serious Fraud Office, ‘Annual Report and Accounts 2013-2014’ http://www.sfo.gov.uk/media/268927/sfo%20ar-2014%20sps-26-6.pdf
organisations which are already subject to FCPA1977 will have existing policies and procedures but the BA2010 is more extreme with its ‘zero tolerance’ stance. Internationally, OECD Guidelines for Multinational Enterprises168 and OECD Business Approaches to Combating Corrupt Practices169 provide guidance, as do US Federal Sentencing Guidelines.170

In the UK, the SFO is designated the national reporting point for ‘all allegations of bribery of foreign public officials by British nationals or companies incorporated in the UK - even if the matter occurred overseas.’171 However, in the UK, the obligation to report is not well established because there is no statutory obligation report bribery, corruption or fraud, unlike money laundering where reporting is required by Proceeds of Crime Act 2002 (POCA2002),172 or terrorism financing where disclosure is required under Terrorism Act 2000.173 This omission continues in the fraud arena, that ‘not having a centralised body to co-ordinate fraud intelligence across the public and private sectors has made it easier for criminals to operate undetected and free to re-offend’.174 The National Fraud Intelligence Bureau seems to rely on ‘best endeavours’ and ‘encouragement’ to report175 although such crimes should be reported to the police.176 By contrast, the other significant actor in the UK, the FCA, which is responsible for regulating financial services, imposes obligations.177 Regulated firms have to tell the regulator promptly anything relating to the firm of which the FCA would reasonably expect prompt notice’.178 The consequence is that the SFO, which takes the lead in bribery matters,179 lacks statutory backing to compel reporting, whereas, the FCA

168 OECD, ‘Guidelines for Multinational Enterprises.’ http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html accessed 24 July 2010
175 National Fraud Authority, ‘National Fraud Intelligence Bureau’ (n 174).
177 Financial Services Authority, ‘What we do: who we regulate’ ‘We regulate most financial services markets, exchanges and firms. We set the standards that they must meet and can take action against firms if they fail to meet the required standards’. http://www.fsa.gov.uk/pages/About/What/Who/index.shtml accessed 27 September 2011. (Emphasis added).
in the sector it regulates does require bribery to be reported. The relationship between SFO and regulator lies at the heart of UK efforts to control economic crime and there is a need for this to be addressed so that one agency is responsible for dealing with cases of bribery, corruption and fraud, the reporting of which should be made a statutory obligation in all cases and remove the overlap and gaps between agencies which would enable economic crime to be confronted by one body. Such lack of a single decision maker was subject to parliamentary opprobrium in relation to LIBOR.

The SFO ‘Approach to Dealing with Overseas Corruption’ provides guidance and industry specific codes of practice which give, for example, advice that ‘a negotiated settlement rather than a criminal prosecution’ would give protection against mandatory European Union (EU) procurement disbarring. Corporate hospitality is also covered: the government having recognised that the provision of corporate hospitality is part of business life and it has not been prescriptive in establishing parameters, preferring that the issue is best left to prosecutorial discretion and common sense, an uncertain state until tested at trial though there is government comfort: ‘[r]est assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix,’ This guidance recognises that corporate hospitality and promotional expenditure is an everyday part of business life with general recognition by both giver and receiver that this is part of relationship building. Nevertheless, it is ‘clear that hospitality and promotional or similar business expenditure can be employed as bribes.’ This means that commercial organisations have to put in place clear procedures with the emphasis on expenditure being ‘reasonable and

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180 Financial Services Authority, ‘Principles for Business’ (n 179).
proportionate\textsuperscript{187} and give direction to their employees to ensure that, at best, their motives are not misinterpreted.\textsuperscript{188}

The risks managed by a commercial organisation are increased by the extra-territorial application of BA2010 because the UK has joined other countries in extending its jurisdiction over bribery beyond its borders in support of the global effort to reduce economic crime.\textsuperscript{189} The BA2010 creates an offence that is committed if 'any act or omission which forms part of the offence takes place (...) in the UK';\textsuperscript{190} or, if not in the UK, then it would be an offence if ‘done or made in the UK’\textsuperscript{191} and the person had a close connection with the UK. A person is a ‘British Citizen, British resident or body incorporated in the UK\textsuperscript{192} or is an ‘associated person’. An Associated person is ‘a person who performs services for and on behalf of a relevant commercial organisation’.\textsuperscript{193} The capacity in which those services are performed does not matter and, thus, the person can be an employee, agent or subsidiary.\textsuperscript{194} The reach of s.7 jurisdiction to prosecute is unclear since the MOJ guidance states that mere admission of a company’s securities to UK Listing Authority’s Official List and trading on London Stock Exchange does not necessarily qualify a company as carrying on a business in the UK which does appear perverse and has not yet been tested in court\textsuperscript{195} but the regulator,\textsuperscript{196} acting against market abuse has fined executives of a Turkish company (Genel Enerji) for insider dealing relating to the company’s UK Listing.\textsuperscript{197} Although the government’s ‘common sense’ approach was intended to assuage international business fears, the courts would have to rule on jurisdictional disputes which, if the regulator can and does take action would leave SFO in the position of it, too, having jurisdiction. Two civil cases demonstrate that a business

\textsuperscript{187} Ministry of Justice, ‘The Bribery Act: Guidance’ (n 185) 12.
\textsuperscript{188} As at September 2014, there had not been any prosecutions under Bribery Act 2010. For a discussion on hospitality see: Peter Aldridge, ‘The law relating to free lunches’ (2002) 23(9) Co L 264, 270.
\textsuperscript{189} All 40 signatories to the OECD Anti-bribery Convention have enacted anti-foreign bribery provisions. However, they desire ‘adoption of the Convention by other major exporters, in particular by the four remaining G20 states China, India, Indonesia and Saudi Arabia.’ OECD, ‘Making Sure That Bribes Don’t Pay’ http://www.oecd.org/daf/anti-bribery/makingsurethatbribesdontpay.htm accessed 8 November 2014.
\textsuperscript{190} Bribery Act 2010, s 12(1).
\textsuperscript{191} Bribery Act 2010, s 12(2).
\textsuperscript{192} Bribery Act 2010, s 12(4).
\textsuperscript{193} Bribery Act 2010, s 8(1).
\textsuperscript{194} Bribery Act 2011, s 8.
\textsuperscript{195} Ministry of Justice, ‘The Bribery Act: Guidance’ (n 185) 36.
\textsuperscript{196} Jennifer Craven, ‘Reading between the guidelines’ (2011) 161 NLJ 540.
presence of nine days\textsuperscript{198} or a mere office\textsuperscript{199} were sufficient to establish jurisdiction. The nature of association is more closely defined in FCPA1977.\textsuperscript{200}

There is no clear definition of ‘performing services’ but the presumption is that an employee is performing services whilst the act stipulates that the relationship ‘is to be determined by reference to all the relevant circumstances’.\textsuperscript{201} However, as a ‘strict liability’ offence, the commercial undertaking can still be liable even if the activity was unknown by anyone. This is a significant change from the previous position which stated that ‘senior’ management had to be involved.\textsuperscript{202}

The intention of this ‘broad reach’ is that multinational companies (and others) avoid responsibility for bribery and corruption by saying that it happened elsewhere and they knew nothing about it. However, the Act’s provisions go further than FCPA1977 and, thus, may ‘catch out’ US Corporations. An example might be of a US incorporated corporation, which does business in UK, employing a Korean agent which pays a bribe in China. If it fails to show that it had ‘adequate procedures’, it can be criminally liable.\textsuperscript{203}

5.2.5 Adequate Procedures Defence

The BA2010, having put in place a crime of ‘failure of commercial organisations to prevent bribery’ also provides a full defence to prosecution if a person associated with it bribes another person.\textsuperscript{204} This is welcome and recognises that, whatever procedures it puts in place, there is a risk of failure. However, the commercial organisation has to demonstrate that it had in place adequate procedures designed to prevent persons associated with the commercial organisation from bribing another person. This builds on the requirements of the Money Laundering Regulations 2007 (MLR2007)\textsuperscript{205} of customer due diligence, training and Suspicious Activity Reports (SAR).\textsuperscript{206} The expression ‘adequate procedures’ generated much debate. The MOJ published guidance to commercial

\textsuperscript{198} Dunlop Pneumatic Tyre Company Ltd v Actien-Gesellschaft fur Motor und Motorfahzeugbau Vorm. Cudell & Co [1902] 1 KB 342.
\textsuperscript{199} South India Shipping Corporation Ltd v Export-import Bank of Korea [1985] 2 All ER 219.
\textsuperscript{200} discussed in chapter seven.
\textsuperscript{201} Bribery Act 2010, s 8.
\textsuperscript{202} Tesco Supermarkets Ltd v Nattrass [1972] A.C.153 HL
\textsuperscript{204} Bribery Act 2010, s 7.
\textsuperscript{205} Money Laundering Regulations 2007, SI 2007/2157.
\textsuperscript{206} Money Laundering Regulations 2007, s 5, 21 Proceeds of Crime Act 2002, s 330.
organisations.\textsuperscript{207} The SFO underlines that this is not an offence of strict liability because of the availability of the defence of ‘adequate procedures’. Thus, ‘if there are adequate procedures, then no offence has been committed. This is a complete defence and not just mitigation.’\textsuperscript{208}

The MOJ guidance is formulated around six principles of general application which it regards as not being either prescriptive or ‘one size fits all’. There is a health warning that questions of adequacy of procedures would have to be determined by the courts but that departure from the procedures would not give rise to a presumption of inadequacy.\textsuperscript{209} Commercial organisations are invited to take a ‘risk based’ approach and it is accepted that ‘no bribery prevention regime will be capable of preventing bribery at all times,’ and, thus, invites self-reporting to SFO.\textsuperscript{210}

The first principle was that the procedures put in place should be proportionate to the risks faced by the organisation;\textsuperscript{211} secondly, is that in order to embed anti-bribery and corruption behaviours, top management (that is board of directors or owners) must be able to demonstrate commitment to preventing bribery;\textsuperscript{212} thirdly, is that a commercial organisation has to assess the risks of bribery for its business, which is familiar territory because it is standard practice for money laundering;\textsuperscript{213} fourthly, that the organisation will undertake due diligence\textsuperscript{214} on all

\textsuperscript{207} Bribery Act 2010, s 9.
\textsuperscript{209} Ministry of Justice, ‘The Bribery Act: Guidance’ (n 185) 6.
\textsuperscript{210} Discussed in chapter six.
\textsuperscript{211} ‘A commercial organisation is required to put in place procedures to prevent bribery by persons associated but such procedures should be proportionate to the bribery risks faced by the organisation. These procedures should be clear, practical, accessible, effectively implemented and enforced, with such matters as performance appraisals and auditing control being effective methods of bringing the seriousness of the issues home.’
\textsuperscript{212} ‘A key element in embedding anti-bribery and corruption behaviours is the involvement of top management (board of directors or owners) to demonstrate commitment to preventing bribery by persons associated with it. They should foster a culture of integrity in which bribery is never acceptable, which could include appointing a specific anti-bribery officer.’ Notwithstanding the specific appointment, as with a Money Laundering Reporting Officer, this role could be undertaken by an existing compliance officer.’
\textsuperscript{213} ‘The risk-based approach means a focus on outputs. Firms must have in place policies and procedures in relation to customer due diligence and monitoring, among others, but neither the law nor our rules prescribe in detail how firms have to do this. Firms’ practices will vary depending on the nature of the money-laundering risks they face and the type of products they sell. For example, a large retail bank with many customers will likely need to develop or purchase customer monitoring software whereas a smaller organisation can be able to monitor its customers using a low tech solution.’ Financial Conduct Authority, ‘The risk-based approach to anti-money laundering (AML)’ http://www.fca.org.uk/about/what/protecting/financial-crime/money-laundering/approach accessed 6 September 2014.
parties to its relationships; fifthly, for the organisation to communicate and embed its bribery prevention policies throughout the organisation, including training (similar to MLR2007); lastly, the sixth principle, is that procedures should be subject to monitoring and review which means that the policy has to be active rather than relying on, say, an external verification that standards are in place. Thus, merely obtaining a lawyers certificate of compliance is not a defence.

As part of a risk management strategy and ensuring adequate procedures is the need for a whistleblowing policy, as an important safeguard, where existing legislation is the Public Interest Disclosure Act 1998. This is outside the scope of this thesis but the regulators FCA/PRA announced in mid 2014 proposals to undertake ‘regulatory changes necessary to require

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'Commercial organisations have to assess a whole variety of risks to their business. However, this principle is designed to focus attention on its potential exposure to external and internal risks of bribery on its behalf. A risk based approach is a pragmatic assessment in light of the types of business undertaken by the organisation such as: country risk; business sector and transaction type; business opportunities and partnerships. Internal risks might include factors such as a bonus reward system which rewards excessive risk taking.'


5. “Customer due diligence measures” means—
(a) identifying the customer and verifying the customer’s identity on the basis of documents, data or information obtained from a reliable and independent source;
(b) identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and (c) obtaining information on the purpose and intended nature of the business relationship.’

Money Laundering Regulations 2007, s 5.

The commercial organisation, having taken a proportionate and risk based approach will have identified all parties to a business relationship, including the supply chain, agents and intermediaries. Due diligence is already an established element of good governance and the guidance envisages that this will encompass anti-bribery.

Ministry of Justice, ‘The Bribery Act: Guidance’ (n 185) 27.

The guidance objective is for the commercial organisation to ensure that its bribery prevention policies and procedures are embedded throughout the organisation. To ensure full understanding, the organisation is expected to plan an implementation strategy involving internal and external communication, training, monitoring (possibly externally) and a clear statement of the penalties for breach of the policy. This process is not prescriptive as organisations are envisaged to adopt strategies proportionate to the risks it faces, which may vary across different functions.


The guidance makes plain that a commercial organisation should monitor and evaluate the effectiveness of their procedures on a regular (unspecified) basis and make improvements where necessary. Such changes may be necessitated by changes to the organisation’s activities as well as in its markets, perhaps to governments overseas. Some organisations may be able to obtain external verification of their standards but the guidance points out that such certification ‘may not necessarily mean that a commercial organisation’s bribery prevention procedures are “adequate” for all purposes where an offence under section 7 of the Bribery Act could be charged.’


Public Interest Disclosure Act 1998
firms to have effective whistleblowing procedures, and to make senior management accountable for delivering these.'

This was in response to suggestions from Parliamentary Commission on Banking Standards and involved researching US practice but concluding that financial incentives to report would not be adopted. The US, as discussed in chapter seven does provide significant financial incentives.

Finally, the costs of implementing an anti-bribery regime for a commercial organisation are significant, notwithstanding government emphasis that its guidance was on implementation in a workable way and that ‘combating the risks of bribery is largely about common sense, not burdensome procedures.’ Not only do commercial organisations have costs but so does the SFO which forecast costs of enforcing estimated at £2m per annum, however, this cost will have to be met from the SFO’s existing and already shrinking budget. The clear inference is that the SFO will have insufficient resources to take active steps to enforce the Act.

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222 See chapter 7.3.1.

223 Financial Conduct Authority, ‘Financial Incentives for Whistleblowers’ (n 221).


225 Alexandra Wrage, ‘Anti-bribery compliance is getting expensive. Companies embroiled in enforcement actions routinely conclude that the fines are less expensive than the costs of the investigations and remediation. Companies not in the middle of ongoing investigations are urged to do more, hire more and pay more to keep it that way.’ Alexandra Wrage, TRACEInternational, ‘Westlaw International Commentary Series’ http://traceinternational.org/data/public/AW_Anti-BriberyResourcesThatCostWellNothingAtAll_Westlaw_ThomsonReuters_01.2011-64899-1.pdf accessed 29 September 2014.


227 Lord McNally, HL Deb 24 January 2011 Vol 724 WA90.


The SFO Budget showed actual reductions from £53.2m in 2009/9, £40m in 2009/10, £35.5m in 2010/11, and £31.6m in 2011/12. The projections showed similar reductions to £34.8m in 2012/13, £32.2m in 2013/14 and £30.8m in 2014/15. In the event, the outturn for 2012/13 was £38m and 2013/14 £51m, reflecting the availability of ‘blockbuster’ funding. The 2014 projections showed budget £37m in 2014/15 and £35.4m in 2015/16. The Serious Fraud Office investigates the most serious and complex cases of fraud, bribery and corruption as described above. The quantity of such work is unpredictable. The SFO has a core budget for this purpose but some exceptionally large cases may require additional resources. The Government has previously made clear that where the SFO needs additional resources, these will be provided. The current agreement with HM Treasury is that any exceptional case funding should be agreed as part of the Supplementary Estimates process.


5.3 Regulatory Bodies

This chapter has examined the landscape of bribery and corruption including UK legislation to criminalise such conduct together with risk management measures. The regulatory bodies are responsible for enforcement, headed by the SFO.

5.3.1 Serious Fraud Office

It is logical that the SFO be given the lead role in enforcing the BA2010 because it was already the lead agency for prosecution of corruption, both domestically and overseas. The SFO which was established in 1987, to counter fraud and has had a chequered life being dogged by controversy because of adverse publicity arising out of its prosecution, or not, of several high profile cases. This resulted in the Attorney General commissioned an external review by de Grazia.231

de Grazia described SFO as a ‘demoralised and underperforming agency’ with ‘inadequate management and leadership’, expending more resources whilst achieving far fewer convictions than US counterparts.232 She highlighted that the SFO had a conviction rate of 61% compared with Manhattan District Attorney’s Office (DANY) of 92% for comparable periods.233 de Grazia’s view was that there were no fundamental differences in role between the SFO and New York agencies but USA had two hundred years more experience.234 de Grazia evidences that in a five year period, SFO employed more lawyers (56), and spent over £4m on external counsel, than DANY which had 19 lawyers, and did not contract out to the external bar. de Grazia concluded that ‘a criminal justice system that produces this little cannot be said to be effective in deterring, detecting or punishing

229 Discussed in chapter 4.
233 The Sunday Times, 1 February 2009. ‘She came, she saw, she scythed through SFO.’
234 A comparison is made between SFO and CPS which has conviction rates approaching DANY. Jessica de Grazia (n 231).
criminals who commit serious crime.’ Essentially, the SFO was considered to be a costly and under-performing organisation.

Tellingly, de Grazia’s key recommendations were not new for they had remarkable similarities with Roskill, calling for: improvement in personnel and judges; use of police powers; team ownership of cases, from cradle to grave; and bringing advocacy ‘in house’. de Grazia’s new point was the use of ‘plea bargains’. In the US, because of the high probability of conviction on indictment, most cases are dealt with by the defendant ‘pleading guilty at an early stage of the process in exchange for a reduced sentence.’ This conserves resources for cases which merit a full trial. ‘Plea bargaining’ utilises a concept of ‘Deferred Prosecution Agreements’ (DPA), a technique to ensure future compliance and performance, discussed in chapter six.

Following the review, the SFO promoted a new model of compliance by corporate entities with the criminal law ‘based in no small part on the US model of plea bargaining.’ The SFO’s publication of *Approach of the Serious Fraud Office to Dealing with Overseas Corruption*, alongside the Attorney General’s Guidelines, made plain their willingness to negotiate on penalties to encourage self-reporting and co-operation with SFO investigators; the alternative being severe penalties. This guidance incentivised companies which self-reported their complicity in corruption, ‘with the emphasis being on the carrot and not the stick.’ The attraction for a commercial organisation in self-reporting bribery to SFO is the prospect of a civil rather than criminal penalty which, apart from providing the opportunity to manage publicity ensures that the provisions of EU Public Sector Procurement Directive 2004, which prescribes exclusion from participation do not apply thus allowing continued participation in publicly funded projects.

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236 de Grazia (n 231) 10.
238 de Grazia (n 231) 10.
239 Discussed in chapter 6.2.2.
241 SFO is the reporting point for overseas corruption. There are no other requirements to report fraud to SFO.
242 Attorney General’s Guidelines on Plea Discussions in cases of Serious or Complex Fraud.
243 O’Shea, McLeod and Beal (n 240) 759.
This policy 'made a number of big assumptions novel to UK prosecutors but common to (...) [DoJ] practice.' To encourage self-reporting, lenient penalties would amount to civil fines and where prosecution is necessary, then the SFO and defendant company would determine the overall sanction. In US, such agreements are widely used and 'a policy of judicial acquiescence or self-restraint prevails.'

The SFO is the lead agency for prosecution of cases of bribery and corruption where the BA2010 redefines the UK approach to bribery and corruption for which, historically, there have been few cases taken to trial. This continued to be the case after the de Grazia review. However, in anticipating the future course of enforcement of the BA2010, it is instructive to consider how the SFO performed in a number of higher profile cases where it was employing the existing legal remedies. In Mabey & Johnson, a plea bargain resulted in a fine of £6.6m for paying €1m bribes through middlemen, together with two executives receiving custodial sentences. This was the first conviction in UK of a company for overseeing corruption and for breaking Iraq sanctions. Balfour Beatty paid £2.25m the SFO the first Civil Recovery Order (CRO) relating to ‘payment irregularities’ on an Egyptian contract; and AMEC also agreed a £4.9m CRO
relating to a South Korean contract for a Companies Act failure to keep accounting records.\textsuperscript{255} These cases evidence a change in prosecution with a first prosecution for overseas corruption, first CRO and first conviction under Companies Act with CRO.

5.3.2 Other Regulatory Agencies

Although the SFO has the ‘lead agency’ role, other authorities are involved in policing the area which can give rise to issues of overlapping responsibilities, leading to confusion over reporting and liability to differing sanctions. Whereas the FSA had four equal objectives, one being ‘the reduction of financial crime’,\textsuperscript{256} the FCA has ‘a single overarching strategic objective to ensure that markets function well’, as discussed in chapter six.\textsuperscript{257} Financial crime includes fraud or dishonesty, which the FCA interpret to include bribery and corruption.\textsuperscript{258} The FCA has another objective, which is impacted by allegations of bribery and corruption, that of maintaining market integrity\textsuperscript{259} on the basis that ‘because bribery and corruption distort natural competition’ this could ‘affect the UK’s reputation, making it a less attractive place for firms to conduct insurance or other business.’\textsuperscript{260} The FCA is careful to clarify that it ‘does not enforce or give guidance on the BA2010’,\textsuperscript{261} nevertheless it does regulate bribery and corruption.\textsuperscript{262} The FCA confirms that

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\textsuperscript{255} Companies Act 1965, s 221.

\textsuperscript{256} Financial Services and Markets Act 2000, s 6.

\textsuperscript{257} Chapter 6.2.1.

\textsuperscript{258} Financial Conduct Authority, ‘Anti-Bribery and Corruption’ 33.

\textsuperscript{259} Financial Conduct Authority, ‘The FCA’s approach to advancing its objectives’ 25.

\textsuperscript{260} Financial Services Authority, ‘Anti-bribery and corruption in commercial insurance broking Reducing the risk of illicit payments or inducements to third parties.’ 6.

\textsuperscript{261} Financial Conduct Authority, ‘Anti-Bribery and Corruption’ (n 258).

\textsuperscript{262} ‘Corruption and bribery are criminal offences under current UK legislation and the Bribery Act 2010, which came into force on 1 July 2011. Authorised firms have additional, regulatory, obligations to put in place and maintain policies and processes to prevent corruption and bribery and to conduct their business with integrity. These are set out in SYSC 3.2.6R/SYSC 6.1.1R and Principle 1 of our Principles for Businesses (PRIN 2.1.1R).’ Financial Conduct Authority, ‘Anti-Bribery and Corruption’ http://www.fca.org.uk/firms-being-regulated/meeting-your-obligations/firm-guides/systems/anti-bribery accessed 7 April 2014.
enforcement action is in the realm of the SFO and guidance on the ‘adequate procedures’ defence to BA2010 s.7 offence of ‘failure to prevent bribery’ is within the MOJ’s purview.263

The regulator ventilated its concerns, about the propensity of insurance companies to make illicit payments or inducements in order to obtain or retain business.264 In two significant cases, the FSA fined major insurance companies for failings in their anti-bribery and corruption systems and controls. For example, in 2009, AON was fined £5.25m for failing to ‘properly assess the risks involved in its dealings with overseas firms and individuals (…) and failed to implement effective controls to mitigate those risks.’265 Furthermore, Willis, was fined £6.895m in 2011 for similar issues and failure to record ‘an adequate commercial rational’ for the payments to high risk jurisdictions such as Egypt and Russia.266 In both cases, as a result of both firms’ ‘weak control environment’, suspicious payments were made amounting to approximately US$7m and £27m respectively.267 It is clear from these cases that the regulator enjoys the flexibility of using discretion over sanctions, which is not the norm for the SFO. Moreover, the regulator’s credible deterrence strategy provides the opportunity to levy a fine in an ‘out of court’ process and gain publicity for its decisions,268 whereas the SFO has to prosecute with potential adverse publicity if unsuccessful.

Another agency is the City of London Police (COLP) ‘Overseas Anti-Corruption Unit’,269 whose role is to investigate foreign bribery by UK business and nationals.270 It operates jointly with SFO on some cases which demonstrates an

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267 Both firms co-operated with FSA and were each given a 30% discount to the fine ‘under the FSA’s settlement discount scheme.’ Financial Services Authority, ‘FSA fines Aon Limited’ (n 265). Financial Services Authority, ‘FSA fines Willis Limited’ (n 266).
270 ‘Since the creation of the unit in 2006 over 155 case of corruption or bribery have commenced with over 115 suspects under investigation, leading to the interview and arrest of 80 individuals, the charging of 28 suspects and 1 corporate entity.’
overlap with the SFO. COLP have charged a London solicitor and two Dutch businessmen with ‘conspiracy to corrupt, conspiring to money launder and fraudulent trading in relation to alleged contract manipulation in a UN project to supply HIV and malaria drugs to [The Congo] one of the world's poorest countries.’\(^{271}\) However worthy COLP endeavours, the presence of another agency represents further confusion for SFO.

5.3.3 Bribery and Corruption Enforcement

It is the SFO’s cases against BAE, Dougall and Innospec which have proved to be problematic. The most ‘high profile’ case was BAE, a defence equipment supplier to UK and US governments and, in this case, to Saudi Arabia, a key ally in the fight against international terrorism. BAE was accused of corruption in its dealing with Saudi Arabia and since BAE is a UK based company, the SFO investigated. In addition to the ‘high octane’ nature of the arms sales sector in general, the SFO’s reputation was severely dented by the forced abandonment of its investigations into BAE Systems plc’s sale of the Eurofighter jet aircraft to Saudi Arabia, the Al Yamamah contract. In the Al Yamamah case,\(^{272}\) the SFO considered that bribery may have been involved by BAE being awarded highly lucrative contracts and they commenced investigations. Saudi Arabia did not welcome this intervention and put pressure on the UK Government for the investigation to cease, citing damage to future commercial interests as well as a fracturing of their relationship to counter the ‘War on Terror.’ Ultimately, the SFO discontinued the investigation: an action which was then subject to judicial review and which the House of Lords concluded was within his discretion.\(^{273}\) The SFO’s decision ‘resulted in widespread anger and indignation throughout the global anti-corruption community.’\(^{274}\)

This case encapsulates the issues facing prosecutors; namely that commercial interests may ‘over-ride’ the strict rule of law. Although the Al Yamamah case predates the BA2010, it is unlikely to change the outcome because the SFO continues to have discretion to act. In this case, the SFO took a ‘balanced view’

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\(^{272}\) R (on the application of Corner House Research and another) v Director of the Serious Fraud Office (BAE Systems plc, interested party) [2008] All ER 927.

\(^{273}\) James Wilson, ‘The day we sold the Rule of Law’ (n 2).

\(^{274}\) Benstead (n 83) 1291.
which naturally offends purists, offering such epithets as ‘shameless capitulation of
the rule of law’, shameless ‘selling-out of principles’ and evidencing the ‘murky
nature’ of the arms business.\(^\text{275}\) Of course, this is an unusual case but it highlights
the ‘real’ issues faced in international commerce, when the SFO is superintended
by the Attorney General, a government minister, who has to embrace political
considerations.\(^\text{276}\)

Enforcement of the BA2010 is a key area and the paucity of prosecutions under
previous legislation has already been noted.\(^\text{277}\) The SFO has been criticised for its
handling of cases, with adverse comments on timeliness and cost-
effectiveness.\(^\text{278}\) As a response and in an endeavour to emulate the successful
outcomes achieved by US authorities, the SFO have sought to use other methods,
which obviate the need for trials, such as CROs.\(^\text{279}\) The SFO may say that it is
pure coincidence that since 2009, when de Grazia reported, it has changed its
approach to adopt different methods to achieve the aims of working on more
cases a year and delivering outcomes faster at a reduced cost.\(^\text{280}\) To do this, the
SFO has introduced two different approaches: self-referral and ‘plea bargaining’.

Historically, one third of SFO’s work related to overseas corruption,\(^\text{281}\) and to deal
with this, the SFO published its ‘Approach of the Serious Fraud Office to dealing
with overseas corruption’,\(^\text{282}\) which highlighted the benefits to be obtained from
self reporting. The attraction offered ‘to the corporate will be the prospect (in

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\(^\text{275}\) James Wilson, ‘The day we sold the Rule of Law’ (n 2).
\(^\text{276}\) John Cooper, ‘The day we sold the Rule of Law’ in Ian McDougall (Ed) Cases That Changed Our Lives (LexisNexis 2010).
\(^\text{279}\) ‘The Serious Fraud Office has today deployed for the first time new powers made available to it as from April 2008. These powers include civil recovery under the Proceeds of Crime Act 2002, under which the SFO can recover property obtained by unlawful conduct. These provisions do not require a specific offence to be established against any particular company or individual, merely that the property sought is the proceeds of unlawful conduct.’ Serious Fraud Office, ‘SFO obtains Civil Recovery Order against AMEC plc’ http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx accessed 31 August 2014.
\(^\text{281}\) Companies Act 1965, s 221.
\(^\text{282}\) ‘Legislative Comment: The United Kingdom Bribery Bill’ (2010) 26(2) Const L J 146-152.

appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively.283

In 2011, the SFO reported M W Kellogg Limited’s (MWKL) self referral because of corruption by its US parent’s joint venture company in Nigeria from which MWKL was due a dividend of £7m.284 The parent company had been investigated and settled with the DoJ/SEC in 2009.285 The SFO obtained a CRO for the dividend and costs under POCA2002, without a criminal prosecution.286 In a clear invitation to others, the SFO commented that they:

will continue to encourage companies to engage with us over issues of bribery and corruption in the expectation of being treated fairly. In cases such as this a prosecution is not appropriate. Our goal is to prevent bribery and corruption or remove any of the benefits generated by such activities. This case demonstrates the range of tools we are prepared to use.287

This philosophy is further demonstrated in relation to two publishers, MacMillan Publishers (MacMillan) and Oxford University Press (OUP). In MacMillan, an agent attempted to bribe officials in Sudan which MacMillan reported to SFO; OUP discovered tendering irregularities, investigated and self-reported. The similarities of the cases are that both involved supply of educational material to African countries, funded by the WB.288 The issue in MacMillan was:

The [educational] materials were supplied by publishers, often following the issuing of a public tender by the national government of a country [Rwanda, Uganda and Zambia] (…) which were susceptible to improper relationships being formed and corruption taking place. It was impossible to be sure that the awards of tenders to the Company in the three jurisdictions were not accompanied by a corrupt relationship.289

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283 Serious Fraud Office, ‘Approach of the SFO to dealing with Overseas Corruption’ (n 282) 1.
286 Serious Fraud Office, ‘M W Kellogg to pay £7m in SFO High Court action’ (n 284).
287 Serious Fraud Office, ‘M W Kellogg to pay £7m in SFO High Court action’ (n 284).
288 World Bank, ‘The International Bank for Reconstruction and Development (IBRD) aims to reduce poverty in middle-income and creditworthy poorer countries by promoting sustainable development through loans, guarantees, risk management products, and analytical and advisory services. Established in 1944 as the original institution of the World Bank Group, IBRD is structured like a cooperative that is owned and operated for the benefit of its 188 member countries.’ http://web.worldbank.org/VBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,menuPK:3046081~pagePK:64168427~piPK:64168435~theSitePK:3046012,00.html accessed 8 January 2013.
MacMillan agreed to pay £11.3m to SFO, representing the estimated earnings, which was taken under POCA2002, and barred from tendering for WB contracts for three years.

OUP reported concerns relating to its subsidiaries in Kenya and Tanzania. OUP reached agreement with SFO to disgorge its gross profits on the contracts of £1.9m as a civil recovery under POCA2002 and volunteered to ‘contribute £2m to not-for-profit organisations for teacher training and other educational purposes in sub-Saharan Africa.’ The SFO explained its reasoning for a CRO instead of prosecution as the difficulties a prosecution would face together with giving credit for the OUP self-referral. The SFO explained that it had ‘previously been subject to criticism in relation to the transparency of the processes and proceedings in civil recovery matters. As a result the Consent Order and Claim (…) have been made public.’ Furthermore, the SFO explained that it would itself benefit from the recovery: ‘[t]he funds will be utilised in accordance with the Asset Recovery Incentivisation Scheme which, for cases of civil recovery, result in the SFO receiving up to 50% of the value the monies remitted to the Home Office.’

With the same objective in mind of expeditiousness and cost-effectiveness, and in parallel with its policy to engage with corporate through self-referral, the SFO endeavoured to respond to exhortations to adopt a more modern, or transatlantic, approach. This entailed changing tack to negotiate outcomes with defendants in order to realise the advantages of cost savings and certainty, which has not been without difficulty. In two cases the SFO ‘plea with defendants caused tensions with the judiciary. Firstly, in Innospec, the Court of Appeal criticised SFO for ‘usurping’ the Judge’s authority by agreeing punishment. Secondly, in Dougall the Judge rejected SFO claims for leniency. Since these cases would appear to be part of a ‘programme (…) instituted to encourage whistleblowing by

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290 Proceeds of Crime Act 2000, s 276.
292 Serious Fraud Office, ‘Oxford Publishing Ltd to pay almost £1.9 million’ (n 290).
293 Serious Fraud Office, ‘Oxford Publishing Ltd to pay almost £1.9 million’ (n 290).
296 R v Dougall [2010 EWCA Crim 1048].
city insiders, lawyers and accountants and to expand the SFO’s role in public anti-fraud initiatives;\textsuperscript{298} judicial antipathy is of clear concern. DPAs are discussed in chapter six and offer the opportunity for a commercial organisation to accept a financial penalty and terms and then be free from prosecution.\textsuperscript{299}

\textit{Innospec} was charged by SFO with conspiracy to corrupt employees of an Indonesian state owned oil refinery.\textsuperscript{300} A global settlement, to include Iraqi Oil-for-Food sanctions breaking charges brought by the DoJ, was agreed with a combination of guilty pleas resulting in fines in US of $14.1m and the UK of $12.7m.\textsuperscript{301} Court approval was thought to be a formality.\textsuperscript{302} The Courts, however, took an early opportunity to establish their primacy by appointing a senior judge to hear the case,\textsuperscript{303} who said ‘the SFO cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged.’\textsuperscript{304} This affirmed the principle that sentencing is for the judiciary alone.\textsuperscript{305} However, the judge recognised the exceptional nature of the case and approved the agreement because ‘implicitly, that it would be too difficult to unpick the settlement.’\textsuperscript{306} Thomas LJ said he would have imposed a higher fine, further criticising SFO for using civil remedies in serious bribery or corruption cases where criminal sanctions were appropriate.\textsuperscript{307} Although this was before DPAs became available, in 2014, it does demonstrate the difficulties faced when endeavouring to

\begin{itemize}
\item \textsuperscript{298} Fraud Advisory Panel, ‘Roskill revisited: is there a case for a unified prosecution office?’ March 2010 23 https://www.fraudadvisorypanel.org/pdf_show_124.pdf accessed 29 August 2014.
\item ‘Convictions in 1994 in major cases as Wallace Smith, Roy Wharton (Castlegate) and four separate BCCI trials’
Jeffrey Bayes, ‘The case against the Serious Fraud Office’ (1994) 144 NLJ 1508.
\item Alec Samuels, ‘Deferred Prosecution Agreements’ (2012) 211 Co Law 2,3.
\item \textit{Innospec} (n 294).In 2014, 3 people received custodial sentences for ‘conspiracy to defraud’ The Judge (HHJ Goymer) commenting "Corruption in this company was endemic, institutionalised and ingrained... but despite being a separate legal entity it is not an automated machine; decisions are made by human minds. "None of these defendants would consider themselves in the same category as common criminals who commit crimes of dishonesty or violence..... but the real harm lies in the effect on public life, the effect on community and in particular with this corruption, its effect on the environment. If a company registered or based in the UK engages in bribery of foreign officials it tarnishes the reputation of this country in the international arena".
\item presumable on the lines of a consent (‘Tomlin’) Order. Dashwood v Dashwood [1927] WN 276
\item Thomas LJ, \textit{Innospec} (n 294).
\item \textit{Innospec} (n 294).
\item O’Shea, McLeod and Beal (n 240) 759.
\item O’Shea, McLeod and Beal (n 240) 759.
\item O’Shea, McLeod and Beal (n 240) 759.
\end{itemize}
translate procedures from other jurisdictions with different traditions and culture. Here, the judge said ‘[t]here can be no doubt that corruption of foreign government officials or foreign government ministers is at the top end of serious corporate offending both in terms of culpability and harm. It is deliberate and intentional wrongdoing.’

In *R v Dougall*, the SFO sought to agree a suspended 12 month prison sentence for Dougall for various reasons, including that he was ‘the “first co-operating defendant” in a major SFO corruption investigation.’ Although doing so, the Court of Appeal yet again made clear that the power and responsibility of sentencing lies with the court, and the court alone. This might create difficulties when the SFO wishes to conclude a DPA since ‘it should not seek to make recommendations on sentencing.’ Lord Judge CJ, used the opportunity to provide a reminder of the status of fraudsters, which are not some superior species of criminal:

> For all the respectable and reputable fronts that many fraudsters and corrupt businessmen may present, they are criminals. What is sometimes described as white collar crime or commercial crime taking the form of fraud and corruption in particular is crime. And it is not victimless: sometimes identified individuals are victims, and at others, unnamed, unknown individuals in the entire community are victims, and sometimes the community itself is the victim.

The Court of Appeal identified key features of fraud trials and difficulties posed which make a ‘deal’ with the criminal attractive and endeavoured to balance DPA discussions with objectivity. Thus, the Judge sympathised with the task:

> So often however the criminal activities are buried under mountains of paper and myriads of figures so that the process of investigation, and ultimately any trial, requires huge resources and painstaking and sometimes protracted study, examination and analysis. All that is immensely frustrating.

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308 *Innospec* (n 294) para 30.

309 O’Shea, McLeod and Beal (n 240) 759.


311 CMS Cameron McKenna, ‘Court of Appeal overturns prison sentence in corruption case.’ (n 310).

312 Lord Judge CJ, *R v Dougall* [2010] EWCA Crim 1048


314 Lord Judge (n 311).
Lord Judge warned that, in fraud and corruption cases, the SFO should not believe that these are ‘more respectable than other forms of crime,’ or that these criminals ‘should not be ordered to serve prison sentences because such sentences should be reserved for those they regard as common criminals.’

The Court’s stance leaves the SFO with a potential difficulty regarding BAE Systems. In 2010, SFO and DoJ agreed a ‘global’ settlement with BAE for £30m and $400m respectively. BAE agreed to plead guilty to various ‘relatively trivial’ accounting offences, and the SFO dropped considerably more serious bribery charges regarding BAE’s ‘dealings in a number of countries, as well as at least one individual’, and explained it was ‘very pleased with the global outcome achieved collaboratively with the DoJ. This is a first and it brings a pragmatic end to a long-running and wide-ranging investigation.’

Whilst undoubtedly pragmatic, bearing in mind multilateral investigations and prosecutors with their differing approaches, the Court’s surprise attack on SFO is, as O'Shea, McLeod and Beal noted, a ‘reminder that in criminal proceedings, the stick is mightier than the carrot and the court is the ultimate arbiter.’

### 5.4 Fraud

This chapter looks at the current fraud landscape in the UK where, despite new, simplified, legislation, fraud continues unabated. However, fraud is far from a new phenomenon and is estimated to cost UK £73bn a year. The NFA data brings into sharp focus the issue confronting UK fraud authorities, a mere eight years after enacting the FRA2006. Although accepting that hard facts are difficult to obtain, this estimate from NFA compares poorly with five years earlier from Association of Chief Police Officers (ACPO) of £13bn. In the last eighteen years, governments made significant structural changes to the regulation of

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315 Lord Judge (n 311).
316 Lord Judge (n 311).
317 The Times, ‘BAE must wait as judge puts £30m bribery plea deal at risk’ http://www.thetimes.co.uk/tto/business/industries/engineering/article2687733.ece accessed 9 November 2014.
318 O’Shea, McLeod and Beal (n 240) 759.
321 O’Shea, McLeod and Beal (n 240) 759.
323 O’Shea, McLeod and Beal (n 240) 759.
financial markets and firms with the advent of the FSA (now FCA). In terms of criminalisation, money laundering is a crime, as fraud continues to be under new definitions. In the 1980’s, concurrent with deregulation of financial services, which had the unfortunate side effect of greater opportunity for fraud, the newly created SFO found itself overlapping with the regulator, an organisation with greater resources, because its funding model did not rely upon the public purse.

5.4.1 UK Fraud Policy

The importance of tackling fraud is illustrated not just by the financial numbers involved but the significant instances of fraud which caused the collapse of multinational corporations in the UK, including for example BCCI and Barings and in the US Madoff and Stanford. The 2008 financial crisis has focused attention on the risks in ‘Casino’ banking, evidenced by Kerviel and Adoboli. However, large as these cases may be, the threat which has overshadowed the global financial markets is mortgage fraud estimated to cost UK £1bn pa and in US $10bn by 2011. US Government statistics show an increase in mortgage fraud reports from 6,900 in 2003 to 93,500 in 2011 and the development of fresh types

326 Financial Services and Markets Act 2000, s 1.
329 Fraud Act 2006.
331 Securities and Exchange Commission, ‘What is a Ponzi Scheme?’ A Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.’ http://www.sec.gov/answers/ponzi.htm accessed 11 October 2011.
332 Gilligan (n 24) 355-362.
334 National Fraud Authority, ‘Annual Fraud Indicator 2012’. (n 324) 37. ‘Mortgage fraud is a material misstatement, misrepresentation, or omission relied on by an underwriter or lender to fund, purchase, or insure a loan. This type of fraud is usually defined as loan origination fraud. Mortgage fraud also includes schemes targeting consumers, such as foreclosure rescue, short sale, and loan modification.’ Total losses 2008 – 2011 £10.556 bn.
of fraud. Whilst fraud at origination of a loan is the most common (62%), rescue refinancing amounts to 20%.

UK governments have commissioned various reports in the arena of fraud, the two most important being the Roskill Report and Fraud Review. The Fraud Review, was asked to ‘recommend ways of reducing fraud and the harm it does to society’, positions fraud as it ‘may be second only to class A drug trafficking as a source of harm from crime’. However, unlike drug crime, police forces are often reluctant to take reports of fraud and, even if they do, take little action as a result because fraud has not been seen as a national policing priority. This then set the first question to be considered: ‘what is the scale of the problem?’ The lack of ability to answer the question, because data was not available, led the report to conclude that a body should be created to devise a strategic response: the NFA. The review also recommended the creation of the National Fraud Reporting Centre (NFRC) to provide a central point for receipt of reports of fraud, together with the National Fraud Intelligence Bureau (NFIB) which would analyse and assess fraud. To complete the organisational changes, COLP would become the national lead force, acting as a centre of excellence for fraud investigations and undertaking the more complex investigations.

The second and third questions considered by the review were to determine the appropriate role of government in dealing with fraud and, how could resources be spent to maximise value for money across the system. The review noted the range of departments and agencies involved and the range of penalties and remedies they may deploy in the three areas of criminal, civil and regulatory. There were two specific recommendations: to increase the sentencing options available in the Crown Courts; and establishment of a specialised ‘financial court’. The increased sentencing powers included the ability to order compensation to all victims, not just those specified in a particular case and the ability to make specific orders relating to other advisors such as solicitors and accountants. The ‘financial court’ proposal recognised the difficulties of trying fraud cases and proposed

336 Roskill (n 237).
338 Attorney General’s Office, Fraud review (n 337) 4.
340 Attorney General’s Office, Fraud review (n 337) 4.
341 Originally ‘National Fraud Strategic Authority’.
342 Attorney General’s Office, Fraud review (n 337) 4.
deploying judges with experience of financial cases to longer, more complex, criminal trials: according to Coolican, ‘All matters could be resolved on the basis of a single unified set of evidence at one facts hearing with a variety of outcomes under criminal, civil and regulatory powers.’

The review considered sentencing and concluded that the maximum sentence for serious or repeated fraud should be increased from ten years to fourteen years, which would match money laundering penalties. However, the proposal which excited the most comment was ‘plea bargaining’. The review proposed a system for reduced sentences in return for a guilty plea and agreement to other sanctions. The rationale for this being the benefits to be gained by reducing the length of trials and shortening investigations:

Any solution should provide an opportunity for the prosecution and defence to enter into negotiations at an earlier stage than is currently possible, preferably pre-charge, at the point where the prosecuting authority is in a position to show the essential core of a case against an individual or individuals.

At that stage there was no formal system in the UK for ‘plea bargaining’. Although, clearly, discussions do take place between prosecution and defence legal teams, these provide no certainty unlike the US model. Hanley observes that ‘plea bargaining is as integral to the US legal system as fast-talking, sharp suited attorneys,’ and ‘if you look at fraud alone, you will see some form of plea bargaining in approximately two-thirds to three-quarters of cases.’ As was seen when considering Roskill, its predecessor by 20 years, implementation of the Fraud Review recommendations was slow with the NFA and COLP measures being the only concrete achievements.

Against this backdrop, it is clear that fraud is a significant and costly matter for government to tackle, as the NFA report:

The threats created by fraudsters are serious and real. Serious and organised crime groups are behind much fraudulent activity across the world.

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347 There are provisions in Serious Organised Crime and Police Act 2005 ss.71-75 for immunity from prosecution or reduced sentences for offenders assisting with investigations or prosecutions.
348 Hanley (n 346) 20.
349 Hanley (n 346) 20. Jeff Stone.
350 See chapter 4.
Funds generated by fraud are being used to support and expand other serious criminal activity such as people and drug trafficking. Fraud has also featured in terrorist cases both in the UK and abroad.351

It has been argued that the UK’s fraud policy can be divided into three distinct parts – criminalisation, financial/law enforcement agencies and the reporting of suspected instances of fraud.352 This neatly positions the importance of the issues which this thesis examines. The ‘three distinct parts’ to tackling fraud more than suggests that when policies are made they are not fully integrated with each other. As will be seen, it is disappointing to note that although a generation ago, problems were identified by Roskill and a way forward recommended, the fraud policy has evolved rather in a haphazard form rather than being mapped. This thesis will, firstly, consider the legal definition of ‘fraud’; secondly, review the legislation and consider whether they can be effective; thirdly, the myriad of enforcement agencies, which are ripe for rationalisation; and, finally, the limited way in which fraud is reported.

Fraud is difficult to define. Although the FRA2006 is relatively new, interestingly, it does not define ‘fraud’, merely stating that ‘[a] person is guilty of fraud if he is in breach of any of the sections listed’.353 Furthermore, there is no universal definition at common law.354 The COLP defines fraud as ‘a criminal deception committed by a person who acts in a false and deceitful way.’355 However, the SFO defines as ‘abuse of position, or false representation, or prejudicing someone's rights for personal gain’.356 As will be seen, the FRA2006 is closer to the SFO definition and provides a clear criminal offence.

In the financial crime arena, fraud was neglected until the establishment of the SFO357 and then, following a significant gestation period, the FRA2006. The FSA/FCA was in a different category because it is a regulator of the financial markets, rather than primarily a prosecutor.358 However, it has raised its profile

353 Fraud Act 2006, s 1
357 Criminal Justice Act 1987, s 1.
‘bringing criminal proceedings for conspiracy’, thus developing its role ‘as a specialist criminal prosecutor’.\(^359\) Criminalisation of fraud has evolved over time with the various Theft Acts which eventually became seen as being inadequate to deal with complex fraud cases. Indeed, the ‘troublesome technicalities’\(^360\) of the Theft Acts left prosecutors falling back on the common law charge of ‘conspiracy to defraud’.\(^361\) The FRA2006 has simplified the law by providing a new offence of ‘fraud’ instead of a variety of the ineffective deception offences under the Theft Acts (1968-1996).\(^362\) The FRA2006 removed such crimes as ‘obtaining a pecuniary advantage’ and ‘procuring execution of a valuable security’ from the statute book. In practice, the range of deception offences created ‘a hazardous terrain for prosecutors’ which, consequently, encouraged reliance on ‘conspiracy to defraud’,\(^363\) a common law offence which:

has been described in Parliament as ‘repellent’; and the Law Commission has proffered the opinion that it is ‘indefensible’ and ‘so wide that it offers little guidance on the difference between fraudulent and lawful conduct’ and has recommended its abolition.\(^364\)

In \(R v Eric Evans\) the court accepted a further observation from the Law Commission that ‘[i]n effect, conspiracy to defraud is a “general dishonesty offence”, subject to the irrational requirement of conspiracy.’\(^365\) That case, which was pursued by the SFO, concluded, interestingly, ‘that a conspiracy to defraud in which both the object and the means are lawful is unknown to the common law.’\(^366\) This case endeavoured to use the charge of conspiracy to defraud, notwithstanding the availability of the FRA2006.

\(^360\) Pickworth (n 37) 1-4.
\(^361\) Common Law (preserved by section 5(2) of the Criminal Law Act 1977).
\(^362\) Ormerod (n 34) 193-219. Theft Act 1968: s 15, Obtaining property; s15A, Obtaining a money transfer; s 16, Obtaining a pecuniary advantage s 20(2), Procuring the execution of a valuable security. Theft Act 1978: s 1, Obtaining services s 2(1)(a), securing the remission of a liability; s 2(1)(b), Inducing a creditor to wait or forego payment; s 2(1)(c), Obtaining an exemption from or abatement of liability.
\(^363\) Ormerod (n 34) 193-219.
\(^365\) \(R v Eric Evans & others T20137190 [149]\) (n 365).
\(^366\) \(R v Eric Evans & others T20137190 [149]\) (n 365).
5.4.2 Criminalisation

In the FRA2006, a person is guilty of fraud by: false representation (s.2); failing to disclose information (s.3); and abuse of position (s.4).\textsuperscript{367} Conviction on indictment carries a maximum sentence of ten years imprisonment or an unlimited fine or both.\textsuperscript{368} Fraud by false representation\textsuperscript{369} occurs when ‘(a) it is untrue or misleading, and (b) the person making it knows that it is, or might be, untrue or misleading.’\textsuperscript{370} Thus fraud requires dishonesty, and the intention ‘to make a gain for himself or another, or to cause loss to another or expose another to a risk of loss.’\textsuperscript{371} It is intention that is key: an actual gain or loss does not have to take place. Dishonesty is, again, not defined in the act but is defined in \textit{R v Ghosh}\textsuperscript{372} which sets a two-stage test:

The first question is whether a defendant’s behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people. If answered positively, the second question is whether the defendant was aware that his conduct was dishonest and would be regarded as dishonest by reasonable and honest people.\textsuperscript{373}

By representation, the Act ‘means any representation of fact or law including a representation of [any person’s] state of mind.’\textsuperscript{374} It can be express or implied and could be written, spoken or posted on a website. For example, ‘dishonestly using a credit card, phishing on the internet or selling fake designer goods’.\textsuperscript{375} To cover ‘chip and pin’ and similar transactions (and, perhaps, ‘future proof’ legislation against technological developments), there is a provision to ‘ensure that a fraud can be committed where a person makes a representation to a machine and a response can be produced without any need for human involvement.’\textsuperscript{376}

\textsuperscript{367} Fraud Act 2006, s 1(2).
\textsuperscript{368} Fraud Act 2006, s 1(3)(b).
\textsuperscript{369} Fraud Act 2006, s 2.
\textsuperscript{370} Fraud Act 2006, s 2(2).
\textsuperscript{371} Fraud Act 2006, s 2(1)(b)(i) & (ii).
\textsuperscript{372} \textit{R v Ghosh} [1982] QB 1053.
\textsuperscript{374} Fraud Act 2006 s.2(3).
\textsuperscript{376} Fraud Act 2006, s 2(5).
Secondly, ‘fraud by failing to disclose information’,\textsuperscript{377} is where a person ‘dishonestly fails to disclose to another person information which he is under a legal duty to disclose.’\textsuperscript{378} Again, there has to be an intention to cause gain or loss:

Such a duty may derive from statute (such as provisions governing company prospectuses), from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the customer of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal).\textsuperscript{379}

Examples might be the failure of a solicitor to share vital information with a client or non-disclosure of a medical condition when entering into a life insurance contract.\textsuperscript{380}

Thirdly, ‘fraud by abuse of position’,\textsuperscript{381} again dishonestly and with intent. This recognises situations where a person ‘occupies a position where he is expected to safeguard, or not act against, the financial interests of another person’\textsuperscript{382} and covers situations where his ‘conduct consisted of an omission rather than an act.’\textsuperscript{383} This would apply in circumstances of: employee and employer; director and company; professional and client; agent and principal; business partners; within a family; or in the context of voluntary work.\textsuperscript{384} Some examples would include: where someone acts for personal gain against the client’s interests; an employee of a software company who clones the company’s products; someone employed to care for an elderly person having access to bank accounts and taking funds for own use; and includes omissions such as not taking up a favourable contract to allow a rival company to do so.\textsuperscript{385}

The FRA2006 has other provisions (s.6 – s.8) which replace the quaint sounding crimes of ‘going equipped for stealing’ and ‘when not at his abode’\textsuperscript{386} with ‘possession etc. of articles for use in frauds’\textsuperscript{387} which is a very far reaching provision. ‘A person is guilty of an offence if he has in his possession or under his

\begin{itemize}
\item \textsuperscript{377} Fraud Act 2006, s 3.
\item \textsuperscript{378} Fraud Act 2006, s 3(a).
\item \textsuperscript{379} Law Commission, ‘Report: Fraud 2002’ para 7.29.
\item \textsuperscript{380} Ministry of Justice, ‘Explanatory notes to the Fraud Act 2006’ (n 374).
\item \textsuperscript{381} Fraud Act 2006, s 4.
\item \textsuperscript{382} Fraud Act 2006, s 4 (1)(a).
\item \textsuperscript{383} Fraud Act 2006, s 4 (2).
\item \textsuperscript{384} City of London Police, ‘Fraud Act 2006’ (n 376).
\item \textsuperscript{385} Theft Act 1968, s 25.
\item \textsuperscript{386} Fraud Act 2006, s 6.
\end{itemize}
control any article for use in the course of or in connection with any fraud. As the COLP describes, ‘any article means anything anywhere’, and ‘includes any program or data held in electronic form’. The provision is constructed to bring across existing case law from the Theft Act 1968 where ‘it is enough to prove a general intention to use’. This provision brings computers and software programs into scope.

The next offence is ‘making or supplying articles for use in frauds, knowing that it is designed or adapted for use in a fraud’. This might, for example, include a device to cause an electricity meter to malfunction or a device to obtain satellite TV signal without payment. The first significant case, R v James McCormick, was far removed from those prosaic examples. McCormack was convicted and sentenced to ten years imprisonment for selling fake explosives detectors to Iraq.

One provision retained is ‘conspiracy to defraud’ which the Law Commission wanted to abolish. It is retained because of serious practical concerns about the ability to prosecute multiple offences in the largest and most serious cases of fraud and acts as a failsafe to see how the new statutory offences worked in practice.

The new criminal offences are seen as being wide enough to meet current and future challenges, by being designed as ‘modern and flexible statutory offences of fraud’. However, the effectiveness of legislation is in the hands of prosecution

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388 Fraud Act 2006, s 6 (1).
389 City of London Police, ‘Fraud Act 2006’ (n 376).
390 Fraud Act 2006, s 8.
391 Ministry of Justice, ‘Explanatory notes to the Fraud Act 2006’ (n 374) 25.
R v Ellames 60 Cr. App. R.7 (CA).
392 whether at a home address or public, and examples of use are: a computer program can generate credit card numbers; computer templates can be used for producing blank utility bills; computer files can contain lists of other peoples’ credit card details or draft letters in connection with ‘advance fee’ frauds
393 Fraud Act 2006, s 7.
394 City of London Police, ‘Fraud Act 2006’ (n 376).
395 T20120228
396 ‘The jury found that you knew the devices did not work, yet the soldiers in Iraq and elsewhere believed in them, in part due to your powers of salesmanship and in part the extravagant and fraudulent claims made in your promotional material. After a six week trial, I am wholly satisfied that your fraudulent conduct in selling so many useless devices for simply enormous profit promoted a false sense of security and in all probability materially contributed to causing death and injury to innocent individuals. It is this exceptional feature which distinguishes your case from the usual case of fraud.’ T20120228
Judiciary of England and Wales (n 396).
398 Pickworth (n 37) 1-4.
agencies which deploy them, principally the SFO and the FCA, which themselves are in the process of changing.399

5.4.3 Reporting Fraud

The UK does not have a legal requirement to report fraud per se. The NFA (now NCA) admitted that 'not having a centralised body to co-ordinate fraud intelligence across the public and private sectors has made it easier for criminals to operate undetected and free to re-offend.'400 The minimal reporting regime and the lack of scope and consistency leave significant gaps in effectiveness. Notwithstanding the FRA2006 which repositioned the crime of fraud, there is no statutory obligation to report fraud as such, unlike money laundering and terrorist financing. Thus it can be seen that fraud is only required to be reported if it is part of suspected money laundering or terrorist financing. The NCA and its offspring the National Fraud Intelligence Bureau, seem to rely on 'best endeavours' and 'encouragement' to report.401 The key statutory requirement to report fraud is POCA2002 (and Terrorism Act 2000):402

Persons in the regulated sector are required to make a report in respect of information that comes to them (...) where they know or; where they suspect or; where they have reasonable grounds for knowing or suspecting that a person is engaged in, or attempting, money laundering or terrorist financing.403

Consequently, it is quite plain that 'if you have knowledge or suspicion that a money laundering offence is taking place then you must submit a SAR to SOCA' (now NCA).404 The submission of the SAR should be done in a timely manner, to allow NCA time to react. The form should include ‘Know Your Customer’ (KYC), now also referred to as Customer Due Diligence (CDD),405 in addition to the grounds for suspicion and any known links to criminality. If a SAR is made before

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399 Nicholas Ryder, (n 345) 128.
400 National Fraud Authority, ‘National Fraud Intelligence Bureau’ (n 174).
401 National Fraud Authority, ‘National Fraud Intelligence Bureau’ (n 174).
a suspicious transaction is completed, NCA then have seven days to determine whether to give consent or whether to impose a 31 day moratorium to facilitate further enquiries. Penalties of completing a transaction or ‘tipping off’ are up to five years imprisonment and or a fine.\textsuperscript{406} This creates practical difficulties where, for example, a bank is required to process a transaction which being subject to a SAR, the bank is able neither to process the transaction nor explain why, because according to:

POCA and the Terrorism Act each contains two separate offences of tipping off and prejudicing an investigation. The first offence relates to disclosing that an internal or external report has been made; the second relates to disclosing that an investigation is being contemplated or is being carried out.\textsuperscript{407}

\textit{K Limited v Nat West} demonstrates the issues a bank faces. In this case, Natwest were suspicious of a receipt by K of monies from the Netherland Antilles and an instruction to transfer the monies the same day to a Swiss Bank. Because of their suspicions, Natwest reported to SOCA and refused to honour K’s instructions. K applied for an injunction requiring Natwest to explain its reasons. The CA stated that since it is unlawful under POCA2002 to honour the mandate, Natwest was not in breach of its contract with K. If the bank has suspicions (not defined) then the customer has no redress during the 31 day moratorium.\textsuperscript{408} This does, however, illustrate a practical problem for bankers: what can they say to their customer when they do not comply with their customers’ mandate? To make the payment when suspicions have been raised is to facilitate money laundering; to explain the reasons for non-payment to the customer is ‘tipping off’, with penalties of up to fourteen years imprisonment for the former and five years for the latter and / or a fine;\textsuperscript{409} or, being in the uncomfortable position of ‘stone-walling’ the customer by saying it is not in a position to make the payment and leaving the customer to reach his own conclusion as to the underlying reasons.

There is also a duty to report ‘acquisitive’ crime (where items are stolen or acquired fraudulently (ie theft, burglary, vehicle crime and fraud.).\textsuperscript{410} The Police have a duty to record the crime under ‘Home Office Counting Rules For Recorded

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\textsuperscript{406} Proceeds of Crime Act 2002, s 329. \\
\textsuperscript{407} Butterworths Banking Law Handbook (n 404). \\
\textsuperscript{408} \textit{K Limited v Nat West} [2007] 1 WLR 311. \\
\textsuperscript{409} Proceeds of Crime Act 2002, Part 7. Money Laundering Offences s 328 & s 333. \\
\end{flushright}
The FCA imposes obligations on Regulated firms: Principle 11 - ‘A firm must deal with its regulators in an open and co-operative way, and must tell the FCA promptly anything relating to the firm of which the FCA would reasonably expect prompt notice.’ This requires the firm, taking a ‘risk-based approach’ to establish Systems and Controls, policies and procedures ‘that enable it to identify, assess, monitor and manage money laundering risk.’ Interestingly, ‘Financial Crime’ is only mentioned in the heading, since money laundering is the focus.

A further area of reporting relates to higher risk situations which includes any high risk customers, which encompasses ‘Politically Exposed Persons’ (PEPs). PEPs ‘are individuals whose prominent position in public life may make them vulnerable to corruption’; for example, individuals entrusted with prominent public functions, such as Heads of State or Government with the definition extending to immediate family members and close associates. The clear danger is that these persons might be corrupt and involved in money laundering through the UK banking system. A significant case was that of General Sani Abacha, the former President of Nigeria, where, the regulator identified 42 personal and corporate account relationships linked to Abacha family members and close associates in the UK. These accounts were held at 23 banks which included UK banks and branches of banks from both inside and outside the European Union and had a turnover amounting to US$1.3 billion for the four years to 2000. For PEPs, MLR2007 require ‘Enhanced Customer Due Diligence and Monitoring,’ for which there are reporting obligations to FCA (but the onus is on the firm to report in line...
with its ‘risk based approach’). In 2011, the regulator issued a reminder to regulated firms of ‘continuing need for vigilance and robust systems and controls’ because of political developments in the Middle East.

This analysis shows that fraud reporting in the UK is limited to areas where there is a connection to money laundering or terrorism financing and / or where a party involved is regulated by the FCA. Thus, there can be overlap between reporting to NCA and the FCA. Outside those reporting structures, there is no general reporting requirement which has the effect that other fraud information is not captured. As a result, anti-fraud agencies and government work in the dark on the basis of incomplete information. By contrast, in the US, FinCEN requires full reporting. It is a single reporting centre and, significantly, part of US Department of the Treasury. In sum, the lack of a statutory co-ordinated reporting regime in the UK has the twin effect of causing a significant administrative burden, yet, allowing much fraud activity to go unreported and consequently not pursued.

5.5 Conclusion

The UK economic crime regime depends upon national culture (sometimes with international exhortation) what are, and what are not, acceptable practices and then putting in place legislation to criminalise unacceptable conduct together with enforcement agencies. The previous chapter considered the historic landscape to UK economic crime and chapter six will consider critique the current institutions which apply the criminal legislation.

This chapter has considered the relatively new bribery legislation which has yet to see a significant case come to trial and where the judicial process would create precedent and set a benchmark. Although the SFO has cases in train, it is still relying upon previous, century old, legislation and conspiracy to corrupt. The BA2010 includes a corporate offence and a mechanism providing a complete defence, for which testing at trial would provide confirmation of their effectiveness: at present how a court would react is pure conjecture.

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In the fraud arena, where the annual UK fraud loss is estimated at £73bn, legislation is slightly more mature and has been well deployed. This has enabled FRA2006 to be tested in court as in *R v Meeson* where the challenge was not about the law itself but sentencing where the provisions of FRA2006 are seen in light of Sentencing Council Guidelines. However, with general public perception that fraud is a ‘victimless crime’, the Sentencing Council issued new sentencing guidelines which:

places victim impact at the centre of considerations of what sentence the offender should get. This may mean higher sentences for some offenders compared to the current guideline, particularly where the financial loss is relatively small but the impact on the victim is high.

This suggests that FRA2006 is working well and based on experience and a move to be victim centred and where gaps in legislation have not been identified upon appeal.

There are two further aspects: reporting fraud; and a corporate offence. The quantum of fraud is unknown with any degree of accuracy because there is no legal requirement to report fraud, unless it is money laundering or terrorism related. The Government should act to make reporting of fraud mandatory and the agency to whom reports should be made would logically be NCA, because it already is the reporting centre for SARs and encompassing Action Fraud (recently realigned to COLP). There is already a template for this manner of reporting because it is employed in the US by FinCEN. The adoption of stringent reporting with ‘teeth’ for non-compliance would enable better direction of scarce resources.

The final element, which is discussed in chapters six and nine is an amendment to the BA2010 in which the corporate offence of failure to prevent bribery is augmented by a new offence of failure to prevent all acts of financial crime. The

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422 National Fraud Authority, ‘Annual Fraud Indicator 2012’. (n 324).
423 *R. v Meeson [2013] EWCA Crim 1976*
426 Sentencing Council (n 425).
428 See chapter 6.4 and 9.4.1.
429 the SFO propose an offence of ‘failing to prevent all acts of financial crime’. 429
next chapter considers how the UK’s current economic crime institutions meet their objectives.
The previous chapters have explored the historical background to the creation of the current institutions charged with managing the United Kingdom’s (UK) response to economic crime. Chapter four concluded that governments of differing political hues had struggled to put in place an effective regime to meet those objectives. Chapter five showed that the UK had put in place new legislation to criminalise fraud and bribery. In chronological terms, both these chapters dealt with events prior to the change of UK government in 2010. The shape of the current UK anti-economic crime landscape is determined by the Coalition government and informed by the most recent financial crisis, and “has exposed the weaknesses of “light touch regulation” and “principles-based” regulation, which characterised the UK financial system in the pre-crisis era, under the previous Labour government. The Coalition government believed that the tripartite regulatory system had failed, and should be reformed because “[p]erhaps the most obvious failing of the UK system is the fact that no single institution has the responsibility, authority or powers to monitor the system as a whole, identify potentially destabilising trends, and respond to them with concerted action.” This conclusion led the Coalition government to propose reforms, as HM Treasury (HMT) stated “[t]his is a problem (...) referred to as “underlap”: a phenomenon whereby macro-prudential risk analysis and mitigation fell between the gaps in the UK regulatory system.” An early example of this is the criticism of the Financial Services Authority (FSA) and Bank of England (BoE) in relation to the Northern Rock collapse and its nationalisation. Campbell stated “[i]t appears that there was a lack of co-ordination and information sharing between these two bodies and this indicates a weakness in the tripartite system”. The Coalition government adopted

2 Nicholas Ryder, The Financial Crisis and White Collar Crime – the Perfect Storm (Edward Elgar 2014) 179.
5 H M Treasury, ‘A new approach to financial regulation: judgment, focus and stability’ Cm 7874 July 2010 3.
6 H M Treasury, ‘A new approach to financial regulation’ (n 5) 3.
a new regulatory structure, the twin peaks model which, in relation to economic crime, saw the ‘single monolithic financial regulator’, the FSA, replaced by the Financial Conduct Authority (FCA). The apprehension over the financial crisis was exacerbated by what the government characterised as ‘the most high profile current issue in the United Kingdom,’ namely the alleged manipulation of the London Inter-Bank Offered Rate (LIBOR).

The importance of the financial services sector in the UK cannot be understated. MacNeil observes that:

Another consideration is the disproportionately large scale of the financial sector (…) in the UK by comparison with many other countries. The reliance on financial services inevitably imposes political constraints on the extent to which tighter regulation leading to contraction and job losses can be countenanced.

This is reflected in political attitudes as demonstrated during the financial crisis, David Cameron, then leader of the opposition, called for a day of reckoning for ‘those suspected of financial wrongdoing’ to be held to account. The context was related to the financial services sector and it is instructive for the analysis of what followed when he stated:

In the good times, some people working in the financial services industry paid themselves vast financial rewards - salaries and bonuses beyond the comprehension of most of us. Now when it’s all gone wrong, they have been bailed out by the taxpayer. (…) I say it is fair and reasonable that those responsible are held to account for their behaviour and (…) there is not one rule for the rich and a different rule for everybody else. (…) The [Regulator] and the SFO should be following up every lead, investigating every suspect transaction. And the government should be urging them on, because we

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8 H M Treasury, ‘A new approach to financial regulation’ (n 5) 3.
9 The other ‘twin peak’ is the Prudential Regulation Authority.
11 Attorney General’s Office, ‘Fighting economic crime in the modern world’ (n 10).
13 Iain MacNeil (n 3) 483, 484.
need to make it one hundred per cent clear: those who break the law should face prosecution.\(^{15}\)

This is an important statement of intent, because when David Cameron became Prime Minister, ‘the day of reckoning’ speech was translated into the Chancellor of the Exchequer’s ‘serious about white collar crime.’\(^{16}\) In his first Mansion House speech George Osborne said:

We take white collar crime as seriously as other crime and we are determined to simplify the confusing and overlapping responsibilities in this area in order to improve detection and enforcement.\(^{17}\)

In addition to announcing the abolition of the ‘tripartite’ regulatory regime and the FSA, in the field of economic crime he said:

I can also confirm that we will fulfil the commitment in the coalition agreement to create a single agency to take on the work of tackling serious economic crime that is currently dispersed across a number of Government departments and agencies.\(^{18}\)

Thus, the high level commitment to reform was a positive step and the Coalition government was correct in proposing such reforms.

This chapter critically examines the performance of the economic crime institutions since May 2010 and considers whether the institutions have met their set objectives.\(^{19}\) The Coalition government announced it would ‘create a single agency to take on the work of tackling serious economic crime.’\(^{20}\) Clearly, there was political momentum, with the Chancellor responding to the economic environment with statements such as ‘many of those who helped trigger the financial crisis, who should have been prosecuted, have escaped justice’.\(^{21}\) The


\(^{17}\) HM Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 16).

\(^{18}\) HM Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 16).

\(^{19}\) Including: FSA, SFO, OFT


\(^{21}\) Mr Osborne had in his sights fraud, bribery, miss-selling of mortgages and pensions and pyramid schemes, such as Madoff. Currently, economic crime is policed and prosecuted by a bewildering number of agencies and government departments – including the Serious Fraud Office, Financial Services Authority, Fraud Prosecution Service, Revenue & Customs, Office of Fair Trading, Trading Standards Department, Serious Organised Crime Agency, Home Office, Ministry of Justice, Treasury and Business Department. A single
government’s ambition was to target economic crime,\textsuperscript{22} recognising that the existing multiplicity of disparate agencies led to conflicting priorities and ineffective outcomes.\textsuperscript{23} Thus, the creation of an ECA should have been welcomed. The \textit{Policy Exchange}\textsuperscript{24} argued that fraud detection, investigation and prosecution would be better served by a unified approach mandated to tackle economic crime.\textsuperscript{25} The principal agencies highlighted being: FCA and SFO. This chapter will discuss how the objectives set out in the coalition agreement have been met, by examining the variety of institutions which have a role to play in management of economic crime, grouped into: primary regulators, secondary regulators and law enforcement agencies, and trade associations.

### 6.1 Primary Regulators

The primary regulators in the UK are the government departments supported by ‘single entities to tackle specific types of financial crime.’\textsuperscript{26} The relevant departments are: HMT, Home Office, and the BoE.

#### 6.1.1 H M Treasury

HMT ‘is the government’s economic and finance ministry, maintaining control over public spending, setting the direction of the UK’s economic policy and working to achieve strong and sustainable economic growth.’\textsuperscript{27} In relation to economic crime, it is responsible for anti-money laundering,\textsuperscript{28} anti-terrorism and financial sanctions,\textsuperscript{29} ‘financial services policy: including (…) financial services regulation,

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\textsuperscript{22} including fraud, insider dealing, bribery, corruption and money laundering.

\textsuperscript{23} See Chapter 6.2.2. As an example, the LIBOR scandal, which in late 2014 has still to come to trial, has shown 13 individuals charged with ‘conspiracy to defraud’ rather than criminalized by existing statutes.


\textsuperscript{26} Nicholas Ryder, ‘Money Laundering – an endless cycle’ (Routledge 2012) 79.


\textsuperscript{28} Fisher and Sumpster (n 24) 12.

financial stability, and ensuring competitiveness in the City' of London (City).³⁰ HMT is the key driver of financial regulation, explaining its mission as: ‘the Government is committed to introducing a new approach to financial regulation – one which is based on clarity of focus and responsibility, and which places the judgement of expert supervisors at the heart of regulation.’³¹ HMT asserts that ‘responsibility for the overall regulatory framework, and the protection of the public finances remains with HMT and the Chancellor of the Exchequer.’³²

The first step taken by the government was to make the role of the BoE pivotal by forming 'a new macro-prudential body, the Financial Policy Committee, and a new micro-prudential supervisor, the Prudential Regulation Authority (PRA).’³³ Secondly, ‘[r]esponsibility for conduct of business will sit with the new FCA, with the mandate and tools to be a proactive force for enabling the right outcomes for consumers and market participants, including through the promotion of competition.’³⁴ These new bodies were described as ‘regulatory centres of excellence’, but there is clear overlap.³⁵ The PRA and FCA are discussed below.

6.1.2 Home Office

The Home Office leads the government response to ‘immigration and passports, drugs policy, crime policy and counter-terrorism and works to ensure visible, responsive and accountable policing in the UK.’³⁶ Of particular relevance to economic crime, the Home Office is responsible for the National Crime Agency (NCA), which gives this organisation a greater political dimension because the Home Secretary is accountable to Parliament for a department with a broad spectrum of responsibilities.³⁷ The NCA includes an Economic Crime Command

³⁰ H M Treasury, ‘What we do’ (n 30).
³¹ H M Treasury, ‘A new approach to financial regulation’ (n 5) 3.
³² H M Treasury, ‘A new approach to financial regulation’ (n 5) 3.
³³ H M Treasury, ‘A new approach to financial regulation’ (n 5) 3.
³⁴ H M Treasury, ‘A new approach to financial regulation’ (n 5) 3.
³⁵ H M Treasury, ‘A new approach to financial regulation’ (n 5) 3.
³⁷ working on the problems caused by illegal drug use; shaping the alcohol strategy, policy and licensing conditions; keeping the United Kingdom safe from the threat of terrorism; reducing and preventing crime, and ensuring people feel safe in their homes and communities; securing the UK border and controlling immigration; considering applications to enter and stay in the UK; issuing passports and visas; supporting visible, responsible and accountable policing by empowering the public and freeing up the police to fight crime.’ Home Office, ‘What we do’ (n 36).
(ECC) which straddles fraud bribery and corruption (the subject of this thesis) and organised crime.\textsuperscript{38} Clearly, the ECC name is an unhelpful confusion.

6.1.3 Bank of England

The Coalition government has positioned the BoE at the heart of ensuring financial stability for the UK by giving it prime responsibility for management of the economy.\textsuperscript{39} In relation to economic crime and regulation, the PRA has a role because it ‘will make judgments about the safety and soundness of individual firms, and will take supervisory and regulatory action to ensure that firms take necessary steps.’\textsuperscript{40} This appears to be a more formal approach than the ‘Governor’s eyebrows.’\textsuperscript{41}

6.1.3.1 Prudential Regulation Authority (PRA)

The PRA, established by Financial Services Act 2012,\textsuperscript{42} is a subsidiary of the BoE and ‘its core objective will be to promote the safety and soundness of the firms it regulates.’\textsuperscript{43} The PRA ‘is responsible for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms.’\textsuperscript{44} The PRA has two statutory objectives: ‘the promotion of the safety and soundness of PRA-authorised persons;\textsuperscript{45} and ‘specifically for insurers, to contribute to the securing of an appropriate degree of protection for policyholders.’\textsuperscript{46} The PRA has been given statutory power to prosecute senior executives in the event of an

\textsuperscript{38} National Crime Agency, ‘Economic Crime Command’

Economic crime covers a range of crimes including: Fraud; Intellectual property crime; Identity crime; Counterfeit currency; These crimes cost the UK millions of pounds each year, and prey on the most vulnerable members of society. The Economic Crime command's role is to fight economic crime by undermining criminals and educating those most at risk of attack. We do this by sharing intelligence and knowledge with partners, disrupting criminal activity, and seizing assets. http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime accessed 30 September 2014.

\textsuperscript{39} Responsibility for financial stability – both at the macro-level of the financial system as a whole, and the micro-level of individual firms – will rest within the Bank of England, in a new macro-prudential body, the Financial Policy Committee, and a new micro-prudential supervisor, the Prudential Regulation Authority.’

\textsuperscript{40} H M Treasury, ‘A new approach to financial regulation’ (n 5).

\textsuperscript{41} See chapter 4.2.1 Attributed to Montagu Norman, (Lord Norman), Governor of the BoE 1920 – 1944. See also: L C B Gower, ‘ “Big Bang” and City Regulation’ (1988) 51 MLR 21.

\textsuperscript{42} Financial Services Act 2012, s 6.

\textsuperscript{43} H M Treasury, ‘A new approach to financial regulation’ (n 5).

\textsuperscript{44} In total the PRA regulates around 1,700 financial firms.

\textsuperscript{45} Prudential Regulation Authority, http://www.bankofengland.co.uk/PRA/Pages/default.aspx accessed 3 March 2014.

\textsuperscript{46} Financial Services Act 2012, s 132.


Financial Services Act 2012, s 132.
institution’s failure. The legislative landscape has become more complicated because the Financial Services (Banking Reform) Act 2013, which introduced the new criminal offence of ‘relating to a decision causing a financial institution to fail’. If a person is convicted of this offence they could face a custodial sentence up to seven years and/or an unlimited fine. The power to institute proceedings is vested in the PRA, FCA, Secretary of State or Director of Public Prosecutions (DPP). There is no specific role intended for the SFO. However, this new offence is limited because the person committing the offence has to be a senior manager and the financial institution has to have failed by among others, insolvency. That being so, significant losses caused to an institution either by someone who is not a ‘senior manager’ or, though large, do not deal a catastrophic blow to an institution’s solvency would not be encompassed by this statute. Thus, there continues to exist a gap in the regulatory response to economic crime. Some conduct can be dealt with by administrative sanction by FCA but when David Cameron said that ‘those responsible should be held to account,’ he had in mind prosecution but that would need a change in the law. Thus, the criminal offence of causing an institution to fail or ‘reckless banking’ should be accompanied by

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47 Financial Services (Banking Reform) Act 2013, s 36.
48 The key provisions are:
(1) A person (“S”) commits an offence if—
(a) at a time when S is a senior manager in relation to a financial institution (“F”), S—
(i) takes, or agrees to the taking of, a decision by or on behalf of F as to the way in which the business of a group institution is to be carried on, or
(ii) fails to take steps that S could take to prevent such a decision being taken,
(b) at the time of the decision, S is aware of a risk that the implementation of the decision may cause the failure of the group institution,
(c) in all the circumstances, S's conduct in relation to the taking of the decision falls far below what could reasonably be expected of a person in S's position, and
(d) the implementation of the decision causes the failure of the group institution.
50 Financial Services (Banking Reform) Act 2013, s 36.
51 Financial Services (Banking Reform) Act 2013, s 36(4).
52 Designated as such by Financial Services and Markets Act 2000, s 59(6A)&(6B).
a criminal offence of ‘Reckless risk-taking on the financial markers.’ As Fisher comments:

Whilst it is true that reckless risk-taking on the financial markets does not necessarily involve behaviour which is deceitful, the affirmation of the principle that it is sufficient for the defendant’s conduct to imperil the economic interests of another is significant in this context.

Such a criminal sanction would complete the suite of sanctions available where there is conduct which imperils the financial system and ensure that, in future, questions such as those of Judge Rakoff of ‘[t]he financial crisis: why have no high level executives been prosecuted?’ would not be for the want of appropriate legislation. This would be a counter-party to the suggested corporate offence of failure to prevent all acts of financial crime by its employees, and would include cases such as: Jerome Kerviel’s illegal transactions which cost Société Générale £3.7bn; Nick Leeson’s unauthorised trading which presaged the collapse of Barings Bank; a UBS trader, Kweku Adoboli, who lost £1.5bn; and J P Morgan’s ‘London Whale’ affair which cost it $6bn.

6.1.3.2 Markets and Banking

In March 2014, the BoE launched its new ‘strategic plan’, which included the creation of a new Deputy Governor for Markets and Banking, who would be responsible for ‘efficient and effective financial markets.’ Mark Carney describes
this as an ‘extraordinarily important task.’\textsuperscript{68} This is an interesting regulatory response which attracts attention because of the BoE’s role in the foreign exchange markets. It was reported that allegations of manipulation of the foreign exchange markets had come as a surprise,\textsuperscript{69} and were very serious, and Martin Wheatley, chief executive of the FCA, ‘told a parliamentary hearing that allegations traders had colluded to rig prices in the $5.3tn spot market were “every bit as bad as they have been with Libor”.’\textsuperscript{70} Media reports of the BoE suspending a member of staff,\textsuperscript{71} were followed by the announcement that it would ‘tighten its governance,’\textsuperscript{72} and ‘establish an enquiry led by a QC.’\textsuperscript{73} Price rigging would suggest fraudulent conduct in a similar manner to the LIBOR cases where thirteen people have been charged by the SFO with conspiracy to defraud, one of who has pleaded guilty.\textsuperscript{74} The BoE said:

It is a matter of public record that the BoE has been conducting an internal review into allegations that BoE officials condoned or were informed of manipulation in the foreign exchange market or the sharing of confidential client information. This extensive review (\ldots) has found no evidence that BoE

\textsuperscript{70} Financial Times, ‘Forex claims ‘as bad as Libor’ (n 69).
\textsuperscript{74} For full details, see chapter 2.2.2, footnote 66.
staff colluded in any way in manipulating the foreign exchange market or in sharing confidential client information.  

The foreign exchange allegations are that the BoE ‘had concerns about manipulation as early as 2006’, at a time when the BoE’s role had diminished, because it was part of a ‘tripartite’ system, which had deconstructed ‘the old model of central banking’, which Governor Carney viewed to be a ‘fatally flawed’ approach.  

Carney’s sideswipe was that for over a century the Bank’s responsibilities ‘remained broad and largely informal until 1997’. This is a significant observation because in 1997, the Labour government took office and downgraded the BoE’s role: which previously had ‘informal responsibility for a broad range of policy areas.’ Carney added that ‘it [the Bank] promoted financial stability through its role as the effective lender of last resort, and more generally, - through judicious exercise of the Governor’s eyebrows - as the institution which managed and resolved financial crises.’

The BoE clearly recognise that there are issues with the functioning of core markets, together with a ‘host of financial reforms’, and ‘most fundamentally, given the serious issues raised by the Libor and foreign exchange scandals, changes must be made to both the hard and soft infrastructure of core markets to ensure they are fair, effective and efficient.’ However, this adds a further layer of complexity because the BoE is itself involved in LIBOR and foreign exchange as

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77 Financial Times, ‘Top barrister chosen to lead Bank of England enquiry’ (n 73). See also Ryder, The Financial Crisis and White Collar Crime (n 2) 105, where LIBOR manipulation was noted the previous year in 2005.

78 While there were enormous innovations of enduring value during this period, the reductionist vision of a central bank's role that was adopted around the world was fatally flawed (…) thus [a]return to a broad role is welcome. Bank of England, Speech given by Mark Carney’ (n 68).

79 Bank of England, Speech given by Mark Carney’ (n 68).

80 Bank of England, Speech given by Mark Carney’ (n 68).


82 In the late 19th Century the banking system was relatively unregulated (and partly self-regulated) – the Bank did not have an explicit supervisory infrastructure or system of prudential control until 1979. Nevertheless the scope of the Bank’s responsibilities was arguably as broad then as it is now, albeit that the mix was different.

83 Bank of England, Speech given by Mark Carney’ (n 68).

84 Bank of England, Speech given by Mark Carney’ (n 68).
well as regulating the markets, where the ‘watchdog’ is the FCA and investigative and prosecutorial agency is the SFO. The BoE provides market liquidity,\(^{85}\) which entails being a participant in markets which it regulates. To add to the confusion over roles, the FCA ‘was accused of triggering a disorderly market in insurance company shares after revealing that the FCA was launching a review of zombie [insurance] funds and their treatment of 30 million customers.’\(^{86}\) It was reported that the BoE were concerned at the false market in shares\(^{87}\) because although it was the FCA’s ‘responsibility to oversee financial markets,’\(^{88}\) the BoE ‘has responsibility for the stability of the system as a whole.’\(^{89}\) This demonstrates that there should be one body with ultimate responsibility and that body should be the BoE.

6.2 Secondary Regulators

The UK’s main means of regulation lies with specific agencies, which report to sponsoring government departments. The FCA embraces a wide-ranging brief encompassing ‘consumer protection, competition and market integrity,’\(^{90}\) whereas the SFO’s role is in relation to serious fraud and bribery.\(^{91}\) Both agencies have available to them specific legislation for use in enforcing economic crime behaviour.

6.2.1 Financial Conduct Authority

The focus of this research is the regulatory response to economic crime but, in the FSA, the regulator had a wide range of responsibilities of which economic crime was merely a part. The financial crisis cast light on the performance of the FSA,

\[^{85}\] Banks and building societies (‘banks’) make long-term loans but fund themselves through on-demand or short-term deposits, so they are subject to liquidity risk: the risk that a material part of their funding is withdrawn before the assets can be realised at their true economic value.


\[^{87}\] The Sunday Times, 6 April 2014, ‘FCA ignored warnings of false market’ (n 87).

\[^{88}\] The Sunday Times, 6 April 2014, ‘FCA ignored warnings of false market’ (n 87).

\[^{89}\] HM Treasury, ‘A new approach to financial regulation’ (n 5).

\[^{90}\] ‘We are investigators and prosecutors of the topmost tier of serious and complex fraud, bribery and corruption. We are not a regulator, a deal-maker or a confessor.’ David Green, ‘Speech to Cambridge Symposium 2013’ [http://www.sfo.gov.uk/about-us/our-views/director’s-speeches/speeches-2013/cambridge-symposium-2013.aspx accessed 27 August 2014].
where the Coalition government considered that it had failed in meeting its objectives. The outcome was the disbanding of the FSA and, notwithstanding government’s initial proposals to create an Economic Crime Agency (ECA), regulation and their enforcement form the new FCA,\textsuperscript{92} as ‘a dedicated and focused conduct of business regulator’.\textsuperscript{93} The government explain that ‘[e]ffective conduct regulation is vital to securing better outcomes for all consumers and restoring trust in the financial system’.\textsuperscript{94}

The Coalition government announced the abolition of the ‘tripartite’ regulatory system.\textsuperscript{95} The FCA \textsuperscript{96} succeeded the FSA\textsuperscript{97} with a role to take ‘responsibility for conduct of business (…) with the mandate and tools to be a proactive force for enabling the right outcomes for consumers and market participants, including through the promotion of competition’.\textsuperscript{98} The FCA has a limited remit when compared to the FSA which, ‘until the financial crisis enjoyed jurisdiction over “virtually everything financial in the UK”’.\textsuperscript{99} The challenge for the FCA is to demonstrate that it is not merely a \textit{rebranded} FSA.\textsuperscript{100}

The change is interesting because the FSA had four equal objectives, one being ‘the reduction of financial crime’,\textsuperscript{101} the FCA has ‘a single overarching strategic objective to ensure that markets function well’.\textsuperscript{102} This is supported by three operational objectives: consumer protection; integrity objective; and competition.\textsuperscript{103} The integrity objective means ‘protecting and enhancing the integrity of the UK financial system’,\textsuperscript{104} and includes ‘not being used for a purpose
connected with financial crime.105 Furthermore, the ‘integrity’ of the UK financial system includes: its soundness, stability and resilience;106 its not being affected by behaviour that amounts to market abuse;107 the orderly operation of the financial markets,108 and the transparency of the price formation process in those markets.109 One significant change from April 2014 was for the FCA to ‘take over the regulation of around 50,000 consumer credit firms from the Office of Fair Trading (OFT).’110 This is a major uplift in volume of firms from the existing 26,000 firms regulated111 and the effect on FCA capability remains to be evaluated. This is in pursuit of the government’s intention of ‘delivering a regulatory regime under which the conduct of business of all retail financial services is regulated by a single body.’112

The FCA, is responsible for dealing with financial crime within the regulatory framework, including the Money Laundering Regulations 2007,113 the Market Abuse Regime114 and maintenance of links with the police, SFO and NCA.115 Furthermore, the FCA operated FIN-NET,116 the cross-government fraud and financial crime network.117

The FCA’s Chief Executive stated that they would build ‘on the FSA’s direction [and] would involve retaining “our policy of credible deterrence, pursuing enforcement cases to punish wrongdoing”’.\(^{118}\) Although Wilson and Wilson note that this is not defined, ‘but can be discerned contextually from (...) key FSA publications,’\(^{119}\) the FSA state that it is ‘robustly deploying our civil and criminal prosecution powers’.\(^{120}\) The FCA state that they are ‘more committed than ever to showing firms and individuals that they must play by the rules; because if they don’t, robust sanctions are a matter of course.’\(^{121}\)

The FCA Business Plan\(^{122}\) states that their ‘enforcement powers\(^{123}\) enable them to deter firms and individuals from wrongdoing by making it clear that there are real and meaningful consequences for poor practice.’\(^{124}\) The FCA’s ‘credible deterrence’ approach enables them to ‘take effective, targeted action across the range of our regulatory responsibilities in support of our objectives.’\(^{125}\) The FCA highlight that they ‘have already delivered significant outcomes following intensive work on the attempted manipulation of LIBOR benchmark rate’.\(^{126}\) This is a surprising claim since this is an area which the FCA did not wish to enforce and which was subject to criticism from the Parliamentary Commission on Banking Standards.\(^{127}\) Notwithstanding this, in 2014, the FCA published warning notices to

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\(^{118}\) Wilson and Wilson (n 99) 4.

\(^{119}\) Wilson and Wilson (n 99) 4, 5.


\(^{123}\) ‘We use a wide range of Enforcement powers – criminal, civil and regulatory – to protect consumers and to take action against firms or individuals that do not meet our standards. We can take action such as: withdrawing a firm’s authorisation; prohibiting individuals from carrying on regulated activities; suspending firms or individuals from undertaking regulated activities; fining firms or individuals who breach our rules or commit market abuse; applying to the Court for injunctions and restitution orders; and bringing criminal prosecutions to tackle financial crime, such as insider dealing or unauthorised business.’ Financial Conduct Authority, ‘How we enforce the law’ http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law accessed 10 April 2014.


two individuals, relating to LIBOR manipulation, stating that it proposed to take unspecified action at some unspecified time.\textsuperscript{128}

In pursuit of the FCA's credible deterrence approach, they 'have the power to impose fines, withdraw or cancel authorization, stop firms or individuals from carrying out regulated activities, apply for injunctions and restitution orders, and prosecute certain financial crimes.'\textsuperscript{129} Cartwright\textsuperscript{130} suggests that the deployment of these powers is to make people 'sit up and take notice'\textsuperscript{131} and that it has a clear preference for 'the imposition of a financial penalty as central to its policy of credible deterrence.'\textsuperscript{132}

The policy underlying the range of penalties which can be imposed is in the 'FCA Handbook, Decision Procedure and Penalties Manual':\textsuperscript{133}

> The principal purpose of imposing a financial penalty or issuing a public censure is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour.\textsuperscript{134}

Wilson and Wilson observe that '[n]o jurisdiction has had a great deal of success in utilising the criminal law in combating sophisticated abuse activity on its capital markets',\textsuperscript{135} and that the response to market misconduct was 'moving away from criminal enforcement, on account of this being perceived as costly and ineffectual.'\textsuperscript{136} Thus, the 'effectiveness of the policy within the UK can be seen in

\begin{itemize}
\item \textsuperscript{128} Financial Conduct Authority, ‘Warning Notice’ http://www.fca.org.uk/static/documents/warning-notice-statements/warning-notice-statement-14-1individual.pdf
\item \textsuperscript{129} Financial Conduct Authority, ‘Business Plan 2014/15’ (n 122) 13.
\item \textsuperscript{130} Peter Cartwright, ‘Credible Deterrence and Consumer Protection through Imposition of Financial Penalties: Lessons for the Financial Conduct Authority’ in N Ryder, U Turksen and S Hassler (eds), \textit{Fighting financial crime in the global economic crisis: Policy, trends and sanctions}. (Routledge Cavendish 2014). 5 [In Press]
\item \textsuperscript{131} Cartwright (n 130) 5. (Footnote omitted).
\item \textsuperscript{134} Wilson and Wilson (n 99) 4,7.
\item \textsuperscript{135} Wilson and Wilson (n 99) 4,7.
\end{itemize}
the FSA’s enthusiasm for non-criminal enforcement of market abuse’. Such enthusiasm for financial penalties as a demonstration of the credible deterrence is examined by Cartwright who, rightly, points to the unlikelihood of firms undertaking a cost-benefit analysis regarding the adherence to FCA requirements as a conscious decision but, rather, that ‘[m]any breaches of FSMA occur where firms lack adequate controls, supervision and organisation rather than where they display wilful misconduct.’

The practical implementation of the credible deterrence pre dates the FCA where, the FSA had been criticised for its performance and ‘light-touch’ approach and an ‘overly close relationship with the City’. However, Tomasic suggests that this was because ‘political pressure [which] may also be facilitated by governments which have been competing with each other to create business-friendly financial centres such as London and New York.’ This attitude allowed the view to pervade of insider dealing as ‘a naughty perk of the job’, however, ‘the number of insider trading cases brought by the FCA has risen sharply in the past few years [and] secured 23 convictions since 2009.’ In parallel, the increase in the number of fines by the regulator appears to show that their strategy to prosecute a

137 Wilson and Wilson (n 99) 4,7.
138 Cartwright (n 130) 6.
140 Tomasic (n 139) 7, 8.
steady stream of cases to demonstrate that they ‘means business’ is bearing fruit. The total fines were at modest levels until 2010 when they increased from £89.1m to £311.6m in 2012 and £476m in 2013. By November 2014, they amounted to £314m.

The regulator has successfully prosecuted and imposed record financial penalties for insider dealing offences and breaches of the Market Abuse Regime. Examples include McQuoid and Melbourne, Uberois, Calvert, Ahmad, Rollins and Littlewoods. The increase in the enforcement activities demonstrates its tougher approach towards insider dealing. Furthermore, it banned 101 mortgage intermediaries because most of the individuals were ‘not fit and proper to work in regulated financial services through failings that led to mortgage fraud.’

The main engine for the increase in fines is the LIBOR scandal, where Barclays was fined £59.5m. This was followed by UBS £160m, RBS £87.5m, ICAP

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145 See (n 143).
154 Attorney General’s Office, ‘Fighting economic crime in the modern world’ (n 10).
£14m and Rabobank £105m. These fines amount to £426m but, as a change from the previous regime, the FCA ‘must pay to the Exchequer all financial penalties we receive, less the enforcement costs that we incurred in generating these penalties.’ Additionally, where the FCA say that ‘investigations against others [firms] continue,’ the FCA have levied their second largest penalty of £137.6m on J P Morgan Chase Bank for misconduct in an activity known as the ‘London Whale’ trades. The FCA explain that:

The fine reflects the seriousness of the firm’s failure to ensure that fundamental controls were applied to the trading of its Chief Investment Office. The consequences of not applying those controls were perilous – the losses that resulted were around $6bn. It also reflects what followed thereafter – which serves as a lesson in how not to do crisis management.

This is an example of the application of the credible deterrence strategy and, tellingly, because ‘this was not some dim and distant pre-[financial] crisis past when people believed they had conquered the risk. This was in 2011 and 2012.’ Furthermore, the FCA stated that ‘we engaged with the firm, being very clear about the candour that we expected and the risks we were concerned about, J P Morgan failed to be open and co-operative, even on one occasion deliberately misleading us.’ Even though J P Morgan lost $6.2bn, there is no reference to criminal charges against individuals in the UK. However, it has been reported that the DoJ have charged two people with ‘conspiracy, falsifying books and records, wire fraud, and causing false statements to be made to the Securities and Exchange Commission.’

161 Financial Conduct Authority, ‘Financial services regulation and enforcement’ (n 121).
162 Financial Conduct Authority, ‘Financial services regulation and enforcement’ (n 121).
163 ‘The Financial Conduct Authority (FCA) has fined JPMorgan Chase Bank N.A. ("JPMorgan") £137,610,000 ($220 million) for serious failings related to its Chief Investment Office (CIO). JPMorgan’s conduct demonstrated flaws permeating all levels of the firm: from portfolio level right up to senior management, resulting in breaches of Principles 2, 3, 5 and 11 of the FCA’s Principles for Businesses - the fundamental obligations firms have under the regulatory system.’ Financial Conduct Authority, ‘JPMorgan Chase Bank N.A. fined £137,610,000 for serious failings relating to its Chief Investment Office’s ‘London Whale’ trades’ http://www.fca.org.uk/news/jpmorgan-chase-bank-na-fined accessed 2 April 2014. See also Chapter 8.
164 Financial Conduct Authority, ‘JPMorgan Chase Bank N.A. fined £137,610,000’(n 163).
165 Financial Conduct Authority, ‘Financial services regulation and enforcement’ (n 121).
166 Financial Conduct Authority, ‘Financial services regulation and enforcement’ (n 121).
Exchange Commission (SEC).\textsuperscript{168} FSMA 2000 gives the FCA authority to set and enforce regulations, which includes levying significant financial penalties, the lack of criminal charges in the UK against any individual involved casts doubt on the credible deterrence influencing individuals. Indeed, as Judge Rakoff stated,\textsuperscript{169} \textquote{the failure of the government to bring to justice those responsible for such colossal fraud bespeaks weaknesses in our prosecutorial system that need to be addressed.}\textsuperscript{170}

The FCA could have considered action against Mark Stevenson who engaged in market abuse\textsuperscript{171} \textquote{for deliberately manipulating a government bond to make money out of the BoE’s quantitative easing programme.}\textsuperscript{172} The FCA said that this it regarded this as a \textit{particularly serious} example of market abuse, which sought to profit unreasonably from Quantitative Easing, at the expense of the BoE and ultimately the Taxpayer.\textsuperscript{173} The financial penalty imposed by the FCA was £662,700,\textsuperscript{174} although noting that his remuneration for the year in question was £2.367m,\textsuperscript{175} and a ban\textsuperscript{176} from working in the City.\textsuperscript{177} This may, or not, be the appropriate case for criminal sanctions, but although the FCA describe the case as \textit{particularly serious}, that view is not shared by some commentators:

\textsuperscript{170} Rakoff (n 60).
\textsuperscript{173} Financial Conduct Authority, ‘Decision Notice’. The Authority considers that Mr Stevenson deliberately acted to increase the price of the Bond on 10 October 2011 and considers that this amounted to deliberate market abuse. His behaviour is particularly egregious as it took place on the first day of QE2 and effectively sought to deprive the economy from QE’s full effect in order to maximise the potential profit from selling the Bond to the BOE in the QE2 reverse auction. The Authority considers that, as a result of this behaviour, Mr Stevenson lacks fitness and propriety in terms of his integrity. The Authority therefore makes a prohibition order pursuant to section 56 of the Act prohibiting Mr Stevenson from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm. This order takes effect from 20 March 2014.
\textsuperscript{174} Financial Conduct Authority, ‘FCA Final Notice 2014: Mark Stevenson’ (n 171) 2. (emphasis added).
\textsuperscript{175} Financial Conduct Authority, ‘FCA Final Notice 2014: Mark Stevenson’ (n 171) 1.
\textsuperscript{176} Financial Services and Markets Act 2000, s 56(1) ‘The FCA may make a prohibition order if it appears to it that an individual is not a fit and proper person to perform functions in relation to a regulated activity.’ Financial Conduct Authority, ‘Decision Notice’.
the FCA has declared Mr Stevenson guilty of market abuse. His main
offence, though, appears to have been greed. Hundreds of gilt-edged
market-makers will have made money from the Bank’s asset purchases by
loading up on gilts ahead of its wading into the market. Mr Stevenson bought
too many (…) he sought to “profit unreasonably” from QE. Perhaps the FCA
can say what a reasonable profit from QE might be.

Either way, the punishment (…) looks harsh. The Bank and taxpayers
suffered no loss (…) since the Bank got wise to what he was doing (…).
Greed aside, Mr Stevenson’s other offence seems to have been messing
with the Bank. Had he cornered the market in a gilt that, say, Goldman Sachs
or Morgan Stanley was trying to buy, it is hard to see the FCA reacting as it
has.178

This comment is instructive because it suggests that there is something special
about trading in the financial markets which should justify different treatment from
other crimes and does not show that the credible deterrence policy either acts as a
deterrent or has changed perceptions of integrity in the financial markets. This is at
the heart of the debate over white collar crime sentencing.179 An example is the
2014 case headlined ‘Cyber gang led by former rave promoter dubbed the ‘Acid
House King’ are facing years behind bars for plundering £1.25m’,180 received five
and a half years imprisonment.181

The FCA, has a role182 in countering the threat from bribery and corruption, where
the SFO is responsible for prosecution:

The FCA does not enforce the Bribery Act 2010 [BA2010]. Our regulatory
powers apply where authorised firms fail adequately to address corruption
and bribery risk, including where these risks arise in relation to third parties
acting on behalf of the firm. We do not need to obtain evidence of corrupt
conduct to take regulatory action against a firm.183

178 The Times, 21 March 2014 ‘Ian King: Business Editor’s Commentary: Market abusers on every side’
179 See chapter 4.2.3.
180 Mailonline, ‘Cyber gang led by former rave promoter dubbed the ‘Acid House King’ are facing years behind
bars for plundering £1.25m’ http://www.dailymail.co.uk/news/article-2580383/Cyber-gang-led-former-rave-
promoter-dubbed-Acid-House-King-facing-years-bars-plundering-1-25m.html accessed 2 April 2014.
181 Daily Telegraph, 24 April 2014, ‘Acid House King’ jailed for sophisticated cyber attack on UK
banks http://www.telegraph.co.uk/news/uknews/crime/10785472/Acid-House-King-jailed-for-sophisticated-
182 ‘Corruption and bribery are criminal offences under current UK legislation and the Bribery Act 2010, which
came into force on 1 July 2011. Authorised firms have additional, regulatory, obligations to put in place and
maintain policies and processes to prevent corruption and bribery and to conduct their business with integrity.
These are set out in SYSC 3.2.6R/SYSC 6.1.1R and Principle 1 of our Principles for Businesses (PRIN
2.1.1R).’ Financial Conduct Authority, ‘Anti-Bribery and Corruption’ http://www.fca.org.uk/firms/being-
183 Financial Conduct Authority, ‘Anti-Bribery and Corruption’ (n 162).
Thus, whilst the SFO does require evidence of corrupt conduct before taking action, the FCA does not. This has allowed the regulator to fine three insurance companies ‘for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to third parties.’\(^{184}\) Besso was fined £315,000;\(^{185}\) AON £5.5m;\(^{186}\) and Willis £6.895m.\(^{187}\) Although the regulatory breaches took place before the BA2010 came into force, the SFO role was not mentioned in the FCA Decision Notice in March 2014 though new procedures under the BA2010 were mentioned.\(^{188}\) The SFO’s first prosecution under BA2010, yet to come to trial, is of four former employees of Sustainable AgroEnergy plc for fraud, conspiracy to commit fraud and ‘making and accepting a financial advantage.’\(^{189}\) A key provision of the BA2010 is s.7, which provides a complete defence to bribery where ‘the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.’\(^{190}\) Therefore, although the FCA has a record of penalising regulatory breaches, the SFO has not yet had the opportunity to test the legislative provisions in the courts because it has yet to bring a case under BA2010 to trial. Thus, the relationship between SFO and FCA over bribery is unclear and the possibility remains of a firm being penalised by the


\(^{185}\) Financial Conduct Authority, ‘FCA Final Notice 2014: Besso Limited’ (n 184).


\(^{189}\) ‘Four men connected to Sustainable AgroEnergy plc have today been charged with offences of conspiracy to commit fraud by false representation and conspiracy to furnish false information, contrary to section 1 of the Criminal Law Act 1977, in connection with the investigation by the Serious Fraud Office into the promotion and selling of "bio fuel" investment products to UK investors. The value of the alleged fraud is approximately £23m and the offences are said to have taken place between April 2011 and February 2012. (…) [three men] have also been charged with offences of making and accepting a financial advantage contrary to section 1 (1) and 2 (1) of the Bribery Act 2010.’ [Serious Fraud Office, ‘Four charged in "bio fuel" investigation’ [http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/four-charged-in-"bio-fuel"-investigation.aspx accessed 13 January 2014].

\(^{190}\) ‘Section 7: Failure of commercial organisations to prevent bribery A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.’ [Ministry of Justice, ‘The Bribery Act 2010 – Guidance’ [http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf accessed 3 April 2014].
FCA and prosecuted by the SFO. This uncertainty could be dealt with by an ECA if it encompassed these two separate organisations.

6.2.2 Serious Fraud Office

The SFO, established in 1987, to tackle ‘the topmost tier of serious and complex fraud and bribery,’ was hailed as the UK’s equivalent of the FBI. It was created due to disquiet about the prosecution of serious fraud in the 1970’s and 1980’s. It has had a troubled life being perceived as a failing organisation. Early high profile cases tarnished its reputation including Guinness, Barlow Clowes, Blue Arrow, Maxwell, Levitt and Saunders. Recently, it has been criticised over its handling of bribery allegations against BAE, the controversial abandonment of investigations into arms sales to Saudi Arabia; its attempt to ‘plea bargain’ has brought judicial opprobrium that, in economic crime cases, the SFO should not believe that these are ‘more respectable than other forms of crime’, or that these criminals ‘should not be ordered to serve prison sentences because such sentences should be reserved for those they regard as common criminals’.

The SFO is judged on its role as a prosecutor. Although its mixed success has in recent years shown an increase in activity, reporting an 80% conviction rate and states that ‘it is stronger, faster and leaner’ and ‘delivering more for less’. However, in 2014 it was reported that:

A recent Freedom of Information request showed that enforcement actions by the SFO this year reached their lowest level since the financial crisis (…)

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191 Criminal Justice Act 1987, s 1(1))
192 Serious Fraud Office, Speech, 'Ethical Business Conduct: An Enforcement Perspective’ (n 61).
193 Federal Bureau of Investigation.
196 Re Arrows Ltd (No. 4) [1994] 3 All E.R. 814, R v Saunders [1996] Crim.LR.420
197 R (on the application of Corner House Research and another) v Director of Serious Fraud Office (BAE Systems plc, interested party) [2008] All ER 927.
201 Serious Fraud Office, ‘The Serious Fraud Office – more effective and costing less’ (n 199).
but the results will come through and we will have to weather the inevitable criticism in the meantime about case numbers and investigation costs.\textsuperscript{201}

For example, in 2011 the SFO made a case for its continued existence as an independent specialist investigator and prosecutor, the return of Asil Nadir to UK brought echoes of its past difficulties with major cases. Asil Nadir was due to be tried for theft in 1993\textsuperscript{202} but fled to Northern Cyprus and could not be extradited. On his return the SFO faced difficulties in prosecution because failing memory or death of some witnesses in the intervening 19 years, combined with problems of reassembling evidence, some of which documents were a health hazard.\textsuperscript{203} Nonetheless, ‘[t]he conviction of Asil Nadir of theft on a grand scale from a public company nineteen years after he fled the jurisdiction is a remarkable achievement.’\textsuperscript{204} The then Director of the SFO stated that its ‘cases are high profile and carry high risk’\textsuperscript{205} and the significance of the Asil Nadir case is that it provided a reference back to its mixed success in achieving convictions in the early 1990s, when this case should have been tried and its ultimate success was not a foregone conclusion.

The financial crisis provided the SFO with an opportunity ‘to investigate suspected offences committed within the UK jurisdiction in relation to Icelandic Bank Kaupthing prior to its collapse.’\textsuperscript{206} The SFO wanted to understand what had ‘allowed substantial value to be extracted from the bank in the year prior to its collapse.’\textsuperscript{207} The SFO said ‘this is a complex investigation which crosses numerous jurisdictions. We have been working closely with the Icelandic Special Prosecutor's Office to ensure that comprehensive and robust investigations are conducted.’\textsuperscript{208} This was just the type of case for which the SFO was established.\textsuperscript{209} However,
when the SFO announced that it arrested people in London and Reykjavik,\textsuperscript{210} \textit{The Guardian},\textsuperscript{211} identified the SFO’s target as Kaupthing’s ‘biggest client Robert Tchenquiz.’\textsuperscript{212} The outcome was the SFO conceding that search warrants were flawed\textsuperscript{213} and SFO actions subject to adverse judgment of the Court because of ‘serious mistakes’,\textsuperscript{214} resulting in the Tchenguiz brothers claiming £300m in damages.\textsuperscript{215} With clear echoes of past difficulties, the SFO eventually settled \textit{Tchenguiz}\textsuperscript{216} by paying damages and significant costs.\textsuperscript{217} The SFO Director reports that: ‘[w]hilst the SFO accepts the criticisms of it made by the Divisional court the outcome of this particular case which concerned events in 2011 does not

\textsuperscript{214} Serious Fraud Office, ‘Annual report and Accounts 2011-2012’ 20 Contingent liabilities: Vincent and Robert Tchenguiz (“VT” and “RT”) and Rawlinson & Hunter (“R&H”) issued Judicial Review (JR) proceedings against the SFO in May 2011, challenging search warrants obtained by the SFO which authorised searches of premises associated with the claimants. Vincent Tchenguiz (“VT”) was later joined as an interested party to the proceedings in August 2011. The hearing was held in May 2012 and the Administrative Court judgment was handed down on 31 July 2012. The court found against the SFO, held that the warrants and searches were unlawful and ordered that (a) the decision to issue the warrants be quashed; and (b) the materials seized under the warrants for R&H and VT should be returned. The SFO subsequently agreed to return material to RT.

The SFO is liable for the claimants’ reasonable costs. Whether this is on a standard or indemnity basis is to be determined. The amount of this obligation cannot be measured with sufficient reliability at the time of closing these accounts. Whilst the SFO will seek a satisfactory resolution of these and other linked issues as speedily as possible, the process of doing so could run beyond the 2012-13 accounting period.

RT, R&H and VT have stated publicly that they intend to claim damages on the basis of the searches. The nature, legal basis and amounts of such claims have not yet been pleaded by any of them. A hearing is scheduled to take place on or before 21 December 2012, where directions will be given for the future conduct of the claim.

In addition, VT has notified SFO of his intention to pursue a civil claim for damages under the Human Rights Act (HRA) and for misfeasance in public office. VT has made it known publicly that he will seek substantial damages from the SFO. It is likely that VT will seek to have this claim joined with the claim brought by RT and R&H. http://www.sfo.gov.uk/media/223353/annual%20report%20and%20accounts%202011-12.pdf accessed 28 February 2014.

\textsuperscript{215} ‘The SFO has so far spent £8.1m defending the £300m claim by the Tchenquiz brothers, due to go to trial in October, the High Court heard’, Financial Times, 8 April 2014, http://www.ft.com/cms/s/0/5f0e1f06-bf41-11e3-94af-00144feabd0c.html#a2zz2yUAxjFyc accessed 10 April 2014.
\textsuperscript{216} Rawlinson and Hunter Trustees SA and others v Akers and another [2014] EWCA Civ 136
\textsuperscript{218} ‘The SFO has now agreed to pay Mr Tchenquiz and his business entities the total sum of £3 million plus their reasonable costs in full and final settlement of their civil claims.’


‘The SFO has now agreed to pay Mr Robert Tchenquiz, £20 and the Trustee the total sum of £1.5 million in full and final settlement, with costs to be determined by the Court if they cannot be agreed.’

reflect the quality of the SFO’s work in 2013. This is understandable because ‘high profile’ cases are ‘high risk’ and have the potential to embarrass, as with the earlier Guinness case. This potential for embarrassment was realised when the SFO had to seek additional funding from HMT to cover not only costs relating to the Tchenguiz claim but also ‘historic legal liabilities relating to the payment of VAT’ and making unauthorised payments to its staff.

The management of the SFO has also suffered when, the House of Commons Public Accounts Committee reported on the SFO’s internal management had ‘showed a disregard for the proper use of taxpayers’ money.’ The Committee concluded that [t]he reputation of the SFO has been undermined by a catalogue of errors and poor judgement and the morale of its staff has suffered. This is underlined by a headline from the Telegraph ‘BAE’ documents lost by SFO found at cannabis farm,’ which was confirmed by the Attorney General. This was followed by the collapse of another prosecution: [f]resh reversal for SFO as £40m bribery trial collapses the SFO had earlier announced that: ‘Dahdaleh, an international businessman, has been arrested today and charged with corruption offences relating to contracts for the supply of aluminium to Bahrain.’ In December 2013, the SFO issued a statement: [t]he SFO has today offered no evidence against Victor Dahdaleh, having concluded that there is no longer a

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220 Written Statement, Serious Fraud Office (Contingencies Fund Advance), HC Deb, 30 January 2014, col 39WS
225 HC Deb 11 September 2013, vol 567, col 707W.
realistic prospect of conviction in this case.\footnote{228} The was due to the principal witness changing his evidence and difficulties with two US witnesses who were unwilling to give evidence.\footnote{229} Reuters\footnote{230} reported that:

Dahdaleh admitted making payments to Alba [Aluminium Bahrain B.S.C. (Alba), an aluminium smelter controlled by the government of Bahrain]\footnote{231} managers but pleaded 'not guilty', citing 'principal's consent', a defence available under Britain's Prevention of Corruption Act 1906.

In essence, his defence was that the payments were known of and approved by those in authority at Alba and in the Bahraini government, and were part of Bahraini custom and practice.\footnote{232}

However, what puts this case into sharp relief is a parallel case in US where ‘Alcoa World Alumina admitted links to what US authorities called a “corrupt international underworld” and agreed to a $384m settlement over charges relating to bribery.’\footnote{233}

The US Department of Justice (DoJ)\footnote{234} detailed the outcome of fines and undertakings regarding future conduct but no criminal conviction against an individual, although it did refer to the middleman involved as ‘Consultant A’ a London-based middleman with close ties to certain [Bahrain] Royal Family

\footnotetext[229]{Serious Fraud Office, ‘Statement: R v Dahdaleh’ (n 228).}
\footnotetext[230]{Reuters, 10 December 2013 ‘UK bribery trial collapses in blow to anti-fraud agency’ http://www.reuters.com/article/2013/12/10/britain-bahrain-trial-idUSL6N0JP2FL20131210 accessed 13 January 2014.}
\footnotetext[232]{See R v J [2013] EWCA Crim 2287, [2014] 1 Cr. App. R. 21; [2014] Lloyd's Rep. F.C. 87 ‘Evidence as to the informed consent of the actual principal might, however, be material to the issue of whether a payment was made corruptly, depending on the facts of the case. The judge's ruling was set aside (see paras 24-25, 32, 44-46 of judgment).’ https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=ia744d065000001453d0fdaebac1e09fd&docguid=I988A8875E051F3E3ABAE9189C69E07DD&hitguid=I988A8875E051F3E3ABAE9189C69E07DD&rank=4&pos=4&epos=4&l=664&crumb=action=append&context=45&resolvein=true accessed 7 April 2014. Dahdaleh was charged under that law because the alleged offences pre-dated the Bribery Act 2010, under which the "principal's consent" defence is no longer available.’

\footnotetext[231]{Department of Justice, ‘Alcoa World Alumina Agrees To Plead Guilty To Foreign Bribery’ (n 231).}
members as a sham sales agent and agreed to pay him a corrupt commission intended to conceal bribe payments, according to court papers.  

The contrast in outcome of the two matters with similar facts highlights the difference in approach where, until February 2014, the SFO had limited room for manoeuvre. The former Director commented on the facilities available to SFO:

> My view is that the prosecution-led approach with integrated teams of lawyers and investigators is needed in this very specialist and complex area. This view is shared by other experts in the field. It is the basis upon which the DoJ as well as the FSA works.

However, the DoJ have long had the ability to employ ‘negotiated outcomes’ or a ‘plea bargaining’ strategy, where such deals are widely used and ‘a policy of judicial acquiescence or self-restraint prevails’. It has to be accepted that litigations has risks and that the outcomes are far from certain and, as Buchanan observes: '[l]itigation is expensive. One has to consider not only the costs of the proposed court action but also the prospect of being unsuccessful in court and being ordered to pay the expenses of others involved in the particular court action.' It is understandable that the SFO saw the attractions of ‘negotiating outcomes’, bringing with them cost savings and certainty advantages. However, two cases where the SFO wished to ‘plea bargain’ caused judicial tensions. Firstly, in *R v Innospec Limited*, Court of Appeal criticised SFO for ‘usurping’ the Judge’s authority by agreeing punishment. Secondly, in *R v Dougall*, the Judge rejected SFO claims for leniency.

### 6.2.2.1 Deferred Prosecution Agreements (DPA)

A significant feature in the response to economic crime in the US is the availability of mechanisms to conclude agreements between prosecutors, the DoJ and SEC, and corporate entities whereby in exchange for admission of guilt, payment of a fine and undertakings regarding remediatory action, the corporate entity and
employees escape prosecution.\footnote{241} As an example of the financial penalties imposed,\footnote{The Times, 23 January 2014 ‘JP Morgan: paying the price of Madoff?’ http://www.thetimes.co.uk/tto/law/article3983127.ece accessed 23 January 2014.} The Times reports that:

Since 2010 JP Morgan has paid penalties totalling $28.7 billion for various failings relating to such matters as the misrepresentation to investors of bundled bad home loans as high-quality securities and the mis-selling of mortgage bonds to pension funds and other investors.\footnote{Department of Justice, ‘J P Morgan Chase Deferred Prosecution Agreement’, http://www.justice.gov/usao/nys/pressconference/jpmcdpa/visual.pdf accessed 26 January 2014.}

This figure includes ‘a non-tax deductible penalty of $1.7bn(…)
[relating to] the Madoff fraud.’\footnote{Department of Justice, ‘J P Morgan Chase Deferred Prosecution Agreement’, (n 243).} This settlement includes an agreement to co-operate with the authorities and not to commit any federal crimes but, as is typical of such settlements, no individuals were to be prosecuted.\footnote{Ministry of Justice, ‘Crime and Courts Bill: Fact Sheet: Deferred Prosecution Agreements’ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184857/fs-cj-deferred-prosecution.pdf accessed 28 January 2014.}

The Coalition government decided to provide its prosecutors, with a similar facility to that used extensively in the US, because ‘[t]ackling and combating financial and economic crime, which encompass an array of offences such as theft, fraud and bribery, is a key commitment within the Coalition agreement.’\footnote{Ministry of Justice, ‘Crime and Courts Bill: Fact Sheet’ (n 245).} The government points to the only two remedies available to prosecutors: those of ‘criminal prosecution or, where this is not possible or appropriate, pursuing a civil recovery order against the person or organisation concerned.’\footnote{Ministry of Justice, ‘Crime and Courts Bill: Fact Sheet’ (n 245).} The Ministry of Justice recognised the disadvantages of these remedies where lengthy investigations are involved ‘and in the case of a criminal prosecution there is a strong likelihood of protracted court proceedings with no guarantee of a successful conviction.’\footnote{Ministry of Justice, ‘Crime and Courts Bill: Fact Sheet’ (n 245).}

The outcome of a successful prosecution would be a financial sanction and, as outlined above, a financial penalty is a key ingredient of a DPA. The second remedy available to the SFO of Civil Recovery Orders, ‘even when successful, are solely a mechanism to recover the proceeds of “unlawful conduct” and do not enable sanctions for wrongdoing or compensation of victims.’\footnote{Ministry of Justice, ‘Crime and Courts Bill: Fact Sheet’ (n 245).}
In the absence of the facility to conclude a DPA, the SFO had previously endeavoured to conclude ‘plea bargains’. In *R v Dougall*, the SFO sought to agree a suspended 12 month prison sentence for Dougall’. Although passing that (requested) sentence, the Court of Appeal ‘yet again made clear that the power and responsibility of sentencing lies with the Court, and the Court alone.’ This created difficulties for the SFO, which might have wished to conclude a plea agreement, since the court’s view was that the SFO ‘should not seek to make recommendations on sentencing.’

Shortly after his appointment as Director of the SFO, David Green outlined his vision and stated that ‘I am keen on maximising the set of tools available to SFO as an investigation and prosecuting agency, and DPAs represent a new and imaginative tool to deal with serious economic crime committed by commercial organisations.’ Green considered that ‘[four] very important principles need to be observed: firstly that ‘sentencing in this jurisdiction is for the judge not the prosecution (…),’ and [secondly] ‘corporates cannot be seen to be allowed some special kid glove treatment (…) individuals will be prosecuted where that is the appropriate course of action (…) [lastly] admissions as to conduct must be realistic, factual and not fanciful.’

Some eighteen months later, DPA’s became available to the SFO from by virtue of the Crime and Courts Act 2013. A DPA, which is a discretionary tool, is subject to court approval. The prosecutors are either the DPP or the Director of

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251 CMS Cameron McKenna, ‘Court of Appeal overturns prison sentence in corruption case.’ (n 250).
253 Serious Fraud Office, ‘Speech by David Green - 10th Annual Corporate Accountability Conference’ (n 252).
256 Crime and Courts Act 2013, s 45 Schedule 17. 2. A DPA is:
1. (…) an agreement between a designated prosecutor and a person (“P”) whom the prosecutor is considering prosecuting for an offence specified in Part 2 (the “alleged offence”). Under a DPA, (a) P agrees to comply with the requirements imposed on P by the agreement; (b) the prosecutor agrees that, upon approval of the DPA by the court (…) paragraph 2 is to apply in relation to the prosecution of P for the alleged offence.”
the SFO, with the Act making it clear that powers to enter into a DPA must be exercised personally by the designated prosecutor.\(^{257}\) The Act specifies the ‘persons who may enter into a DPA with a prosecutor’, which are in three categories: ‘P may be a body corporate, a partnership or an unincorporated association, but may not be an individual.\(^{258}\) This latter provision differs from the US so that in the UK, ‘DPAs will not be available for individuals, whether for individual crimes or for action undertaken on behalf of an organisation.’\(^{259}\)

A DPA is likely to be available to companies which ‘self-report suspected criminal misconduct to SFO.’\(^{260}\) In such circumstances, the SFO would launch a formal criminal investigation to test the evidence and scale of offending.\(^{261}\) The SFO’s position is that:

> The available evidence may well pass the evidential test. But if the company has taken appropriate disciplinary action against those responsible, made appropriate amendments to its compliance regime, compensated victims, and genuinely and proactively cooperated with the SFO investigation, it is hard to see how it would be in the public interest to prosecute the company, as opposed to individuals.\(^{262}\)

The SFO warn that ‘if the corporate chooses to bury the misconduct rather than self-report, the risks attendant on discovery are truly unquantifiable.’\(^{263}\) The first DPA is awaited and will be subject to judicial supervision,\(^{264}\) and ‘as experience is built up by all parties, this will generate consistency and therefore predictability around the likelihood of achieving a DPA.’\(^{265}\)

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2. \((1)\) Proceedings in respect of the alleged offence are to be instituted by the prosecutor in the Crown Court by preferring a bill of indictment charging P with the alleged offence (\(\ldots\)).

\((2)\) As soon as proceedings are instituted under sub-paragraph (10 they are automatically suspended.

\((3)\) The suspension may only be lifted on an application to the Crown Court by the prosecutor; and no such application may be made at any time when the DPA is in force.

\((4)\) At a time when proceedings are suspended under sub-paragraph (2), no other person may prosecute P for the alleged offence.

\(^{257}\) Crime and Courts Act 2013, s 45 Schedule 17. 3.

\(^{258}\) The Act states that for a partnership or an association, the DPA shall be in the name of the partnership or association and that any money payable must be paid out of the partnership or association and not that of any of the partners or members.

\(^{259}\) Crime and Courts Act 2013, s 45 Schedule 17. 4.


\(^{261}\) Serious Fraud Office, Speech, ‘Ethical Business Conduct: An Enforcement Perspective’ (n 61).

\(^{262}\) Serious Fraud Office, Speech, ‘Ethical Business Conduct: An Enforcement Perspective’ (n 61).

\(^{263}\) Serious Fraud Office, Speech, ‘Ethical Business Conduct: An Enforcement Perspective’ (n 61).

\(^{264}\) Serious Fraud Office, Speech, ‘Ethical Business Conduct: An Enforcement Perspective’ (n 61).

\(^{265}\) Serious Fraud Office, Speech, ‘Ethical Business Conduct: An Enforcement Perspective’ (n 61).
The reasoning for this is that ‘the most likely candidate for the first DPA will be the type of case that would attract the lowest level of fine on a plea of guilty if proceedings were to take place.’\textsuperscript{266} The clear issue for the SFO is that although it might well wish to avail itself of the new facility, given the history of judicial opprobrium, the SFO would not wish to risk an adverse outcome and the attendant publicity, of its first DPA presentation to court. Thus, it may be that the first cases of significance are more distant than immediately following the date the legislation took effect.

\subsection*{6.2.2.2 Bribery Act 2010}

The SFO, is endowed with prosecutorial powers under the specific legislation of the BA2010 \textsuperscript{267} This legislation overhauls the UK’s patchwork of archaic corruption laws,\textsuperscript{268} and is regarded within the industry as ‘the single most important development’ in combating white collar crime.\textsuperscript{269} The BA2010 ‘provides the UK with some of the most draconian and far-reaching anti-corruption legislation in the world,’\textsuperscript{270} with the potential to ‘propel the UK to the forefront’ in fighting international bribery and corruption.\textsuperscript{271} The SFO’s prosecutions under the BA2010 have been for relatively minor offences rather than the major instances of bribery projected when the legislation was enacted.\textsuperscript{272} The SFO’s first prosecution is of four former employees of Sustainable AgroEnergy plc for fraud, conspiracy to commit fraud and ‘making and accepting a financial advantage.’\textsuperscript{273} The trial

\textsuperscript{266} The Times, 27 February 2014. ‘Doing deals to avoid prosecution: which company will be first?’ http://www.thetimes.co.uk/tto/law/article4017176.ece accessed 3 March 2014.


\textsuperscript{271} Salens (n 269).

\textsuperscript{272} Note: the ‘Act extends to England and Wales, Scotland and Northern Ireland.’ Bribery Act 2010, s 18.


\textsuperscript{272} Four men connected to Sustainable AgroEnergy plc have today been charged with offences of conspiracy to commit fraud by false representation and conspiracy to furnish false information, contrary to section 1 of the Criminal Law Act 1977, in connection with the investigation by the Serious Fraud Office into the promotion and selling of “bio fuel” investment products to UK investors. The value of the alleged fraud is approximately £23m and the offences are said to have taken place between April 2011 and February 2012. (…) [three men]
commenced at Southwark Crown Court in October 2014. This case was followed by charges against former employees of Smith and Ouzman Limited but under the previous legislation, Prevention of Corruption Act 1906, with the trial listed for November 2014.

6.2.2.3 LIBOR scandal

The LIBOR scandal has been described as ‘the most high profile current issue in the United Kingdom.’ The LIBOR scandal is ‘allegations that bankers have colluded to manipulate the London inter-bank lending interest rate.’ LIBOR was managed by the British Bankers’ Association (BBA) and used to calculate the interest rates for a range of financial instruments (…) [which were] used as the basis for many types of lending, from syndicated and commercial lending, to calculating rates on residential mortgages. In July 2012, the SFO announced that it had agreed to investigate manipulation of LIBOR, since when, thirteen people have been charged with fraud or conspiracy to defraud. The SFO stated that would continue to work with the FCA and US agencies. The government said that ‘[i]t is vital that law enforcement agencies are seen to have both the will and the capability to investigate offences relating to complex financial transactions.’

have also been charged with offences of making and accepting a financial advantage contrary to section 1 (1) and 2 (1) of the Bribery Act 2010.’


One person has pleaded guilty in October 2014. For full details, see chapter 2.2.2, footnote 66.

Attorney General’s Office, ‘Fighting economic crime in the modern world’ (n 10).

Financial instruments such as, ‘derivatives based on the BBA LIBOR rates are now traded on exchanges such as LIFFE and the Chicago Mercantile Exchange (CME) as well as over-the-counter.’ British Bankers’ Association, ‘Understanding BBA LIBOR - a briefing by the British Bankers’ Association’ http://www.bbailibor.com/news-releases/understanding-bba-libor accessed 16 January 2014.

For full details, see chapter 2.2.2, footnote 66.


Attorney General’s Office, ‘Fighting economic crime in the modern world’ (n 10).
The LIBOR scandal erupted in June 2012 when the FSA announced a financial penalty of £59.5m had been imposed on Barclays Bank.\(^{283}\) The FSA described the penalty as being for ‘significant failings’.\(^{284}\) The press and politicians referred to the issue as a scandal.\(^{285}\) The issue was that LIBOR, ‘something of an anachronism, a throwback to a time when many bankers within the square mile [City of London] knew one another and when trust was more important than contract.’\(^{286}\) As The Economist reports, ‘[w]hat may still seem to many to be a parochial affair involving Barclays, a 300-year-old British Bank, rigging an obscure number, is beginning to assume global significance.’\(^{287}\) The FSA reported the misconduct of Barclays’ employees who ‘were involved in submitting artificially low estimate for the setting of the LIBOR, before and during the financial crisis.’\(^{288}\) LIBOR may well be a ‘throwback’ and the BBA, as discussed later, may well regret its role in managing a benchmark rate\(^{289}\) which was used for purposes outwith its original intention, however, the ‘LIBOR issue is serious.’\(^{290}\)

The reason why LIBOR is serious is that it, alongside ‘the Euro Interbank Offered rate (EURIBOR), are benchmark reference rates fundamental to the operation of both UK and international financial markets, including markets in interest rate derivatives contracts.’\(^{291}\) The FSA said that ‘LIBOR and EURIBOR are by far the most prevalent benchmark reference rates used in

\(^{283}\) Financial Services Authority, ‘Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR’ (n 155).
\(^{284}\) Financial Services Authority, ‘Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR’ (n 155).
\(^{286}\) George Osborne MP. HC Deb 2 July 2012, Col 616
\(^{287}\) The Economist, ‘The LIBOR scandal’ (n 286).
\(^{288}\) The Economist, ‘The LIBOR scandal’ (n 286).
\(^{290}\) ‘Like many of the City's ways, LIBOR is something of an anachronism, a throwback to a time when many bankers within the Square Mile knew one another and when trust was more important than contract. For LIBOR, a borrowing rate is set daily by a panel of banks for ten currencies and for 15 maturities. The most important of these, three-month dollar LIBOR, is supposed to indicate what a bank would pay to borrow dollars for three months from other banks at 11am on the day it is set. The dollar rate is fixed each day by taking estimates from a panel, currently comprising 18 banks, of what they think they would have to pay to borrow if they needed money. The top four and bottom four estimates are then discarded, and LIBOR is the average of those left. The submissions of all the participants are published, along with each day's LIBOR fix.’ The Economist, ‘The LIBOR scandal’ (n 286).
euro, US dollar and sterling over the counter (OTC) interest rate derivatives contracts and exchange traded interest rate contracts.\textsuperscript{292} The use made of this data affects ‘payments made under a wide range of other contracts including loans and mortgages\textsuperscript{293} and involves ‘a wide range of counterparties including small businesses, large financial institutions and public authorities.’\textsuperscript{294} The volume of trades quoted by FSA is significant:

The notional amount outstanding of OTC interest rate derivatives contracts in the first half of 2011 has been estimated at 554tn dollars. The total value of volume of short term interest rate contracts traded on LIFFE [London International Financial Futures Exchange] in London in 2011 was 477 trillion euro including over 241 trillion euro relating to three month EURIBOR future contract.\textsuperscript{295}

Having established that LIBOR was far from an ‘obscure number’, it became clear that ‘[s]ince 2009, the FSA and other international regulators have been extensively investigating allegations of widespread attempts in the banking industry to manipulate\textsuperscript{296} LIBOR. The Economist reported that:

Regulators around the world have woken up, however belatedly, to the possibility that these vital markets may have been rigged by a large number of banks. The list of institutions that have said they are either co-operating with investigations or being questioned includes many of the world’s biggest banks. Among those that have disclosed their involvement are Citigroup, Deutsche Bank, HSBC, JP Morgan Chase, RBS and UBS.\textsuperscript{297}

Contemporaneously with Barclays’ financial penalty to FSA, ‘Barclays was also fined $200m by the US Commodity Futures and Trading Commission and a further US $160m penalty imposed by the DoJ in respect of attempted LIBOR manipulation and false reporting charges.’\textsuperscript{298}

\textsuperscript{292} Financial Services Authority, ‘Barclays Bank plc – Final Notice’ (n 291).
\textsuperscript{293} Financial Services Authority, ‘Barclays Bank plc – Final Notice’ (n 291).
\textsuperscript{294} Financial Services Authority, ‘Barclays Bank plc – Final Notice’ (n 291).
\textsuperscript{295} Financial Services Authority, ‘Barclays Bank plc – Final Notice’ (n 291).
\textsuperscript{296} Other regulators included: United States, Canada and Japan.
\textsuperscript{299} Callaghan and Ullah (n 296) 160. Other charges: see Financial Conduct Authority (Chapter 5 – 5.2.1)
\textsuperscript{300} Financial Services Authority, ‘Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR’ (n 155).
A full review of the LIBOR scandal is outside the scope of this thesis, but there are other commentaries which provide greater details. However, a key issue was not just the ability of the regulator, to levy financial penalties but an examination of whether there had been breaches of the criminal law. George Osborne stated:

> every avenue for the possible criminal investigation of individuals involved in the attempted manipulation of LIBOR is being explored, but in the view of its chairman, Lord Turner, the powers given to the FSA do not allow it to pursue criminal sanctions. People in the country rightly ask why it does not have the necessary powers, and those who set up the tripartite system can answer.

People also ask whether the gaping holes in the existing law mean that no action at all is possible. After all, fraud is a crime in ordinary business, so why should it not be in banking? I agree with that sentiment, and I welcome the Serious Fraud Office’s confirmation that it is actively and urgently considering the evidence to see whether criminal charges can be brought, particularly in relation to the Fraud Act 2006 and false accounting. It expects to come to a conclusion by the end of the month, and we encourage it to use every legal option available.

The outcome of the SFO review was that it ‘formally accepted on 6 July 2012, and involves an investigation into allegations of attempts by traders and submitters at a number of banks and other financial institutions to manipulate the rate at which LIBOR was set, since when it has charged thirteen people with conspiracy to defraud. The issue of the relationship between FSA and SFO was highlighted in the House of Commons Treasury Select Committee which recommended a ‘formal and comprehensive framework’ be put in place:

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Financial Conduct Authority, ‘ICAP Europe Limited fined £14 million’ (n 158).

Financial Conduct Authority, ‘The FCA fines Rabobank £105 million’ (n 159).


Financial Conduct Authority, ‘The FCA fines Rabobank £105 million’ (n 159).

25 September 2013 Financial Conduct Authority, ‘ICAP Europe Limited fined £14 million’ (n 158).


George Osborne MP. HC Deb 2 July 2012, Col 612.


For full details, see chapter 2.2.2, footnote 66.
The SFO is now conducting a criminal investigation into LIBOR. The Committee was surprised that neither the FSA nor the SFO saw fit to initiate a criminal investigation until after the FSA had imposed a financial penalty on Barclays. The evidence in this case suggests that a formal and comprehensive framework needs to be put in place by the two authorities to ensure effective relations in the investigation of serious fraud in financial markets. The lead authority must be clearly identified for the purposes of an investigation, and formal minutes of meetings between the authorities must be maintained. We recommend that the Wheatley review examine whether there is a legislative gap between the responsibility of the FSA and the SFO to initiate a criminal investigation in a case of serious fraud committed in relation to the financial markets.305

The suggestion of a framework between SFO and FSA (now FCA) emphasises the need for cooperation between two agencies operating under the separate agency model, instead of reaping the benefit of matters being dealt with by one agency.

A key challenge for the SFO is management of its financial resources which have recently diminished.306 Because of financial constraints, the SFO has to rely upon ‘blockbuster’ funding,307 which the SFO describe as:

This funding reflects the arrangement through which “Blockbuster” cases are supported. It is in the nature of the SFO’s work that significant additional funding can be required at short notice. In a very short space of time, it can become clear that an investigation, as wide as that into Libor, is required. At the same time, I consider it would be unacceptable to have expert investigators, lawyers and accountants as permanent employees waiting around in case such an investigation is required.308

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305 House of Commons Treasury Committee, ‘Fixing LIBOR’ (n 127).

The SFO Budget showed actual reductions from £53.2m in 2009/9, £40m in 2009/10, £35.5m in 2010/11, and £31.6m in 2011/12. The projections showed similar reductions to £34.8m in 2012/13, £32.2m in 2013/14 and £30.8m in 2014/15. In the event, the outturn for 2012/13 was £38m and 2013/14 £51m, reflecting the availability of ‘blockbuster’ funding. The 2014 projections showed budget £37m in 2014/15 and £35.4m in 2015/16. The Serious Fraud Office investigates the most serious and complex cases of fraud, bribery and corruption as described above. The quantity of such work is unpredictable. The SFO has a core budget for this purpose but some exceptionally large cases may require additional resources. The Government has previously made clear that where the SFO needs additional resources, these will be provided. The current agreement with HM Treasury is that any exceptional case funding should be agreed as part of the Supplementary Estimates process.


308 House of Commons Justice Committee, ‘Serious Fraud Office Supplementary Estimate 2013-14’ (n 306) 4.
In January 2014, the government announced further resources of £19 m,\(^{309}\) but would not specify the resource allocation.\(^{310}\) However, the press reported that this was needed for the SFO’s inquiry into LIBOR, ‘Barclays fundraising from Qatar, a Rolls Royce investigation and to meet costs linked to a £300 m damages suit launched by (...) the Tchenguiz brothers.’\(^{311}\) The latter being settled by the SFO paying damages and costs in August 2014.\(^{312}\) Unhappily for the SFO, the House of Commons Justice Committee has published more information,\(^{313}\) prompting the headline ‘Fraud Office gets £19 m bailout after misleading taxman’\(^{314}\) because ‘it wrongly reclaimed VAT between 2009 and 2012 on fees paid to counsel.’\(^{315}\) These issues are laid at the door of the previous Director.\(^{316}\) The Solicitor General having described the LIBOR scandal as ‘the most high profile current issue in the UK ,’\(^{317}\) the shadow Attorney General remarked that ‘it was entirely predictable that the scale and pace of budget cuts inflicted on the SFO would make it impossible for the agency to prosecute its workload.’\(^{318}\) In recognition of this, The Times report that the ‘Justice Committee is now to ask Dominic Grieve, the Attorney-General, if he thinks that “the current funding arrangements of the SFO are sustainable”.’\(^{319}\)

The perception of the SFO’s workload presents a further difficulty in that it does not provide a running commentary on its work, merely providing some occasional comment, such as: ‘[t]he biggest is Libor. This investigation employs a team of 60. Charges have been laid against [thirteen] individuals so far. There will be further

\(^{309}\) Oliver Heald MP, HC Deb 30 January 2014, vol 574 col 39W
\(^{310}\) Oliver Heald MP, HC Deb 4 February 2014, vol 575 col 147W
\(^{311}\) Reuters, ‘UK fraud prosecutor seeks extra 19 million pounds for Libor, other cases’, (n 306).
\(^{312}\) The SFO has so far spent £8.1 m defending the £300 m claim by the Tchenguiz brothers, due to go to trial in October, the High Court heard’, Financial Times, 8 April 2014, http://www.ft.com/cms/s/0/5f0e1f06-bf41-11e3-a4af-00144feabcdc0.html#axzz2yUAjxFyc accessed 10 April 2014.
\(^{313}\) The SFO has now agreed to pay Mr Tchenguiz and his business entities the total sum of £3 million plus their reasonable costs in full and final settlement of their civil claims.
\(^{315}\) The SFO has now agreed to pay Mr Robert Tchenguiz, R20 and the Trustee the total sum of £1.5 million in full and final settlement, with costs to be determined by the Court if they cannot be agreed.
\(^{317}\) House of Commons Justice Committee, ‘Serious Fraud Office Supplementary Estimate 2013-14’ (n 306) 4.
\(^{318}\) The Times, ‘Fraud Office gets £19 m bailout’ (n 218).
\(^{319}\) The Times, ‘Fraud Office gets £19 m bailout’ (n 218).
\(^{320}\) The Times, ‘Fraud Office gets £19 m bailout’ (n 218).
significant developments in due course.\textsuperscript{320} Such statements are then augmented by further announcements of additional persons charged.\textsuperscript{321} The effect of this is that the SFO’s Director has no opportunity to advance his case, where Reuters report that ‘he has staked his reputation on the success of high-profile investigations such as the sprawling global investigation into Libor manipulation.’\textsuperscript{322} This then allows a vacuum to be filled by politicians, such as the shadow Attorney General observing:

This is not a government that takes economic crime seriously, which is why it is allowing the SFO to stagger from crisis to crisis and providing temporary sticking plasters [blockbuster funding] where what is needed is a long-term plan to put it on a sustainable footing.\textsuperscript{323}

In the meantime, parallel proceedings were instituted in the civil court in \textit{Graiseley Properties Limited v Barclays Bank Plc}.\textsuperscript{324} In these cases, ‘[t]he Court of Appeal ruled (…) that two businesses bringing separate cases against Barclays and Deutsche Bank could include allegations about manipulation of the Libor lending benchmark in their cases.’\textsuperscript{325} However, Barclays settled the case before trial,\textsuperscript{326} which had the effect of keeping documents and witness evidence private which might have shed light on the commercial issues giving rise to allegations of manipulation which would have been a helpful insight in parallel with the SFO cases.

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\textsuperscript{320} Green (n 91). For full details, see chapter 2.2.2, footnote 66.  \\
\textsuperscript{321} For full details, see chapter 2.2.2, footnote 66.  \\
\textsuperscript{322} Reuters, ‘UK fraud prosecutor seeks extra 19 million pounds for Libor, other cases’, (n 306).  \\
\textsuperscript{323} Reuters, ‘UK fraud prosecutor seeks extra 19 million pounds for Libor, other cases’, (n 306).  \\
\textsuperscript{324} [2013] EWCA Civ 1372.  \\
\textsuperscript{325} The Times, 9 November 2013 ‘banks lose bid to dismiss Libor claims’.  \\
\textsuperscript{326} The Times, 8 April 2014, ‘Settlement keeps Diamond and out of court’
\end{flushleft}
6.2.3 The Competition and Markets Authority

The Competition and Markets Authority (CMA) \(^{327}\) was established by the Enterprise and Regulatory Reform Act 2013 (ERRA), \(^{328}\) taking effect from 1\(^{st}\) April 2014, at which stage the Office of Fair Trading (OFT) and Competition Commission (CC) are abolished. \(^{329}\) It is a non-ministerial department of the Department of Business, Innovation and Skills. \(^{330}\) The government rationale for merging two ‘world class’ \(^{331}\) organisations was provided by the CMA chairman: ‘competition is a key driver for delivering greater productivity and growth in the UK economy, particularly in the context of the financial crisis and recession and the challenges that lie ahead in sustaining competitiveness.’ \(^{332}\) The CMA was established as a ‘single competition and consumer authority, bringing together most of the OFT’s consumer role and all of its competition work together with the Competition Commission.’ \(^{333}\) The OFT’s consumer credit activities being transferred to the FCA. \(^{334}\) The CMA was established as a ‘strong, independent competition authority’ \(^{335}\) but given a ‘steer’ \(^{336}\) by government as to its priorities, in particular: ‘[s]ecuring strong, sustainable economic growth is the Government’s central priority and open and fair competition is a vital ingredient in achieving this.’ \(^{337}\) The CMA is given a ‘steer’ \(^{338}\) to enforce: ‘the CMA should select and conclude an appropriate mix of complex and simpler enforcement cases to maximise its impact,

\(^{327}\) Enterprise and Regulatory Reform Act 2013, ss 25–28.

\(^{328}\) Enterprise and Regulatory Reform Act 2013, s 25.

\(^{329}\) Enterprise and Regulatory Reform Act 2013, s 26.


\(^{332}\) Competition and Markets Authority, ‘Speech Redesigning Regulatory Architecture’ (n 330).

\(^{333}\) Department for Business, Innovation and Skills, ‘Competition Regime: Response to consultation on statement of strategic priorities for the CMA 1 October 2013. Strategic Steer for the Competition and Markets Authority 2014-17.’

\(^{334}\) HM Treasury, ‘A new approach to financial regulation: transferring consumer credit regulation’ (n 93).

\(^{335}\) Department for Business, Innovation and Skills, ‘Competition Regime: Response to consultation on statement of strategic priorities for the CMA 1 October 2013. Strategic Steer for the Competition and Markets Authority 2014-17.’

\(^{336}\) Department for Business, Innovation and Skills, ‘Competition Regime’ (n 335) 10.

\(^{337}\) Department for Business, Innovation and Skills, ‘Competition Regime’ (n 335) 4.
end abuse and create a credible deterrent effect to anticompetitive behaviour across the whole economy.\textsuperscript{339}

The significance of the establishment of the CMA is that it is the single entity to regulate competition and markets and it is a ‘unitary body (…) bringing together the OFT’s competition and key consumer functions with the functions of the CC.’\textsuperscript{340} The concentration of resource into one entity is precisely what was proposed in relation to the formation of an ECA. The government rationale is that by: ‘combining these roles in a single body, the regime will be more coherent and predictable, competition processes more efficient and there will be more flexible allocation of resources.’\textsuperscript{341} Clearly, the inference to be drawn is that a multiplicity of bodies is less coherent, less predictable and less efficient because resources cannot be managed to advantage. Furthermore, in pursuance of CMA’s objective to criminalise cartels, the prosecutor no longer has to prove dishonesty.\textsuperscript{342}

Unlike conspiracy to defraud, where dishonesty has to be present,\textsuperscript{343} the removal of the requirement to establish \textit{Ghosh}\textsuperscript{344} dishonesty from the criminal cartel offence,\textsuperscript{345} in addition to the ERR\textsuperscript{346} which also addresses the concurrent enforcement powers ‘granted to certain sector economic regulators [which] is one of the more remarkable features of UK competition law.’\textsuperscript{347} These regulators were established as part of the privatisation\textsuperscript{348} of state-owned businesses, such as

\textsuperscript{339} Department for Business, Innovation and Skills, ‘Competition Regime’ (n 335) 17.
\textsuperscript{342} Enterprise Act 2002, s 188.
\textsuperscript{344} R v Ghosh [1982] EWCA Crim 2.
\textsuperscript{345} Dunne (n 331) 254.
\textsuperscript{346} Enterprise and Regulatory Reform Act 2013.
\textsuperscript{347} Dunne (n 331) 254.
\textsuperscript{348} ‘privatisation of utilities as vertically (or horizontally) integrated monopolies was routine, particularly in the initial stages, as liberalisation was viewed as a secondary consideration to the need to secure sufficient
water, gas and electricity and have their own regulatory powers. The government was keen to see increased enforcement activity stating that ‘the cartel offence should deter the most serious forms of anti-competitive behaviour but there have been only 2 cases prosecuted, only 1 successfully.’ Thus, there is increased pressure on sector regulators to use antitrust powers to promote competition: [t]he CMA will also have powers to allocate cases, and in certain circumstances, take cases from sector regulators. The clarity of purpose is plain and within the CMA structure including the network of statutory regulators, the expectation is that either the regulators use their powers of the CMA will do so. This offers a template which could be used with advantage in relation to an ECA.

6.2.4 Crown Prosecution Service

The Crown Prosecution Service (CPS) is headed by the Director of Public Prosecutions. Since 2010, the CPS has also administratively encompassed the Revenue and Customs Prosecutions Office (RCPO), although legislation to achieve formal transfer of powers had to wait until 2014. It is instructive to note that the previous government’s method of achieving an administrative merger was to appoint the DPP additionally as the Director of RCPO, but what this meant was...
'running two offices under one umbrella'. Thus, to achieve the amalgamation of two prosecutorial organisations, the simple mechanism of appointing the same person to head both organisations must have been intended to accomplish the objective without the necessity of formalising such change. However, this simple solution had still left in place an operational difficulty because since 2010, RCPO cases had been 'ring fenced'. The manner in which this has been implemented is that RCPO cases remained to be 'prosecuted by a specialist fraud division of the CPS' which is administratively cumbersome because of confidentiality considerations which limited RCPO cases to being handled by a small number of crown prosecutors, rather than by any similarly authorized CPS prosecutors. The government considered that the ‘two offices under one umbrella' operating model was inefficient and time-consuming whereas the combined operation would provide ‘increased value for money that derives from minimising duplication and making economies of scale.' This is a further example of the muddled manner in which the UK government’s response to economic crime was hamstrung from the outset by not establishing a cohesive management structure for the CPS, underpinned by the proper legislative change, belatedly taking place in 2014, which enables the relationship to be placed on a formal basis, which should have happened at the outset as the scrutiny committee confirmed that this was not a contentious matter.

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355 Ministry of Justice, ‘Explanatory document to the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014’ (n 353) 2.
356 Ministry of Justice, ‘Explanatory document to the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014’ (n 353) 3.
357 Ministry of Justice, ‘Explanatory document to the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014’ (n 353) 3.
358 Ministry of Justice, ‘Explanatory document to the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014’ (n 353) 5.
359 Ministry of Justice ‘Explanatory document to the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014’ 6.
361 The purpose of the merger was to create a strengthened prosecution service to safeguard and improve the high-quality work done by both organisations in serious and complex cases, and to provide efficiency savings. The administrative merger has achieved those objectives, but it is unsatisfactory that the two organisations continue to exist as legally distinct entities: first, it tends to call into question whether the change is intended to be permanent; and secondly, it has practical implications for how the organisations work.’ House of Commons, Dedicated Legislation Committee Debate. 17 March 2014. http://www.publications.parliament.uk/pa/cm201314/cmgeneral/deleg1/140317/140317s01.htm accessed 10 April 2014.
362 House of Commons, Dedicated Legislation Committee Debate (n 361).
6.2.5 National Fraud Authority

The NFA, was originally titled The National Strategic Fraud Authority and was established in 2008.\textsuperscript{363} However, its existence has proved to be short-lived because it ceased to exist from March 2014,\textsuperscript{364} and to ‘realign its responsibilities to reflect the creation of the NCA.’\textsuperscript{365} The government explained that ‘[w]hile the NFA has been successful in raising awareness of fraud and improving co-ordination, the focus should now be on cutting economic crime.’\textsuperscript{366} The government’s conclusion is that ‘[t]he closure of the NFA will strengthen the government’s fight against economic crime by concentrating effort into law enforcement bodies and improving the fraud reporting and analysis service.’\textsuperscript{367} The NFA responsibilities were spread amongst the Home Office, NCA, Cabinet Office and City of London Police (COLP).\textsuperscript{368} The latter change will see the reporting of fraud into the dedicated centre, Action Fraud,\textsuperscript{369} become the responsibility of COLP. Given that the creation of Action Fraud was a key recommendation of the Fraud Review in 2006,\textsuperscript{370} when it would have been open to the review to conclude that the fraud reporting centre should be located within COLP, this is a significant change and takes away the independence of the fraud reports receptor. In April 2013, ‘all UK police forces started referring victims directly to Action Fraud’,\textsuperscript{371} in a move which saw all police forces reporting fraud to a non police organization but which is to be embraced within a single police force, as COLP observe: ‘[t]his further integrates our functionality as the National Police Service Lead for Economic Crime and enhances our capability to combating fraud nationwide.’\textsuperscript{372} COLP state that they are ‘the acknowledged lead force within

\textsuperscript{363} May (n 115).
\textsuperscript{364} May (n 115).
\textsuperscript{365} May (n 115).
\textsuperscript{366} May (n 115).
\textsuperscript{367} May (n 115).
\textsuperscript{368} ‘Strategic development and threat analysis will be led by the NCA’; ‘Action Fraud, the national fraud and financially-motivated crime reporting centre’ to the City of London Police; ‘work to raise awareness of fraud’ to the Home Office; and ‘development of the Counter-fraud checking service will be led by the Cabinet Office.’ May (n 115).
\textsuperscript{369} Formerly the National Fraud Reporting Centre.
the UK for economic crime investigation\textsuperscript{373} however, they will have to work with the NCA’s Economic Crime Command.\textsuperscript{374} This adds another level of complexity in managing the relationship between different organisations instead of one cohesive unit incorporating all the elements of the anti-economic crime endeavours.

6.2.6 National Crime Agency

The NCA, formed by the Crimes and Courts Act 2013\textsuperscript{375} became operational in October 2013,\textsuperscript{376} took over the Serious Organised Crime Agency\textsuperscript{377} intended to be:

front and centre in the UK’s fight to cut serious and organised crime. It will be a highly visible agency of crime fighters, drawing on a single, shared, national intelligence picture to lead the UK’s response to the most dangerous criminal groups and individuals.\textsuperscript{378}

The NCA is classified as a Non-Ministerial Department,\textsuperscript{379} and directly accountable through the Home Secretary to Parliament.\textsuperscript{380} Although a new organisation, it encompasses a number of existing organisations.\textsuperscript{381} The NCA organises its activities into four command areas: Organised Crime Command; Border Policing Command; Economic Crime Command; and CEOP Command.\textsuperscript{382}

The government have set the NCA strategic priorities: ‘to identify and disrupt serious and organised crime including by investigating and enabling the

\begin{flushright}
\textsuperscript{375} Crime and Courts Act 2013, s 1.  
\textsuperscript{379} ‘NMDs are departments in their own right, established to deliver a specific function; part of government, but independent of Ministers. The precise nature of relationships between NMDs and Ministers vary according to the individual policy and statutory frameworks, but the general rationale is to remove day-to-day administration from ministerial control.’ Treasury Select Committee. http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmselect/cmtreasy/1111/111107.htm accessed 4 April 2014.  
\textsuperscript{381} The Serious Organised Crime Agency (SOCA), the Child Exploitation and Online Protection Centre (CEOP); the Police Central e-Crime Unit; the former UKBA Criminal and Financial Investigation Borders team; and a number of units from the National Policing Improvement Agency.  
\end{flushright}
prosecution of those responsible.\textsuperscript{383} to support, and where appropriate, lead cross-government work (…) strengthen protection against and reduce the impact of serious and organised crime\textsuperscript{384} and preventing people becoming involved in such crime.\textsuperscript{385} The priorities also include collaboration with other departments and agencies together with facilitating ‘intelligence sharing and transparency.’\textsuperscript{386}

The Economic Crime Command (ECC) is the area of importance to this research, because it was established as part of NCA rather than being a separate ECA. The NCA sees the ECC’s role as ‘to cut economic crime by disrupting criminal activity and educating those most of risk of attack. It coordinates activity, shares intelligence and knowledge with partners, disrupting criminal activity, and seizing assets.’\textsuperscript{387} The NCA Annual Plan 2014/15 \textsuperscript{388} ‘published at the start of the NCA’s first full operational year,’ forms ‘the basis for how the NCA will lead, support and coordinate the operational response to the threat from serious and organised crime.’\textsuperscript{389} It is clear both that the NCA have little to report in terms of ECC activities and the plan merely identifies themes for its future work: ‘fraud against the individual, the private and the third sectors; fraud against the public sector (these are high priority); bribery and corruption / sanctions evasion; counterfeit currency; market abuse / insider dealing.’\textsuperscript{390} Although the NCA has been in existence for a short time which does not allow conclusions to be drawn regarding its performance, the themes identified suggest a confused approach with yet another agency involved in anti-bribery and corruption and market abuse and insider dealing which already has areas of overlap with the SFO and FCA.

6.3 Trade Associations

There are three significant trade associations which make a contribution to a regulatory response to economic crime. The BBA represents the interests of the UK banking industry while the Joint Money Laundering Steering Group (JMLSG) is

\textsuperscript{386} National Crime Agency, ‘NCA Annual Plan 2013–14’ (n 378) 5.  
an association of financial services industry organisations with a focus on combating money laundering. The Fraud Advisory Panel (FAP) seeks to raise awareness of fraud and provide advice to government and others. These trade associations do more than merely providing commentaries on the economic crime arena: JMLSG guidance is endorsed by government; FAP has been given a lead role in civil justice approach to fraud; while the BBA created and managed the international benchmark interest rates system which regrettably mutated into an instrument used in economic crime. These demonstrate the mixed effectiveness of non government bodies and suggest that a more cohesive approach is appropriate.

6.3.1 British Bankers’ Association

The BBA is ‘the UK’s leading association for the banking and financial services sector, representing the interests of more than 240 member organisations with a worldwide presence in 180 countries.’

The role of the BBA is to help customers, promoting growth, raising standards.’

The BBA has two high level strategic aims: ‘to restore trust and confidence in banking; [and], to be the principal trade association for banking.’ This is a response to the economic crisis and recognition that ‘[t]rust and confidence in banking in the UK is at a low level and there is widespread hostility to banks among politicians, regulators, the media, consumer groups and some business groups.’ The BBA recognise that ‘[t]his makes it difficult for banks to get their legitimate concerns addressed’, which is not assisted by the tarnished reputation of the BBA itself as the industry mouthpiece for they themselves acknowledge that their own reputation ‘has also been damaged.’

The challenge for the BBA is to realise their ambition to ‘restore confidence and trust in banking so that BBA members can fully contribute to the delivery of sustained economic growth and support customers and clients, and so that the sector is no longer the

subject for political debate.\textsuperscript{398} The ‘trade association’ work undertaken by BBA involves representing the banking industry on regulation and legislation at UK, EU and international level, recognising that ‘the bulk of regulation affecting banking [comes] from the EU.’\textsuperscript{399} This is an important area because the BBA point to ‘the divergence of regulatory approaches in international financial markets’\textsuperscript{400} which ‘encourages “regulatory arbitrage” whereby financial service providers have an incentive to locate business in the most favourable regulatory regime.’\textsuperscript{401} Thus, the BBA recognise their role is as a trade association speaking for their members in an antipathetic environment, which should benefit from a line being drawn on their involvement in the LIBOR scandal which, regrettably, saw a helpful benchmark interest rate become an instrument of economic crime.

6.3.1.1 BBA and LIBOR

The BBA has faced the twin challenges of representing the banking sector at a time when banks themselves were in the spotlight because of the financial crisis and the LIBOR scandal, where LIBOR: \textsuperscript{402}

\begin{quote}
\textsuperscript{398} British Bankers’ Association, ‘BBA Strategy 2013-15’ (n 393).
\textsuperscript{399} British Bankers’ Association, ‘BBA Strategy 2013-15’ (n 393).
\textsuperscript{401} British Bankers’ Association, ‘Banks need a level playing field’ (n 400).
\textsuperscript{403} ‘BBA LIBOR was first developed in the 1980s as demand grew for an accurate measure of the rate at which banks would lend money to each other. This became increasingly important as London’s status grew as an international financial centre. More than 20 per cent of all international bank lending and more than 30 per cent of all foreign exchange transactions now take place in London. BBA LIBOR is now used to calculate the interest rates for a range of financial instruments; derivatives based on the BBA LIBOR rates are now traded on exchanges such as LIFFE and the Chicago Mercantile Exchange (CME) as well as over-the-counter. The rates are also used as the basis for many types of lending, from syndicated and commercial lending, to calculating rates on residential mortgages.’ British Bankers’ Association, ‘Understanding BBA LIBOR’ (n 403).
\end{quote}

\begin{quote}
\end{quote}
benchmark but had not seemingly reacted to the growing importance of its data nor how such data was being utilised, with the consequence that its ‘systems, controls and governance arrangements (…) had proven inadequate.’\textsuperscript{405} The Treasury Review noted that the BBA had voiced questions over the appropriateness of a trade body providing this function.\textsuperscript{406} The ‘Wheatley Review’ (Wheatley)\textsuperscript{407} concluded that: the ‘authorities should introduce statutory regulation of (…) LIBOR, including an Approved Persons regime, to provide the assurance of credible independent supervision, oversight and enforcement, both civil and criminal; and that the ‘BBA should transfer responsibility for LIBOR to a new administrator.’\textsuperscript{408} Another recommendation of Wheatley was that LIBOR should become a regulated activity which has been achieved by the ‘Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2013.’\textsuperscript{409} The BBA involvement in LIBOR ceased in January 2014, when administration was handed over to another organisation.\textsuperscript{410}

6.4 Conclusion

The Coalition government came to power with a bold mission ‘to hold those suspected of financial wrongdoing to account’\textsuperscript{411} as part of their ‘day of reckoning’\textsuperscript{412} and ‘serious about white collar crime’\textsuperscript{413} agenda. In order to achieve this key policy objective the Coalition government agreed to ‘to create a single

\textsuperscript{405} A clear finding of the Review is that the systems, controls and governance arrangements covering the processes of submitting to and administering LIBOR have proven inadequate especially given the pressures on LIBOR created by market developments in recent years. Given the importance of the benchmark to the stable and efficient operation of a wide range of financial markets, there is a strong case for bringing these activities clearly and explicitly within the regulatory perimeter.’\textsuperscript{11} H M Treasury, ‘The Wheatley Review of LIBOR: final report’, 11.

\textsuperscript{406} ‘It should be noted that on 25 April 2008, Angela Knight [BBA Chief Executive] is quoted as telling a meeting of senior UK bankers, as well as representatives of the Bank of England (including the Deputy Governor at the time, Sir John Gieve) that “Longer term, [she] thought it would be necessary to explore whether a trade association was best placed to continue to provide what represented a key piece of market infrastructure.”’\textsuperscript{406} Financial Conduct Authority, ‘Business Plan 2014/15’ (n 122) 57.

\textsuperscript{407} H M Treasury, ‘The Wheatley Review’ (n 405).


\textsuperscript{409} IntercontinentalExchange Group (NYSE: ICE), the leading global network of exchanges and clearing houses, today announced that ICE Benchmark Administration (IBA) will officially take over as the new administrator of the London Interbank Offered Rate (LIBOR) from February 1, 2014. Today the Financial Conduct Authority (FCA) confirmed formal authorisation to IBA to administer LIBOR effective February 1, 2014.’\textsuperscript{409} Intercontinental Exchange Group, ‘Libor’ http://ir.theice.com/default.aspx?SectionId=5cc5ecca-6c48-4521-a1ad-480e593e4835&LanguageId=1&PressReleaseId=3ad034fa-38c3-4161-903e-c5d8406289ff accessed 24 February 2014.

\textsuperscript{411} BBC, ‘Cameron urges ‘day of reckoning’ (n 14).

\textsuperscript{412} BBC, ‘Cameron urges ‘day of reckoning’ (n 14).

\textsuperscript{413} H M Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 16).
agency to take on the work of tackling serious economic crime that is currently dispersed across a number of Government departments and agencies.\textsuperscript{414}

The Coalition government considered that the previous financial regulatory, or ‘tripartite’, regime centred on the FSA as a ‘super regulator’,\textsuperscript{415} together with HMT and the BoE, had failed to achieve its objectives by identifying ‘gaps in the UK regulatory system’.\textsuperscript{416} Furthermore, the FSA’s performance was attributed to the weakness of its ‘light-touch’ approach and an ‘overly close relationship with the City,’\textsuperscript{417} encouraged by political pressure to be ‘business friendly’ in competing with other financial centres, such as New York.\textsuperscript{418} The government’s response was to replace tripartite model with the ‘twin peaks’ model, where, firstly and pivotally,\textsuperscript{419} the BoE was given responsibility for Financial Stability and for the Prudential Regulation of banking institutions. The second ‘peak’ was the creation of the FCA to take responsibility for protecting consumers and the financial markets. This meant the disbanding of the FSA and provided a challenge to its successor not to be seen as simply the beneficiary of a rebranding exercise.

The PRA has the statutory role of ‘the promotion of the safety and soundness of PRA-authorised persons’;\textsuperscript{420} and ‘specifically for insurers, to contribute to the securing of an appropriate degree of protection for policyholders.’\textsuperscript{421} Under the Financial Services (Banking Reform) Act 2013, the PRA and FCA were given responsibility to prosecute a new criminal offence of ‘relating to a decision causing a financial institution to fail.’\textsuperscript{422} However, this would only apply to cases where a bank or financial institution had failed and entered insolvency, thus, poor decision making at a bank or institution which did not result in insolvency would not be penalised. This is a significant deficiency and is not congruent with the Prime Minister’s pre-government stance that ‘those who break the law should face

\textsuperscript{414} HM Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 16).
\textsuperscript{416} The other ‘twin peak’ is the Prudential Regulation Authority.
\textsuperscript{417} Tomasic (n 139) 7, 8.
\textsuperscript{418} Tomasic (n 139) 7, 8.
\textsuperscript{420} Financial Services Act 2012, s 132.
\textsuperscript{421} Prudential Regulation Authority, http://www.bankofengland.co.uk/PRA/Pages/default.aspx accessed 3 March 2014.
\textsuperscript{422} Financial Services Act 2012, s 133.
prosecution.\textsuperscript{423} Furthermore, the lack of criminal charges against any individual involved casts doubt on the FCA’s credible deterrence influencing individuals. Thus, although the FCA has a range of administrative penalties, there is a gap for conduct which warrants a criminal sanction in cases where there is no institutional failure or insolvency and the Fisher proposal of a crime of ‘reckless risk-taking’\textsuperscript{424} provides an attractive solution.

The replacement of ‘tripartite’ with ‘twin peaks’ regulatory model is a fulfilment of the Coalition agreement. However, in relation to the government commitment to establish an ECA, the government has ‘backtracked’.\textsuperscript{425} Instead of the SFO forming a key part of the overarching ECA, it has had to fight for its continued existence as the Home Office established a new non-ministerial department, the NCA, whose responsibilities range from border control to child exploitation and online protection but also encompass an ‘Economic Crime Command.’ This is a disappointment because instead of the ECA being accountable to either the Attorney General, as a specialist prosecutor,\textsuperscript{426} or HMT, with the same status as counter-terrorism financing, anti-money laundering or prudential regulation,\textsuperscript{427} the NCA is part of the Home Office bailiwick which states that it is ‘the department with the role of crime-fighting’, believing that ‘the government is determined to give greater focus to tackling both serious and economic crime’\textsuperscript{428} and ‘that the “piecemeal” approach to tackling white-collar crime will end’.\textsuperscript{429} As part of organisational changes, the NFA, which provided the government’s strategic lead on combating fraud, was subsumed into the Home Office in 2013 and formally disbanded in 2014.\textsuperscript{430}

Although the prospect of an ECA has receded, the two principal agencies have undoubtedly raised their profiles but whereas the former FSA Enforcement

\begin{footnotesize}
\item[423] Conservative Home (n 15).
\item[424] Fisher (n 57) 2.
\item[426] who presently superintends SFO
\item[427] which superintends FSA/FCA, in addition to Bank of England.
\item[430] To the Home Office.
\end{footnotesize}
Division looks to be settled as part of the FCA, the SFO’s future looks uncertain. The FCA, as a regulator, has been able to impose significant financial penalties (mainly as a result of LIBOR failings) totalling £476m in 2014.\textsuperscript{431}

The government’s intention for the FCA was of ‘delivering a regulatory regime under which the conduct of business of all retail financial services is regulated by a single body.’\textsuperscript{432} The FCA has ‘a single overarching strategic objective to ensure that markets function well’,\textsuperscript{433} unlike its predecessor the FSA which had four equal objectives, one being ‘the reduction of financial crime’.\textsuperscript{434} One of the FCA’s operational objectives is integrity: ‘protecting and enhancing the integrity of the UK financial system’,\textsuperscript{435} and includes ‘not being used for a purpose connected with financial crime.’\textsuperscript{437} In pursuit of these objectives, the FCA has continued the policy of ‘credible deterrence’, for which ‘the imposition of a financial penalty is central to its policy.’\textsuperscript{438} This policy has certain fiscal attractions because significant monies are raised for the Exchequer,\textsuperscript{439} however, as Cartwright observes, ‘[m]any breaches of FSMA occur where firms lack adequate controls, supervision and organisation rather than where they display wilful misconduct.’\textsuperscript{440} The ‘credible deterrence’ policy, whilst remunerative, has not answered questions such as that posed by Judge Rakoff in relation to the financial crisis of ‘[w]hy have no high level executives been prosecuted?’\textsuperscript{441} Thus, ‘the failure of the government to bring to justice those responsible for such colossal fraud bespeaks weaknesses in our prosecutorial system that need to be addressed.’\textsuperscript{442} Although Rakoff’s perspective is in relation to the US, the same questions and reasoning equally apply to the UK. Such a question is seen in sharp relief when the FCA had an opportunity in 2014 to demonstrate the credibility of its deterrence by taking action against an individual who had sought to benefit from the financial crisis by profiting unreasonably from Quantitative Easing to the detriment of the BoE and, ultimately,

\begin{itemize}
\item Financial Services Authority, ‘Fines Table’ 2013 £474.1m http://www.fca.org.uk/firms/being-regulated/enforcement/fines/2013 accessed 2 April 2014.
\item HM Treasury, ‘A new approach to financial regulation: transferring consumer credit regulation’ (n 93).
\item HM Treasury, ‘A new approach to financial regulation: transferring consumer credit regulation’ (n 93).
\item Financial Services and Markets Act 2000, s 6.
\item Financial Services Act 2012, s 1B(3).
\item Financial Services Act 2012, s 1D(1).
\item Financial Services Act 2012, s 1D(2)(b).
\item Cartwright (n 3) 5.
\item Financial Conduct Authority, ‘Financial services regulation and enforcement’ (n 121).
\item Cartwright (n 130) 6.
\item Rakoff (n 60).
\item Rakoff (n 60).
\end{itemize}
the UK taxpayer.\textsuperscript{443} The FCA’s response was a financial penalty of £662,700 and prohibition from working in the City.\textsuperscript{444} Clearly, the penalty was a significant sum for an individual but, set against his earnings for the previous year of £2.367m,\textsuperscript{445} does not look especially credible and far from eliciting condemnation, City commentators believed he had been harshly treated\textsuperscript{446} which may be an indication of a ‘mindset’ dating back to the time of ‘light touch’ regulation.

The heavier touch is associated with the SFO which has a unique role because of its power to both investigate and prosecute potential crimes unlike the Police and CPS who have separate roles. The SFO has the benefit of a relatively new BA2010 and the availability of Deferred Prosecution Agreements, though neither had the expected impact by mid-2014: firstly, because the prosecution of Bribery Act offences was for activities after July 2011 and there is a lengthy lead time cases to come to trial; and, secondly, because DPA’s only became available from February 2014. However, notwithstanding the lack of an SFO bribery case coming to trial, they have proposed an extension of the BA2010 s.7 offence of ‘failure to prevent bribery’\textsuperscript{447} as their contribution to answering the Rakoff question. Instead of having to prove that high level executives were the ‘controlling mind’, the SFO propose an offence of ‘failing to prevent all acts of financial crime, which would make the firm liable for all such offences by its staff. Not only would this have direct financial consequences but ‘threat of debarment from tendering for public contracts of any kind across the whole of the EU, which is thought to be far more worrying for corporations than one-off fines, whatever the size.’\textsuperscript{448}

However, in terms of performance, the SFO has also unable to shake off the past reputation of being maladroit because it seems that each success in investigation and prosecution is matched by examples of the SFO suffering from problems of its own making. For example, the Tchenguiz investigation and prosecution revealed

\textsuperscript{443} Financial Conduct Authority, ‘FCA Final Notice 2014: Mark Stevenson’ (n 171) 2.\textsuperscript{444} Financial Conduct Authority, ‘FCA Final Notice 2014: Mark Stevenson’ (n 171) 1.\textsuperscript{445} Financial Conduct Authority, ‘FCA Final Notice 2014: Mark Stevenson’ (n 171) 22.\textsuperscript{446} The Times, ‘Ian King: Business Editor’s Commentary (n 178).\textsuperscript{447} ‘I have suggested that the situation could easily be remedied by an amendment to s.7 of the Bribery Act to create the corporate offence of a company failing to prevent acts of financial crime by its employees. We need to tackle corporate criminal liability for DPAs to have maximum bite.’ Serious Fraud Office, Speech, ‘Ethical Business Conduct: An Enforcement Perspective’ (n 61).\textsuperscript{448} Bribery Library, ‘Director of the Serious Fraud Office seeks wider powers to pursue corporate crime under the Bribery Act’ http://www.briberylibrary.com/enforcement/director-of-the-serious-fraud-office-seeks-wider-powers-to-pursue-corporate-crime-under-the-bribery/ accessed 12 April 2014.
problems with its search procedures, resulting in litigation against the SFO reported to be of £300m;\textsuperscript{449} documentation relating to the SFO investigation of BAE being found in a cannabis farm;\textsuperscript{450} the Dahdaleh trial collapsing shortly before DoJ agreed a DPA including a penalty of US$384m on broadly the same facts;\textsuperscript{451} and most recently the SFO’s internal accounting issues of unauthorised payments to its own staff and wrongly claiming VAT refunds.\textsuperscript{452} Although these SFO issues can properly be laid at the door of the departed Director, nevertheless, the impression gains currency that the SFO is accident-prone.

Furthermore, the SFO has inadequate resources and a diminishing budget forces it to rely upon ‘blockbuster’ funding for new investigations, as with LIBOR.\textsuperscript{453} This is in sharp contrast to the FCA which has seen its budget increase by 15% to £452m since transforming itself from FSA.\textsuperscript{454}

LIBOR is a scandal which erupted in 2012\textsuperscript{455} and involves the FCA, SFO, BBA and BoE is the ‘allegations that bankers have colluded to manipulate the London inter-bank lending interest rate.’\textsuperscript{456} Barclays were fined £59.5m, followed by UBS

\textsuperscript{449} ‘The SFO has so far spent £8.1m defending the £300m claim by the Tchenguiz brothers, due to go to trial in October, the High Court heard’, \textit{Financial Times}, 8 April 2014, http://www.ft.com/cms/s/0/5f0e1f06-bf41-11e3-a4af-00144feabdc0.html#axzz2yUAjxFyc accessed 10 April 2014.


\textsuperscript{451} \textit{Financial Times}, 10 January 2014.. ‘Alcoa in $384m deal to settle Bahrain bribery charges’. http://www.ft.com/cms/s/0/62b10d60-793e-11e3-91ac-00144feabdc0.html#axzz2ucpXDq2D


\textsuperscript{453} The SFO Budget showed actual reductions from £53.2m in 2009/9, £40m in 2009/10, £35.5m in 2010/11, and £31.6m in 2011/12. The projections showed similar reductions to £34.8m in 2012/13, £32.2m in 2013/14 and £30.8m in 2014/15. In the event, the outturn for 2012/13 was £38m and 2013/14 £51m, reflecting the availability of ‘blockbuster’ funding. The 2014 projections showed budget £37m in 2014/15 and £35.4m in 2015/16. ‘The Serious Fraud Office investigates the most serious and complex cases of fraud, bribery and corruption as described above. The quantity of such work is unpredictable. The SFO has a core budget for this purpose but some exceptionally large cases may require additional resources. The Government has previously made clear that where the SFO needs additional resources, these will be provided. The current agreement with HM Treasury is that any exceptional case funding should be agreed as part of the Supplementary Estimates process.’

\textsuperscript{454} Serious Fraud Office, ‘Annual Report and Accounts 2011-12’, (n 306).

\textsuperscript{455} Serious Fraud Office, ‘Annual Report and Accounts 2013-14’ (n 306).

\textsuperscript{456} ‘Company Lawyer, ‘FCA and PRA to cost 15% more than FSA’, (2013) 34(7) Co Law 217. FCA budget 2014/14 ‘Our budget for the year is £452m, an increase of £6.3m (1%)’ Financial Conduct Authority, Business Plan 2014/15’ (n 122) 8.

\textsuperscript{457} Financial Services Authority, ‘Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR’ (n 155).

\textsuperscript{458} Attorney General’s Office, ‘Fighting economic crime in the modern world’ (n 10).
£160m,457 RBS £87.5m,458 ICAP £14m459 and Rabobank £105m.460 The reason why LIBOR is important is that it is the ‘benchmark reference rate fundamental to the operation of both UK and international financial markets, including markets in interest rate derivatives contracts.’461 In addition to the administrative penalties imposed by FCA, the SFO announced that it had agreed to investigate manipulation of LIBOR, since when, thirteen people have been charged with fraud or conspiracy to defraud.462 However, both the FSA and SFO were criticised by Parliament for failing to initiate a criminal investigation until Barclays had been fined.463 The government has described the LIBOR scandal as ‘the most high profile current issue in the United Kingdom’,464 which serves to highlight the role of two different organisations where the regulator seemed satisfied to impose a financial penalty without addressing the issue of criminal sanctions. Clearly, with both FCA and SFO as part of an ECA, there could have been greater clarity of thinking and a cohesive approach.

The BoE is responsible for ‘efficient and effective financial markets,’465 and ‘for the stability of the system as a whole,’466 whereas the FCA has ‘responsibility to oversee financial markets.’467 This is clearly confusing but is a demonstration that the anti-economic crime arena is multifaceted. This can be seen in serious allegations of manipulation of the foreign exchange markets,468 described by FCA as ‘every bit as bad as they have been with Libor’.469 The additional ingredient in this case is the involvement of the BoE which has suspended a member of staff,470

459 Financial Conduct Authority, ‘ICAP Europe Limited fined £14 million’ (n 158).
460 Financial Conduct Authority, ‘The FCA fines Rabobank £105 million’ (n 159).
462 For full details, see chapter 2.2.2, footnote 66.
464 Attorney General’s Office, ‘Fighting economic crime in the modern world’ (n 10).
466 The Sunday Times, ‘FCA ignored warnings of false market’ (n 87).
467 The Sunday Times, ‘FCA ignored warnings of false market’ (n 87).
468 Financial Times, ‘Forex claims ‘as bad as Libor’ (n 69).
469 Financial Times, ‘Forex claims ‘as bad as Libor’ (n 69).
announcing that it would ‘tighten its governance,’ and establish an enquiry.\textsuperscript{471} Thus, the interplay between the regulators of the markets and potential for SFO investigation will be interesting to observe because it has the potential to reveal either gaps in regulation or inertia caused by overlap between regulators. The need for primacy in regulation is underlined by the BoE’s concern that its parallel regulator the FCA had caused a false market in shares when announcing an enquiry into zombie (insurance) funds in 2014.\textsuperscript{473} If the tripartite regime was criticised for confusion over roles and responsibilities, it is important that the markets have one ultimate regulator and that should be the BoE because it is responsible for the stability of the system as a whole.

The creation of the NCA has added another level of confusion because the ECC has ambitions: ‘it coordinates activity, shares intelligence and knowledge with partners, disrupting criminal activity, and seizing assets.’\textsuperscript{474} Some of these activities are already undertaken by the SFO and FCA. The next level of confusion is that the ECC has themes for its future work which includes fraud,\textsuperscript{475} bribery and corruption and market abuse / insider dealing,\textsuperscript{476} which are certainly key areas for SFO and FCA.

The UK needs a cohesive and effective anti-economic crime policy and that government was right to propose an ECA as part of its white-collar crime agenda where is said that its mission was to hold people suspected of financial wrongdoing to account,\textsuperscript{477} in a day of reckoning,\textsuperscript{478} which demonstrated that the government was serious about white-collar crime.\textsuperscript{479} Notwithstanding such lofty ambitions, the government was wrong to be diverted from that course. Whilst, a generation earlier, Roskill advanced a clear rationale for the SFO’s creation, it can

\textsuperscript{472} Financial Times, ‘Top barrister chosen to lead Bank of England enquiry’ (n 73).
\textsuperscript{473} The Sunday Times, ‘FCA ignored warnings of false market’ (n 87).
\textsuperscript{475} ‘fraud against the individual, the private and the third sectors; fraud against the public sector (these are high priority)
\textsuperscript{477} BBC, ‘Cameron urges ‘day of reckoning’ (n 14).
\textsuperscript{478} The Sunday Times, ‘FCA ignored warnings of false market’ (n 87).
\textsuperscript{479} National Crime Agency, ‘NCA Annual Plan 2014/15’ (n 475) 8.
also be concluded that its limited role and remit owed more to political expediency
and infighting rather than a firm belief in the finished article, with the consequence
that it has failed to meet expectations. The government has successfully created
the CMA, which has overarching responsibility for its sector and subsidiary
regulators. This is a template which should be employed for the economic crime
arena where an ECA encompassing the SFO and FCA (and employing the
resources of the COLP and regional police forces). The CMA is a credible agency
in itself, whereas the current economic crime equivalent is merely a division of the
NCA. What a strong ECA offers is the prospect of an independent authority to
bring together the regulatory structure and enforcement regime of the FCA
together with the investigation and prosecution powers of the SFO. Just as the
CMA has the ability to take over actions by its constituent regulatory bodies, so an
ECA should be able to deploy the powers of both the SFO and FCA to ensure that
the correct sanction is advanced rather than each organisation being either
hamstrung by its own powers or adopting civil remedies when a particular conduct
demands a criminal sanction. In this regard, while the availability of an ‘Offence
relating to a decision causing a financial institution to fail’480 (or reckless banking)
is of some benefit in relation to an insolvent financial institution, the gap between
the tectonic plates of economic crime would be covered by the addition of a further
criminal sanction for ‘Reckless risk-taking on the financial markers.’481 This may be
modern language but it harkens back to the conclusion of Roskill that:

The public no longer believes that the legal system in England and Wales is
capable of bringing the perpetrators of serious frauds expeditiously and
effectively to book. The overwhelming weight of the evidence laid before us
suggests that the public is right.482

Thus, the creation of an Economic Crime Agency, adopting the CMA template and
encompassing the existing bodies of SFO and FCA would remove both areas of
overlap and underlap and, within an overarching structure, ensure that existing
and new legislative powers are available to match the imperatives of dynamic
financial markets.

480 Financial Services (Banking Reform) Act 2013, s 36.
481 Fisher (n 57) 2.
482 Roskill (n 194) 1.
7.1 Introduction

This chapter critically reviews and contrasts the United States (US) and United Kingdom (UK) approaches to economic crime. The US is chosen as a comparator country to study because it has a dominant position as the largest single country in terms of international trade.1

It is logical to suggest that the largest trading nation would suffer economic crime and illogical to ignore its methods of dealing with these issues. The nature of international trade is that within a framework of international conventions countries should have their own economic crime legislation but being aware of jurisdictional arbitrage, whereby adherence to one countries laws might be more advantageous than another’s. This chapter looks critically at the US approach to fraud, bribery and corruption, comparing its statutes with the UK and its regulatory bodies to ascertain whether the US experience can offer a template for the UK.

The key US statute to combat economic crime internationally is the Foreign Corrupt Practices Act 1977 (FCPA)2 which has a major difference with the UK in that it allows ‘modest hospitality expenditure and small facilitation payments’.3 Additionally it permits payments to foreign political officials ‘to expedite or secure the performance of a routine government action.’ 4 The difference of approach is important because the US Department of Justice (DoJ) frequently prosecutes international companies alongside, or leading, the Serious Fraud Office (SFO).

The US takes breaches of FCPA seriously with threats of prosecutions leading to financial sanctions amounting to ‘eye-watering’ proportions when compared with UK.5 Many organisations conducting business internationally are already familiar

1 8.6% of global exports and 12.9% of global imports (UK accounted for 2.6% and 3.8% and China 11.4% and 10% respectively)
with FCPA because, although it is US domestic legislation, it applies to non US companies such as those listed on the US Stock Exchanges or other capital markets or use US telecommunications or banking systems. As an example of the extra-territorial application of FCPA related to Alcatel-Lucent who agreed to settle claims by the DoJ and Securities and Exchange Commission (SEC) by paying $137m because they bribed foreign government officials in Costa Rica, Honduras, Malaysia and Taiwan in order to secure a number of telecommunications contracts. The DoJ’s comments put this into perspective: ‘foreign bribery weakens economic development, erodes confidence in the marketplace and distorts competition.’ The DoJ agreed a three year deferral of prosecution during which Alcatel had to institute an enhanced corporate compliance programme and employ an independent compliance monitor to oversee the company’s implementation and maintenance of an enhanced FCPA compliance program and to submit yearly reports to the DoJ. Alcatel resolved to cease using sales and marketing agents worldwide because Court documents showed that Alcatel’s business model was ‘prone to corruption’. Consultants were used as conduits for bribery payments to foreign officials and business executives of private customers. One Alcatel executive has been imprisoned for conspiring to violate the FCPA, making corrupt payments, and laundering the bribe payments through a third-party. Additionally, Siemens agreed to pay $1.6bn in fines, penalties and disgorgement of profits to US and German authorities. These headlines support the view that the US has taken the lead in anti-corruption endeavours with the FCPA in the vanguard of compliance and ethical conduct or international businesses. The international nature of trade and the differing standards applied

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6 CMS Cameron McKenna, ‘Alcatel-Lucent’ (n 5).
8 Raman, ‘Press Release’ (n 7).
9 Raman, ‘Press Release’ (n 7).
10 ‘Christian Sapsizian, a French citizen and Alcatel CIT executive [was] charged in March 2007 with conspiring to violate the FCPA, making corrupt payments in violation of the FCPA, and laundering the bribe payments through a third-party. Sapsizian was arrested in Miami in late 2006 and pleaded guilty on June 6, 2007, to FCPA violations. He was sentenced on Sept. 23, 2008, in the U.S. District Court for the Southern District of Florida to 30 months in prison.’ Raman, ‘Press Release’ (n 7).
by countries militated in favour of a global framework to standardise approaches to bribery and corruption.

7.2 International Conventions

In the economic crime arena, '[g]lobalization has forced like-minded western capitalists to interact with their counterparts in lower-income countries, where interpretations of trust, reciprocity, honesty and social engagement may differ.'

As a consequence, demand grew for a some international standards to be created to which all countries should adhere in order to create a ‘level playing field’. According to Eicher, in the US by the mid-1970s, '[m]ore than 400 [companies] openly admitted paying foreign government officials, politicians and political parties.' In response to ‘public discontent’ as to why ‘American companies [were] engaging in unethical practices and encouraging corruption in other countries,’ the US Congress created the FCPA, which ‘was ground-breaking for its time, as it was the first international anti-bribery statute of its type and scope in the world,’ or, to be accurate, domestic statute with international scope.

One unintended consequence of the reach of the FCPA was that US Congress later considered that ‘American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of a penalty.’ Furthermore, other countries were criticised for making such payments ‘tax deductible’, which would indicate that such payments were treated as a legitimate business expense.

In 2014, China has also become more active. See, for example, Glaxosmithkline, where the SFO has opened an investigation. Serious Fraud Office, ‘GlaxoSmithKline plc investigation’ http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/glaxosmithkline-plc-investigation.aspx ‘GSK could yet face further action from US and UK authorities which have the power to punish the company for overseas corruption. Investigations are under way in both countries.’ Financial Times, ‘GSK to pay £297m fine for Chinese bribes’ http://www.ft.com/cms/s/0/dea9811e-3fd5-11e4-936b-00144feabdc0.html#axzz3Eo0GXH00 accessed 30 September 2014.

15 Eicher, ‘Risk management – playing by the rules’ (n 14).
16 Heidi L Hansberry, ‘In spite of its good intentions, the Dodd-Frank Act has created an FCPA monster’ (2012) 102 JCRLC 195.
18 Department of Justice, ‘Proposed Legislative History’ (n 17).
other countries would follow the US example in enacting similar legislation. However, as Griffin describes, '[f]oreign governments objected on a number of grounds'.

Firstly, that ‘the extra-territorial application of national law is inconsistent with international law’, although that might have been because it was the US that was endeavouring to apply its national law extra-territorially. Secondly, that ‘“bribery” and “corruption” are difficult to define and even more difficult to police’. Thirdly, the suggestion that bribery is a “public good” because ‘the economic effects of bribery in developing countries often “trickle down” to disadvantaged members of the society’. Fourthly, that ‘the focus should be on officials that solicit bribes.’

The FCPA was not the only initiative in 1977, the International Chamber of Commerce (ICC) ‘produced its first Report on Extortion and Bribery in International Business Transactions.’ The ICC objective was to end bribery and extortion by creating ‘the Rules of Conduct to Combat Extortion and Bribery’, which would be voluntarily adopted ‘by enterprises’. The ICC recommendation ‘that the United Nations adopt an international convention to prohibit corruption’, can be seen in light of FCPA as further supporting the international effort. However, as the ICC report, ‘UN efforts to reach such an agreement fell through in the 1980s.’ Griffin concluded that ‘[u]nfortunately, in the absence of an international treaty, there is no co-ordinating mechanism to ensure that the various initiatives do not result in inconsistent or burdensome legislation by numerous nations.’ It was not until 2000, that the UN General Assembly recognised ‘that an effective international legal instrument against corruption (...) was desirable’, resulting in the United Nations Convention against Corruption:

21 Griffin (n 20) 341.
22 Griffin (n 20) 341.
23 Griffin (n 20) 341.
24 Griffin (n 20) 341.
26 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
27 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
28 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
29 Griffin (n 20) 341.
Nations Convention against Corruption,\(^{31}\) to which 140 states are parties and a further 27 are signatories.\(^{32}\)

US ‘efforts to spread its gospel’\(^{33}\) culminated in the creation of OECD Convention: ‘Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’ in 1997.\(^{34}\) Furthermore, ‘the Council of Europe (COE) and the Organization of American States (OAS) each adopted recommendations that their member nations address the issue of bribery of foreign government officials.’\(^{35}\) The Council of Europe adopted both civil and criminal Law Conventions in 1999 and OAS ‘Inter-American Convention against Corruption in 1996’.\(^{36}\) However, according to Carr:

> The scope of these conventions inevitably vary but all of them require contracting states to criminalize bribery from the supply side, although OECD Anti-Bribery Convention is restricted solely to bribery of foreign public officials in the context of international business transactions.\(^{37}\)

The truisms highlighted by Carr is that ‘[t]he success of any convention lies in it being ratified, implemented and enforced.’\(^{38}\)

What is apparent is an issue commented upon by ICC, which is that of co-ordination of conventions.\(^{39}\) They highlight ‘from an international business standpoint the proliferation of anti-corruption instruments raises concerns about


\(^{33}\) Hansberry (n 16) 195.


\(^{35}\) Griffin (n 20) 341.


\(^{38}\) Carr (n 37) 363.

\(^{39}\) International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
inconsistent rules, overlapping enforcement and lack of common definitions. The remedy that the ICC propose is that ‘the OECD Convention should remain the principal instrument focusing on the supply side of international corruption.’ The regional conventions (OAS, CE, African Union) ‘should give priority to issues on which progress can be made by cooperation among their participating parties’, which would leave UNCAC to deal with issues which need world-wide cooperation. Since all these bodies have their own monitoring programmes, ICC propose that monitoring and assessment should be coordinated in order to remove duplication.

However, progress does appear to have been made for, as Feldman observed, US advocacy that European and OECD nations should ‘ramp up enforcement of their anti-bribery laws on both a domestic and international basis’ has borne fruit, citing with approval the UK Bribery Act 2010. The US interest in this is because ‘the United States has, for better or worse, been viewed as the policeman for the world’ and ‘remains by far the most vigorous enforcer of white collar offenses.’ The US view is that ‘[i]n nations lacking strong legal institutions, law enforcement efforts against white collar offenses such as bribery of foreign officials has traditionally been spotty at best, and sometimes non-existent.’ Congruent with their belief that the US has set the standard for bribery enforcement, Feldman considers that ‘[a]lthough there is a movement in the international community toward greater white collar criminal enforcement, it will likely be some time before other countries take enforcement to the level that currently exists in the United States.’ Thus, in the absence of internationally agreed and binding standards the US appears to have taken on the self-appointed role of ‘policeman’. At a time when ‘[w]estern-based multinational companies are

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40 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
41 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
42 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
43 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
44 International Chamber of Commerce, ‘Combating Extortion and Bribery’ (n 25).
46 Feldman (n 45).
47 Feldman (n 45).
48 Feldman (n 45).
49 Feldman (n 45).
50 Feldman (n 45).
increasingly expanding into other regions and developing nations', the challenges faced by companies are in extending the boundaries of commerce ‘often in jurisdictions where there is a high susceptibility to corruption than is typical in the jurisdictions of more developed nations.’ Here, Feldman cites China, where traders ‘will often be dealing with state owned enterprises (SOEs),’ and, in a telling phrase, ‘[u]nder the US Department of Justice’s typically expansive view of its jurisdiction employees of SOEs may well be viewed as government officials, creating potential exposure under FCPA.’ The DoJ’s ‘typically expansionist view of its jurisdiction’ can be seen in cases where it has endeavoured to extend the boundaries of its remit.

This chapter will now review the US criminalisation and regulatory regime which counters economic crime commencing with fraud. However, unlike bribery and corruption, fraud unfortunately does not benefit from an international convention.

7.3 Fraud

The US government has, since enacting the FCPA given priority to combating economic crime, including the creation of the Financial Fraud Enforcement Task Force (FFETF) to strengthen efforts to combat financial crime’ arising from the

51 Feldman (n 45).
52 Feldman (n 45).
53 There is evidence of China taking steps to penalize corruption, as with GSK, however, Transparency International’s view is that: ‘Transparency International also favours transparency and justice. We know all too well that corruption charges can be used as a political tool. We know very little indeed about most corruption cases in China, including that of GSK. We often do not know the charges, the evidence or the defence. Confessions might appear, but it is unclear under what circumstances they have been obtained. This also leaves a sour taste. There has been some admirable anti-corruption activity in China over recent months. Perhaps the real test of the government’s intent is when it starts to prosecute Chinese companies for paying bribes in overseas markets such as Africa.’ Transparency International, ‘Glaxosmithkline – a wake up call for the pharma sector’ http://www.transparency.org.uk/news-room/12-blog/1144-glaxosmithkline—a-wake-up-call-for-the-pharma-sector accessed 10 November 2014. BBC, ‘GlaxoSmithKline fined $490m by China for bribery’ http://www.bbc.co.uk/news/business-29274822 accessed 10 November 2014.
54 Feldman (n 45). [emphasis added]
55 For example, in SEC v Magyar Telecom PLC, ‘Certain electronic communications made in furtherance of the improper payments and the concealment of the payments, including drafts of the agreements with the government officials and the offer to the minority party official, and copies of certain of the contracts with the intermediary, were transmitted by Magyar Telekom employees and others through U.S. interstate commerce or stored on computer servers located in the United States.’ Securities and Exchange Commission, http://www.sec.gov/litigation/complaints/2011/comp22213-co.pdf accessed 20 June 2013.
56 Judge Holmes of the Fifth Circuit stated that “the law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.” Ellen S Podgor, ‘Criminal Fraud’ (1999) 48 Am U L Rev 729. (footnotes omitted).
2008 financial crisis.\textsuperscript{58} This followed an announcement in May 2009 that the DoJ 'has been given $330m to investigate any suspected instances of mortgage fraud and to pursue any potential prosecutions that arise from those investigations.'\textsuperscript{59} The contrast with UK could not be more marked, since the budgeted resources available to SFO were progressively cut from £52m in 2008/9 to £30m in 2014/15 before additional monies had to be made available,\textsuperscript{60} unlike its sister organisation the Financial Conduct Authority (FCA) which is gaining a 15\% increase in funding.\textsuperscript{61} Leaving aside the disparity in domestic budgets, there is a clear contrast between the US, which has allocated additional financial resources to combat economic crime, and the UK, which is intent upon driving down costs. At this stage, it is important to recognise that this does represent a change in US strategy which, under President's Clinton and Bush, had concentrated resources on the 'war on terror'.\textsuperscript{62} Ceresney highlights that '[f]ollowing the September 11\textsuperscript{th} attacks, the FBI shifted more than 1,800 agents, nearly one third of all agents in criminal programs, including many of those trained in financial investigations, to counterterrorism and intelligence duties.'\textsuperscript{63} As a consequence, there were insufficient resources to deal with fraud and non-terrorism investigations.\textsuperscript{64} Eventually, in 2008, ‘the FBI announced operation “Malicious Mortgage”, a multi-
agency take down of more than 400 defendants charged with mortgage fraud schemes nationwide.\(^{65}\) This presaged the creation of FFETF.

The purpose in creating the FFETF was:

the understanding that no matter the office or agency – federal, state, or local; law enforcement or regulatory – all of us within government share a common desire and have a core obligation to do everything that we can do to protect the American public from the often devastating effects of financial fraud, whether it be mortgage fraud or investment fraud, grant or procurement fraud consumer fraud or fraud in lending. And we know that we can accomplish so much more by working together than working in isolated, compartmentalised silos.\(^{66}\)

President Obama’s aim in creating FFETF is neatly encapsulated by stating that working together is better than in isolation, which is a key theme of this thesis when applied to the UK. However, in terms of prosecuting economic crime, while the UK has many agencies, as discussed in chapter six, the US as a federal country,\(^{67}\) is not streamlined either, hence the exhortation for agencies to work together:

In the USA, the picture is complicated even more by the Federal and state infrastructure. Federal agencies such as the Federal Bureau of Investigation (FBI) have jurisdiction over a wide range of different types of fraud and corruption, such as public sector fraud and corruption, mass marketing fraud and identity fraud. However, there is also the [SEC], which takes the lead on investment fraud; the Internal Revenue Service Criminal Investigation division, which deals with tax fraud; the United States Postal Inspectors, mail fraud; the United States Secret Service, credit card fraud / currency fraud; and many others with particular responsibilities. This is on top of a state bureaucracy of law enforcement which is often as diverse and complex as at Federal level.\(^{68}\)

In the US, according to Ryder, ‘the prevention of fraud is an essential part of many criminal statutes and it shows no signs of abating.’\(^{69}\) However, as Podgor notes, the proliferation of fraud statutes is found to be ‘problematic in that there is

\(^{65}\) Ceresney, Eng and Nuttall (n 63) 225. (Footnotes omitted).
\(^{67}\) ‘having or relating to a system of government in which several states form a unity but remain independent in internal affairs’ Oxford Dictionaries http://oxforddictionaries.com/definition/english/federal accessed 12 September 2013.
\(^{68}\) Mark Button and Jim Gee, Countering fraud for competitive advantage (Wiley 2013) 52.
\(^{69}\) Ryder, Financial Crime in the 21st Century (n 57) 103.
no specific group of statutes designated in the federal code as fraud statutes and no consistent definition.\textsuperscript{70} Podgor’s view is that ‘the term “fraud” is a “concept” (…)’\textsuperscript{71} and ‘[a]lthough fraud is not a crime in itself, fraud is an integral aspect of several criminal statutes.’\textsuperscript{72} In the absence of a single fraud statute, ‘there appears to be an acceptance of an “I know it when I see it” approach. Judge Holmes of the Fifth Circuit stated that “the law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity”.’\textsuperscript{73} The US is not alone in not providing a definition. The more recent UK Fraud Act also fails to do so.\textsuperscript{74} In light of the lack of definition, this chapter will not explore the various terms by which fraud is expressed.\textsuperscript{75}

US Fraud statutes are either generic, such as ‘conspiracy’, ‘mail’ or ‘wire’ frauds; or specific, such as ‘bankruptcy’ fraud, ‘healthcare’ fraud and ‘bank’ fraud. At the ‘generic’ end of the spectrum the ‘focus of the [fraud] statute is almost exclusively on the fraud and not the object of the offense.’\textsuperscript{76} Thus, ‘the emphasis of the crime of mail fraud is the fraudulent conduct as opposed to the mailing.’\textsuperscript{77} In a similar manner, ‘a conspiracy to defraud does not require agreement to violate a specific statute.’\textsuperscript{78} The statute ‘Conspiracy to commit offense or to defraud the United States’\textsuperscript{79} has been interpreted to be ‘so elastic over the years that it can potentially encompass any conduct which a court views as ‘collusive and dishonest’ if some federal rule or regulation was violated in the process.’\textsuperscript{80} As such, it is easy to understand the sentiments of the often quoted Judge Learned Hand who in 1925 described the conspiracy statute as ‘that darling of the modern prosecutor’s nursery.’\textsuperscript{81}

\textsuperscript{70} Podgor (n 56) 729.
\textsuperscript{71} Podgor (n 56) 729.
\textsuperscript{72} Podgor (n 56) 729.
\textsuperscript{73} Podgor (n 56) 729. (footnotes omitted).
\textsuperscript{74} Fraud Act 2006 does not define ‘fraud’, merely stating that ‘[a] person is guilty of fraud if he is in breach of any of the sections listed’. Fraud Act 2006 s.1
\textsuperscript{75} For example: fraud, fraudulent, fraudulently, defraud, misrepresentation, concealment, non-disclosure.
\textsuperscript{76} Podgor (n 56) 729.
\textsuperscript{77} Podgor (n 56) 729.
\textsuperscript{78} Podgor (n 56) 729.
\textsuperscript{79} 18 U.S.C. § 371—Conspiracy to Defraud the United States.
\textsuperscript{81} United States of America, Appellee, v. Fred Eubanks, Eugene Martinez, Leroy Jones, Henry D. Yanez, appellants. United States Court of Appeals, Ninth Circuit. - 591 F.2d 513 Feb. 2, 1979.As Amended March 12,
7.3.1 Criminalisation

7.3.1.1 Mail Fraud and Wire Fraud

The conspiracy statute dates back to 1867 and was followed in 1872 by the Mail Fraud Statute,\(^{82}\) which has mutated over time from being ‘merely one section within the postal act’\(^{83}\) into a general ‘nonspecific’ fraud statute.\(^{84}\) The origin of the US Mail Fraud Statute lies in a mid-nineteenth century desire to protect the US Post Office and prohibit its use for the transmission of letters or circulars for lotteries.\(^{85}\) Henning describes this statute as being ‘treated as a harmless stepchild by Congress’ but now it has universal application:

Today, the mailing element seemingly provides federal prosecutors with carte blanche to prosecute virtually any activity to which the mail or a shipment by interstate carrier can be linked, no matter how tangential.\(^{86}\)

Indeed, Congress has chosen to expand the remit of the Mail Fraud Statute to include the use of private delivery services and because it has refused to define the meaning of its purpose\(^{87}\) to the extent that the Statute can be regarded as the Federal Fraud Statute.\(^{88}\) Judge Rakoff, when he was Chief of Business Fraud Prosecutions in New York, waxed lyrical about the Federal Mail Fraud Statute:

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart – and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law ‘darling’, but we always come home to the virtues of 18 USC § 134, with its simplicity, adaptability and comfortable familiarity.\(^{89}\)

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\(^{82}\) 18 U.S.C. § 1341.

\(^{83}\) Podgor (n 56) 729.

\(^{84}\) Ryder, Financial Crime in the 21st Century (n 57) 103.


\(^{86}\) Henning (n 85) 435.

\(^{87}\) ‘The “scheme or artifice to defraud” language has been part of the federal criminal code since 1872, but it has never been accorded a more precise statutory definition by Congress.’ Aaron D. Hoag, ‘Defrauding the Wire Fraud Statute: United States v. LaMacchia’ (1995) 8 Harv. J. L. & Tech. 511.

\(^{88}\) Henning (n 85) 435.


Judge Learned Hand (Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). )

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The mail fraud statute was enacted in the aftermath of the American Civil War, when the federal government embarked upon reconstruction of the United States and, according to Rakoff, concluded that ‘rudimentary criminal codes, conceived for rural societies could not cope (...) [with the need] to dispel widespread fraud’. Thus, the present day statute, although amended, is a ‘legal fiction’ because:

it has led courts, (...) to describe the element of mailing as the ‘gist’, ‘essence’, ‘gravamen’, and ‘substance’ of the crime of mail fraud, even though it is obvious that the prime concern of those who commit mail fraud, those who legislate against it, those who prosecute it, and those who judge it, is the fraud and not the mailing.

The attraction of the mail fraud statute, ‘together with its lineal descendent, the wire fraud statute,’ is that it is used as a ‘first line of defence’ against the development of new types of fraud until specific legislation is enacted. The Wire Fraud Statute, enacted in 1952, is nearly identically worded to the mail fraud statute except that instead of mailing, ‘it requires some interstate or international communications by means of a “wire” (such as telephone lines), radio or television. The advantage of this consistent approach is that it ‘utilizes the same definition of fraud (...) [with the consequence that] cases interpreting the mail fraud provision are of equal precedential value where (...) the defendant is accused of wire fraud.’ In the UK, ‘Conspiracy to defraud’ is the closest common law equivalent.

The importance which the US authorities place on the mail and wire statutes (and for which there is no UK equivalent statute) is, according to Zelcer, shown by their expansion to cover ‘mailings delivered by private interstate commercial carriers’, and modern ‘modes of communication such as facsimile, telex, modem, and

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90 Oxford English Dictionary ‘American Civil War n. (b) the war fought in the United States from 1861 to 1865 between the eleven seceding Southern states (the Confederacy) and the remaining (northern) states (the Union).’ http://www.oed.com/view/Entry/6342?redirectedFrom=american+civil+war#eid119737493 accessed 10 September 2013.
91 Rakoff (n 89) 771. (Footnotes omitted).
92 Rakoff (n 89) 771.
93 Rakoff (n 89) 771.
94 Rakoff (n 89) 771.
96 Rakoff (n 89) 771.
97 Hoag (n 87) 509.
98 See Chapters 5 and 6.
internet transmissions.\textsuperscript{100} The applications of these statutes includes any ‘scheme or artifice to deprive another of the intangible right of honest services.’\textsuperscript{101} Zelcer notes that this means that ‘Courts generally agree that the defendant has a duty to provide the victim with honest services’,\textsuperscript{102} which was redefined in 2010 as to ‘criminalize only bribery and kickback schemes.’\textsuperscript{103} These statutes ‘provide federal courts with jurisdiction over a broad array of frauds’\textsuperscript{104} such as, consumer, stock, land, bank, insurance, commodity and election, in addition to blackmail, counterfeiting, bribery and money laundering.\textsuperscript{105} The provisions of 18 USC enable mail and wire fraud to be a predicate act for the purposes of the Racketeering Influenced and Corrupt Organizations Act 1970 (RICO)\textsuperscript{106} which ‘aims to eliminate organised crime’,\textsuperscript{107} ‘by preventing the reintegration of their proceeds of crime into the US economy.’\textsuperscript{108}

In the US, government agencies have sought opportunities to stretch existing laws.\textsuperscript{109} In the PNP case,\textsuperscript{110} which concerned ‘stock parking’ (an arrangement whereby an investor nominally sells his shareholding to another party with an understanding to re-purchase at a later stage, without loss), prosecutors were able to extend their securities and tax fraud charges in to other charges. In this case, PNP having been charged with tax fraud, was also charged with ‘mail fraud.’ This was purely on the basis that it had used the US Postal Service as part of the fraud merely by putting the tax returns in the post and which would have been avoided by hand delivery.\textsuperscript{111} The line of reasoning, according to Strader, was that:

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\textsuperscript{100} Zelcer (n 99) 985.
\textsuperscript{102} Zelcer (n 99) 985.
\textsuperscript{103} Zelcer (n 99) 985, citing Skilling v United States 130 S Ct 2896 (2010).
\textsuperscript{104} Zelcer (n 99) 985.
\textsuperscript{105} Zelcer (n 99) 985. (Footnotes omitted).
\textsuperscript{108} Ryder also notes the opportunity to use RICO to prosecute mortgage fraud arising from the 2008 financial crisis. Nicholas Ryder, The Financial Crisis and White Collar Crime – the Perfect Storm (Edward Elgar 2014) 20.
\textsuperscript{110} 9 United States v Regan,37 F.2d 823, 826-27 (2nd Cir. 1991).
Because it charged mail fraud, the government could bring charges under the RICO statute,\(^{112}\) with mail fraud as the principle predicate acts. And because RICO contains forfeiture provisions, the government could, and did, assume control over PNP’s assets prior to trial.\(^ {113}\)

What PNP demonstrates is the linking of seemingly disparate legislation by the use of mail or wire fraud acts allows access to other parts of the criminal code than was originally intended: an alternative, as in the UK, would be simple and straightforward fraud legislation.\(^ {114}\) In the US, the RICO Statute was the end product of a long process of legislative effort to develop new legal remedies to deal with an old problem: organized crime.\(^ {115}\) At first, this might seem a strange bedfellow when linked with fraud, bribery and corruption but, as Ryder describes, RICO has been utilised to tackle insider trading because of the shortcomings of the Securities Exchange Act 1934,\(^ {116}\) since under RICO, ‘it was only necessary for prosecutors to illustrate that “a defendant committed securities fraud twice within any ten-year period. Prosecutors also favoured the stiff penalties imposed for a RICO conviction”.\(^ {117}\) However, RICO is not without criticism because of its ‘broad and ambiguous language’ coupled with the judiciary ‘repeatedly interpreting the statute in a liberal, far-reaching manner.’\(^ {118}\) Nevertheless, ‘whatever its weaknesses, RICO gives the government an effective threat against sophisticated crime (…). At least for a while, for white-collar criminals as well as gangsters, RICO appears to be evening up the odds.’\(^ {119}\) However, Strader reports difficulties created by ‘vagueness of many white collar statutes (…)’,\(^ {120}\) provide scope for prosecutors to overreach themselves ‘in instances of ambiguous harm and


\(^{113}\) Strader (n 111) 61.

\(^{114}\) Such as Fraud Act 2006.


\(^{116}\) Ryder, Financial Crime in the 21st Century (n 57) 152.

\(^{117}\) Ryder, Financial Crime in the 21st Century (n 57) 152. (Footnotes omitted).


\(^{119}\) Blakey and Gettings (n 115) 1048.

\(^{120}\) Strader (n 111) 96.
unproven legal theories. The conclusion that ‘[m]ore carefully crafted statutes would begin to solve this problem’, is based on the reasoning that:

Apart from being incomprehensible, the RICO statute’s potential application is nearly boundless, principally because of its inclusion of the mail and wire fraud statutes as predicate acts. These statutes can be used just about anytime anyone puts anything in the mail, makes an interstate phone call, or sends an email in suspicious circumstances.

Notwithstanding the use of existing statutes, other events such as the ‘credit crunch’ and the earlier corporate accounting scandals caused US legislators to expand the range of legislation by enacting the Dodd-Frank and Sarbanes-Oxley Acts.

7.3.1.2 Dodd-Frank Wall Street Reform and Consumer Protection Act

The 2008 financial crisis, as Ceresney comments, ‘will be known as the modern financial system’s annus horribilis. A natural consequence of a crisis is that ‘citizens are asking angrily how this happened and who is to blame.' This then invites the enquiry that [a]midst this wreckage, as legislators consider proposals for sweeping regulatory reforms, prosecutors and regulatory agencies have begun the arduous and time-consuming process of determining whether any criminal wrongdoing led to the credit crisis. The outcome of this ‘soul searching’ was:

The Dodd-Frank Wall Street Reform and Consumer Protection Act [Dodd-Frank] set out to reshape the U.S. regulatory system in a number of areas including but not limited to consumer protection, trading restrictions, credit ratings, regulation of financial products, corporate governance and disclosure, and transparency.

The introduction to Dodd-Frank makes clear what the legislation’s intentions: ‘[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the
American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.\textsuperscript{130}

One particular aspect of Dodd-Frank, ‘the Volcker Rule, [which] prohibits a bank from engaging in proprietary trading, and from acquiring or retaining an ownership interest in a hedge fund or private equity fund.’\textsuperscript{131} The intent of the Volcker Rule was to endeavour to replicate ‘The US Banking Act of 1933, called the Glass-Steagall Act after its sponsors, [which] separated investment banking from retail banking by limiting the range and volume of securities-related transactions that the commercial entities could perform.’\textsuperscript{132} This rule, though, does not merely affect US entities but also applies to foreign banks and entities which have a branch or agency in the US and clearly demonstrates the reach of US legislation.\textsuperscript{133}

An additional outcome of the review of the ‘financial crisis’ was that the SEC recognised that more information on breaches of securities law was required and has caused it to promote the role of the ‘Whistleblower’.\textsuperscript{134} Dodd-Frank encourages ‘whistleblowers’ to report suspected violations direct to the SEC ‘Office of the Whistleblower,’\textsuperscript{135} which will reward\textsuperscript{136} such suppliers of information who are eligible to receive between 10 percent and 30 percent of any

\begin{footnotesize}

\textsuperscript{131} The Dodd–Frank Wall Street Reform and Consumer Protection Act 2010, s 619.

\textsuperscript{132} Baber (n 131) 237.

\textsuperscript{133} Baber (n 131) 237.


\textsuperscript{135} ‘Means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act to the Commission, in a manner established by rule or regulation by the Commission’ Dodd-Frank Act 2010, s 748(7).

\textsuperscript{136} Hansberry (n 16) 195.
\end{footnotesize}
enforcement penalty in excess of $1 million that the agency ultimately recovers as a result of the report.\textsuperscript{137} The largest reward was $30m in 2014.\textsuperscript{138}

However, Dodd-Frank was not the first attempt at encouraging ‘informers to come forward with information about fraud against the [US] government in return for a share of the damages recovered.’\textsuperscript{139} In 1863, pre-dating both conspiracy to defraud (1867) and Mail Fraud (1872), the False Claims Act empowered citizens to sue ‘on behalf of the government for fraud against the government’\textsuperscript{140} and share in the fruits of litigation: since 2009, the DoJ ‘has recovered more than $13.3 billion in False Claims Act cases.’\textsuperscript{141} In 2012, the DoJ brought an all-time high of 647 whistleblower cases,\textsuperscript{142} thus demonstrating the economic value of an incentivised whistleblower. Thus, the rewards from SEC clearly ‘make it all the more likely that employees who notice such wrongdoing will take steps to bring it to light.’\textsuperscript{143} However, this may be at the expense of reporting through companies’ internal corporate risk management or governance channels. Indeed, ‘[t]he SEC recently reported receiving one to two “high value” tips per day, up from about a dozen a year prior to enactment’ of Dodd-Frank.\textsuperscript{144} Furthermore, there is also the risk of ‘repeat bad faith’ claims as in a 2014 case where the SEC banned an individual who had knowingly made 196 award applications which were false, fictitious or fraudulent in pursuit of an award.\textsuperscript{145}

\textsuperscript{137} These percentages are typical when compared with other statutes with similar whistleblowing provisions, such as IRS Whistleblower Act and False Claims Act.


\textsuperscript{139} Carr (n 37) 368.

\textsuperscript{140} Carr (n 37) 369.


\textsuperscript{143} Bennett, LoCicero and Hanner (n 137) 411.

\textsuperscript{144} Hansberry (n 16) 195.

In noting the effect of Dodd-Frank, it is clear that the US has a long history of providing incentives. This is not a feature of UK culture and legislation, including the UK Bribery Act 2010, does not provide for these rewards.\textsuperscript{146} The UK regulators FCA/PRA have announced proposals to make ‘regulatory changes necessary to require firms to have effective whistleblowing procedures, and to make senior management accountable for delivering these,’\textsuperscript{147} but concluded that financial incentives to report would not be adopted.\textsuperscript{148} This area is outside the scope of this thesis but would warrant further research because of the risk of regulatory arbitrage where, for UK companies falling within the purview of the SEC, whistleblowers may be tempted to report wrongdoing in the US rather than either the UK authorities or through internal procedures, where no rewards exist.\textsuperscript{149}

Some eight years before Dodd-Frank, in the wake of ‘a spate of financial / accounting scandals’,\textsuperscript{150} Sarbanes-Oxley Act 2002 was enacted ‘to protect Investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.’\textsuperscript{151} This was a ‘Congressional response to revelations of several high profile accounting fraud cases including Enron, WorldCom, Tyco, (…) that resulted in mass destruction of investor value and loss of investor confidence in the integrity of the financial markets.’\textsuperscript{152} Eventually, as Yeager notes, ‘these cases led to criminal charges of company officials and the bankruptcy of Arthur Andersen LLP, at the time arguable the most prestigious independent auditing firm in the world,’ discussed later in this chapter.\textsuperscript{153} Consequently, a key feature of Sarbanes-Oxley was provision for whistleblowers: firstly, anti-retaliation measures, ‘which involves protecting

\textsuperscript{146} Chris Warren-Smith, ‘Regulatory: The year ahead’ (2011) 161 NLJ 358.
\textsuperscript{148} Financial Conduct Authority, ‘Financial Incentives for Whistleblowers’ (n 157).
\textsuperscript{149} Hansberry (n 16) 195.
\textsuperscript{150} For example Enron, Worldcom, Tyco, Arthur Andersen.
\textsuperscript{153} Yeager (n 150) 25.
whistleblowers from employer retaliation after they disclose wrongdoing;\textsuperscript{154} secondly, reporting arrangements which ‘requires that corporations provide employees with a standardized channel to report organizational misconduct internally within the corporation.’\textsuperscript{155} A further feature of Sarbanes-Oxley was increased sentences: ‘the maximum penalty for wire and mail fraud from five years to twenty years imprisonment.’\textsuperscript{156} This can be compared with the UK Fraud Act 2006 maximum of ten years.\textsuperscript{157}

7.3.1.3 Sentencing

The white-collar offender with the longest prison sentence on record is Shalmon Weiss. Weiss, whose misdeeds resulted in the collapse of National Heritage Life Insurance, was sentenced [in 2000] by a Florida judge to 845 years in prison.\textsuperscript{158} More recently, Bernard Madoff was sentenced to 150 years imprisonment\textsuperscript{159} and ‘Sir’ Allen Stanford was sentenced to 110 years imprisonment\textsuperscript{160} for $7bn Ponzi\textsuperscript{161} scheme.\textsuperscript{162} In the UK, the maximum sentence under Fraud Act 2006 and Bribery


\textsuperscript{158} Brian K Payne, White-collar crime (Sage 2013) 370.


\textsuperscript{161} Securities and Exchange Commission,’ What is a Ponzi Scheme?’ ‘A Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.’ http://www.sec.gov/answers/ponzi.htm accessed 11 October 2011.

\textsuperscript{162} The Times, ‘Stanford’s bank “made up the numbers for more than 20 years.” ’ . 4 February 2012. http://www.thetimes.co.uk/tto/business/industries/banking/article3309416.ece accessed 4 February 2012.

Act 2010 is ten years imprisonment and / or an unlimited fine. Asil Nadir, who fled to Northern Cyprus in 1993 before his original trial, was sentenced in 2012 to ten years imprisonment for fraud dating back to 1987. At first glance, it would appear that the UK might be unduly lenient in its sentencing options when compared with US. There appear to be two factors contributing to the US approach. Firstly, according to Anello and Albert, that legislators (Congress) have exerted:

Pressure to increase the penalties associated with fraud offenses, [resulting in] changes to Sentencing Guidelines over the past decade [which] have transformed sentences in high-loss fraud cases from less than five years under the original guidelines to a sentence of life imprisonment. The consequence of this is what Anello and Albert refer to as ‘overcriminalization’ whereby federal prosecutors have ‘access to too many charging choices’. The temptation identified is that ‘prosecutors could easily fall prey to the temptation of “picking the man, and then searching the law books (…) to pin some offense on him”’. The availability of a large number of laws upon which to charge gives prosecutors considerable discretion whether to charge or not.


166 Anello and Albert (n 165) 106.
167 Anello and Albert (n 165) 106.
168 The SEC’s ‘civil enforcement response has generated a superabundance of high profile, record breaking, headline grabbing, and media friendly financial sanctions’. Ryder, The Financial Crisis and White Collar Crime (n 106) 152, 163-174.
The second aspect is that ‘prosecutors will pile on charges to gain leverage in plea negotiations’. Reynolds identifies that: ‘[w]hen facing a hundred felony charges, the prospect that a jury might go along with even one of them is enough to make a plea deal look attractive, something many prosecutors count on.’ An example of this, which Anello and Albert note, though with tragic consequences, is the case of:

Aaron Swartz, the 26 year-old Internet activist who committed suicide after being named in a federal indictment containing 13 felony counts carrying a possible 50-year sentence for allegedly hacking into a computer database to download academic journals.

Concurrent with this disquiet is the concern of the US government about the costs of the prison system. The Attorney General said: ‘too many people go to too many prisons for far too long for no good law enforcement reason.’ Holder poses a fundamental question regarding the US criminal justice system which is that ‘Statutes passed by legislatures that mandate sentences, irrespective of the unique facts of an individual case, too often bear no relation to the conduct at issue.’ Recognising that such sentences ‘breed disrespect and are ultimately counterproductive,’ Holder urged that ‘[w]e need to ensure that incarceration is used to punish, to rehabilitate, and to deter – and not simply to warehouse and forget.’

Meanwhile, in the UK, ‘[s]entencing for the common law offence of conspiracy to defraud is back in the spotlight following the Court of Appeal’s judgment in Levene v R and R v Kallis and Williams.’ In these cases, the Court considered whether the Sentencing Council’s guidance on sentencing for substantive fraud offences should apply to conspiracy to defraud, for which there is no specific guidance. Additionally, the Court considered the question of whether sentences should be concurrent or consecutive and quoted the current guidelines: ‘There is no inflexible
rule governing whether sentences should be structured as concurrent or consecutive components. The overriding principle is that the overall sentence must be just and proportionate. In 2014, the Sentencing Council introduced new guidelines (which for the first time included conspiracy to defraud) and a toughening of their approach to sentencing.

A key element in the criminalisation of fraud in the US is that of corporate criminal liability, a concept which was absent in UK until Bribery Act 2010. It was:

established in the United States by the Supreme Court in 1909. In that year, the court held that any criminal act committed by a corporation’s employee within the scope of employment and in part intended to benefit the corporation could be imputed to the corporation.

The effect of this is that instead of prosecuting the corporate entity or individuals, the DoJ and SEC enter deferred prosecution agreements. This avenue is not available in the UK because ‘[c]orporate criminal in English law it depends on the identification principle. A corporation is only liable for criminal conduct if the controlling mind (ie the top personnel) of the company can be shown to have been complicit in the criminality.’ As the SFO Director acknowledges, ‘[t]his is very hard to prove: rarely does the email chain go above a certain level.’

179 Kallakis (n 178), Levene (n 178).
182 Bribery Act 2010, s 7. ‘Creates the offence of a commercial organisation "failing to prevent" bribery by its employees, with a statutory "adequate procedures" defence. Extending this approach, a Corporate, or certain types of Corporate (such as banks and companies listed on stock exchange) could be liable for failing to prevent certain types of criminal offence by their employees subject to a statutory defence.’ Serious Fraud Office, ‘David Green Speech’ 26 March 2013. http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2012/inaugural-fraud-lawyers'-association.aspx accessed 20 June 2013.
185 Directors Disqualification may also feature in DPA discussions.
7.3.2 Regulatory Bodies

In the US, the primary regulatory body for fraud is the DoJ, which is considered in greater detail later in relation to bribery.

7.3.2.1 Department of Justice

The DoJ has ‘control over all criminal prosecutions and civil suits in which the United States had an interest.’ Created in 1870, after the Civil War, the DoJ is headed by the Attorney General and comprises 40 components, including the Criminal Division Fraud Section, which:

plays a unique and essential role in the Department's fight against sophisticated economic crime. The Section is a front-line litigating unit that acts as a rapid response team, investigating and prosecuting complex white collar crime cases throughout the country.

The role of the DoJ is 'protecting taxpayer dollars and consumers against financial fraud while ensuring competitive advantage.' The current Attorney General stated that they:

Have charged and had sentenced a number of defendants involved in securities fraud and related investment fraud, mortgage fraud and Ponzi schemes. These defendants include CEOs, owners, board members, presidents, general counsel and other executives of Wall Street firms, hedge funds and banks.

Although the DoJ state that they 'do not hesitate to bring charges against anyone [and] between 2009 and 2013, (...) charged more white-collar defendants than during any previous five-year period going back to at least 1994,' nevertheless the headlines are given to the significance of the penalties it imposes in ‘over 60

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187 Department of Justice, ‘2014 Budget’ (n 187).
188 Department of Justice, ‘Criminal Division Fraud Section’ http://www.justice.gov/criminal/about/orgchart.html#FRAUD accessed 22 August 2013.
189 Department of Justice, ‘Accomplishments under the leadership of Attorney General Eric Holder’ (n 141).
190 Examples include: Allen, sentenced to 210 years imprisonment of orchestrating $7 billion investment fraud; Barclays Bank $160m LIBOR violations; Department of Justice, ‘Accomplishments under the leadership of Attorney General Eric Holder’ (n 141).
cases against financial institutions since 2009, resulting in recoveries totaling over $85 billion.192

The DoJ as primary regulator and prosecutor is supported by the investigative tools of the Federal Bureau of Investigation (FBI),193 which is another division of DoJ. Thus, the Attorney General has line management responsibility for both investigation and prosecution, as does UK SFO but with a more limited remit. Neither DoJ or SFO have control over financial intelligence through FinCEN and National Crime Agency respectively. The former being part of US Treasury and the latter UK Home Office.194

7.4 Bribery and Corruption

7.4.1 Criminalisation

The ‘Watergate’195 scandal saw the resignation of President Nixon and provided the stimulus for creating the FCPA.196 The Watergate Special Prosecutor, as noted by Brown, disclosed ‘corrupt payments to foreign officials and overseas agents by [US] domestic companies.’197 In a ‘reaction to a flurry of scandals during the 1970s,’198 the SEC reported to Congress that it had ‘discovered that many public companies were maintaining cash “slush funds” from which illegal [political] campaign contributions were being made in the United States and illegal bribes were being paid to foreign officials.’199 Incidents of international bribery were revealed as widespread ‘by over 300 companies involving corrupt payments of hundreds of millions of dollars.’200 According to Cavico and Bahaudin, the philosophy underlying the FCPA is:

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192 Department of Justice, ‘Attorney General Holder Remarks on Financial Fraud Prosecutions’ (n 191).
193 Ryder, Financial Crime in the 21st Century (n 57) 102.
195 ‘A relentless investigation pays off, and the most famous journalistic feat of its time brings down a president. Two metro reporters stumble upon what at first seems to be a routine crime story -- a break-in at a well-known Washington office-hotel complex. But belying the initial simplicity of the crime, it is a scandal that mushrooms into one of the biggest news stories in the history of journalism and brings about the fall of a president.’
199 Department of Justice, ‘Proposed Legislative History’ (n 17).
200 Brown (n 197) 260.
The statute reflects the public policy of the United States that the payment of bribes to foreign officials in order to secure business was unethical, contrary to the democratic values of the people of the United States, as well as harmful to good governance and the rule of law, contrary to the principles of fair competition, an impediment to economic progress, and thus inimical to society.201

Prior to ‘1976, bribery of a foreign official was not illegal if it occurred outside US territory.’202 The FCPA ‘has the noble goal of deterring corporations and individuals from engaging in corrupt dealings with foreign officials’203 and ‘Congress intended the FCPA to be expansive, prohibiting not only the successful payment of bribes, but also attempts not fully consummated or effective in achieving their desired ends.’204

The FCPA takes a two pronged approach. Firstly, to ‘prohibit individuals and businesses from bribing foreign government officials in order to gain or retain business’.205 Secondly, ‘the FCPA contains accounting provisions applicable to public companies (…) [which] prohibit off-the-books accounting.’206 These are two different prohibitions that fall within the purview of two different regulators: the DoJ and SEC. The FCPA ‘focuses primarily on US entities and citizens’,207 together with ‘US and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the SEC issuers.’208 US jurisdiction is, thus, established over ‘domestic concerns’209 and ‘issuers’,210 which

202 Hansberry (n 16) 195.
203 Hansberry (n 16) 195.
204 Salbu (n 198) 229.
206 DoJ/SEC (n 205) 38.
207 Griffin (n 20) 341.
209 ‘A domestic concern is any individual who is a citizen, national or resident of the United States, or any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principle place of business in the United States.’ 15 U.S.C. § 78dd-2
210 15 U.S.C. § 78dd-1 [Section 30A of the Securities Exchange Act of 1934] Prohibited foreign trade practices by issuers. ‘In practice, this means that any company with a class of securities listed on a national stock exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. Foreign companies with American depository Receipts that are listed on a US exchange are also issuers.’ DoJ/SEC (n 205) 11.
includes 940 foreign companies. However, the ambit of FCPA extends further because it takes territorial jurisdiction over ‘foreign persons and foreign non-issuer entities that (...) engage in any act in furtherance of a corrupt payment (...) while in the territory of the United States.’ The territory of the US is, though, extended outside the US because the statute includes the ‘use of the mails or any means of interstate commerce.’ The use of ‘mails’ provides a link to Mail Fraud Statute and ‘interstate commerce’, which is defined as:

Means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the use of – (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

In this way, the use of telephone, fax, and or email or traveling across US state or international borders is included as is the use of the US banking system to make ‘wire transfers’ to or from the US.

7.4.1.1 Anti-Bribery Provisions

The DoJ describes the overall objective of the FCPA in relation to bribery as the ‘business purpose test’, because ‘[t]he FCPA applies only to payments intended to induce or influence a foreign official to use his or her position “in order to assist (...) in obtaining or retaining business for, or with, or directing business to, any person.”’ The FCPA contains sections relating to the three areas prohibited (issuers, domestics concerns and foreign persons) and prohibitions, albeit with tailored introductions, being the same:

It shall be unlawful for any [issuer; domestic concern; person other than issuer] (...) or for any officer, director, employee or agent (...) to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the

212 DoJ/SEC (n 205) 11.
215 DoJ/SEC (n 205) 11.
216 DoJ/SEC (n 205) 12.
payment of any money, or offer, gift, promise to give, or authorization of the
giving of anything of value (...) .  

Thus, the Act encompasses anyone acting on behalf of the issuer (or domestic concern / person other than issuer), using a means of interstate or international commerce and providing or offering to provide, ‘anything of value’. Next, the recipient is identified as ‘any foreign official’. 

The term “foreign official” means any officer or employee of a foreign government or any department or agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality or (...) public international organization.

This definition includes ‘any foreign political party or official thereof or any candidate for foreign political office’ or ‘any person, while knowing that all or a portion of such money or thing of value will be given (...) to any foreign official.’ The DoJ provides some clarification that ‘[t]he FCPA prohibits payments to foreign officials, not foreign governments, but warns that steps should be taken ‘that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials.’ For example, in SEC v Willbros a defendant:

Admitted that beginning in approximately late 2003, he conspired with others to make a series of corrupt payments totalling more than $6 million to various Nigerian officials and officials from a Nigerian political party to assist Willbros in obtaining and retaining the Eastern Gas Gathering System (EGGS) Project, which was valued at approximately $387m.

Additionally, the DoJ stated that not all foreign governments are organised in the same fashion as the US (and, for that matter, the UK) with clearly identified government departments or agencies.

223 DoJ/SEC (n 205) 20.
Many [foreign governments] operate through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications and transportation.\textsuperscript{225}

The FCPA also recognises and prohibits the possibility of routing payments indirectly, through a third party or intermediary.\textsuperscript{226} Although the DoJ understand the way in which foreign business is undertaken, they do warn that:

Many companies doing business in a foreign country retain a local individual or company to help them conduct business. Although these foreign agents may provide entirely legitimate advice regarding local customs and procedures and may help facilitate business transactions, companies should be aware of the risks involved in engaging third-party agents or intermediaries.\textsuperscript{227}

Through the language of the FCPA and the enforcement department’s explanatory notes, it is clear that a strict regime is to be adopted towards bribery being ‘to “any” officer or employee of a foreign government and to those acting on a foreign government’s behalf.’\textsuperscript{228} The DoJ state that ‘[t]he FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike.’\textsuperscript{229}

Violations of the FCPA means that ‘corporations and other business entities are subject to a fine of up to $2 million’ for each violation, whereas, ‘Individuals, including officers, directors stockholders, and agents of companies are subject to a fine of up to $100,000 and imprisonment for up to five years.’\textsuperscript{230} Furthermore, ‘fines imposed on individuals may not be paid by their employer or principal.’\textsuperscript{231} What this range of penalties leads to, as is discussed later in this chapter, is negotiations with the prosecutor regarding the outcome of a prosecution.

\textsuperscript{225} U DoJ/SEC (n 205) 20.
\textsuperscript{227} DoJ/SEC (n 205) 20.
\textsuperscript{228} DoJ/SEC (n 205) 20.
\textsuperscript{229} DoJ/SEC (n 205) 20.
\textsuperscript{230} DoJ/SEC (n 205) 68.
\textsuperscript{231} DoJ/SEC (n 205) 20.
7.4.1.2 Facilitating or Expediting Payments

Rather prosaically termed in the FCPA is ‘15 U.S.C. § 78dd-1(b), Exception for routine government action’. This is not expressly an exception for the US government itself but:

Means only an action which is ordinarily and commonly performed by a foreign official in – (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers such as visas and work orders; (iii) providing police protection, mail pick up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

This exception is in contrast to the UK Bribery Act 2010 which does not permit ‘facilitation or grease payments’. Furthermore, the DoJ recognise that it is against ‘the OECD’s Working Group on Bribery [which] recommends that all countries encourage companies to prohibit or discourage facilitating payments.’ This provision recognises that there is not complete agreement amongst countries for a strict requirement. There is a warning though that such payments must be properly recorded in the issuer’s books and records, failing which they will breach FCPA. This is an interesting point of disparity between the US and UK, because the FCPA exceptions were cited in submissions to UK Ministry of Justice when the Bribery Act was being drafted and which was criticised when not permitted. Thus, in analysing a key difference between US and UK anti-bribery legislation it can be seen that the US exemption was considered by UK in drafting its Bribery

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234 See Chapter 6.
235 DoJ/SEC (n 205) 25.
236 DoJ/SEC (n 205) 20.
Act and not adopted: UK experience has not yet produced cases to cause this
decision to be revisited. Indeed, such a change would be difficult for the SFO to
justify because it stated that the UK prohibition on facilitation payments was
consistent with the UN Convention and OECD policy, concluding with the
‘Government and SFO are committed to stamping out bribery and upholding the
rule of law. The SFO stands ready to take effective action against the use of
facilitation payments, regardless of where they are requested.’

In the US, there is also a debate, but Jordan’s view is that ‘the facilitation
payments exception has become a dinosaur remnant of a bygone era [the 1970s],
(…) when corruption was prevalent and no international treaty existed to prohibit
foreign bribery.’ While that may have been reasonable at the time, because the
rest of the world had not proscribed foreign bribery, the US had ‘pushed hard for
an international anti-bribery regime so that it would no longer be isolated in the
fight against foreign bribery that left its domestic companies at an unfair
disadvantage.’ The consequence of leading international efforts to reform global
bribery legislation is that ‘these efforts have also backfired on the United States, as
it now finds itself awkwardly criticized by the rest of the world for its own anti-
bribery deficiencies inherent in the facilitation payments exception.’ Thus, as
Jordan proposes, the US should abandon the facilitation payments carve out and,

239 There have been three cases under the Bribery Act 2010 but these are petty cases which have not raised
Mawla Mushtaq (unreported) http://www.oldham.gov.uk/press/article/301/would_be_cab_driver_attempted_to_bribe_officer,
240 Serious Fraud Office, ‘Enforcement of the United Kingdom’s (UK) Bribery Act – Facilitation Payments’
241 TI reporting that: ‘both the US Chamber of Commerce, which represents thousands of businesses, and the
American Petroleum Institute, have been working overtime to weaken the Dodd-Frank financial reform
legislation and the FCPA. Dodd-Frank includes provisions to increase transparency in the financial system
and ensure that companies published more information about how and where they do business. The FCPA
targets bribery of foreign officials.’ Transparency International, ‘Stop watering down anti-corruption legislation’,
242 Jon Jordan, ‘The OECD’s call for an end to ‘corrosive’ facilitation payments and the international focus on
243 Jordan (n 242) 881.
244 Jordan (n 242) 881.
in doing so, ‘join the rest of the world in condemning facilitation payments and fulfill its leadership role in the fight against foreign bribery.’

7.4.1.3 Accounting Provisions

The second prong of the FCPA is its accounting provisions,\(^\text{246}\) which are ‘designed to “strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure.”’\(^\text{247}\) Sorensen describes the US commercial landscape leading to enactment of the FCPA as:

> The practice of exporters and investors offering special inducements to host country officials is at least as old as Marco Polo. But in the United States a post-Watergate climate of pitiless exposure for all suspect practices connected with government has intensified both the investigations of these payments and the oversimplified publicity given to them. (…) As a result, the U.S. corporate officials have engaged in the most painful rush to public ‘voluntary’ confession since China’s Cultural Revolution.\(^\text{248}\)

At this time, there were clear tensions between all payments being condemned and the recognition that ‘[n]ot every foreign consultant or sales agent is corrupt or retained to perform some improper function,’\(^\text{249}\) ‘but properly recorded payments, of an amount appropriate under the circumstances, to a qualified and responsible professional for his performance of legitimate and necessary services, may well be perfectly justifiable.’\(^\text{250}\) The words ‘properly recorded’ are key, according to Diersen, because:

> The record-keeping provisions are used to prevent three types of improprieties: (1) a failure to record improper transactions; (2) the falsification of records to conceal improper transactions; and (3) the creation of records that are quantitatively correct, but fail to specify the qualitative aspects of a transaction which might reveal the true purpose of a payment.\(^\text{251}\)

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\(^{245}\) Jordan (n 242) 881.
\(^{247}\) DoJ/SEC (n 205) 38.
\(^{249}\) Sorensen (n 248) 719.
\(^{250}\) Sorensen (n 248) 719. (emphasis added).
The Act applies to ‘[e]very issuer which has a class of securities registered (...) and every issuer who is required to file reports.’ 252 This means:

Any issuer whose securities trade on a national securities exchange in the United States, including foreign issuers with exchange-traded American Depository Receipts. They also apply to companies whose stock trades in the over-the-counter market in the United States and which file periodic reports with the commission, such as annual or quarterly report.253

Thus, this part of the Act defines who falls within the purview of the SEC where ‘[u]nlike the FCPA’s anti-bribery provisions, the accounting provisions do not apply to private companies.’ 254 The SEC regulated ‘issuers’ are, firstly, required to ‘make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer.’ 255 The second element applicable to ‘issuers’ is to ‘devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly authorised and recorded.’ 256 Underlying these provisions is the knowledge that ‘[i]n the past, “corporate bribery has been concealed by the falsification of books and records”,’ 257 with the consequence that accounting records have been inaccurate and do not ‘fairly reflect the transactions and dispositions of assets of the issuer.’ 258 Furthermore, as the DoJ and SEC state, ‘[t]he payment of bribes often occurs in companies that have weak internal control environments.’ 259 Although the act requires a system of internal controls to be in place, it does not prescribe the form of those controls. Instead, it is the responsibility of the ‘issuer’ to create controls appropriate to the business risks which it faces:

The SEC considers several factors in order to determine the adequacy of a system of internal controls, including: the (1) role of the board of directors; (2) communication of corporate procedures and policies; (3) assignment of

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253 DoJ/SEC (n 205) 43.
254 DoJ/SEC (n 205) 43.
257 DoJ/SEC (n 205) 39.
259 DoJ/SEC (n 205) 43..
authority and responsibility; (4) competence and integrity of personal; (5) accountability for performance and compliance with policies and procedures; and (6) objectivity end effectiveness of the internal audit function.\(^{261}\)

It is the role of the ‘issuer’ to devise its own controls which ‘must take into account the operational realities and risks attendant to the company’s business’,\(^{262}\) such as ‘[b]usinesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls that businesses that have a lesser exposure to corruption.’\(^{263}\)

Both the ‘books and records’ and ‘internal controls’ provisions are qualified by employing a ‘prudent man’ standard.\(^{264}\) ‘[T]he terms “reasonable assurances” and “reasonable detail” mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.’\(^{265}\) The reason for this qualification being adopted was ‘in light of the concern that a standard, if unqualified, might connote a degree of exactitude and precision which is unrealistic.’\(^{266}\) The DoJ further note that when Congress adopted the definition ‘[t]he concept of reasonableness of necessity contemplates the weighing of a number a relevant factors, including the costs of compliance.’\(^{267}\) Thus, it is clear that the FCPA contemplate a degree of interpretation of actions.

Criminal liability arises when companies and individuals ‘knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record or account’.\(^{268}\) This requirement of intent, a (1988) refinement of the FCPA,\(^{269}\) ‘is an attempt to reduce the potential for unlimited liability as a result of accounting violations.’\(^{270}\) The expression ‘knowing’ also embraces, not knowing, or ‘wilful blindness, or conscious attempts not to know’.

\(^{261}\) Diersen (n 251) 753.
\(^{262}\) DoJ/SEC (n 205) 40.
\(^{263}\) DoJ/SEC (n 205) 40.
\(^{264}\) Diersen (n 251) 753.
\(^{265}\) 15 U.S.C. § 78m (b)(7).
\(^{266}\) DoJ/SEC (n 205) 39.
\(^{267}\) DoJ/SEC (n 205) 68.
\(^{268}\) 15 U.S.C. § 78m (b)(5).
\(^{270}\) Diersen (n 251) 753.
such as ‘deliberately avoiding knowledge or adopting a ‘head in the sand approach.’\footnote{Diersen (n 251) 753.}

The penalties for each violation of FCPA accounting provisions are a fine of up to $25 million for corporations, with individuals subject to a fine of $5 million and 20 years imprisonment.\footnote{DoJ/SEC (n 205) 20.} ‘Fines imposed on individuals may not be paid by their employer or principal,’\footnote{DoJ/SEC (n 205) 68.} which clearly can be seen as an incentive for individuals to reach an accommodation with the authorities whereby the corporation bears the burden.

There is a defence ‘to ensure that mundane accounting deficiencies would not violate the Act’\footnote{Diersen (n 251) 753.} such as ‘technical or insignificant accounting errors.’\footnote{Diersen (n 251) 753.} Furthermore, a parent issuer, owning less than 50% of a subsidiary may use its ‘good faith’ as a defence if it ‘encourage[s] compliance with FCPA accounting controls’,\footnote{Diersen (n 251) 753.} on the basis ‘that it is “unrealistic to expect a minority owner to exert a disproportionate degree of influence over the accounting practices of a subsidiary”.’\footnote{Diersen (n 251) 753.}

‘The FCPA was not heavily enforced during the first twenty years of its existence’\footnote{Hansberry (n 16) 195.} and it appeared to Hotchkiss that:

> For many years, international firms and executives treated the Foreign Corrupt Practices Act as the proverbial sleeping dog, best left alone. The FCPA was perceived as an overreaching and naïve attempt by the US government to impose unrealistic standards on global business conduct.\footnote{Carolyn Hotchkiss, ‘The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business’ (1998) 17(1) Journal Of Public Policy & Marketing 108.}

expanded efforts to combat corruption at home and abroad. \(^{281}\) Since 2009, the Department’s FCPA-related enforcement has secured more than $2 billion in fines and penalties and increased prosecutions of individuals who have bribed foreign officials\(^{282}\) and the SEC $1.2bn between 2010 and 2013.\(^{283}\)

### 7.4.2 Regulatory Bodies

The Department of Justice and the Securities and Exchange Commission share responsibility for enforcement of FCPA and have the facility to either work independently or together.\(^{284}\)

#### 7.4.2.1 The Department of Justice

The DoJ Criminal Division, Fraud Section is responsible for authorising all FCPA criminal actions\(^{285}\) and ‘develops, enforces, and supervises the application of all federal criminal laws except those specifically assigned to other divisions.’\(^{286}\) Thus, the DoJ ‘is solely responsible for criminal enforcement but may institute civil proceedings;’\(^{287}\) whereas, the SEC can only institute civil proceedings, with any criminal prosecutions being referred to DoJ.\(^{288}\) The DoJ maintains a FCPA Unit and works with the Federal Bureau of Investigation (FBI), whose ‘International Corruption Unit has primary responsibility for international corruption and fraud investigations and coordinates the FBI’s national FCPA enforcement program.’\(^{289}\)

The DoJ has instituted a new initiative: the Kleptocracy Asset Recovery Initiative to ‘target and recover the proceeds of foreign official corruption that have been laundered into or through the United States.’\(^{290}\) Their first success in 2012 was a

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\(^{281}\) Department of Justice, ‘Accomplishments under the leadership of Attorney General Eric Holder’ (n 141).

\(^{282}\) Department of Justice, ‘Accomplishments under the leadership of Attorney General Eric Holder’ (n 141).


\(^{285}\) Department of Justice, ‘Assistant Attorney General Lanny A. Breuer’ (n 162).

\(^{286}\) The United States Department of Justice. ‘About the division’ http://www.justice.gov/criminal/about/ accessed 29 April 2013.

\(^{287}\) Cavico and Bahaudin (n 201) 83.

\(^{288}\) DoJ/SEC (n 205) 39.

\(^{289}\) DoJ/SEC (n 205) 39.

\(^{290}\) ‘Once fully implemented, this Initiative will allow the Department to recover assets on behalf of countries victimized by high-level corruption, building on the Justice Department’s already robust enforcement of the Foreign Corrupt Practices Act. Through the Kleptocracy Initiative, the Department will ensure that corrupt leaders cannot seek safe haven in the United States for their stolen wealth. And, if we uncover such wealth, the Justice Department will forfeit and return this stolen money to its rightful owners – the people and governments from whom it was taken.’ Department of Justice, ‘Assistant Attorney General Lanny A. Breuer’ (n 162).
$3 million restraining order against ‘the former governor of the oil-producing Delta State in Nigeria’ (Ibori) followed by another order for $4 million.\textsuperscript{291}

In considering criminal penalties to be imposed for violation of FCPA, the DoJ also has the availability of ‘the Alternative Fines Act’,\textsuperscript{292} which can double the fines provided for in the FCPA.\textsuperscript{293} Furthermore, there is a procedure for calculating the magnitude of fines, contained in the ‘US Sentencing Guidelines’\textsuperscript{294} which ‘provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA.’\textsuperscript{295} These are two significant differences between the manner in which enforcement is undertaken in US and UK, where there is no such degree of certainty for defendants when considering their options.

An important point of difference between UK and US, is the ability of the US to negotiate an outcome with the defendant,\textsuperscript{296} a proposition which the UK SFO found attractive but which generated judicial antipathy\textsuperscript{297} prior to 2014 when Deferred Prosecution Agreements were allowed, see chapter six, but had not been used by mid 2014. In the US, the:

DoJ may agree to resolve criminal FCPA matters against companies either through declination or, in appropriate cases, a negotiated resolution resulting in a plea agreement, deferred prosecution agreement, or non-prosecution agreement.\textsuperscript{298}

In a Plea Agreement, ‘the defendant generally admits to the facts supporting the charges, admits guilt, and is convicted of the charged crimes when the plea
agreement is presented to and accepted by a court.\textsuperscript{299} For example, the publicly available letter detailing terms between DoJ and Siemens AG,\textsuperscript{300} shows a settlement where Siemens AG ‘and three of its subsidiaries, pleaded guilty to FCPA-related violations. The parent was not required to plead guilty to a bribery violation, thereby likely avoiding mandatory debarment in Europe.’\textsuperscript{301} In the US, a guilty plea does not result in automatic debarment from US government contracting because an independent debarment authority will consider the issues.\textsuperscript{302} However, in the UK, the EU Public Sector Procurement Directive applies.\textsuperscript{303} The effect of this is that a commercial organization is excluded from participation in public sector contracts if convicted of fraud, bribery and corruption under Article 45. This provides the incentive to ‘self report’ to SFO with the prospect of negotiating an outcome and incurring a civil rather than criminal penalty (see chapter five).\textsuperscript{304}

A second alternative is a DPA, which operates as a ‘Sword of Damocles’\textsuperscript{305} in that the DoJ ‘files a charging document with the court, but simultaneously requests that the prosecution be deferred.’\textsuperscript{306} The deferral, or not proceeding with the prosecution, is on the basis that the defendant pleads guilty but in return for a fine or other penalties and agreement, as in the case of Daimler AG, to ‘an independent compliance monitor for three years’,\textsuperscript{307} the DoJ agrees to dismiss the

\begin{footnotesize}
\begin{enumerate}
\item DoJ/SEC (n 205) 74.
\item DoJ/SEC (n 205) 70.
\item ‘Sword of Damocles n. (also Damocles’ sword) used by simile of an imminent danger, which may at any moment descend upon one.’ (‘Damocles, a flatterer, having extolled the happiness of Dionysius tyrant of Syracuse, was placed by him at a banquet with a sword suspended over his head by a hair, to impress upon him the perilous nature of that happiness.’) Oxford English Dictionary. \url{http://www.oed.com/view/Entry/47084?redirectedFrom=sword+of+damocles#eid7417619} accessed 14 May 2013.
\item DoJ/SEC (n 205) 74.
\item Tarun and Tomczak (n 301) 153.
\end{enumerate}
\end{footnotesize}
charges upon expiry of the agreement. 308 The attraction of a DPA is certainty, in the knowledge that a breach of the agreement would result in a criminal conviction, whereas, ‘a company’s successful completion of a DPA is not treated as a criminal conviction.’ 309

A third alternative agreement is a ‘Non-Prosecution Agreement’ (NPA). A NPA is less formal and restrictive than a DPA and, although the facts are disclosed, a charging document is not lodged with the court but left to lie on the prosecutor’s file to be activated if there is a breach of the NPA. This would include a tolling agreement to stay any statute of limitations issues.

The use of a NPA is demonstrated in the 2013 agreement with Ralph Lauren Corporation (RLC), which had a subsidiary in Argentina. 311 The facts were that over a five year period, a manager of the subsidiary paid bribes and gifts totaling $593,000 to customs officials in Argentina 312 to:

Improperly obtain paperwork necessary for goods to clear customs; permit clearance of items without the necessary paperwork and / or the clearance of prohibited items; and on occasion, to avoid inspection entirely. RLC’s employee disguised the payments by funneling them through a customs clearance agency, which created fake invoices to justify the improper payments. (…) RLC did not have an anti-corruption program and did not provide any anti-corruption training or oversight with respect to its subsidiary in Argentina. 313

In parallel with DoJ, SEC also agreed a NPA, which was the first occasion both regulators completed agreements with the same company. The SEC’s reasoning was ‘[w]hen they found a problem, [RLC] did the right thing by immediately reporting it (…) and providing exceptional assistance (…) we will confer substantial benefits on companies that respond appropriately to violations and cooperate

309 DoJ/SEC (n 205) 70.
310 ‘A tolling agreement is an agreement to waive a right to claim that litigation should be dismissed due to the expiration of a statute of limitations.’ US Legal.Com ‘Definitions’ http://definitions.uslegal.com/t/tolling-agreement/ accessed 14 May 2013.
313 Department of Justice, ‘Ralph Lauren’ (n 311).
The DoJ agreement gave credit for, and rewarded, self-reporting by not prosecuting and, instead, entering NPAs with substantial fines. RLC have closed the Argentina operation. This case involves the fashion industry where, ‘[t]his investigation highlights the expanding reach of the FCPA across all industries and its global impact on operations in foreign jurisdictions.’

The DoJ has available the various options described above, as alternatives to criminal action. It also has a ‘track record’ of enforcement which has such severe consequences that encourage a defendant to compromise rather than fight a case through the courts. The DoJ emphasise that ‘fighting corruption is, and always will be, a core priority.’

Since 2005, the Department has secured close to three dozen corporate guilty pleas in FCPA cases. And just since 2009, the department has entered into over 400 corporate resolutions, including nine of the top 10 biggest resolutions in terms of penalties, resulting in approximately $2.5 billion in monetary fines. And, perhaps most important, in that same period, we have successfully secured the convictions of over three dozen individuals for engaging in foreign bribery schemes.

The ability of the DoJ to negotiate outcomes is graphically demonstrated by the differing experience of two of the world’s major accounting firms: Arthur Andersen (AA) and KPMG, as Bennett describes. In the fall out of the Enron scandal

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314 Securities and Exchange Commission, ‘SEC Announces Non-Prosecution Agreement With Ralph Lauren’ (n 312) (Footnotes omitted).
315 The agreement gave credit for ‘(...)' timely, voluntary, and complete disclosure of the conduct; (...)' extensive, thorough, and real-time cooperation with the Department, including conducting an internal investigation, voluntarily making employees available for interviews, making voluntary document disclosures, conducting a world-wide risk assessment, and making multiple presentations to the Department on the status and findings of the internal investigation and the risk assessment; (...) early and extensive remedial efforts already undertaken – including conducting extensive FCPA training for employees world-wide, enhancing the Company's existing FCPA policy, implementing an enhanced gift policy as well as other enhanced compliance, control and anti-corruption policies and procedures, enhancing its due diligence protocol for third-party agents, terminating culpable employees and a third-party agent, instituting a whistleblower hotline, and hiring a designated corporate compliance attorney – and to be undertaken, including enhancements to its compliance program (...); and (...) agreement to provide annual, written reports (...).’ Department of Justice ‘Non prosecution Agreement’ dated 22 April 2013. http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf accessed 2 May 2013.
316 Securities and Exchange Commission, ‘SEC Announces Non-Prosecution Agreement With Ralph Lauren’ (n 312).
319 Raman, ‘Keynote Address at the Global Anti-Corruption Congress’ (n 318).
320 Bennett, LoCicero and Hanner (n 137) 411.
the first criminal charge in that case was also the first time a major accounting firm had been charged with obstruction of justice. There was a marked difference in experience of AA, which eventually had its guilty verdict overturned through Appeals to US Supreme Court and final withdrawal by the prosecution, and KPMG which negotiated with the DoJ. KPMG was subject to:

An aggressive 2002 investigation into (...) [its] accounting practices (...). KPMG diligently cooperated with requests from US Department of Justice during the investigation and was rewarded with a deferred prosecution agreement in exchange for an admission of guilt and an agreement to remediate the wrongdoing and establish a more robust internal compliance system.

The outcome of these two cases is that whereas 'KPMG remains a successful business to this day', 'it was already too late for Arthur Andersen. Shortly after the indictment, the firm effectively collapsed. Thus, although it achieved a victory against DoJ, it proved pyrrhic because '[t]he company's right to a jury trial was illusory, and the effect of the indictment was irreparable. Nothing from the Supreme Court could bring Arthur Andersen back from the dead.' These examples show the value to firms in identifying breaches of the FCPA and taking opportunities to negotiate a settlement with the DoJ. The use of DPAs would offer similar benefits to the UK in terms of certainty for a firm and for the SFO bringing breaches of the Fraud Act and Bribery Act to a conclusion without protracted court proceedings, in appropriate cases, as discussed in chapters five and six.

### 7.4.2.2 The Securities and Exchange Commission

The SEC’s mission ‘is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.’ The SEC is governed by the Securities Act 1933 ‘Often referred to as the "truth in securities" law,’ which has two main objectives: firstly, to ‘require that investors receive financial and other significant information concerning securities being offered for public sale’; and,

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321 Bennett, LoCicero and Hanner (n 137) 411.
322 Bennett, LoCicero and Hanner (n 137) 411.
323 Bennett, LoCicero and Hanner (n 137) 411.
324 Bennett, LoCicero and Hanner (n 137) 411.
325 Bennett, LoCicero and Hanner (n 137) 411.
326 Bennett, LoCicero and Hanner (n 137) 411.

The SEC is responsible for civil enforcement over ‘issuers and their officers, directors, employees, agents,’ and has a ‘specialized FCPA Unit.’ The emphasis for the SEC is on civil enforcement because, as Schipani notes, it ‘has a wide variety of civil and administrative powers to address corporate fraud.’ The remedies available to it are financial penalties both in terms of fines and disgorgement of gains, together with preventing individuals from serving as directors or officers of public companies and it may suspend trading in a company’s stock.

After the passage of Sarbanes-Oxley Act, the SEC may now also order a temporary freeze over payments the company is going to pay to its executives, and order CEOs and CFOs to forfeit any bonuses, incentive compensation and profits from the sales of securities when a company restates its financial statement due to misconduct.

The SEC is judged on ‘performance metrics’ including case resolution: ‘A case is considered “successfully resolved” if it results in a favorable outcome for the SEC, including through litigation, a settlement, or the issuance of a default judgment.’ Although the SEC states that it is a ‘law enforcement agency’, tellingly it confirms that ‘In many cases, the Commission and the party charged decide to settle a matter without trial.’ In 2013, the SEC took 686 enforcement actions and imposed $3.4bn in ‘monetary relief’ with a strategy to be more aggressive in enforcement and ‘seeking stronger penalties, which raised the

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328 Securities and Exchange Commission, ‘The Investor's Advocate’ (n 327).
330 DoJ/SEC (n 205) 5.
331 Schipani (n 183) 336.
332 Cind Schipani (n 183) 336.
333 CEO – Chief Executive Officer; CFO – Chief Financial Officer.
334 Schipani (n 183) 336.
336 Securities and Exchange Commission, ‘The Investor’s Advocate’ (n 327).
opportunity cost of malfeasance. The message conveyed to the market was clear: no institution is too large to be held to account and no violation is too small to escape scrutiny.

7.5 Conclusion

The US has been the instigator internationally of a strong response to economic crime. It was an early adopter of domestic legislation to criminalise overseas bribery and has led the way in enforcement, achieving significant outcomes in terms of prison sentences and fines. The US has also brought into the enforcement equation the use of agreements either not to prosecute or defer prosecution (with the expectation of eventually not prosecuting) with the defendant agreeing the valuable consideration of paying a significant fine but not suffering either corporate or individual criminal convictions.

The international adoption of conventions to combat economic crime eventually led to the UK enacting legislation to counter fraud, bribery and corruption, the latter statute being some 33 years after US legislation. In the UK, the SFO as lead prosecutor has been seen as slower to act, achieving less success than its US counterparts, and suffering from a near terminal damage to its reputation. This has resulted in pressure to ape the US by concluding ‘deals’ with defendants rather than prosecution. However, at a time when the UK has been enabled to conclude DPAs, the SFO have emphasised that they are a prosecution agency and ‘did not have a preference for risk-free civil penalties.’ Furthermore, even though the BA2010 has yet to see anything more than modest cases taken to court, there is proposal to dilute its effect by allowing limited foreign bribery (facilitation payments) to match the US exception to its law. Such a change would see the UK lose its international pre-eminence, because it would then not have the strongest domestic law, and could expect to suffer international criticism.

The US is also subject to internal criticism that its laws are too strict and, especially, that the post credit crunch Dodd-Frank legislation is too onerous. There

341 Serious Fraud Office, ‘David Green Speech’ (n 182).
342 See chapter 6.
is also some evidence of judicial disquiet about their mere ‘rubber stamping’ role in DPAs and questioning whether the ambitions of prosecutors are weighted towards income rather than convictions. This latter aspect is one which had started to be seen in the UK. In relation to sentencing, there is a clear disparity between the length of sentences available in the US and in the UK: the former being criticised for being too long and the latter for being too short.

It is the view of this thesis that the UK has simple, modern legislation to criminalise fraud and bribery and corruption, in contrast with the US which has a myriad of statutes and a reliance upon old statutes as a fall-back. Thus, in terms of legislation, this thesis does not consider that the UK would benefit from adopting US style statutes.

The enforcement of legislation has two components: institutions and sentencing. In the US, enforcement is the province of the DoJ, which reports to the Attorney General. In the UK, there is a more fragmented approach with the SFO reporting to the Attorney General; the Police, and the National Crime Agency in 2013, to the Home Secretary. The view of this thesis\textsuperscript{343} is that a single, unified agency with clear lines of command is the preferred model: this is the model adopted by the US. However, it is also clear that enforcer has to be properly resourced. In this regard whilst the US government has shown determination and flexibility by the Obama Administration making significant funds available to the DoJ, in contrast, the UK’s prime agency has suffered successive funding cuts amounting to a reduction of 43% over five years.

Alongside the institutions tasked with prosecuting economic crime is the availability of sanctions. Whereas the US has sentencing guidelines which facilitate prison sentences in excess of 100 years, the penalties in the UK have a ten year maximum. The view of this thesis is that the US guidelines would not translate into the UK because they are outwith the structure of sentencing in the UK. However, that does not mean that UK sentencing is not in need of review and new guidelines take effect from October 2014.\textsuperscript{344}

\textsuperscript{343} See chapter 6.4.
\textsuperscript{344} Ashworth (n 180) 553,554.
The US experience demonstrates that having a regime which enjoys the possibility of lengthy prison sentences, together with a high probability of success at trial, gives the prosecutor the option to negotiate an agreement with the defendant in appropriate circumstances: since the Crime and Courts Act 2013, the SFO has DPAs in its armoury. However, the perception of the SFO is that its success record at trial is low, thus, acting as a disincentive to defendants to plead guilty or recognise that they would be found guilty at trial, which would then encourage settlement. The view of this thesis is that the prosecution of economic crime is handled with more determination and success in US and that this is because the DoJ is properly resourced and organised as a cohesive unit. Thus, at this stage it is the conclusion that the UK prosecution authority should be similarly organised but the next chapter will examine the manner in which Australia approaches the same issues.

Chapter Eight: Australia

This chapter critically reviews and contrasts the Australian and United Kingdom (UK) approaches towards economic crime and follows the previous chapter which contrasted the United States of America (US) and UK. This chapter examines the place of Australia in the international financial community and its participation in international endeavours to combat economic crime. The issues of fraud, bribery and corruption are considered in light of the Australian constitution, which has a federal and state structure with fraud, in general, falling within an Australian state’s purview and external bribery being a Commonwealth of Australia matter. The design and implementation of the Australian financial regulatory structure is also examined since its ‘Twin Peaks’ model has been thought to successfully withstand the stresses of the 2008 financial crisis, as described by Lui, and Saunders and Wong.

Australia is chosen for comparison because, as the OECD comment, it is ‘a significant economy, exporter and international investor’, which means that it has the propensity to be a target for economic crime. It is also a member of ‘The Commonwealth’, ‘a voluntary association of 53 member countries.’ Sometimes

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1 ‘Australia’s formal name is the Commonwealth of Australia.’ Australian Government ‘Our Government’ http://australia.gov.au/about-australia/our-government . Under the Australian Constitution, the country is a federal country. Under a federal system, powers are divided between a central government and several regional governments. In Australia, power was divided between the then Commonwealth Government and the governments of the six colonies, which were renamed ‘states’ by the Constitution. Specific areas of legislative power (‘heads of power’) were given to the then Commonwealth Government, including: taxation; defence; foreign affairs; postal and telecommunications services. (…) The wording of the law has often created situations where both the Australian Government and the states claim the authority to make laws over the same matter. See State and territory government for a discussion of the federal-state relationship and how these conflicts are resolved. http://australia.gov.au/about-australia/our-government/australias-federation#Thefederalsystem. ‘There are six states in Australia: New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas.), Victoria (Vic.) and Western Australia (WA). Each state has its own state Constitution, which divides the state’s government into the same divisions of legislature, executive, and judiciary as the Australian Government. The six state parliaments are permitted to pass laws related to any matter that is not controlled by the Commonwealth under Section 51 of the Australian Constitution.’ http://australia.gov.au/about-australia/our-government/state-and-territory-government . Accessed 16 September 2013.


3 ‘Many factors contributed to the resilience of the Australian economy over this period. One was the decisive fiscal stimulus measures introduced by the federal government in 2008 and 2009 that have attracted wide praise from international agencies like the OECD and the IMF, as well as from expert commentators.1 Another was the rapid return to growth in the Chinese economy which stimulated the demand for Australian mineral exports, while the strong financial regulatory framework introduced in Australia in the early 1990s and reforms to the labour market that increased flexibility have cushioned it from external shocks like the GFC. A large budget surplus and relative low public debt also provided room for the government to expand its fiscal stance without compromising its longer-term fiscal sustainability.’ Peter Saunders and Melissa Wong (2011) 46(3), Australian Journal of Social Issues 292.


known as the British Commonwealth, its ‘roots go back to the British Empire when some countries were ruled directly or indirectly by Britain.’

This includes Australia, whose common law heritage and ties to the UK provide an historic association which makes drawing comparisons pertinent. In the Organisation for Economic Cooperation and Development (OECD) Working Group, Australia was the ‘11th largest economy and 14th largest exporter of goods and services’ and its largest trading partner was China. Importantly, ‘Australia also plays a significant role in many countries in Polynesia and the South Pacific that have serious corruption risks.’ However, Australia is not immune from such risks itself and the size of its economy and financial markets does make it ‘very susceptible to illicit financial activities’ and, as Ryder notes, ‘Australia has been described as one of the easiest places to launder money.’ Since the onset of the most recent financial crisis, and unlike the US and UK, Australia is regarded as having more successfully withstood the effects than other leading industrial nations which, thus, invites enquiry into the underlying reasons.

One reason advanced for this is that Australia adopted the twin peaks model of financial regulation, which as discussed by Taylor is to structure regulation around two agencies, one responsible for the safety and soundness of all financial firms and the other for regulating their sales practices. Lui observes that ‘Australian banks have withstood the financial crisis better than UK banks. Australia did not have any bank runs. Four of the nine AA-rated banks around the world are Australian banks, so the Australian regulation system worked well.’ The irony of Australia’s adoption

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7 OECD, ‘Phase 3 Report’ (n 3).
8 OECD, ‘Phase 3 Report’ (n 3).
10 Ryder, Money Laundering – An Endless Cycle? (n 9) 6.
15 Lui (n 2) 242, 243.
of the twin Peaks structure is that this was first advocated by Taylor, a Bank of England alumni, in 1995 but this structure was not adopted by the UK."16

8.1 Introduction

The success of Australia in weathering ‘the global financial crisis far better than many other developed economies,’17 does not, however, imply that it is unaffected by economic crime. As Tomasic observes, ‘[t]he global financial crisis has revealed massive financial frauds and misconduct that have long been a part of our markets but have been submerged by the euphoria that has dominated these markets’.18 Notwithstanding Australia’s economic success, neither it nor any other country is immune from economic crime but, against that background, its experience and response will form a key part of this research to establish whether its formula can be of benefit to the UK. For example, the Australian Institute of Criminology, reports that:

Serious fraud in Australia is both widespread and costly. The act of using dishonest means to gain an unjust advantage over another takes many forms including cheque and credit card fraud, fraudulent trade practices, social security fraud, forgery, counterfeiting and bribery. It is believed to be one of the most under-reported offences in Australia, with fewer than 50 per cent of incidents being reported to police or other authorities.19

The acknowledgement by the Australian government of the shortfall in reporting, then invites a critique of the government’s response. In this regard, it is helpful to have an external assessment. As a result of Australia’s obligations under the United Nations Convention against Corruption 2003 (UNCAC),20 an external review reported:

Australia has several agencies, including the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC), the Commonwealth Ombudsman and the Australian Federal Police (AFP), which prevent and detect corruption. The Government’s approach to corruption is based on the idea that no single body should be solely responsible for anti-corruption. All Government agencies must maintain plans for preventing and reporting corruption.21

It is significant that the UNCAC should highlight that no single body should be responsible for anti-corruption because, as this chapter illustrates, the Australian regulatory structure faces organisational challenges which are not present in the UK.

The Commonwealth of Australia (the Commonwealth) has, under the Australian Constitution established ‘a federal system’22 in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and six states’.23 The essence of this is that ‘[t]he Constitution does not confer on the Commonwealth Parliament the power to make laws on all subjects but list subjects about which it can make laws.’24 Therefore, in order to understand the legislative landscape, it is important to note that each state has its own constitution but is subject to the Commonwealth constitution, contained in the Commonwealth of Australia Constitution Act 1900.25 However, it has been noted that, ‘except for a few matters, a state parliament can make laws on any subject of relevance to that state. Accordingly, state parliaments can pass laws on a wider range of subjects


21 UNCAC (n 20). (Emphasis added).
22 Similar to US. See Chapter 8 7.3 Fraud.
23 ‘It also enables the Commonwealth Parliament to make laws in relation to territories. There are ten territories, of which three are self-governing.’
24 ‘They include defence; external affairs; interstate and international trade; taxation; foreign, trading and financial corporations; marriage and divorce; immigration; bankruptcy; and interstate industrial conciliation and arbitration.’ Commonwealth of Australia Constitution Act 1900, s 51 (Legislative powers of the Parliament) s 52 (Exclusive powers of the Parliament). ‘The Constitution of Australia’ http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCKOFjAB&url=http%3A%2F%2Fwww.comlaw.gov.au%2FDetails%2FC2005Q00193%2F0332ed71-e2d9-4451-b6d1-33e4b570e9f6el-HXwyVOLpJ8fdatlqsqJ&sug=AFQjCNmIo_yccXGyObogy44U3qMs07K1Q&sig2=d1g4m4QIUIhS5_JxAcbc3g&bvm=bv.76802529,d.d2s accessed 6 October 2014.
than the Commonwealth Parliament. This brings into focus that, as Tomasic discusses, '[c]orporate law and practice is largely the product of national legal systems drawing upon their particular traditions and development trajectories.' Therefore, this might appear complicated with potential for difficulties. However, the Attorney General suggests not, since 'the Commonwealth Parliament has vested state and territory courts with extensive jurisdiction to hear matters arising under federal law.' Thus, it is clear that the states and territories may avail themselves of federal law. However, in relation to matters of criminalising fraud, bribery and corruption it is instructive to note that '[t]he Commonwealth Parliament does not have specific power with regard to criminal law' since '[m]ost criminal activity is governed by the laws of the states. This is true for offences of corruption, including fraud and bribery.' Therefore, it can be seen that the six states are able to enact different laws that criminalise fraud, bribery and corruption. As Tomasic observes, in relation to national traditions, while they may be different from other nations and other structures might seem more logical, '[o]nce a pattern of corporate law and regulation is formed, deviation from this pattern becomes difficult, although not impossible, as the constitutional framework of Australian corporations law illustrates.' At the federal level, ‘Commonwealth criminal legislation is primarily restricted to criminal activity against Commonwealth interests, officers or property or is directed at crimes with an international element such as the bribery of foreign officials.’ This is in contrast to the UK Bribery Act 2010 (BA2010) which applies to England and Wales, Scotland and Northern Ireland. However, it is interesting to note that the Fraud Act 2006 (FRA2006) does not extend to Scotland. Bribery of Foreign Public Officials is the subject of

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29 ‘However, the Commonwealth can enact criminal laws relying on other powers, for example those that are expressly provided for under the Constitution.’ Australian Government, ‘The Commonwealth’s approach to Anti-Corruption’ (n 23).
30 Tomasic, ‘Governance and the evaluation of corporate law and regulation in Australia’ (n 27) 24.
33 Bribery Act 2010, s 18.
34 Fraud Act 2006, s 15.
35 ‘In Scotland, criminal fraud is mainly dealt with under the common law and a number of statutory offences. The main fraud offences in Scotland are: Common law fraud, uttering, embezzlement and statutory frauds.’ One of the main differences is a maximum sentence is life imprisonment in addition to or instead of unlimited fine, whereas in the rest of the UK, the maximum is 10 years imprisonment. Fraud Advisory Panel, ‘Fraud Facts: Fraud in Scotland’ 17 October 2013. https://www.fraudadvisorypanel.org/pdf_show_225.pdf accessed 17 October 2013.

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the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Convention), which sets the international standards to which Australia subscribes.

8.2 International Treaties and influence on domestic concerns

Australia has adopted a number of international conventions in the arena of economic crime and these provide international benchmarks for the establishment of standards to counter economic crime and the monitoring of progress to implement such standards. For example, in 1999, Australia ratified the OECD Convention and, concurrently, amended the Commonwealth Criminal Code Act 1995 to criminalise bribery of foreign public officials. In 2008, the OECD Working Group on Bribery ‘recognised Australia’s significant efforts to implement the Recommendations made by the Working Group,’ which deemed ‘that Australia has fully implemented 12 out of the 22 Recommendations made [earlier] (...) while 10 Recommendations have either been partially implemented or not implemented.’ This report demonstrates, firstly, that there is an international mechanism to review the implementation of the OECD standards and, secondly, that Australia is working towards implementation. However, a review by OECD, found that:

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35 The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction.’ OECD, ‘OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’ (OECD Convention) http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm accessed 15 July 2013. See also chapter 5.2.1 and 7.2.

36 OECD Convention (n 35).


40 The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction.’ http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm accessed 15 July 2013.

40 OECD, ‘AUSTRALIA: phase 2 follow-up report’ (n 37).
Australia’s enforcement of its foreign bribery laws has been extremely low, with just a single case leading to prosecutions out of 28 referrals in 13 years. Cases may have been closed prematurely. Australia must vigorously pursue foreign bribery allegations.\footnote{OECD seriously concerned by lack of foreign bribery convictions, but encouraged by recent efforts by the Australian Federal Police}. This is an important conclusion because ‘[a] significant portion of Australia’s international activities are exposed to risks of foreign bribery’,\footnote{OECD, ‘Phase 3 Report’ (n 3).} and the OECD note that ‘75% of the top 100 companies and 63% of the top 200 companies listed on the Australian Stock Exchange operate in a high risk sector, a high risk country, or both.’\footnote{OECD, ‘Phase 3 Report’ (n 3). (Footnotes omitted).} The particular sector of vulnerability is mining and resources, both in Australia and overseas, especially Africa where ‘Australian companies (...) have more projects in Africa than any other region of the world.’\footnote{‘A significant portion of Australia’s international economic activities are exposed to risks of foreign bribery. A recent study found that 75% of the top 100 companies and 63% of the top 200 companies listed on the Australian Stock Exchange operate in a high risk sector, a high risk country, or both. Of particular note is Australia’s large mining and resource sector. Australia is home to some of the largest multinational corporations in this area, though many small- and medium-sized enterprises (SMEs) are also active. Over 220 listed exploration and mining companies with a combined market capitalisation in excess of AUD 250 billion (EUR 208.7 billion) are active in Africa. Australian companies in this sector have more projects in Africa than any other region of the world. Projects have nearly tripled since 2005, and investment has increased from AUD 20 billion (EUR 16.7 billion) in 2009 to an expected AUD 50 billion (EUR 41.7 billion). The sector also contributes to almost half of Australia’s exports.’ OECD, ‘Phase 3 Report’ (n 3) 8.} The penetration of Australian companies into Africa is of particular concern because, as OECD comment, ‘African countries still face significant obstacles to economic development. Corruption and lack of transparency and accountability in business transactions remain high on the list of investment risks in Africa.’\footnote{OECD, ‘Stocktaking of Business Integrity and Anti-Bribery Legislation, Policies and Practices in Twenty African Countries - OECD-AfDB Joint Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa.’ 18.} Australia subsequently committed itself to further action against bribery when it signed the United Nations Convention against Corruption (UNCAC) in 2003.\footnote{Signed on 9 December 2003, ratified 17 December 2005. UNCAC (n 36).} The UNCAC was incorporated into domestic legislation by Anti-Money Laundering and Counter-terrorism Financing Act 2006.\footnote{Anti-Money Laundering and Counter-Terrorism Financing Act 2006, s 212(4).} UNCAC ‘requires States Parties to criminalise bribery of foreign public officials in the course of international

\footnote{OECD seriously concerned by lack of foreign bribery convictions, but encouraged by recent efforts by the Australian Federal Police}. http://www.oecd.org/newsroom/oecdseriouslyconcernedbylackofforeignbriberyconvictionsbutencouragedbyrecenteffortsbytheaustralianfederalpolice.htm accessed 15 July 2013.\footnote{OECD, ‘Phase 3 Report’ (n 3).\footnote{OECD, ‘Phase 3 Report’ (n 3). (Footnotes omitted).}}
business.Interestingly, as will be discussed later in the chapter, “[t]he Legislative Guide for the Implementation of UNCAC does not differentiate between bribery and facilitation payments.” This is significant in the discussions which are current in Australia regarding their retention of the ‘facilitation payments defence’ to bribery of foreign public officials.

Although Australia took steps to legislate against bribery, in terms of enforcement, the risks of bribery and corruption are heightened when combined with poor money laundering control because, according to Ryder, ‘Australia has been described as one of the easiest places to launder money.’ This is unhelpful because Australia has also been a member of the Financial Action Task Force (FATF), since 1990. It has been argued by Ryder that ‘the FATF was highly critical of the minimal level of compliance with its 40 Recommendations which resulted in “both embarrassments for the Australian government and with it international scrutiny on the Australian AML system”’. This criticism of Australia’s enforcement record was especially significant because of Australia’s profile in promoting these standards in the region and because it has leadership of the G20 in 2014, where it admitted in opening the G20 Anti-Corruption Roundtable that ‘in Australia we have recently seen serious allegations of widespread corruption within our trade unions, representing a threat to honest businesses and important projects.’

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49 developed by the United Nations Office on Drugs and Crime.
50 Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).
52 Ryder, Money Laundering – An Endless Cycle? (n 9) 6.
54 Ryder, Money Laundering – An Endless Cycle? (n 9) 6.
57 G20, ‘About G20’ The Group of Twenty (G20) is the premier forum for its members’ international economic cooperation and decision-making. Its membership comprises 19 countries plus the European Union. Each G20 president invites several guest countries each year.’ https://www.g20.org/about_G20 accessed 6 October 2014.
Australia’s geographic and global economic presence facilitated it taking a leading role in the Asia/Pacific region where, Jensen and Png report that it ‘agreed to set up a Secretariat for the purpose of obtaining regional commitment and establishing a regional’ FATF-style body with practical objectives. The objective for ‘the Asia/Pacific Group on Money Laundering (APG) is to ensure the adoption, implementation and enforcement of internationally accepted anti-money laundering and counter-terrorist financing standards’. Thus, Australia’s adherence to the FATF standards is important for the region because, according to Jensen and Png, ‘the general level of compliance of these Developing Member Countries on a strict reading of the compliance ratings is not high.’

The FATF, although clearly originally skewed towards anti-money laundering, as a result of the US led ‘War on Drugs and counter-terrorist financing strategies since 2001, does provide a structure to assess the steps taken by countries to combat economic crime. The FATF objectives are:

to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

58 ‘the so-called “FATF-styled regional bodies” which are tasked with promoting the implementation of the FATF Recommendations at the regional level’. Neil Jensen and Cheong-Ann Png, ‘Implementation of the FATF 40 + 9 Recommendations: a perspective from developing countries’ (2011) 14(2) J M L C 110,111.


60 This group now has 41 members and includes US. APG Members: Afghanistan; Australia; Bangladesh; Bhutan; Kingdom of; Brunei; Darussalam; Cambodia; Canada; China; People’s Republic of; Cook Islands; Fiji; Hong Kong, China; India; Indonesia; Republic of Korea (South Korea); Japan; Lao People’s Democratic Republic; Macao, China; Malaysia; Maldives; The Marshall Islands; Mongolia; Myanmar; Nauru; Nepal; New Zealand; Niue; Pakistan; Palau; Papua New Guinea; The Philippines; Samoa; Singapore; Solomon Islands; Sri Lanka; Chinese Taipei; Thailand; Timor Leste; Tonga; United States of America; Vanuatu; Vietnam. [http://www.fatf-gafi.org/pages/asiapacificgrouponmoneylaunderingapg.html accessed 8 October 2013.]

61 as set out in the FATF Forty Recommendations and FATF Eight Special Recommendations. ‘Save for a handful of the more developed DMCs that are able to devote more resources in absorbing the information from these materials, a challenge for many DMCs (similar experiences may be shared by other developing countries and less developed countries) is the limited resources they have for assimilating the requirements and related materials in the FATF Recommendations before formulating and implementing suitable reforms.’ Jensen and Png (n 58) 110,113.


63 Ryder, Financial Crime in the 21st Century (n 63) 59.

Furthermore, the FATF undertakes periodic reviews of member countries to evaluate compliance with its Recommendations.\(^66\) Although detailed analysis of such reports is outside the scope of this thesis because money laundering is not its focus, it is instructive to note that the FATFs ‘Third Mutual Evaluation Report’ was critical of Australia’s level of compliance: ‘the key issue in terms of effective implementation of the money laundering offence is the low number of money laundering prosecutions at Commonwealth level (…), indicating that the regime is not being effectively implemented.’\(^67\) This lack of prosecutions is a theme which recurs in relation to Australian prosecution of bribery.\(^68\) However, Ryder notes that the ‘Australian government responded by introducing the Anti-Money Laundering and Counter-Terrorism Act 2006\(^69\) (and Rules in 2007 and Regulations in 2008)\(^70\) ‘to improve compatibility with the 40 Recommendations of the FATF.’\(^71\) Thus, Australia has put in place legislation to meet its international obligations.\(^72\)

8.3 Fraud

In Australia, ‘[m]ost criminal activity is governed by the laws of the states. This is true for offences of corruption, including fraud and bribery.’\(^73\) Furthermore, Smith comments that:

> in Australia, fraud is not recognised as a separate legal category of crime (other than conspiracy to defraud). Instead, a variety of property offences may be used to prosecute conduct which involves fraud and deception such as crimes of theft and obtaining a financial advantage by deception.\(^74\)

The Attorney General provides that ‘Australia has a strong legislative regime criminalising corrupt behaviour.’\(^75\) Furthermore, its ‘corruption offences cover a broad range of crimes, including bribery, embezzlement, nepotism and extortion.’\(^76\)

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\(^67\) FATF, ‘summary of the third mutual evaluation report’ (n 66) 4.

\(^68\) See chapter 8.4.1.

\(^69\) Ryder, Money Laundering – An Endless Cycle? (n 9) 105.


\(^71\) Ryder, Money Laundering – An Endless Cycle? (n 9) 106.

\(^72\) This legislation is deployed by AUSTRAC – Australian Transaction Reports and Analysis Centre. See this chapter, section 8.3.2.

\(^73\) Australian Government, ‘The Commonwealth’s approach to Anti-Corruption’ (n 23).


\(^75\) Australian Government, ‘The Commonwealth’s approach to Anti-Corruption’ (n 23).

\(^76\) Australian Government, ‘The Commonwealth’s approach to Anti-Corruption’ (n 23).
This is given as a reason why such ‘corruption offences are not contained in any single Act of Parliament and are found in Commonwealth, state and territory legislation.’ This makes the anti-fraud arena more complicated when compared with the UK for the Attorney General provides a shopping list of Commonwealth legislation: Criminal Code Act 1995, Proceeds of Crime Act 2002, Financial Management and Accountability Act 1997, Anti-Money Laundering and Counter-Terrorism Financing Act 2006, Commonwealth Authorities and Companies Act 1997. These are then combined with state legislation to criminalise fraud, thus clearly demonstrating the fragmented landscape and can be seen in light of antipathy towards changing the structure. However, Australia is not alone in having a regime of fragmented legislation. In the US, as Podgor notes, ‘the scope of fraud is problematic in that there is no specific group of statutes designated in the federal code as fraud statutes and no consistent definition to create the boundaries of what is encompassed within the term.’ Thus, while there are similarities between Australia and US these represent complicating factors when compared with the UK. The criminalisation of fraud in Australia reflects such constraints.

8.3.1 Criminalisation

Criminalisation of fraud in Australia reflects the constraints of operating in a fragmented constitutional system in that there is not just one piece of legislation to cover the Commonwealth, states, and territories. Some states and territories have criminal codes while others do not, where ‘[c]odification has been defined as “the setting out in one statute of all the law affecting a particular topic whether it is to be found in statutes or common law”.’ This is not part of the UK tradition. However, in 1991, the Commonwealth government started to prepare a criminal code for all Australian jurisdictions but when the Commonwealth Criminal Code

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79 See chapter 8.5.
81 Queensland, Criminal Code 1899; Western Australia, 1902; Tasmania, 1924; Northern Territories 1983.
82 Andrew Hemming, ‘When is a code a code?’ (2010) 15 Deakin L Rev 65,66. (Footnotes omitted).
was enacted in 1995\textsuperscript{83} to cover matters purely within its own purview (that is, not states or territories) the theft, fraud and bribery provisions were absent, until the Code was amended in 2000\textsuperscript{84} These offences, which only apply to Commonwealth entities, all carried the same maximum penalty of ten years imprisonment.\textsuperscript{85} The purpose, according to Johns, was to simplify and reduce the Commonwealth statute book,\textsuperscript{86} ‘replacing overly complex provisions with a modern and transparent scheme as part of a national initiative.’\textsuperscript{87} However, this only affected matters within the Commonwealth bailiwick, since fraud is a matter dealt within individual state jurisdictions.

The interplay between the authorities in the constitutional framework means that ‘[f]raudulent offences can be statute or common law based criminal offences in federal and state criminal jurisdictions.’\textsuperscript{88} However, only two states in the Commonwealth, New South Wales (NSW) and South Australia ‘retain the common law approach to fraud regulation.’\textsuperscript{89} In NSW, which is Australia’s largest state economy and, thus, particularly relevant to this thesis,\textsuperscript{90} ‘the common law is based on the offence of larceny.’\textsuperscript{91} Thus, in terms of evaluating the legislative underpinning to countering fraud in Australia, the lack of federal or common state legislation is a disadvantage. However, it is instructive to note that in NSW, there has been legislative change by the Crimes Amendment (Fraud, Identity and Forgery Offences Act) 2009. It has been suggested by Steel that this law:

\begin{flushright}
\textsuperscript{83} Criminal Code Act 1995
\textsuperscript{84} Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth).
\textsuperscript{85} Criminal Code Act 1995, ‘s 131.1 Theft: (1) A person is guilty of an offence if: (a) the person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property. ‘s 134.1 Obtaining property by deception: (1) A person is guilty of an offence if: (a) the person, by a deception, dishonestly obtains property belonging to another with the intention of permanently depriving the other of the property. ‘s 141.1 Bribery of a Commonwealth public official. (1) A person is guilty of an offence if: (a) the person dishonestly: (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 person does so with the intention of influencing a public official (who may be the other person) in the exercise of the official’s duties as a public official; and (c) the public official is a Commonwealth public official; and (d) the duties are duties as a Commonwealth public official.’
\textsuperscript{86} Criminal Code Act 1995, ‘s 131.1(1); ‘s 134.1(1); and ‘s 141.1(5) ‘punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.’
\textsuperscript{87} Rowena Johns, Sentencing in fraud cases (Judicial Commission of NSW 2012) 12. (Footnotes omitted).
\textsuperscript{88} Johns (n 86) 12. (Footnotes omitted).
\textsuperscript{89} Parliament of New South Wales, ‘Fraud and identity theft’ 3. (Footnotes omitted).
\textsuperscript{91} Parliament of New South Wales, ‘Fraud and identity theft’ (n 88) 4.
\end{flushright}
represents a significant change to fraud offences in New South Wales and introduces identity-crime offences. The Act continues to move away from offences based on common law larceny and interference with property rights toward general offences based on a statutory defined concept of dishonesty. However, larceny and related offences have been retained. Consequently, care needs to be taken to distinguish between the different ingredients that constitute the various offences.\footnote{92}{Alex Steel, ‘New fraud and identity-related crimes in New South Wales’, Judicial Commission of New South Wales. (2010) Judicial Officers Bulletin 22(3) 18. \url{http://works.bepress.com/alex_steel/19} accessed 14 October 2013.}

The reason this step is instructive is because it post dates the UK FRA2006. As detailed in chapter six, the UK approach was to repeal various Theft Acts and to introduce a statutory offence of fraud. In NSW, as Steel notes, legislators have found themselves hamstrung by existing legislation because, ‘[t]he [Crimes Amendment] Act repeals over 30 fraud offences in the 

\textit{Crimes Act} 1900 and replaces those offences with a new Part 4AA containing one general fraud offence, and three ancillary offences.’\footnote{93}{Steel (n 92) 19.} Whereas the UK FRA2006 represented a new departure, the foundations for the new NSW offences are the historic offences, which means that ‘[t]he complexity of this section is due to its heritage as the definitional section in the Theft Act 1968 (UK) – on which the theft and fraud offences in the Criminal Code (Cth) are based.’\footnote{94}{Steel (n 92) 19.} The NSW legislators did have an opportunity to follow the UK lead but, according to Steel, considered that ‘[r]epresentation and general dishonesty based offences (…) [were] criticised for being too broadly defined,’\footnote{95}{Steel (n 92) 19.} which was found attractive by the UK. The NSW fraud offences are based on the ‘traditional requirement of dishonest deception’,\footnote{96}{Steel (n 92) 19.} which are found in the definition in \textit{R v Ghosh}.\footnote{97}{\textit{R v Ghosh} [1982] QB 1053. For further explanation see Chapter 6. \url{http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060035_en_1.htm} accessed 11 October 2011.} The motivation for change can be traced back to the 1990’s when ‘the Standing Committee of the [Australian] Attorneys-General established the Model Criminal Law Officers Committee (MCLOC).’\footnote{98}{Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, ‘Model Criminal Code, Chapter 3, Theft, Fraud, Bribery and Related Offences’. December 1995. \url{http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/mcloc_mcc_chapter_3_theft_fraud_bribery_report.pdf} accessed 14 October 2013.} An outcome of which was to highlight ‘the importance of simplifying fraud and forgery
offences and orienting them to the use of computers.'\textsuperscript{99} Thus, according to Johns, the intention was that states would take steps to align their individual legislation with that of the Commonwealth:

The reforms introduced in NSW in 2009 were intended (...) to bring NSW ‘closer to the national approach’ of the Model Criminal Code, to replace ‘outdated and redundant provisions’ with ‘simple and modern offences’, and to assist law enforcement to ‘keep pace with modern criminal conduct.’\textsuperscript{100}

If the Commonwealth and states aligned their legislation, then that might present a structure which could be used to compare with the UK. The ‘national approach’ is the code adopted by the Commonwealth in 2000, rather than identical state laws and whilst there may be ‘some correlation between the maximum penalties for fraud and forgery offences in NSW and the Commonwealth’,\textsuperscript{101} there are marked differences between some of the penalties for their respective identity fraud offences.\textsuperscript{102} However, what the Commonwealth does have is a ten-year head start in terms of judicial precedent which can inform state prosecution and sentencing decisions.\textsuperscript{103} There are two further aspects in relation to the application of Commonwealth and state law. Firstly, when both laws apply, an offender punished under state law is not then liable for punishment under a Commonwealth offence, and \textit{vice versa}.\textsuperscript{104} Secondly, there should be consistency in sentencing similar cases, as Johns identifies,

Both state and federal governments have legislated in respect of drug offences, some of them very similar, even parallel. It may seem odd if, in respect of comparable crimes, an offender sentenced in, say, New South Wales, under federal law was treated markedly differently from an offender sentenced in New South Wales under State law.\textsuperscript{105}

\begin{itemize}
\item[99] Johns (n 86) 2.
\item[100] Johns (n 86) 2. (Footnotes omitted).
\item[101] Johns (n 86) 114.
\item[102] Johns (n 86) 114.
\item[103] Johns (n 86) 115.
\item[104] ‘Where an offender is sentenced for conduct which might constitute an offence against both Commonwealth and State laws, and the Commonwealth statutory regime is less punitive, there is no requirement for the [NSW state] court to reduce the sentence for the State offence to bring a degree of conformity with the Commonwealth offence.’
\item[105] Johns (n 86) 115 citing \textit{DPP (Cth) v De La Rosa} (2010) 79 NSWLR 1 [297] (Simpson J).
\end{itemize}
There is a degree of similarity between the Commonwealth and NSW maximum penalties of ten years imprisonment. In the Commonwealth, Johns notes, ‘Obtain property by deception’, ‘Obtain financial advantage by deception’, and ‘Conspiracy to defraud the Commonwealth’, and, in NSW, ‘Obtain property belonging to another by deception’, ‘Obtain financial advantage or cause financial disadvantage by deception’. ‘However, there are marked differences between some of the penalties for the Commonwealth and NSW identity offences, where in NSW ‘the maximum penalties of seven years for possess identification information and ten years for deal in identification information are double those of the Commonwealth, reducing the utility of sentencing comparisons.’

The purpose in comparing Commonwealth and NSW fraud legislation is to demonstrate that the federal government and the leading financial markets state are not in complete alignment. However, there are also differences in the other states. In South Australia, ‘[t]he MCLOC model was regarded as “not comply[ing] with the drafting style of the South Australian statute book”’. Furthermore, in Victoria, although following NSW and the Commonwealth, ‘numerous other fraud offences have been retained’. In Queensland, ‘there is still an assortment of provisions’ and a variety of sentences, none of which ‘correspond to the NSW or Commonwealth maximum penalty of 10 years for general fraud or forgery’ and, in Western Australia, ‘the general fraud offence (...) has a 7 year maximum penalty which, uniquely, rises to 10 years if the victim is aged 60 or over.’

This review of the Australian approach to criminalisation of fraud shows that although some progress has been made in aligning legislation in the states to the Commonwealth, this process is incomplete and differences remain. The example of changes in NSW illustrate that the UK FRA2006 developments were

106 Unlike Bribery of a Foreign Public Official (s.70.2(4)) and Bribery of a Commonwealth Public Official (s.141.1(5)), the Criminal Code does not contain financial penalties for fraud offences. This is the same as the UK Fraud Act 2006.
107 Johns (n 86) 13.
108 Johns (n 86) 5.
109 Johns (n 86) 14.
110 Crimes Act 1900, s 192K, s 192K.
111 Johns (n 86) 14.
112 Johns (n 86) 17.
113 Johns (n 86) 17.
114 Johns (n 86) 18.
considered, but rejected. At a time when the FRA2006 is working well and there does not appear to be a demand for change, the lack of a clear unified approach by the Commonwealth and all the states does not provide a basis for the UK to follow Australia.

8.3.2 Regulatory Bodies

The Australian constitutional structure of 'a federal system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and six states,' also embodies 'the Government’s approach to corruption [which] is based on the idea that no single body should be solely responsible for anti-corruption.' Thus, at the Commonwealth level there are three key regulatory bodies which cover the field of intelligence, investigation and prosecution. The Australian Transaction Reports and Analysis Centre, Commonwealth Director of Public Prosecutions and Australian Federal Police.

8.3.2.1 Australian Transaction Reports and Analysis Centre (AUSTRAC)

A key element in the response to economic and organised crime is financial intelligence. Financial intelligence is the ‘analysis and use of financial transaction report data’ ‘in the prevention, detection and prosecution of crime.’ This then ‘assists the authorities to trace the trail of illicit money, to combat money laundering and other serious crimes.’ In Australia, this is the responsibility of AUSTRAC, ‘whose purpose is to protect the integrity of Australia’s financial system and contribute to the administration of justice through [their] expertise in countering money laundering and the financing of terrorism.’ AUSTRAC, which

115 Steel (n 92) 19.
117 ‘It also enables the Commonwealth Parliament to make laws in relation to territories. There are ten territories, of which three are self-governing.’
118 UNCAC (n 20). (Emphasis added).
121 Australian Government, ‘Austrac Overview’ (n 120).
is a Commonwealth institution conducting its role through ‘two interdependent functions – as the [AML/CTF] regulator and as Australia’s specialist financial intelligence unit (FIU).’ This includes working ‘with law enforcement and other agencies to protect the integrity of the Australian financial system and fight serious crimes such as drug trafficking, tax evasion, fraud and people smuggling.’ The numbers of transactions involved are significant, with ‘84 million individual reports of financial transactions’ in 2012-13, totalling [AUD] $3.5 trillion. In addition, in 2012-13 there were ‘40,000 suspicious matter reports.’ AUSTRAC point to the use made of its intelligence by the Australian Tax Office (ATO) which:

contributed to 1,428 cases during the year and resulted in [AUD] $572 million in taxation assessments being raised. (...) [and assisted] law enforcement, intelligence, human services, regulatory and revenue partner agencies in 280 other significant investigations.

This report of the use made of AUSTRAC’s intelligence appears to demonstrate improvements since Australia was earlier criticised for its weaknesses in anti-money laundering. An outcome of this criticism was the AML/CTF Act 2006, which served to comply with the FATF 40 recommendations. This is something which Ryder applauds because ‘it is extremely rare for a country to formally provide the measures of the FATF with recognition in primary legislation.’ Recognising the importance of the Australian legislation, Ryder contrasts ‘with both the US and UK, which have adopted a piecemeal approach towards implementing the international AML legislative measures.’ However, although money laundering per se is not the focus of this thesis, reporting instances or suspicious of economic crime is germane. Thus, in contrast to the strict money laundering reporting requirements of US and UK, the Australian approach is to

126 59 million reports in 2011-12.
129 Ryder, Money Laundering – An Endless Cycle? (n 9) 105.
130 Ryder, Money Laundering – An Endless Cycle? (n 9) 105.
131 Nicholas Ryder, Money Laundering – An Endless Cycle? (Routledge 2012 ) 107. Anti-Money Laundering and Counter-Terrorism Financing Act 2006, s 212(4)’ In performing the AUSTRAC CEO’s functions under this Act, the AUSTRAC CEO must have regard to:
(a) any relevant FATF Recommendations; and
(b) any relevant Conventions mentioned in subsection 3(3).’
132 Ryder, Money Laundering – An Endless Cycle? (n 9) 107.
adopt a ‘risk-based’ stance, ‘away from prescriptive, compliance-based approaches,’ but this does place the onus on the ‘reporting entities’ to properly assess their own risks. AUSTRAC stated:

AML/CTF programs are risk based. This means reporting entities can develop their own programs with minimal cost, tailored to their situation and money laundering and terrorism financing risks. This approach recognises that the reporting entity is in the best position to assess the risk of their customers, products and services and to allocate resources to counter those risks. The risk-based approach also ensures there is minimum impact on customers.

AUSTRAC regulates four sectors: banks and other lenders; gambling services and bullion; money service businesses; and non-bank financial services. The burden of establishing the parameters lies with the reporting entities which ‘would be expected to demonstrate to AUSTRAC (…) that their risk-based systems and controls are suitable to their particular businesses (having regard to their size, nature and complexity) and are consistent with prudent and good practices.’ The costs of compliance is significant, but non-compliance can bring enforcement, where ‘AUSTRAC has a range of enforcement powers at its

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133 What is risk management? Risk management is the process of recognising risk and developing methods to both minimise and manage the risk. This requires the development of a method to identify, prioritise, treat (deal with), control and monitor risk exposures. In risk management, a process is followed where the risks are assessed against the likelihood (chance) of them occurring and the severity or amount of loss or damage (impact) which may result if they do happen.’ Australian Government. Australian Transaction Reports and Analysis Centre. ‘Other Publications’ http://www.austrac.gov.au/risk_management.html accessed 11 December 2013.


136 AUSTRAC regulates four main industry sectors: Banks and other lenders – this sector includes domestic banks, investment banks, foreign bank branches and subsidiaries, credit unions and building societies. It also includes finance companies, micro lenders and specialist providers: Gambling services and bullion – this sector includes casinos, TABs, pubs and clubs, online gambling providers (corporate bookmakers) bookmakers and bullion dealers; Money service businesses – this sector includes remittance servicesm foreign exchange dealers and cash carriers; Non-bank financial services – this sector encompasses businesses providing a range of services including financial planning, funds management, stockbroking, custodial services, superannuation and life assurance.’ Australian Government, ‘AUSTRAC Annual Report 2012-13’ (n 126) 7.

137 ‘A reporting entity is an individual, company or other entity that provides a ‘designated service’ as defined in section 6 of the AML/CTF Act. Reporting entities include banks, non-bank financial services, remittance (money transfer) services, bullion dealers and gambling businesses.’ Australian Government. Australian Transaction Reports and Analysis Centre. ‘AML/CTF Reporting Obligations’ http://www.austrac.gov.au/amlctf_compliance_report.html accessed 11 December 2013.


140 Anti Money Laundering and Counter Terrorism Financing Act 2006, s 135. ‘It is an offence to: (a) produce false or misleading information; or (b) produce a false or misleading document; or (c) forge a document for use in an applicable customer identification procedure; or (d) provide or receive a designated service using a false customer name or customer anonymity; or (e) structure a transaction to avoid a reporting obligation under this Act.’
disposal, including issuing notices compelling businesses to provide information to the agency, and directing businesses to undertake a risk assessment or external audit. In 2013, these amounted to eight actions.

8.3.2.2 Commonwealth Director of Public Prosecutions

The Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecuting service established by the Parliament of Australia to prosecute alleged offences against Commonwealth law. CDPP’s role is in relation to offences against the Commonwealth, such as people trafficking, terrorism, money laundering and frauds against the Commonwealth, such as ‘tax fraud, Medicare fraud and social security fraud. The CDPP ‘is not an investigative agency and has no powers or statutory function to carry out its own investigations. This is in contrast to the US, where the Department of Justice and its agencies investigate and prosecute, and in the UK, where the key attribute of the Serious Fraud Office (SFO) is its powers to investigate and prosecute. Accordingly, it is a Commonwealth resource and ‘received briefs from 36 Commonwealth investigative agencies in the last financial year, including Australian Federal

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141 'The maximum civil penalty for a body corporate is AUD $11 million and AUD $2.2 million for an individual.' AUDSTRAC is able to apply for a civil penalty order without the consent of the Commonwealth Director of Public prosecutions’ Anti- Money Laundering and Counter- Terrorism Financing Act 2006, s 173. Pecuniary penalties are payable for contraventions of civil penalty provisions. Authorised officers, customs officers and police officers may issue infringement notices for unreported cross-border movements of physical currency and bearer negotiable instruments. The AUSTRAC CEO is to monitor compliance by reporting entities with their obligations under this Act, the regulations and the AML/CTF Rules. The AUSTRAC CEO may give a remedial direction to a reporting entity that has contravened a civil penalty provision. The Federal Court may grant injunctions in relation to contraventions of civil penalty provisions. The AUSTRAC CEO may accept enforceable undertakings. Customs officers and police officers may exercise powers of questioning, search and arrest in connection with a cross-border movement of physical currency or bearer negotiable instruments.


144 Director of Public Prosecutions Act 1983.

145 CDPP prosecute a wide range of alleged criminal offences, such as offences relating to the importation of serious drugs, frauds on the Commonwealth (including tax and social security fraud), commercial prosecutions, people smuggling, people trafficking (including sexual servitude and sexual slavery), terrorism, and a range of regulatory offences. Our prosecution practice stretches as far as the reach of Commonwealth law. State and Territory Directors of Public Prosecutions are responsible for the prosecution of alleged offences against their State and Territory laws.’ Commonwealth Director of Public Prosecutions.


149 See Chapter 4.6.5.

150 Commonwealth Director of Public Prosecutions ‘Annual report 2012-1013’ (n 147) 36.
Police and ATO. In relation to economic crime, the role of the Australian Federal Police (AFP) is significant.

### 8.3.2.3 Australian Federal Police

In the Commonwealth, the AFP ‘investigates serious or complex crimes against Commonwealth laws, it revenue, expenditure or property.’ AFP provides police services: ‘in relation to the laws of the Commonwealth and the property of the Commonwealth (…) and the safeguarding of Commonwealth interests’, and, ‘in relation to the Australian Capital Territory (…) and Australia’s external territories.’ AFP operates under the Australian Federal Police Act 1979 and has strategic priorities relating to terrorism, organised crime and ‘safeguarding the economic interests of the nation from criminal activities such as serious fraud, money laundering, corruption, intellectual property crime and technology-enabled crime.’

The AFP has a limited role in policing across Australia because of the structure of the Commonwealth, its states and territories. Consequently, it works in ‘multi-agency, multidisciplinary crime teams.’ The AFP established a ‘Fraud and Anti-Corruption business area’, in 2013, as a ‘response to serious and complex fraud against the Commonwealth such as corruption, foreign bribery and complex identity crime, including the manufacture and abuse of identity credentials.’

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151 Commonwealth Director of Public Prosecutions ‘Annual report 2012-1013’ (n 147) 11.
167 The Coalition Government has formally established the Fraud and Anti-Corruption (FAC) Centre located in the Australian Federal Police (AFP) headquarters, with the recent signing of a Commonwealth multi-agency Memorandum of Understanding—marking a new era in the approach to dealing with fraud and corruption at a federal level. The FAC Centre brings together the Australian Taxation Office, Australian Securities and Investments Commission, Australian Crime Commission, Australian Customs and Border Protection Service, Department of Human Services, Department of Immigration and Border Protection, Department of Defence, and Department of Foreign Affairs and Trade in order to assess, prioritise and respond to serious fraud and corruption matters.' Minister for Justice, ‘AFP-Hosted Fraud and Anti-Corruption Centre’ http://www.ministerjustice.gov.au/Mediareleases/Pages/2014/ThirdQuarter/31July2014-AFPHostedFraudAndAntiCorruptionCentre.aspx accessed 15 September 2014.
specialist area will also address the OECD review of Australia’s response to foreign bribery allegations.\textsuperscript{160}

Although the CDPP and AFP work together, they are separate institutions. Thus, the investigation and prosecution of serious economic crime is split, whereas, in the UK, the SFO is a single investigator and prosecutor. Furthermore, the SFO can operate across the whole of the UK, unlike AFP/CDPP which has a limited remit and has to operate through a variety of multi-agency, multidisciplinary crime teams, which consequently ‘can sometimes overlap with those of state and territory law enforcement, regulatory or criminal justice areas,’\textsuperscript{161} thus creating a need for a coordinated response in the form of a Framework.\textsuperscript{162} The purpose of the Framework is to ensure that ‘law enforcement, intelligence policy and regulatory agencies are collaborating effectively with each other, state, territory and international counterparts.’\textsuperscript{163} The clear need for this in Australia is understandable because of their constitutional structure where ‘the Commonwealth does not have a head of power with respect to criminal law.’\textsuperscript{164} However, because the UK does not have such a constitutional structure, the mechanisms employed in Australia to achieve a cohesive approach do not provide a template for adoption in the UK.

8.4 Bribery and Corruption

8.4.1 Criminalisation - Bribery of Foreign Public Officials

As a consequence of Australia’s obligations under the OECD Convention, Australia’s Criminal Code was amended\textsuperscript{165} to criminalise bribery of foreign public officials.\textsuperscript{166} The Australian government set out its values as:

\begin{enumerate}
\item \textsuperscript{160} See 8.4.1.
\item \textsuperscript{161} Australian Federal Police, ‘Annual Report 2012-13’ (n153) 67.
\item \textsuperscript{163} Attorney General, ‘Commonwealth Organised Crime Strategic Framework’ (161) 5.
\item \textsuperscript{164} Attorney General, ‘Commonwealth Organised Crime Strategic Framework’ (161) 5.
\item \textsuperscript{165} Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999.
\item \textsuperscript{166} ‘In amending the Code to criminalise foreign bribery, the Australian government acknowledged the OECD Convention as a key driver, and justified [the Act] both on moral grounds and as a means to reduce the harms that flow from corruption.’ Cindy Davids and Grant Schubert, ‘Criminalising foreign bribery: is Australia’s bark louder than its bite?’ (2011) 35 Crim L J 98
\end{enumerate}
Bribery of foreign public officials in the course of international trade is unacceptable. Although Australian business has high ethical standards, it is important that Australia maintains a good reputation by supporting the OECD in this initiative and therefore benefiting from the improvements it should bring to world trade. In particular, a reduction in the role played by bribery should result in more merit based commercial decisions. This will advantage Australia because as a rule its businesses are competitive.\(^{167}\)

This is an important statement because it provides that Australia already had high ethical standards and it was being collegiate with other nations in wanting all countries to adopt such standards. The rationale was that this would benefit Australia because international trade, based on pure commercial considerations should reward competitive businesses. However, the government stated that their reputation would depend upon active enforcement of the law, although by 2011, only seven of the 37 signatories to the OECD Convention were considered active in enforcement (including US and UK), with Australia, noted by Davids and Schubert, as ‘one of the 20 countries that is judged as exhibiting “little or no enforcement”’.\(^{168}\)

Before considering enforcement, it is appropriate to examine the legislation. The criminal code dealt with ‘[t]he integrity and security of the international community and foreign governments: Bribery of foreign public officials’.\(^{169}\) S.70.2(1) provides that 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 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-named 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


\(^{168}\) Davids and Schubert (n 166) 98, 99 (footnotes omitted).

recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).\textsuperscript{170}

These provisions are broadly the same as the BA2010.\textsuperscript{171} There are two defences to claims of foreign bribery: lawful conduct and ‘facilitation payments’.\textsuperscript{172}

\textbf{8.4.1.1 Lawful Conduct Defence}

The lawful conduct exemption\textsuperscript{173} applies for activities which are lawful in the foreign public official’s country, subject to ‘a written law in force in that place’ or ‘a written law in force in the foreign country or in the part of the country, as the case may be.’\textsuperscript{174} This, too, replicates BA2010.\textsuperscript{175} Davids and Schubert explain this defence in ‘the findings of the Cole enquiry\textsuperscript{176} into the Australian Wheat Board (AWB) affair.’\textsuperscript{177} In that case, payments were made to Iraqi government officials ‘in violation of United Nations [UN] sanctions imposed under the Oil-for-Food program but it was doubted that this alone could make them unlawful under Iraqi law.’\textsuperscript{178} By way of background, ‘[i]n 1990, following the invasion of Kuwait, the UN imposed sanctions on Iraq.’\textsuperscript{179} However, these sanctions imposed hardship on the Iraqi people because its government did not have hard currency to purchase foodstuffs.\textsuperscript{180} In response, the UN passed Security Council Resolution 986 allowing Iraq to sell oil in order to purchase ‘humanitarian goods, including foodstuffs’.\textsuperscript{181} An outcome of the AWB case was a change to the Criminal Code to

\begin{footnotes}
\textsuperscript{170} Commonwealth Criminal Code Act 1995, Division 70.
\textsuperscript{171} Bribery Act 2010, s 6.
\textsuperscript{172} ‘They exist in addition to the generally applicable defences of duress, mistake of fact, sudden or extraordinary emergency, and self-defence contained in Div 10 of the [Criminal] Code.’
\textsuperscript{173} Commonwealth Criminal Code Act 1995, s 70.3.
\textsuperscript{174} Davids and Schubert (n 166) 98, 110 (footnotes omitted).
\textsuperscript{175} Criminal Code Act 1995, Division 70(3)(1).
\textsuperscript{176} Bribery Act 2010, s 5.
\textsuperscript{177} Davids and Schubert (n 166) 98, 110.
\textsuperscript{178} Davids and Schubert (n 166) 98, 110.
\textsuperscript{179} Davids and Schubert (n 166) 98, 110.
\textsuperscript{180} Oil-For-Food Programme (n 176) xiii.
\textsuperscript{181} Resolution 986: On 14 April 1995, acting under Chapter VII of the United Nations Charter, the Security Council adopted resolution 986, establishing the “oil-for-food” programme, providing Iraq with another opportunity to sell oil to finance the purchase of humanitarian goods, and various mandated United Nations activities concerning Iraq. The programme, as established by the Security Council, is intended to be a “temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfillment by Iraq of the relevant Security Council resolutions, including notably resolution 687 (1991) of 3 April 1991”. United Nations. Office of Iraq Programme. ‘oil-for-food’. http://www.un.org/Depts/oip/background/index.html
\end{footnotes}
clarify that ‘the benefit offered must be required or permitted in the written law of the place or country.’

8.4.1.2 Facilitation Payments Defence

The second defence is that payments were ‘facilitation payments’. This is a contentious issue for Australia because ‘[t]he Government is considering whether to remove the defence for facilitation payments by repealing section 70.4 of the Criminal Code, and is seeking submissions from interested parties on this issue.’ The Criminal Code states:

(1) A person is not guilty of an offence (...) if:
(a) the value of the benefit was of a minor nature; and
(b) the person’s conduct was engaged in the for the sole or dominant purpose of expediting or securing the performance of a routine government action; and
(c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and
(d) any of the following subparagraphs apply:
(i) the person has retained that record at all relevant times;
(ii) a prosecution for the offence is instituted more than 7 years after the conduct occurs.

The ‘facilitation payments’ defence is not available under UK BA2010, but it is available under the US Foreign Corrupt Practices Act 1977. However, the OECD report a ‘general confusion about the facilitation payment defence (…). The evaluation team noted a lack of understanding of what constitutes a “facilitation payment” under Australian law.’ This leads to misunderstandings such as

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182 International Trade Integrity Act 2007.
183 An Act to implement the Australian Government’s response to recommendations made by the Inquiry into Certain Australian Companies in relation to the United Nations Oil-for-Food Programme, and for other purposes’ Davids and Schubert (n 166) 98,110. (emphasis added).
184 Criminal Code Act 1995, s 70.4.
187 OECD, ‘Phase 3 Report’ (n 3).
‘facilitation payments appear to be frequently equated with any bribes of small value.’ The OECD reminder is that what is ‘often overlooked is the requirement that such payments must be made to secure routine government action of a minor nature that does not result in the obtaining of a business advantage.’ Furthermore, because such payments are lawful they benefit from tax deductibility. However, instead of pressing for abolition of facilitation payments, the OECD recognises the difficulties inherent in endeavouring to eliminate such payments by exhorting in their recommendation that Australia:

continues to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognizing that such payments must in all cases be accurately accounted for in such companies’ books and financial records.

Thus, although OECD may not approve the use of facilitation payments, they recognise the reality that some countries, as in Australia and US, allow such payments within their anti-bribery laws. However, the Australian government recognises that there is an issue and conducted a public consultation in 2011, the results of which had not been published by late 2014. The consultation invitation proffers reasons for and against removal of the ‘facilitation payments defence’, with key reasoning against being:

Each of these arguments is based on an assumption that corruption and demands for bribes or facilitation payments are firmly entrenched in foreign jurisdictions. As the international business community continues to take steps against bribery and corruption, these arguments will become increasingly redundant.

188 OECD, ‘Phase 3 Report’ (n 3). (Emphasis added).
189 OECD, ‘Phase 3 Report’ (n 3). (Emphasis added).
190 Income Tax Assessment Act 1997
The Australian government cite ‘[c]ommentaries to the Anti-Bribery Convention [which] considered facilitation payments to be separate to bribery on the grounds that “small facilitation payments” did not constitute an attempt “to obtain or retain business or other improper advantage”’.\footnote{Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).} Yet, in the following paragraph, the government points to Australia being a party to UNCAC, the purpose of which is to ‘criminalise bribery of foreign public officials in international business’.\footnote{Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).} This Convention, though, ‘does not differentiate between bribery and facilitation payments’,\footnote{Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).} thus, adding weight to the view that the facilitation payments defence be reviewed. This is especially so because UNCAC thank Australia ‘for providing funding for the promotion’ of UNCAC.\footnote{Inde, the UN specifically thank Australia (and other countries, including UK and US) ‘their generosity in providing funding for the promotion of the United Nations Convention against Corruption’. LÉGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION. http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf accessed 1 October 2013.}

The Australian government noted that ‘Australian businesses operating overseas may be subject to UK, US and Australian foreign bribery laws.’\footnote{Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).} The Attorney General points to Australian law being ‘modelled’ on US law\footnote{Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).} but ‘[a]s the UK defines facilitation payments as illegal, Australian law represents an inconsistency.’\footnote{Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).} The clear implications are that Australia is moving closer to removing the ‘facilitation payments defence’. The case against such action being summarised as:

> Each of these arguments has, at its source, the problem of corruption. These arguments predominantly arise in business environments where facilitation payments are common and will become increasingly difficult argument to sustain. The Australian Government encourages Australian businesses to work actively to reduce corruption by resisting demands for facilitation payments and reporting them to authorities and works closely with foreign governments to improve governance and reduce corruption.\footnote{Australian Government, ‘Assessing the ‘facilitation payments’ defence’ (n 48).}

Although a decision has not been made, the direction of travel is towards following the UK lead, rather than adhering to the US position. The impact of such a decision is difficult to assess because the existing law has not been tested since
there have been no prosecutions under s.70, and, thus, the facilitation payments
defence has yet to be considered by the courts.204

8.4.1.3 Enforcement: Securency corruption case

The ‘bribery of foreign officials’ provisions of the Criminal Code have yet to be
tested in the courts, notwithstanding those provisions having been in place since
1999. However, in 2011, a case emerged with such potential: Securency
International Pty Ltd (Securency) is a multi-faceted case, involving allegations of
bribery and corruption in Nepal, Indonesia, Malaysia, Nigeria, Vietnam and the
UK,205 Securency, ‘a joint venture between Australia’s central bank, the Reserve
Bank of Australia and UK based Innovia Films’,206 was still awaiting trial by late
2014:

The Australian Federal Police (AFP) has charged two Australian companies -
Securency International Pty Ltd and Note Printing Australia Limited (NPA) -
and six Victorian individuals with bribery of foreign public officials. The
charges relate to alleged bribes paid to public officials in Indonesia, Malaysia
and Vietnam between the dates of 1999-2005 in order to secure banknote
contracts. It is Australia’s first prosecution under foreign bribery legislation
introduced on 17 December 1999.207

The importance of Australia’s first bribery of foreign public officials cannot be
overstated because of adverse comments from the FATF208 and the OECD209
regarding its history of enforcement. There will be considerable attention on the
eventual Securency trial but, in the meantime, there has been some peripheral
activity.210

204 Drinnan and Nicolson (n 195) 40.
205 Trace International, ‘Trace Compendium – Securency’
accessed 17 September 2013.
208 FATF, ‘summary of the third mutual evaluation report’ (n 66) 4.
209 Davids and Schubert (n 166) 98,110.
210 The Guardian, ‘Australian court’s gagging order condemned as “abuse of legal process”.
The Guardian, ‘Redacted copy of supreme court of Victoria’s gagging order’
accessed 3 October 2014.
In 2012, Ellery, Securency’s Chief Financial Officer, pleaded guilty to one charge of false accounting.\textsuperscript{211} He received a six-month suspended prison sentence.\textsuperscript{212} It should be noted that the prosecution was predicated upon a charge of false accounting under Victorian state legislation, rather than the Commonwealth Criminal Code of bribery of foreign public officials.

In the UK, the SFO charged a director of a connected company with conspiracy to corrupt,\textsuperscript{213} but he was acquitted at trial as the Financial Times report: ‘[a] Cumbrian businessman has been cleared by a jury at Southwark Crown Court in London of conspiring to bribe the former governor of Vietnam’s central bank,\textsuperscript{214} by helping his son to obtain a place at Durham University, paying fees and accommodation costs to induce the placing of contracts by the State Bank of Vietnam with Securency for the supply of banknotes.’\textsuperscript{215}

One objective of a comparative analysis of the practice in Australia relating to prosecution of bribery of foreign public officials cannot be satisfied because the only case in the last 14 years (Securency) is still work in progress. As a consequence, there is no experience in Australia on prosecution of bribery of foreign public officials upon which to base comment. However, even within the constraints of the Securency case still being before the courts, the bribery issues have been considered by the Australian Parliament which concludes:

The NPA/Securency case raises the critical importance of integrity standards and due diligence. These need to be matched with clear processes in relation to reporting suspected misconduct and corruption as well as effective protection of whistleblowers. The case demonstrates how, in a situation in which established policies and procedures were not adhered to or subject to effective oversight (for reasons including the poor relationship between the respective company boards and management), an opaque culture of secrecy

\textsuperscript{211} ‘contrary to s83(1)(a) of the Crimes Act 1958 (Vic)’  
\textsuperscript{212} Ellery (n 211).  
\textsuperscript{214} Financial Times, 6 December 2012 ‘Businessman cleared of Vietnam bribery’ http://www.ft.com/cms/s/0/77e60e7c-3fb7-11e2-b2ce-00144feabdc0.html#axzz2fpYKtwJa accessed 24 September 2013.  
\textsuperscript{215} Financial Times, 6 December 2012 ‘Businessman cleared of Vietnam bribery’ (n 214).
and collective amnesia (when asked to explain practices) came to characterise both companies.\textsuperscript{216}

It is clear that the Australian Parliament will wish to ensure that lessons should be learned from the case once it is concluded and, especially, in terms of protecting any whistleblower.\textsuperscript{217}

\section*{8.4.1.4 Sentencing}

The maximum penalties for individuals in breach of s.70 are ten years imprisonment and/or a AUD1.7 million fine. The penalty for companies are of the greater of: AUD 17 million fine; three times the value of the benefit attributed to the conduct (if it can be determined); or, 10\% of the annual turnover.\textsuperscript{218} This compares with the UK of ten years imprisonment and / or an unlimited fine,\textsuperscript{219} and the US of $2m for corporates and five years and $100,000 for each FCPA violation.\textsuperscript{220} However, in Australia, these provisions have yet to be deployed.

\section*{8.4.2 Regulatory Bodies}

\subsection*{8.4.2.1 ‘Twin Peaks’: Australian Prudential Regulation Authority}

Australia became the first country in the world to adopt the so-called twin peaks model of regulatory reform in 1998. As discussed by Taylor, this approach is ‘to structure regulation around two agencies, one responsible for the safety and soundness of all financial firms and the other for regulating their sales

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{217} Parliament of Australia, Joint Committee on the Australian Commission for Law Enforcement Integrity.’ (n 216).
\item \textsuperscript{218} Penalty for individual
(4) An offence against subsection (1) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both. [Penalty unit = AUD 170 - Effective from 28 December 2012, the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (Cth) amended the value of a penalty unit, increasing it from AUD110 to AUD170 (Crimes Act 1914 (Cth), s 4AA(1)).]
\item \textsuperscript{219} Penalty for body corporate
(5) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:
\begin{itemize}
\item \textsuperscript{a} 100,000 penalty units; [Penalty unit = AUD 170 - Effective from 28 December 2012, the Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (Cth) amended the value of a penalty unit, increasing it from AUD110 to AUD170 (Crimes Act 1914 (Cth), s 4AA(1)).]
\item \textsuperscript{b} if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
\item \textsuperscript{c} if the court cannot determine the value of that benefit—10\% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred. Criminal Code Act 1995, s.70 4(2)(a); s 70.2(2)(a); Crimes Act 1914 s 4AA.
\end{itemize}
\item \textsuperscript{219} See chapter 5.2.3.
\item \textsuperscript{220} See chapter 7.4.1.
\end{itemize}
\end{footnotesize}
practices."^{221} The Commonwealth created ‘[t]wo new regulators – prudential (Australian Prudential Regulation Authority, APRA) and disclosure (Australian Securities and Investment Commission, ASIC).^{222} This simplified the system because the ‘existing 10 regulators operating at federal, state and territory levels were abolished and the Reserve Bank of Australia (RBA) lost its bank regulation powers.^{223} The RBA’s role is focused on ‘monetary policy, stability of the financial system and the safety and efficiency of the payments system.’^{224} Another agency, the Australian Competition and Consumer Commission, is responsible for competition policy.^{225} However, it is APRA^{226} and ASIC which are the twin peaks: ‘APRA is responsible for prudential supervision of individual financial institutions and for promoting financial system stability in Australia,’^{227} this includes ‘Australia’s authorised deposit-taking institutions (banks, building societies and credit unions), life and general insurance and reinsurance companies, friendly societies and superannuation funds.’^{228} The supervisory role of APRA is focused on managing the risks of the institutions it supervises by establishing and enforcing ‘prudential standards and practices designed to ensure that (...) financial promises made by the institutions it supervises are met within a stable, efficient and competitive financial system.’^{229} The role of APRA as one of the twin peaks is important but its activities are not central to this thesis, unlike its ‘twin’ the ASIC.

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221 Taylor (n 14) 61.
222 Bakir (n 16) 910.
223 Bakir (n 16) 910.
225 Australian Prudential Regulation Authority, ‘Protecting Australia’s depositors’ (n 224).
226 ‘Established in 1998, APRA is a Commonwealth statutory authority established under the Australian Prudential Regulation Authority Act 1998. APRA’s high-level powers for the prudential supervision of institutions derive from this Act and from specific industry legislation: the Banking Act 1959; the Insurance Act 1973; the Life Insurance Act 1995; and the Superannuation Industry (Supervision) Act 1993.’ Australian Prudential Regulation Authority, ‘Protecting Australia’s depositors’ (n 224).
227 Australian Prudential Regulation Authority, ‘Protecting Australia’s depositors’ (n 224).
228 Australian Prudential Regulation Authority, ‘Protecting Australia’s depositors’ (n 224).
229 Australian Prudential Regulation Authority, ‘Protecting Australia’s depositors’ (n 224).
The other ‘twin’ in the Australian twin peaks system is ASIC, ‘Australia’s corporate, markets and financial services regulator.’\(^{230}\) It is an independent Commonwealth [of Australia] Government Body, established by statute\(^ {231}\) and deriving its powers from the Corporations Act 2001.\(^ {232}\) ASIC’s mission is to ‘contribute to Australia’s economic reputation and wellbeing by ensuring that Australia’s financial markets are fair and transparent, supported by confident and informed investors and consumers.’\(^ {233}\)

ASIC has a wide remit to ‘regulate Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.’\(^ {234}\) ASIC is organised into three regulatory areas: as ‘consumer credit regulator’,\(^ {235}\) ‘financial services regulator’,\(^ {236}\) and ‘markets regulator’.\(^ {237}\)

Relatively shortly after the establishment of the twin peaks institutions of APRA and ASIC, came a ‘defining moment in APRA’s history [that of] the US$3.75 billion corporate collapse of Australian insurance group HIH in March 2001.’\(^ {238}\) A Royal Commission investigated and reported\(^ {239}\) ‘that there were difficulties in the relationship, which arose principally because APRA and ASIC had overlapping and clearly undelineated roles in relation


\(^ {231}\) Australian Securities and Investments Act 2001

\(^ {232}\) Australian Securities and Investments Commission, ‘About ASIC’ (n 230).

\(^ {233}\) Australian Securities and Investments Commission, ‘About ASIC’ (n 230).

\(^ {234}\) Australian Securities and Investments Commission, ‘About ASIC’ (n 230).

\(^ {235}\) Australian Securities and Investments Commission, ‘About ASIC’ (n 230).

\(^ {236}\) Australian Securities and Investments Commission, ‘About ASIC’ (n 230).

\(^ {237}\) As the consumer credit regulator, we license and regulate people and businesses engaging in consumer credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers). We ensure that licensees meet the standards - including their responsibilities to consumers - that are set out in the National Consumer Credit Protection Act 2009. Australian Securities and Investments Commission, ‘About ASIC’ (n 230).

\(^ {238}\) Cooper (n 12) 5.

to financial services providers. This is seen as one of the risk areas for twin peaks and serves to underline the need for proper exchange of information to ensure that regulation does not fall between two stools. The difficulty is explained by Carmichael, APRA’s then Chairman as:

The difficulty for a prudential regulator is that it is much easier for the community to identify when you are doing a poor job than it is for them to identify when you are doing a good job. Unlike a conduct regulator [ASIC], which can at least count ‘heads on pikes’, there is no ready metric for APRA’s performance.

ASIC has a wide range of responsibilities, including 2 million corporations (of which 2,141 are listed on stock exchanges); over 6,000 deposit takers, credit providers, insurers, investment banks and hedge fund managers; and regulating 18 authorised financial markets. ASIC notes that it is ‘[a] regulator with many hats’ and, certainly, it has a significant number of matters within its purview. Accordingly, the adoption of a risk based approach, as an alternative to principles based is unsurprising, as Cooper explains:

This means that ASIC focuses on areas that it assesses as being of the greatest risk, such as misconduct and non-compliance that affect consumers’ decisions, threaten the reputation of our markets or undermine Australia’s international reputation as a safe, well-regulated place to do business. It then decides what available regulatory tools best deal with those risks.

ASIC operates under the Australian Securities and Investments Commission Act 2001 (ASIC Act) and administers the Corporations Act 2001. ASIC has, wide ranging powers and can counter financial misconduct by: investigating matters; prosecuting in a criminal court, applying for a civil penalty order; bringing a civil action; disqualifying people from managing corporations or dealing in financial services; and accepting and enforcing undertaking.

\[240\] Cooper (n 12) 6.
\[243\] Cooper (n 12) 7.
\[244\] Cooper (n 12) 8.
\[245\] Australian Securities and Investments Commission Act 2001, Corporations Act 2001, s 5B.
Penalties for non-compliance with the ASIC Act range from 5 penalty units (total AUD 840) at one end of the spectrum to 100 penalty units (AUD17,000 and / or 2 years imprisonment).\textsuperscript{247}

Notwithstanding the availability of powers of prosecution and regulation, the determination of the Australian government to take action is the subject of media speculation and parliamentary comment.\textsuperscript{248} As already discussed in relation to Securency, the Commonwealth has yet to achieve its first prosecution for bribery of foreign public officials. Although ASIC fairly state that bribery is not within their purview,\textsuperscript{249} it ‘has declined to investigate Securency and NPA directors for breaches of directors’ duties, despite a significant amount of evidence being sent to it by AFP’,\textsuperscript{250} the point being made that ‘[u]nlike the US and UK, Australia does have a public regulator that is empowered to prosecute individuals for breaches of directors duties.’\textsuperscript{251} The conclusion is '[o]ne of ASIC’s key problems is it is overstretched and understaffed, and, as a result Australia “gets what it pays for” from the regulator.'\textsuperscript{252} Resource constraint is also an issue for UK SFO, which suffered a budget cut from £50 million to £30 million between 2008 and 2013.\textsuperscript{253}

\textsuperscript{247} Australian Securities and Investments Commission Act 2001, s 63.
\textsuperscript{249} Bribery of foreign officials falls under the Criminal Code Act 1995 and is a law mainly enforced by the AFP, not ASIC. This means it is the AFP that is responsible for investigating foreign bribery and corruption, and taking criminal action through the courts.
\textsuperscript{250} The Canberra Times, ‘Show the world we’re fighting corruption’ (n 248).
\textsuperscript{251} The Canberra Times, ‘Show the world we’re fighting corruption’ (n 248).
\textsuperscript{252} The Canberra Times, ‘Show the world we’re fighting corruption’ (n 248).
\textsuperscript{253} The Serious Fraud Office investigates the most serious and complex cases of fraud, bribery and corruption as described above. The quantity of such work is unpredictable. The SFO has a core budget for this purpose but some exceptionally large cases may require additional resources. The Government has previously made clear that where the SFO needs additional resources, these will be provided. The current agreement with HM Treasury is that any exceptional case funding should be agreed as part of the Supplementary Estimates process.'

Parliament of Australia, ‘The Senate: Economics References Committee’ (n 79) 3.3.

ASIC had its funding cut by 12 per cent in this year’s budget.

Nevertheless, Carmichael’s analysis of ‘heads on pikes’ does strike a chord with media and parliamentarians for although such a measure is not entirely reflective of our [ASIC’s] ability to achieve this objective, it does at least provide one metric. In the year to 30th June 2013, ASIC secured 22 convictions, 9 of which resulted in custodial sentences, and the most significant case (Hobbs) was a AUD 50 million Ponzi scheme which achieved a ‘penalty order of [AUD] $500,000 [which] is the largest awarded in ASIC’s history. The judgment also included permanent prohibitions on managing corporations and disqualification from engaging in financial services. These penalties can be seen in the light of the Madoff and Stanford penalties in the US of 150 and 100 years imprisonment respectively. In ‘June 2013 the Senate referred an inquiry into the performance of [ASIC] to the Senate Economics
References Committee, ‘following revelations in Fairfax Media that the regulator took 16 months to act on information from whistleblowers about serious misconduct inside the Commonwealth Bank’s financial planning unit [CFPL].

ASIC welcomed the inquiry into their performance by outlining issues regarded by them ‘as barriers to fulfilling [their] legislative responsibilities and obligations, and proposals for overcoming these barriers’. ASIC also acknowledged that in ‘the public discussion of the handling of the CFPL matter there has been a misapprehension that (…) ASIC was not active in relation to the matter.’ ASIC accept that ‘all stakeholders would have been better served if (…) ASIC had been public about CFPL’s agreement to undertake the [Continuous Improvement Compliance Program] in response’ to previous negative review findings. ASIC also accept that their communication with whistleblowers ‘was not adequate,’ and this has exposed areas of concern relating to whistleblowers, such as: ‘expanding the definition’ of a whistleblower; ‘expanding the scope’ of information protection; and, protecting information about a whistleblower.

In the face of a Parliamentary inquiry, ASIC has suggested a number of areas for enhancement, pointing to its ‘investigative powers were established in the Corporations Act and ASIC act over a decade ago.’ ASIC then points out that ‘financial services and markets have expanded rapidly and grown in complexity,’ as has technology but ‘ASIC’s investigative powers have not kept pace.’

[264] ASIC, ‘Senate inquiry’ (n 256) 7.
[265] ASIC, ‘Senate inquiry’ (n 256) 7.
[267] ASIC. ‘Senate inquiry into the performance of the Australian Securities and Investments Commission Initial submission by ASIC on Commonwealth Financial Planning Limited’ (n 266) 16.
[268] ASIC. ‘Senate inquiry into the performance of the Australian Securities and Investments Commission Initial submission by ASIC on Commonwealth Financial Planning Limited’ (n 266) 16.
[269] ASIC, ‘Senate inquiry’ (n 256) 164.
[270] ASIC, ‘Senate inquiry’ (n 256) 164.
[271] ASIC, ‘Senate inquiry’ (n 256) 167.
[272] ‘ASIC has access to search warrant powers under both the Commonwealth Crimes Act 1914 (Crimes Act) and the ASIC Act. However, neither is entirely satisfactory:
(a) the ASIC Act powers only authorise a limited range of search activities (e.g. entering premises and taking possession of ‘particular’ books, which ASIC must attempt to name in applying for a warrant), posing significant practical difficulties for ASIC; and
Furthermore, ASIC points to inadequacies in what it calls its ‘enforcement toolkit.’ It identifies as the key issue that ‘[t]he penalties available in corporations legislation have not been comprehensively reviewed for over a decade, and, in many cases, do not meet community expectations.’ ASIC make the point that the range of civil fines which they can make are markedly lower than those seen in UK and US. The example of the outcome of a major case involving J P Morgan illustrates the point they wish to make:

JP Morgan was fined heavily for losses of over $6 billion on the so-called ‘London Whale trades’ affair. The fines amounted to: £138 million by the UK FCA; US$200 million by the US SEC; US$200 million by the US Federal Reserve; US$309 million by the US Consumer Finance Protection Bureau; and US$300 million by the US Office of the Comptroller of the Currency. In addition, JP Morgan will pay compensation to affected customers.

In contrast, under the Corporations Act, the maximum civil penalty payable by a corporation for an offence is [AUD] $1 million. Due to the ‘totality principle’, multiple offences arising out of the same course of conduct will not usually give rise to a substantially greater penalty than a single offence. Accordingly, multiple offences cannot attract remotely comparable civil penalties in Australia, even assuming that the maximum penalty is applied.

The deterrence effect of ‘heads on pikes’ relies on the enforcement penalties available but ‘shortcomings in the consistency or size of penalties’ can ‘create gaps between community expectations of the appropriate regulatory response to a particular instance of misconduct and what ASIC can do in practice.’ They clearly adopt a cost / benefit analysis approach ‘when considering whether to take civil penalty action’, one component of which is that ‘[i]f only a low civil penalty would be available, this might be one factor weighing against taking this kind of action.’ ASIC state that these issues ‘can risk undermining confidence in the financial

(b) by contrast, the Crimes Act authorises a far larger range of search activities (e.g. examining electronic equipment at the searched premises). However, the Crimes Act only authorises searches relating to suspected criminal offences, where the ASIC Act allows for searches relating to all of the provisions under ASIC’s jurisdiction, including civil penalty provisions and administrative remedies.
regulatory system’, which would appear to be precisely the case in Parliament undertaking a review. The Parliamentary report published in June 2014, presented ASIC with an opportunity to undertake its own review of its activities and suggest improvements which is as well because the the report found that ‘ASIC has limited powers and resources but even so appears to miss or ignore clear and persistent early warning signs of corporate wrongdoing or troubling trends that pose a risk to consumers.’

Furthermore, ‘it showed ASIC as a timid, hesitant regulator, too ready and willing to accept uncritically assurances of a large institution that there were no grounds for ASIC’s concerns or intervention.’ The Parliamentary report compared Australian penalties with other jurisdictions ‘while ASIC’s maximum criminal penalties are broadly consistent with those available in other countries, there are significantly higher prison terms in the US, and higher fines in some overseas countries for breaches of continuous disclosure obligations and unlicensed conduct.’ Moreover, ‘there is a broader range of civil and administrative penalties in other countries, and the penalties are higher.’ This means firstly that Australia is found wanting in its penalties and, secondly, that the UK has no need to look to Australia for an alternative model to adopt.

The UK has already undergone a process of examining its regulatory structure and has adopted the twin peaks approach pioneered by Australia. A difference is that the UK FCA has a wider range of powers and certainly greater maxima in terms of financial penalties, than ASIC but
even the UK lacks a single agency to deal with serious economic crime. The Commonwealth’s position ‘was that its multi-agency response is based “on the premise that no single body should be responsible”, and that there is “no convincing case for the establishment of a single over-arching integrity commission.'291 Thus, the prospects for a change of plan would appear to be limited for, as Tomasic notes, ‘[o]nce a pattern or corporate law and regulation is formed, deviation from this pattern becomes difficult, although not impossible.’292

8.5 Conclusion

The purpose in considering the regulatory responses to economic crime in Australia, a country which, according to Ryder, had successfully weathered the storm of post-financial crisis economies than other nations,293 was to establish whether it had methods and processes which might translate to the UK with benefit.

The first aspect is in the nature of regulation itself. That Australia is considered to have managed its economy and institutions in a manner which has protected the country from the vicissitudes of the global market felt in UK and US.294 The basis of this regulatory structure is the twin peaks model: as deployed in Australia combines the prudential regulator (APRA) with the ‘corporate, markets and financial services regulator’ ASIC.295 It is ironic; therefore, that such a model should have a UK philosophical parentage by Taylor. However, as Ryder notes the twin peaks model is being successfully applied to Canada.296 This is another

The committee recommends that the government commission an inquiry into the current criminal and civil penalties available across the legislation ASIC administers. The inquiry should consider: the consistency of criminal penalties, and whether some comparable offences currently attract inconsistent penalties; the range of civil penalty provisions available in the legislation ASIC administers and whether they are consistent with other civil penalties for corporations; and the level of civil penalty amounts, and whether the legislation should provide for the removal of any financial benefit.


Tomasic, ‘Governance and the evaluation of corporate law and regulation in Australia’ (n 27) 24.

Levi and Smith (n 11).

Nicholas Ryder, The Financial Crisis and White Collar Crime – the Perfect Storm (Edward Elgar 2014) 196.


Nicholas Ryder, The Financial Crisis and White Collar Crime – the Perfect Storm (Edward Elgar 2014) 196.
interesting feature: firstly, the UK, through the Financial Services Act 2012, adopted the twin peaks structure successfully implemented by Australia but then, concurrent with passing that legislation, appointed the then Governor of the Bank of Canada to be Governor of the Bank of England, in which role he Chairs the Prudential Regulation Authority, one of the UK’s ‘Twin Peaks.’ Thus, it can be seen that the UK has adopted a regulatory regime and has had the benefit of Australia’s 15 years experience to inform its design.

The role of ASIC is to regulate consumer credit, financial services and markets. It has a wide range of responsibilities and a significant number of entities to supervise. However, ASIC’s enforcement record has been subject to criticism, resulting in the establishment of a Parliamentary inquiry. In response to the inquiry, ASIC acknowledged that their investigatory powers had not kept pace with changes in technology, and that the penalties available to them under corporations’ legislation were in need of review. Thus, it would appear that ASIC has, prompted by Parliament, recognised the opportunities for improving its enforcement activities and highlighting in its ‘London Whale’ case study the disparity between penalties available in UK and US and Australia. Therefore, with ASIC casting covetous eyes on UK and US sanctions, it is they who will be considering the new regulatory regime in the UK of FCA, PRA and SFO, rather than offering a template for UK adoption. The Australian Parliamentary inquiry reported in June 2014 and considered whether Australia and ASIC would benefit from establishment of a SFO. The report reveals a range of views, including a former CDPP who said it would be a retrograde step and ASIC that it would lead
to fragmentation before concluding 'that there needs to be a shake-up of how complex fraud, bribery and corruption is addressed in Australia.' Notwithstanding this, the report stated:

the committee is of the view that the public interest would be better served if ASIC was more willing to litigate complex matters involving large entities. There appears to be either a disinclination to initiate court proceedings, or a penchant within ASIC for negotiating settlements and enforceable undertakings. The end result is that there is little evidence to suggest that large entities fear the threat of litigation brought by ASIC.

This assessment highlights the preference for civil or regulatory penalties rather than criminal sanction as through the SFO and the committee ended by urging the government to consider the issues and, meantime, ensure that existing agencies were properly resourced.

Financial intelligence is an important aspect of the response to economic and organised crime. In Australia, this is the responsibility of AUSTRAC, a Commonwealth institution. In the past, Australia was criticised for weaknesses in anti-money laundering and responded by enacting the AML/CTF Act to comply with FATF requirements. This is a single piece of legislation in contrast to the UK and US which have adopted a piecemeal approach. Although outside the scope of this thesis, the example of primary legislation for AML/CTF may provide an example for other countries to follow, or provide a template for future FATF Recommendations. However, in relation to economic crime, the intelligence gathering through risk based reporting requirements does provide

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313 Parliament of Australia, 'The Senate: Economics References Committee' (n 79) 23,34.
314 Australian Government, 'Operational Intelligence' (n 119).
316 Ryder, Money Laundering – An Endless Cycle? (n 9) 105.
317 Ryder, Money Laundering – An Endless Cycle? (n 9) 107.
information for other agencies to use, as with the ATO. This fulfils a similar role to National Crime Agencies SARs reports in UK.

Allied to AUSTRAC are CDPP and AFP. The former ‘investigates serious or complex crimes’ against the Commonwealth, while the latter ‘is an independent prosecuting service (…) to prosecute alleged offences against Commonwealth law.’ These are two separate institutions in contrast to the UK where the SFO is a single investigator and prosecutor. Furthermore, these are both Commonwealth institutions and, ‘can sometimes overlap with those of state and territory law enforcement, regulatory or criminal justice areas.’ As a consequence of the Australian constitutional structure of Commonwealth, states and territories, their institutions have to work in ‘multidisciplinary crime teams’. The UK does not have the same structural issues for an insight into the Australian approach to be of benefit.

The Australian approach to fraud is a reflection of its constitutional heritage with responsibility being divided between the Commonwealth and states. In its review of the theft, fraud, bribery and related offences landscape in 1995, MCLOC opined that:

The excesses of the 1980s have focussed a great deal of attention on the prosecution of fraud offences in Australia. Corruption in the public sector has also found focus in the Fitzgerald Report in Queensland and WA Inc in Western Australia. That focus finds the substantive law in such areas as theft, fraud, secret commissions and bribery fragmented and complex. The nine jurisdictions operate under nine sets of laws which adopt fundamentally different criteria.

This demonstrates the extent of the task faced by Australian legislators to create a common standard which might then be described as the Australian fraud law. Since 1995, steps have been taken to move towards a ‘uniform national approach’ but this is by no means complete and inconsistencies remain.

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320 See chapter 5.2.5.
322 Director of Public Prosecutions Act 1983.
326 Model Criminal Code Officers Committee (n 98).
Although the Commonwealth and states may adopt different terminology, they are becoming more aligned. However, the general direction of travel promoted by the 1995 Model Criminal Code report pre-dates the UK FRA2006, but it is clear from NSW 2009 legislation\(^{327}\) that the UK legislation was given consideration. However, the FRA2006 provisions were thought to be too broad and, therefore, not adopted.\(^{328}\) This thesis discusses the implementation of the Fraud Act in chapter six but, given that it is working well and meeting desired objectives, the patchy adoption of differing standards in the Australian states leads to a conclusion that the UK would not benefit from taking the Australian approach.

In relation to bribery of foreign public officials, Australia has ratified both OECD Convention in 1999 and UNCAC in 2005. These conventions, which both the UK and US have also ratified,\(^{329}\) impose standards but while the UK has enacted recent legislation,\(^{330}\) which is congruent with those conventions, the other two countries have not. In particular, the UK has made clear that a facilitation payment (of minor value ‘for the sole or dominant purpose of expediting or securing the performance of a routine government action’)\(^{331}\) was, nevertheless, a bribe and therefore illegal.\(^{332}\) Thus, especially in view of the debate in Australia regarding following the UK lead, far from the UK potentially benefitting from the Australian experience, the reverse applies.

Therefore, the conclusion of this chapter is that the issues of fraud, bribery and corruption are handled differently in Australia, where the Constitutional framework represents a complicating factor when considering whether any of its approach to economic crime could be translated with benefit to the UK. However, notwithstanding the constitution, it does have a different approach to prosecution which is not attractive. Where Australia has a structure of benefit is in relation to financial regulation where its twin peaks model of financial regulation is thought to have contributed to Australia successfully withstanding the stresses of the 2008

\(^{327}\) Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009
\(^{328}\) Steel (n 92) 19.
\(^{329}\) USA in 1998 and UK in 2002. OECD Convention (n 35).
\(^{330}\) Bribery Act 2010
\(^{331}\) Criminal Code Act 1995, Division 70(4).
financial crisis.\textsuperscript{333} The UK, in 2013, has adopted such a structure, as discussed in chapter six.\textsuperscript{334} In considering the regulation and prosecution of economic crime, the Australian constitutional structure introduces some features which are not relevant to the UK and some complications, for example, regarding a variety of fraud legislation and the limited remit of some regulators and agencies, such as CDPP and AFP. The prime corporate and markets regulator, ASIC (one twin peak) is under scrutiny for its enforcement record and acknowledges itself that its armoury needs enhancing, whereas, the UK changed its regime in 2013.\textsuperscript{335} In relation to bribery of foreign public officials, the UK legislation, which is compliant with international standards, is more stringent than Australia which has still to decide whether or not to remove the ‘facilitation payments’ defence to bribery. Thus, the conclusion reached by this thesis is that the one area where the UK can usefully look to Australia for insight is the twin peaks approach.\textsuperscript{336}

\begin{itemize}
\item \textsuperscript{333} Lui (n 2) 242, 243.
\item \textsuperscript{334} Chapter 6.4.
\item \textsuperscript{335} Financial Services Act 2012.
\item \textsuperscript{336} Bakir (n 16) 910.
\end{itemize}
Chapter 9: Conclusion and Recommendations

Economic crime is a significant feature of the United Kingdom’s (UK) economic landscape and yet, as is clear from this research, is not a subject which readily engages with either the public or the authorities. As a consequence, and despite the Coalition government’s bold mission statements ‘to hold those suspected of financial wrongdoing to account’\(^1\) as part of their ‘day of reckoning’\(^2\) and ‘serious about white collar crime’\(^3\) agenda, it failed to achieve its objectives.\(^4\) This research examines the history to creation of the UK’s anti-economic crime institutions and accompanying legislation, providing a critique of their effectiveness and analyses of whether the regime established by the Coalition government is appropriate for the future and considers the contribution which could be made by reviewing the way two other countries face the issues. The conclusion of the research is that further change must take place: a new structure is required for the UK with the formation of a broad Economic Crime Agency (ECA) that incorporates the Serious Fraud Office (SFO) and Financial Conduct Authority (FCA).

In the previous chapters, this study has been guided by the available literature to inform the subject area and takes as its start-point the change of UK government in 1979. This thesis explains the significance of that political development which presaged a change in supervision of financial markets away from the metaphorical ‘Governor's eyebrows’ approach of informal control to the establishment of a succession of formal regulators, from the Securities and Investment Board (SIB) via the Financial Services Authority (FSA) and finally to FCA. Co-incident with designing a formal regulatory structure, government concerns over the

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\(^2\) BBC, ‘Cameron urges ‘day of reckoning’ (n 1).


\(^4\) ‘(…) our position as one of the world’s leading global financial centres. I can also confirm that we will fulfil the commitment in the coalition agreement to create a single agency to take on the work of tackling serious economic crime that is currently dispersed across a number of Government departments and agencies. We take white collar crime as seriously as other crime and we are determined to simplify the confusing and overlapping responsibilities in this area in order to improve detection and enforcement.’ HM Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 3).

‘We take white collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading.’ Cabinet Office, ‘The Coalition: our programme for government’ http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf accessed 26 June 2010.
management of fraud trials and the failure to secure convictions led ultimately to the creation of the SFO. This study tracks the vicissitudes faced by regulatory and prosecutorial streams over the past 35 years.

The range of regulatory and prosecutorial powers has been expanded, in particular with the Financial Services and Markets Act 2000, Fraud Act 2006 (FRA2006) and Bribery Act 2010 (BA2010). Recent developments allow the SFO to reach court supervised ‘Deferred Prosecution Agreements’ (DPA) with some potential defendants,\(^5\) in addition to allowing regulators to criminalise ‘a decision causing a financial institution to fail.’\(^6\) This latter provision is a consequence of the 2008 financial crisis, which severely affected the UK and revealed failings in regulation and supervision of markets and institutions.

The response to failure in regulation and successful prosecutions assisted in the discussion of what it is that is encompassed in the expression ‘economic crime’ and the nature of the term ‘white-collar crime’ and whether the perception of differential treatment from other crimes is correct.

Examination of the UK financial services and markets landscape alone, is not sufficient upon which to base any recommendations. Accordingly, this study has also embraced consideration of the way in which two other countries faced similar challenges by critically examining the regulatory responses to economic crime by the United States of America (US) and Australia. They were chosen for comparison because the former is the UK’s most significant trading partner outside European Union\(^7\) and the latter is regarded, by Levi and Smith for example, as.

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\(^6\) Financial Services (Banking Reform) Act 2013, s 36.

\(^7\) Note: the European Union was not selected for comparison, primarily because EU directives to establish a common regime across member states are absent, through lack of political will, as evidenced by complaints of patchy adoption of international corruption conventions.

‘Several EU Member States have ratified all or most of the existing international anti-corruption instruments. However, three EU Member States (Austria, Germany, Italy) have not ratified the Council of Europe’s Criminal Law Convention on Corruption, twelve have not ratified its additional Protocol (Austria, the Czech Republic, Estonia, Finland, Germany, Hungary, Italy, Lithuania, Malta, Poland, Portugal, Spain) and seven have not ratified the Civil Law Convention on Corruption (Denmark, Germany, Ireland, Italy, Luxembourg, Portugal and the UK). Three Member States have not yet ratified the UN Convention against Corruption (The Czech Republic, Germany, and Ireland). Five EU Member States (Cyprus, Latvia, Lithuania, Malta, and Romania) have not ratified the OECD Anti-Bribery Convention.’ EU ‘Commission steps up efforts to forge a comprehensive anti-corruption policy at EU level.’ 3 June 2011. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/376&format=HTML&aged=0&language=EN&guiLanguage=en accessed 9 April 2012.
having more successfully withstood the effects of the financial crisis than other leading industrial nations. 8

9.1 Research base information - Literature Review and Methodology

The field of economic crime covers mainly fraud, bribery and corruption, and financial markets regulation, 9 though some agencies encompass other criminality which makes application of the label less clear, 10 as discussed in chapter three. This also builds upon research into white-collar crime, a label applied to non-violent or common crime. The research is multi-layered in looking at UK government policy over three periods, 11 a number of research topics, the UK’s international obligations and comparison with two other jurisdictions. This thesis has a convenient base because of two major studies, 12 which although rooted in the 1980’s still have current application. These studies looked separately at different strands of economic crime (but not bribery and corruption) and other studies have also looked individually at different aspects but not bringing them together, and not accompanied by review of US and Australia. Furthermore, economic crime has been overshadowed by terrorism and the focus on terrorist financing and money laundering.

The bedrock of the thesis is doctrinal research in combination with comparative and socio legal because the subject area lends itself to examination of existing material such as legislation rather than the creation of new research by engaging in empirical surveys. 13 Comparative methodology is employed because the thesis takes advantage of the counter-economic crime experience in US and Australia. 14 Socio legal methodology places the research in the context of ‘law and sociology,

9 We take white collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading.’ Cabinet Office, ‘The Coalition: our programme for government’ (n 4).
11 See chapter 3.2.
13 See chapter 2.2
14 See chapter 2.2
social policy and economics\textsuperscript{15} because it is a contemporary subject as indicated by the post financial crisis clamour to criminalise the alleged illegal misconduct of traders and bankers.\textsuperscript{16} Thus, it can be seen that the research area is highly relevant to the UK economy and by employing traditional and contemporary methodologies is able to analyse both academic work and current information.

\subsection*{9.2 UK Economic Crime Perspective}

The Coalition government came to power with a bold mission ‘to hold those suspected of financial wrongdoing to account’\textsuperscript{17} as part of their ‘day of reckoning’\textsuperscript{18} and ‘serious about white collar crime’\textsuperscript{19} agenda. In order to achieve this objective, according to Lomnicka, the Coalition government proposed ‘to create a single agency to take on the work of tackling serious economic crime that is currently dispersed across a number of Government departments and agencies’.\textsuperscript{20}

The immediate change which the Coalition government set in motion was the adoption of a new economic regulatory model called twin peaks because it considered that the previous financial regulatory, or ‘tripartite’, regime centred on the FSA as a ‘super regulator’,\textsuperscript{21} together with HM Treasury and the Bank of England (BoE), had failed to achieve its objectives, revealing ‘gaps in the UK regulatory system’.\textsuperscript{22} The FSA’s performance was attributed to the weakness of its ‘light-touch’ approach and, according to Tomasic, an ‘overly close relationship with the City,’\textsuperscript{23} encouraged by political pressure to be ‘business friendly’ in competing with other financial centres, such as New York.\textsuperscript{24} The government’s response was to replace the tripartite model with the twin peaks model, where, firstly and pivotally,\textsuperscript{25} the BoE was given responsibility for Financial Stability and

\textsuperscript{15} See chapter 2.2.
\textsuperscript{16} M Salter and J Mason, \textit{Writing Law Dissertations} (Pearson Education 2007) 123.
\textsuperscript{18} BBC, ‘Cameron urges ‘day of reckoning’ (n 1).
\textsuperscript{19} BBC, ‘Cameron urges ‘day of reckoning’ (n 1).
\textsuperscript{20} HM Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 3).
\textsuperscript{22} The other ‘twin peak’ is the Prudential Regulation Authority.
\textsuperscript{23} Roman Tomasic, ‘The financial crisis and the haphazard pursuit of financial crime’ (2011) 18(1) JFC 7,8.
\textsuperscript{24} Tomasic, ‘The financial crisis’ (n 23) 7,8.
for the Prudential Regulation of banking institutions. The second ‘peak’ was the creation of the FCA to take responsibility for protecting consumers and financial markets. The twin peaks model had previously been adopted in Australia and Canada, both of which are regarded as having withstood the financial crisis better than the UK and US.

The government’s key concern was financial stability, which was a direct consequence of the way in which the financial crisis afflicted the UK. In the new structure, the Prudential Regulatory Authority (PRA) was created to be responsible for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms\(^\text{26}\) with the statutory role of ‘the promotion of the safety and soundness of PRA-authorised persons;\(^\text{27}\) and ‘specifically for insurers, to contribute to the securing of an appropriate degree of protection for policyholders.’\(^\text{28}\) Concerns over the ‘reckless’ way in which some institutions imperilled their solvency without consideration of the risks to the country’s financial system led to the PRA and FCA being given responsibility to prosecute a new criminal offence of ‘relating to a decision causing a financial institution to fail.’\(^\text{29}\) However, this would only apply to cases where a bank or financial institution had failed and entered insolvency. Thus, poor decision making at a bank or institution, which did not result in insolvency would not be penalised. This is a significant deficiency and is not congruent with the Prime Minister’s pre-government stance that ‘those who break the law should face prosecution’.\(^\text{30}\)

Furthermore, it has been suggested by Wilson and Wilson that the lack of criminal charges in the UK against any individual involved in the financial crisis casts doubt on the FCA’s ‘credible deterrence’\(^\text{31}\) strategy. Thus, although the FCA has a range of administrative penalties and some criminal offences,\(^\text{32}\) there is a gap for conduct

\(^{26}\) Prudential Regulation Authority, http://www.bankofengland.co.uk/PRA/Pages/default.aspx accessed 3 March 2014.
\(^{27}\) Financial Services Act 2012, s 132.
\(^{28}\) Prudential Regulation Authority (n 26).
Financial Services Act 2012, s 133.
\(^{29}\) Financial Services (Banking Reform) Act 2013, s 36.
\(^{32}\) ‘General prohibition’ Financial Services and Markets Act 2000 s.19.
‘False claims to be authorised or exempt’ Financial Services and Markets Act 2000 s.24.
‘Prohibition of dealing’ Financial Services and Markets Act 2000 s.85(3)
‘Restrictions on financial promotion’ Financial Services and Markets Act 2000 s.21
‘Prohibition orders’ Financial Services and Markets Act 2000 s.56(4).
‘Failing to cooperate’ Financial Services and Markets Act 2000 s.177.
which warrants a criminal sanction in cases where there is no institutional failure or insolvency and the Fisher proposal of a crime of ‘reckless risk-taking’ provides an attractive solution.

The adoption of the twin peaks regulatory model represents a fulfilment of the Coalition agreement, in contrast to the government’s commitment to establish an ECA, where it has backtracked. Instead of the SFO forming a key part of the overarching ECA, it had to fight for its continued existence because the Home Office established the National Crime Agency (NCA), an organisation responsible for activities ranging from border control to child exploitation and online protection but within which includes an ‘Economic Crime Command’ (ECC). This is a disappointment because, instead of the ECA being accountable to either the Attorney General, as a specialist prosecutor, or HM Treasury, on a par with counter-terrorism financing, anti-money laundering or prudential regulation, the NCA sits, as a non-ministerial department within the Home Office. The Home Office states that it is ‘the department with the role of crime-fighting’, believing that ‘the government is determined to give greater focus to tackling both serious and economic crime’ and advances an aspiration ‘that the “piecemeal” approach to tackling white-collar crime will end’.

The creation of the NCA has added another level of confusion because the ECC has ambitions: ‘it coordinates activity, shares intelligence and knowledge with

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35 who presently superintends SFO
36 which superintends FSA/FCA, in addition to the Bank of England.
37 However, even counter-terrorism financing suffers the same issues, as the Home Affairs Committee report: ‘This is further compounded by the fact that in the UK, the responsibility for countering terrorism finance is spread across a number of departmental departments and agencies with no department in charge of overseeing the policy.’ Home Affairs Committee, Counter-terrorism (HC 2013-14, 231) 50.
partners, disrupting criminal activity, and seizing assets. Some of these activities are already undertaken by the SFO and FCA. The next level of confusion is that the ECC has themes for its future work which includes fraud, bribery and corruption and market abuse, insider dealing, which are certainly key areas for SFO and FCA.

Notwithstanding the claim of ‘greater focus’, the economic crime arena has become more rather than less diverse. Although the prospect of an ECA has receded, the two principal agencies have undoubtedly raised their profiles, but whereas the former FSA Enforcement Division is part of the FCA, the SFO’s future remains uncertain. The profile of the FCA has been elevated because of its facility as a regulator to be able to impose financial penalties. These penalties have been significant, mainly as a result of London Inter-Bank Offered Rate (LIBOR) failings, and in 2013 totalled £476m and £314m by late 2014.

The government’s intention for the FCA was of ‘delivering a regulatory regime under which the conduct of business of all retail financial services is regulated by a single body’. The FCA has ‘a single overarching strategic objective to ensure that markets function well’, unlike its predecessor the FSA which had four equal objectives, of which one was ‘the reduction of financial crime’. One of the FCA’s operational objectives is integrity: ‘protecting and enhancing the integrity of the UK financial system,’ and includes ‘not being used for a purpose connected with financial crime’. In pursuit of these objectives, the FCA has continued the policy


43 Financial Services and Markets Act 2000, s 206.


47 HM Treasury, ‘A new approach to financial regulation’ (n 46).


49 Financial Services Act 2012, s 1B(3).

50 Financial Services Act 2012, s 1D(1).

51 Financial Services Act 2012, s 1D(2)(b).
of ‘credible deterrence’, for which ‘the imposition of a financial penalty is central’.\textsuperscript{52} This policy has certain fiscal attractions because significant monies are raised for the Exchequer.\textsuperscript{53} However, as Cartwright observes, ‘[m]any breaches of FSMA occur where firms lack adequate controls, supervision and organisation rather than where they display wilful misconduct.’\textsuperscript{54} The ‘credible deterrence’ policy, whilst remunerative, has not answered questions such as that posed by Judge Rakoff in relation to the financial crisis of ‘[w]hy have no high level executives been prosecuted?’\textsuperscript{55} Thus, ‘the failure of the government to bring to justice those responsible for such colossal fraud bespeaks weaknesses in our prosecutorial system that need to be addressed.’\textsuperscript{56} Although Rakoff’s perspective is in relation to the US, the same questions and reasoning equally apply to the UK.

The SFO is an organisation whose raison d’être is ‘greater focus’ on economic crime. It has a unique role because of its power to both investigate and prosecute crimes, unlike the Police and Crown Prosecution Service (CPS) who have separate roles. The SFO has the recent benefit of BA2010 and DPAs, though neither had made an impact by mid-2014 for two reasons. Firstly, because the prosecution of BA2010 offences was for activities after July 2011\textsuperscript{57} and there is a lengthy lead time cases to come to trial. Secondly, because DPA’s only became available from February 2014. However, the SFO has contributed to discussions on learning the lessons from the financial crisis and answering Rakoff’s question: notwithstanding that it has not yet taken a prosecution to trial under the BA2010, they have proposed an extension of the BA2010 offence of ‘failure to prevent bribery’.\textsuperscript{58} Instead of having to prove that high level executives were the


\textsuperscript{54} Cartwright (n 52) 6.

\textsuperscript{55} Rakoff, ‘The Financial Crisis’ (n 16).

\textsuperscript{56} Rakoff, ‘The Financial Crisis’ (n 16).


\textsuperscript{58} ‘I have suggested that the situation could easily be remedied by an amendment to S7 of the Bribery Act to create the corporate offence of a company failing to prevent acts of financial crime by its employees. We need to tackle corporate criminal liability for DPAs to have maximum bite.’ Serious Fraud Office, ‘Ethical Business Conduct: An Enforcement Perspective’ http://www.sfo.gov.uk/about-us/our-views/director’s-speeches/speeches-2014/ethical-business-conduct-an-enforcement-perspective.aspx accessed 19 May 2014.
‘controlling mind’, the SFO propose an offence of ‘failing to prevent all acts of financial crime’, which would make the firm liable for all such offences.

However, in terms of performance, the SFO has also been unable to shake off the past reputation of being maladroit because it seems that each success in investigation and prosecution is matched by examples of the SFO suffering from problems of its own making. For example, in Tchenguiz the investigation and prosecution revealed problems with the SFO’s search procedures, resulting in it making settlements for damages. Furthermore, in BAE, documentation relating to the SFO investigation was found in a cannabis farm. Also, following the collapse of the UK Dahdaleh trial, the US Department of Justice (DoJ) agreed a DPA including a penalty of US$384m on broadly the same facts, and most recently the SFO’s internal accounting issues of unauthorised payments to its own staff and wrongly claiming VAT refunds. Although these SFO issues can properly be laid at the door of the departed Director, nevertheless, the impression gains currency that the SFO is accident-prone.

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59 Serious Fraud Office, ‘Ethical Business Conduct’ (n 58).
60 Rawlinson and Hunter Trustees SA and Others v Akers and Another [2014] EWCA Civ 136
61 ‘The SFO has so far spent £8.1m defending the £300m claim by the Tchenguiz brothers, due to go to trial in October, the High Court heard’, Financial Times 8 April 2014, http://www.ft.com/cms/s/0/5f0e1f06-bf41-11e3-a4af-00144feabdc0.html#axzz2yUAJxFyc accessed 10 April 2014. ‘The SFO has now agreed to pay Mr Tchenguiz and his business entities the total sum of £3 million plus their reasonable costs in full and final settlement of their civil claims.’
62 BEA Systems plc.
64 Financial Times. 10 January 2014. ‘Alcoa in $384m deal to settle Bahrain bribery charges’. http://www.ft.com/cms/s/0/62b10d60-793e-11e3-91ac-00144feabdc0.html#axzz22ucpXDq2D
67 Written Statement, Serious Fraud Office (Contingencies Fund Advance), HC Deb, 30 January 2014, col 39WS
9.3 Lessons from the United States of America and Australia

9.3.1 United States

The US is chosen as a comparator country to study because it has a dominant position as the largest single country in terms of international trade and its experience of combating economic crime has, consequently, to be relevant. This is demonstrated by the lead it took in contemporary measures against bribery and corruption by criminalising bribery and corruption internationally when it enacted the Foreign Corrupt Practices Act 1977 (FCPA).

The date of the FCPA is significant because it is just before the 1979 base point of significant structural changes in UK regulation and legislation. Thus, since 1977, knowledge of US experience would have been available to UK governments to inform domestic decision making. Over the succeeding time period, the FCPA, as deployed by the DoJ and Securities and Exchange Commission (SEC), has become more prominent: considerable fines have been levied for FCPA breaches, together with an extensively interpreted extra-territorial jurisdiction. Furthermore, as Feldman notes, the US has been a driving force to encourage European and Organisation for Economic Co-operation and Development (OECD) nations to ‘ramp up enforcement of their anti-bribery laws on both a domestic and international basis’. The motivation for the US was that as a result of the ‘Watergate’ scandal, the government had discovered that ‘[m]ore than 400 companies openly admitted paying foreign government officials, politicians and political parties.’ As a consequence of the public disquiet as to why ‘American companies [were] engaging in unethical practices and encouraging corruption in

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69 See Chapter 7.1.
other countries,'\textsuperscript{73} the US Congress enacted the FCPA. The FCPA was then a unique and original piece of legislation because it was the ‘first international anti-bribery statute of its type and scope in the world’,\textsuperscript{74} or, to be more accurate, a domestic statute with international scope. However, having introduced this legislation, the motivation for extension to other countries resulted, in Feldman’s opinion, from the US being ‘viewed as the policeman for the world’.\textsuperscript{75} Congress later concluded that, because of the FCPA, ‘American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of a penalty.’\textsuperscript{76} Furthermore, other countries were criticised for making such payments tax deductible,\textsuperscript{77} which would indicate that such payments were treated as a legitimate business expense.\textsuperscript{78}

In looking to see what features of the US system to deal with fraud, bribery and corruption could be translated with benefit into the UK, this research has examined the US regulatory and legislative provisions and the institutions charged with their enforcement. Such research is in light of changes which have already taken place in the same areas in the UK of fraud; bribery and corruption.

\textbf{9.3.2 Australia}

Australia is chosen for comparison because it is ‘a significant economy, exporter and international investor’, which means that it has the propensity to be a target for economic crime.\textsuperscript{79} In the OECD, Australia was the ‘11\textsuperscript{th} largest economy and 14\textsuperscript{th} largest exporter of goods and services’ and its largest trading partner was China.\textsuperscript{80} From a UK perspective, its connections with Australia ‘go back to the British Empire when some countries were ruled directly or indirectly by Britain,’\textsuperscript{81} and it also has a common law tradition. Furthermore, since the onset of the most recent financial crisis, and unlike the US and UK, Australia is regarded as having more

\textsuperscript{72} Eicher (n 72).

\textsuperscript{73} Heidi L Hansberry, ‘In spite of its good intentions, the Dodd-Frank Act has created an FCPA monster’ (2012) 102 JCR 195.

\textsuperscript{74} Feldman (n 70).


\textsuperscript{78} OECD, ‘Phase 3 Report on implementing the OECD Anti-Bribery Convention in Australia’ (n 79).

successfully withstood the effects than other leading industrial nations which, thus, invites enquiry into the underlying reasons. One reason advanced for this is that Australia adopted the twin peaks model of financial regulation which ‘structure[s] regulation around two agencies, one responsible for the safety and soundness of all financial firms and the other for regulating their sales practices.’

Lui observes that ‘Australian banks have withstood the financial crisis better than UK banks. Australia did not have any bank runs. Four of the nine AA-rated banks around the world are Australian banks, so the Australian regulation system worked well.’

Nevertheless, The Australian Institute of Criminology is of the view that serious fraud in Australia is seen as both widespread and costly and ‘one of the most under-reported offences in Australia, with fewer than 50 per cent of incidents being reported to police or other authorities.’ Furthermore, the United Nations Convention against Corruption (UNCAC), reported that the Australian ‘government’s approach to corruption is based on the idea that no single body should be solely responsible for anti-corruption.’ These are interesting issues which this research has examined because it is a conclusion that a multiplicity of UK anti-economic crime agencies is counter-productive.

Although Australia represents itself internationally as a single country, under the Commonwealth of Australia (Commonwealth) Constitution it is ‘a federal system in which legislative, executive and judicial powers are shared or distributed

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82 Levi and Smith (n 8).
85 Cooper (n 83) 2.
90 UNCAC (n 89) (Emphasis added).
91 Similar to US. See Chapter 8.7.3 Fraud.
between the Commonwealth and six states’. The consequence of this structure for economic crime is that ‘[t]he Commonwealth Parliament does not have specific power with regard to criminal law’ as a result of which ‘[m]ost criminal activity is governed by the [varying] laws of the states. This is true for offences of corruption, including fraud and bribery.

This chapter will draw conclusions on the issues of economic crime and regulation from the standpoints of the UK, the US and Australia to identify areas where UK practice can be improved or, alternatively, where the US and Australia might recognise advantages in a UK approach.

9.4 Fraud

9.4.1 United Kingdom

The UK has a number of agencies which may either investigate or prosecute fraud but the only agency with a specific role for fraud is the SFO. The SFO was established to tackle ‘the topmost tier of serious and complex fraud and bribery,’ in a clear contrast with financial regulators which have been criticised for a ‘light-touch’ approach and an ‘overly close relationship with the City.’ The SFO has a focused role: ‘[w]e are investigators and prosecutors of the topmost tier of serious and complex fraud, bribery and corruption. We are not a regulator, a deal-maker or a confessor.’ The key element for the SFO which sets it apart from other agencies is its unique role because of its power to both investigate and prosecute crimes, unlike the Police and CPS who have separate roles.

93 ‘However, the Commonwealth can enact criminal laws relying on other powers, for example those that are expressly provided for under the Constitution.’ Australian Government. Attorney General’s Department. ‘The Commonwealth’s approach to Anti-Corruption’ (n 92) 10.
94 Australian Government, Attorney General’s Department, ‘The Commonwealth’s approach to Anti-Corruption’ (n 92) 10. The varying laws of the states are discussed in Chapter 8.3.1.
95 43 police forces, with City of London Police as a specialist force; the SFO, the FCA, Office of Fair Trading, HM Revenue & Customs, and NCA. Most of these investigatory bodies handled their own prosecutions but the Revenue & Customs Prosecution Office, created to be independent of HMRC and Fraud Prosecution Service (to handle cases for police and SOCA), are both CPS divisions.
96 Criminal Justice Act 1987, s 1(1).
97 Serious Fraud Office, ‘Ethical Business Conduct’ (n 58).
98 Tomasic, ‘The financial crisis’ (n 23) 7.8.
In the economic crime arena, fraud was relatively neglected until the establishment of the SFO and then, following a significant gestation period, specific legislation: the FRA2006. The FRA 2006\textsuperscript{100} ‘has simplified the law by providing a new offence of fraud instead of a variety of ineffective deception offences under the Theft Acts’\textsuperscript{101} removing such crimes as ‘obtaining a pecuniary advantage’ and ‘procuring execution of a valuable security’ from the statute book. In practice, the range of deception offences created ‘a hazardous terrain for prosecutors’ which, consequently, encouraged reliance on ‘conspiracy to defraud’.\textsuperscript{102} Conspiracy to defraud is a common law offence which in effect ‘is a “general dishonesty offence”, subject to the irrational requirement of conspiracy.’\textsuperscript{103} Nevertheless, even after FRA2006 and notwithstanding its opponents,\textsuperscript{104} the offence remains available to prosecutors.

The FRA2006 has greatly simplified fraud offences:\textsuperscript{105} a person is guilty of fraud by: false representation (s.2); failing to disclose information (s.3); and, abuse of position (s.4).\textsuperscript{106} Conviction on indictment carries a maximum sentence of ten years imprisonment or an unlimited fine or both.\textsuperscript{107}

Since February 2014, the UK has been able to use DPAs,\textsuperscript{108} a mechanism to conclude agreements between prosecutors and corporate entities whereby in exchange for admission of guilt, payment of a (generally significant) fine and undertakings regarding remediatory action, the corporate entity and employees

\begin{footnotesize}
\textsuperscript{100} See Chapter 5.
\textsuperscript{102} Ormerod (n 101) 193-219.
\textsuperscript{104} ‘described in Parliament as ‘repellent’ (Hansard HC, 12 June 2006, col 561); and the Law Commission has proffered the opinion that it is ‘indefensible’ and ‘so wide that it offers little guidance on the difference between fraudulent and lawful conduct’ and has recommended its abolition.’
\textsuperscript{105} See Chapter 6.
\textsuperscript{106} Fraud Act 2006, s 1(2).
\textsuperscript{107} Fraud Act 2006, s 1(3)(b).
\textsuperscript{108} See Chapter 6.
\end{footnotesize}
would not be subject to prosecution. DPAs have been extensively used in the US, a practice which provided a clear example to inform UK thinking and is evidence of the UK learning, the lessons from the manner in which another country is able to tackle economic crime. The view of the SFO is that ‘DPAs provide an alternative response to some corporate criminality, a response which avoids that collateral damage. The route to a DPA should also be cheaper, quicker and more certain for all parties.’

The SFO, which leads the investigation and prosecution of fraud arising from the financial crisis, has recognised that even the FRA2006 might not be sufficient to counter the challenges faced in prosecuting the manipulation of LIBOR. The SFO have proposed an extension of the offence of ‘failure to prevent bribery’ as their contribution to answering the Rakoff question. Instead of having to prove that high level executives were the ‘controlling mind’, the SFO propose an offence of ‘failing to prevent all acts of financial crime’, which would make the firm liable for all such offences by its staff. Not only would this have direct financial consequences but carry with it the ‘threat of debarment from tendering for public contracts of any kind across the whole of the EU, which is thought to be far more worrying for corporations than one-off fines, whatever the size.’

LIBOR involving ‘allegations that bankers have colluded to manipulate [LIBOR], The FCA/FSA fined Barclays £59.5m, followed by UBS £160m, RBS £87.5m, ICAP £14m and Rabobank £105m. LIBOR is important

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109 See Chapter 7.
110 Serious Fraud Office, ‘Ethical Business Conduct’ (n 58).
111 I have suggested that the situation could easily be remedied by an amendment to s.7 of the Bribery Act to create the corporate offence of a company failing to prevent acts of financial crime by its employees. We need to tackle corporate criminal liability for DPAs to have maximum bite.’
112 Serious Fraud Office, ‘Ethical Business Conduct’ (n 58).
because it is the ‘benchmark reference rate fundamental to the operation of both UK and international financial markets, including markets in interest rate derivatives contracts.’ Additionally, the SFO announced that it had agreed to investigate the alleged manipulation of LIBOR: thirteen people have been charged with fraud or conspiracy to defraud and, by October 2014, ‘one senior banker had pleaded guilty.’ However, both the FCA/FSA and SFO were criticised for earlier failing to initiate a criminal investigation. The government described the LIBOR scandal as ‘the most high profile current issue in the United Kingdom’, which serves to highlight the role of two different organisations where the regulator seemed satisfied to impose a financial penalty without addressing the issue of criminal sanctions. Clearly, with both FCA and SFO as part of an ECA, there could have been greater clarity of thinking and a cohesive approach.

The LIBOR scandal has shone light on the financial system where the Bank of England is responsible for ‘efficient and effective financial markets,’ and ‘for the stability of the system as a whole,’ while the FCA has ‘responsibility to oversee financial markets.’ This is clearly confusing but is a demonstration that the anti-economic crime arena is multifaceted. Furthermore, other serious allegations have arisen of manipulation of the foreign exchange markets, described by FCA as ‘every bit as bad as they have been with LIBOR’, and the SFO announced an investigation in July 2014. In this case, questions have arisen over the

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123 Attorney General’s Office, ‘ Fighting economic crime in the modern world’ (n 115).
127 The Financial Times, 4 February 2014. ‘Forex claims ‘as bad as Libor’ (n 126).
129 The Financial Times, 4 February 2014. ‘Forex claims ‘as bad as Libor’ (n 128).
involvement of the BoE\textsuperscript{131} which responded that it would ‘tighten its governance,’\textsuperscript{132} and establish an enquiry.\textsuperscript{133} Following the revelations about manipulation of LIBOR, and there were similar issues in Australia,\textsuperscript{134} and the foreign exchange markets, it was revealed that similar manipulation had taken place in the London Gold Market which, hitherto, had ‘always managed to shroud itself in a carefully cultivated aura of glamorous mystery.’\textsuperscript{135} The FCA has fined Barclays £26m\textsuperscript{136} and banned a trader for offences relating to the manipulation of the market for gold at a daily meeting known, ironically, as gold fixing.\textsuperscript{137}

\textsuperscript{131}Hamish McRae and Frances Cairncross, \textit{Capital City}, (Eyre Methuen 1973) 190.

\textsuperscript{132}Breach of Principle 3: “A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.” Breach of Principle 8: “A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.”


\textsuperscript{134}The Gold Fixing is an important pricing mechanism which provides market users with the opportunity to buy and sell gold at a single quoted price,'
Thus, the interplay between the regulators of the markets and potential for SFO investigations will be interesting to observe because it has the potential to reveal either gaps in regulation or inertia caused by overlap between regulators. The need for primacy in regulation is underlined by the BoE’s concern that its parallel regulator the FCA had caused a false market in shares when announcing an enquiry into zombie (insurance) funds in 2014.\textsuperscript{138} If the tripartite regime was criticised for confusion over roles and responsibilities, it is important that the markets have one ultimate regulator and that should be the BoE because it is responsible for the stability of the system as a whole.

In the context of serious allegations about the markets and their supervision, the role of the SFO as an independent prosecutor is likely to be pivotal. The SFO is not the only prosecutor of fraud but, in most instances, the values and significance fall below the £1m entry threshold.\textsuperscript{139} However, the FCA is prosecuting a £5m land banking fraud with charges being: ‘conspiracy to defraud’; criminal offences relating to the carrying out of a regulated activity without authorization; and money laundering.\textsuperscript{140} This was a case described by the judge as ‘complex and substantial’\textsuperscript{141} and, although marketed to the public, is evidence of conduct which

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\textsuperscript{138} The Sunday Times, ‘FCA ignored warnings of false market’ (n 126).
\textsuperscript{140} R v Crawley \textit{et al} [2014] EWCA Crim 1028.


\textsuperscript{141} Crawley (n 141).

1. The [respondents] are charged with offences of conspiracy to defraud, possessing criminal property and offences contrary to s.19 and 23(1), and s.177(4)(a) of the Financial Services and Markets Act 2000. The evidence is complex and substantial. The volume of papers amounts to some 46,030 pages. There are in addition 194 excel spreadsheets with a combined total of 864,200 lines of entry. The Case Summary covers 55 pages.

2. In essence the Crown alleges that between 2008 and 2011 the defendants were involved in a land banking scheme using, variously, three limited companies. Those companies acquired, or purported to acquire, sites which were then divided into a number of sub-plots. It is alleged that those sub-plots were then aggressively marketed to members of the public – often vulnerable members of the public – who were persuaded to buy
would normally suggest serious fraud and, thus, be prosecuted by SFO. To show
the contrary approach, in the JJB case which involved allegations of forgery and
making misleading statements to the stock market, the prosecution is undertaken
by the SFO under the FSMA, whereas since the conduct is related to the
markets, the FCA would appear more appropriate.

9.4.2 United States

The US has demonstrated its commitment to combating fraud by establishing the
Financial Fraud Enforcement Task Force (FFETF) with $330m to investigate any
suspected instances of mortgage fraud and to pursue any potential prosecutions
that arise from those investigations. This is in marked contrast to the UK’s SFO
where government planned to reduce its budget to £30m in 2014/15. Thus, a
key difference is the disparity in resources between the US and the UK. This is
also a matter highlighted in examining the FCA’s resources. Therefore, it can be
seen that the SFO is not only disadvantaged in relation to its domestic regulatory
counterpart but also to the US endeavour to prosecute fraud.

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Based on false representations as to the nature of the company selling the sub-plots, the professionals they
employed, as to planning permission, potential purchasers of the sites for onward development and their
previous success. Some purchasers were given good title, some were not, and some sub-plots were sold
more than once. Various interventions by the FSA (as it then was) to stop the practices were subverted by
transferring the fraudulent scheme to a new company. The investigation and prosecution have been in the hands of the FCA and it is clearly an extremely important but complex case. (Citation omitted).

142 Forgy and Counterfeiting Act 1981, s 3.
143 Financial Services and Markets Act 2000, s 397(1)(b).
144 Serious Fraud Office, ‘JJB Sports - D Jones and S Jones’ http://www.sfo.gov.uk/our-work/our-cases/case-
progress/jjb-sports---d-jones-and-s-jones.aspx
145 Nicholas Ryder and Clare Chambers, ‘The credit crunch and mortgage fraud- too little too late? A
comparative analysis of the policies adopted in the United States of America and the United Kingdom’ in I.
Balogh and S Kis (eds), Housing, housing costs and mortgages: Tends, impact and prediction. (Nova
146 The SFO Budget showed actual reductions from £53.2m in 2009/9, £40m in 2009/10, £35.5m in 2010/11,
and £31.6m in 2011/12. The projections showed similar reductions to £34.8m in 2012/13, £32.2m in 2013/14
and £30.8m in 2014/15. In the event, the outturn for 2012/13 was £38m and 2013/14 £51m, reflecting the
availability of ‘blockbuster’ funding. The 2014 projections showed budget £37m in 2014/15 and £35.4m in
2015/16. ‘The Serious Fraud Office investigates the most serious and complex cases of fraud, bribery and
corruption as described above. The quantity of such work is unpredictable. The SFO has a core budget for this
purpose but some exceptionally large cases may require additional resources. The Government has
previously made clear that where the SFO needs additional resources, these will be provided. The current
agreement with HM Treasury is that any exceptional case funding should be agreed as part of the
Supplementary Estimates process.’

Serious Fraud Office, ‘Annual Report and Accounts 2013-14’ http://www.sfo.gov.uk/media/268927/sfo%20ar-
While the funding of FFETF is important, there is an underlying reason which is to do with the US constitutional structure of federal and state law and the number and variety of law enforcement and regulatory agencies, as is also seen in Australia. The rationale of the FFETF was ‘we know that we can accomplish so much more by working together than working in isolated, compartmentalised silos.’ The UK may also have a variety of regulators and agencies but is not hampered by a federal constitution and this research does not propose a change to the UK’s constitutional structure but that does not mean that there are not aspects of the US response to fraud which should not be considered.

Legislation to criminalise fraud is another area for consideration. In the US, fraud statutes are either generic, such as ‘conspiracy’, ‘mail’ or ‘wire’ frauds; or specific, such as ‘bankruptcy’, ‘healthcare’ or ‘bank’ fraud. In the former category, Podgor notes that the ‘focus of the statute is almost exclusively on the fraud and not the object of the offense.’ Thus, in the Mail Fraud Statute 1872, Henning comments that ‘the mailing element seemingly provides federal prosecutors with carte blanche to prosecute virtually any activity to which the mail or a shipment by interstate carrier can be linked, no matter how tangential.’ In 1952, a twin statute, the Wire Fraud Statute, was enacted with nearly identical wording to the mail fraud statute except that instead of mailing, ‘it requires some interstate or international communications by means of a “wire” (such as telephone lines), radio or television.’ Together, these statutes amount to a federal fraud statute and are also used as a predicate acts for other statutes. In addition to being combined with conspiracy to defraud (‘Conspiracy to commit offense or to defraud the United States’), Gordon observes that it has been interpreted to be ‘so

146 'In the USA, the picture is complicated even more by the Federal and state infrastructure. Federal agencies such as the Federal Bureau of Investigation (FBI) have jurisdiction over a wide range of different types of fraud and corruption, such as public sector fraud and corruption, mass marketing fraud and identity fraud. However, there is also the Securities and Exchange Commission, which takes the lead on investment fraud; the Internal Revenue Service Criminal Investigation division, which deals with tax fraud; the United States Postal Inspectors, mail fraud; the United States Secret Service, credit card fraud / currency fraud; and many others with particular responsibilities. This is on top of a state bureaucracy of law enforcement which is often as diverse and complex as at Federal level. Mark Button and Jim Gee, Countering fraud for competitive advantage (Wiley 2013) 52.


151 Henning (n 149) 435.


elastic over the years that it can potentially encompass any conduct which a court views as ‘collusive and dishonest’.\textsuperscript{154}

The main differences between the US and the UK lie in their fraud statutes. However, whereas the US not only retains but builds upon its structure of a variety of fraud statutes, in the UK, the FRA2006 has provided a clear statement that fraud is by ‘false representation’,\textsuperscript{155} ‘failing to disclose information’,\textsuperscript{156} and ‘abuse of position’.\textsuperscript{157} The conclusion of this research is that the UK has already modernised its legislation to produce a straight-forward suite of criminal offences and would not benefit from a change to US-style legislation. By the same token the US is clearly wedded to its pattern of legislation and adopting a simplified UK-style fraud act would be difficult.\textsuperscript{158}

While the US and UK use different mechanisms to criminalise fraud, another disparity is in sentencing. In the US, the economic crime offender with the longest prison sentence on record is Shalmon Weiss, sentenced in 2000 to 845 years in prison'.\textsuperscript{159} More widely known because of the financial crisis are Bernard Madoff, sentenced to 150 years imprisonment\textsuperscript{160} and Allen Stanford to 110 years.\textsuperscript{161} In contrast, in the UK, the maximum sentence under FRA2006 (and BA2010) is ten years imprisonment and / or an unlimited fine.\textsuperscript{162} The UK has not seen frauds of this magnitude, however, in \textit{R v James McCormick},\textsuperscript{163} McCormack was convicted

\begin{footnotes}
155 Fraud Act 2006, s 2.
156 Fraud Act 2006, s 3.
\end{footnotes}
and sentenced to ten years imprisonment for selling fake explosives detectors to Iraq, the first maximum sentence. There is a clear disparity between headline sentences but, putting aside the appropriateness of UK sentencing, there is disquiet in the US about the length of sentences where Anello and Albert note that pressure from Congress has ‘transformed sentences in high-loss fraud cases from less than five years under the original guidelines to a sentence of life imprisonment.’ As this research illustrates, there is concern over ‘over-criminalisation’ whereby federal prosecutors have ‘access to too many charging choices’ and that ‘prosecutors will pile on charges to gain leverage in plea negotiations’. The US Attorney General’s view is that legislation with mandatory sentences which bear little relation to the conduct at issue, results in ‘too many people go to too many prisons for far too long for no good law enforcement reason.’ The outcome of this is that such sentences ‘breed disrespect and are ultimately counterproductive’, which means that there needs to be a change ‘to ensure that incarceration is used to punish, to rehabilitate, and to deter – and not simply to warehouse and forget.’

Thus, whilst there is some attraction in headlines given to long prison sentences in the US, as with the Australian ‘heads on pikes’, in the UK, the Sentencing Guidelines Council (SGC) has introduced new guidelines from October 2014 which ‘places victim impact at the centre of considerations of what sentence the offender should get. This may mean higher sentences for some offenders compared to the current guideline, particularly where the financial loss is relatively

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164 The jury found that you knew the devices did not work, yet the soldiers in Iraq and elsewhere believed in them, in part due to your powers of salesmanship and in part the extravagant and fraudulent claims made in your promotional material. After a six week trial, I am wholly satisfied that your fraudulent conduct in selling so many useless devices for simply enormous profit promoted a false sense of security and in all probability materially contributed to causing death and injury to innocent individuals. It is this exceptional feature which distinguishes your case from the usual case of fraud.’ T20120228 Judiciary of England and Wales, ‘Central Criminal Court, 2 May 2013, Sentencing remarks of His Honour Judge Hone QC’ (n 163).
166 See Chapter 7.3.1.
167 Anello and Albert (n 165) 106.
168 Anello and Albert (n 165) 106.
170 Holder, ‘Speech to 15th Annual National Action Network Convention’ (n 169).
171 Holder, ‘Speech to 15th Annual National Action Network Convention’ (n 169).
172 Holder, ‘Speech to 15th Annual National Action Network Convention’ (n 169).
173 Cooper (n 83) 6.
small but the impact on the victim is high.\textsuperscript{174} Furthermore, ‘consecutive sentences may be appropriate for multiple offences where large sums are involved.’\textsuperscript{175}

Having considered whether there are lessons which the UK could usefully learn from the US, from a pure fraud viewpoint, this research concludes that the UK FRA2006, with its straight-forward approach consolidating previous legislation is more appropriate to the UK than the US style of a myriad of statutes. Sentencing is an area where the US differs from the UK by providing longer sentences where the ‘Fraud Review’ recommended a maximum of fourteen years\textsuperscript{176} instead of the current ten years but even without legislation this could be achieved by amending Sentencing Guidelines. One aspect of US practice which has been adopted is that of DPAs which have been available for fraud offences\textsuperscript{177} since 2014 and are discussed later in this chapter in relation to bribery and corruption.

9.4.3 Australia

Fraud in Australia, according to Smith, is criminalised by the individual states and territories under a variety of property offences such as ‘theft and obtaining a financial advantage by deception,’\textsuperscript{178} together with ‘conspiracy to defraud.’\textsuperscript{179} At the Commonwealth level, law has been codified,\textsuperscript{180} however, the Commonwealth Code 1995 (CC)\textsuperscript{181} only applies to matters within the Commonwealth purview and that does not extend to the individual states or territories. This thesis has considered the Australian constitutional structure but, as Tomasic notes, ‘once a pattern of corporate law and regulation is formed, deviation from this pattern becomes difficult, although not impossible, as the constitutional framework of Australian corporations law illustrates.’\textsuperscript{182} This provides a difficulty in considering whether the Australian endeavours to combat economic crime provide a template for the UK. However, in New South Wales (NSW), the Crimes Act 1900 was

\textsuperscript{174} Sentencing Council, ‘New sentencing guidelines bring increased focus to the impact of fraud on victims’ http://sentencingcouncil.judiciary.gov.uk/media/1029.htm accessed 29 September 2014.
\textsuperscript{177} Fraud Act 2006 Part 2.
\textsuperscript{179} Russell G Smith (n 178) 273.
\textsuperscript{180} ‘the setting out in one statute of all the law affecting a particular topic whether it is to be found in statutes or common law.’ Andrew Hemming, ‘When is a code a code?’ (2010) 15 Deakin L Rev 65,66. (Footnotes omitted).
\textsuperscript{181} Criminal Code Act 1995
\textsuperscript{182} Roman Tomasic, ‘Governance’ (n 158) 24.
amended in 2009 to introduce one general fraud offence and three ancillary offences but the significance of the change, according to Steel, was that NSW did not follow the UK’s FRA2006, criticising it for being too broadly defined, and instead because of its legislative heritage based its new law on the UK Theft Act 1968. The other Australian states and territories have differing approaches from each other and the Commonwealth, which exhibit complicating factors leading to a conclusion that there are no attractions for UK in adopting Australian fraud legislation.

Notwithstanding the complications occasioned by the suite of statutes to criminalise fraud, the second aspect of considering whether Australia provides an example which could be adopted by the UK is the manner in which the laws are deployed. In this respect, although the Commonwealth Director of Public Prosecutions (CDPP) and Australian Federal Police (AFP) work together, not only are they separate institutions which means that investigation and prosecution of serious economic crime is split, unlike with the SFO, but they have no national overarching remit. As a consequence the AFP/CDPP has to operate through a variety of multi-agency, multidisciplinary crime teams where ‘Commonwealth responsibilities can sometimes overlap with those of state and territory law enforcement, regulatory or criminal justice areas.’ Whereas Australia has created a framework to ensure that ‘law enforcement, intelligence policy and regulatory agencies are collaborating effectively with each other, state, territory and international counterparts the SFO has no need to establish its jurisdiction. Thus, although it is understandable that the Commonwealth should have to establish such structures because of its constitutional arrangements, the UK does not have such a need and, accordingly, the mechanisms employed in Australia to achieve a cohesive approach do not provide a template for adoption in the UK.

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184 Steel (n 183) 19.
185 See Chapter 8.
188 Attorney General, ‘Commonwealth Organised Crime Strategic Framework’ (n 186) 5.
9.5 Bribery and Corruption

9.5.1 United Kingdom

The SFO is the prime UK agency for investigation and prosecution of bribery and corruption. Since 2011, the SFO has been provided with two new legislative instruments to prosecute bribery and corruption: BA2010 and DPAs. Taken together, these measures represent considerable enhancement defining criminal behaviour and providing an alternative approach to a criminal trial.

Unlike the US, which legislated against foreign bribery in 1977, the UK waited until 2001.\(^{189}\) Equally, it was various scandals which caused the UK to deal with domestic corruption in 1889, 1906 and 1916\(^ {190}\) and it was a scandal which motivated the US to create the FCPA1977.\(^ {191}\) Notwithstanding the temporary expedient of incorporating provisions in the Anti-Terrorism, Crime and Security Act 2001\(^ {192}\) to criminalise bribery outside the UK, or if done in the UK would be corrupt, in order to satisfy the UK’s international obligations to OECD,\(^ {193}\) it was not until 2010 that the comprehensive Bribery Act was enacted\(^ {194}\) to overhaul the UK’s patchwork of archaic corruption laws.\(^ {195}\) The BA2010 is regarded within the industry as ‘the single most important development’ in combating white collar crime.\(^ {196}\) Aaronberg and Higgins are of the view that the Act ‘provides the UK with some of the most draconian and far-reaching anti-corruption legislation in the world,’\(^ {197}\) and Salens is of the opinion that this has the potential to ‘propel the UK to the forefront’ in fighting international bribery and corruption.\(^ {198}\)


\(^{191}\) Giuffo (n 71) 74.


\(^{193}\) The reason for this was that the UK had been strongly criticised by Organisation for Economic Co-operation and Development (OECD) for ‘failure to address deficiencies in its laws on bribery of foreign public officials and corporate liability for foreign bribery’ which it considered ‘undermines the credibility of the UK legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral development Banks.’ OECD Working Group on Bribery. Annual Report 2008, 43. http://www.oecd.org/dataoecd/21/24/44033641.pdf accessed 19 September 2011.

\(^{194}\) Bribery Act 2010.


\(^{198}\) Salens (n 196).
The BA2010 is discussed in detail in chapter five, where two particular features are noted. Firstly, the introduction of a new corporate offence of ‘failure of commercial organisations to prevent bribery’. Secondly, the absence of a provision for permit ‘facilitation payments.’

The corporate offence of ‘failure of commercial organisations to prevent bribery,’ targets employees or associated persons such as third parties, intermediaries, suppliers or joint venture partners. Although a ‘strict liability’ offence, ‘or perhaps more accurately, vicarious liability based on the actions of an associated person,’ there is a defence if the commercial organisation can show that it had in place ‘adequate procedures’ designed to prevent persons associated with the commercial organisation bribing another person.

The UK position regarding facilitation payments, which aligns with the OECD, is not to permit such payments. The government faced the issue clearly and acknowledged the disparity with the US:

We recognise that many UK businesses still struggle with petty corruption in some markets, but the answer is to face the challenge head-on, rather than carve out exemptions that draw artificial distinctions, are difficult to enforce, and have the potential to be abused. Providing exemptions for facilitation payments, as the US does, is not a universally accepted practice, and not something that we consider acceptable.

Therefore, in terms of criminalising bribery and corruption, it is clear that the UK had taken cognisance of the US legislation in framing the BA2010 is more strict than the FCPA in not allowing facilitation payments, alongside creating a new corporate offence. Thus, unsurprisingly, the UK’s bribery and corruption legislation is not in need of improvement.

Therefore, the UK has up-to-date legislation with which to tackle bribery and corruption, alongside a modern FRA2006. Both these sectors now benefit from the

Note: the ‘Act extends to England and Wales, Scotland and Northern Ireland.’ Bribery Act 2010, s 18.

Bribery Act 2010, s 7.
Bribery Act 2010, s 8.
Raphael (n 189) 61.
Bribery Act 2010, s 7(2).
Facilitation payments are ‘unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. Sometimes referred to as “speed” or “grease” payments’ The Serious Fraud Office, ‘Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions’ http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf accessed 16 April 2012.
Claire Ward MP, HC Deb 3 March 2010 Vol 506 Col 981.
facilitate for prosecutors to enter into DPAs. DPAs have been extensively deployed in the US, where the authorities:

have placed an increasing focus on crime committed by commercial organisations and the enforcement of the Foreign Corrupt Practices Act through a deliberate policy of giving organisations meaningful credit for voluntarily disclosing their conduct and cooperating with (...) [DoJ] investigations by self-reporting.

The Ministry of Justice (MoJ) saw the attraction of adopting the US model which recognised the ‘potentially harmful effects that prosecuting a commercial organisation can have on investors, employees, pensioners, suppliers, customers and associated communities who were not involved in the organisations criminal behaviour.’

The bankruptcy of Arthur Anderson (discussed in chapter seven), which was overturned by the US Supreme Court, caused the US to look for alternative sanctions, such as DPAs, which would not lead to the economic collapse of a firm. Further motivating factors are potential unequal treatment internationally in the event of conviction, and, opportunity for jurisdictional arbitrage.

In the US, a guilty plea does not result in automatic debarment from US government contracting because an independent debarment authority will consider the issues. However, in the UK, the EU Public Sector Procurement Directive applies. The effect of this is that a commercial organization is excluded from participation in public sector contracts if convicted of fraud, bribery and corruption.

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205 Crime and Courts Act 2013, s 45, Schedule 17.
206 Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (Cm 8348, 2012) 16. (Deferred Prosecution Agreements).
207 Ministry of Justice, Deferred Prosecution Agreements (n 206) 16.
208 ‘Congressional response to revelations of several high profile accounting fraud cases including Enron, WorldCom, Tyco, etc… that resulted in mass destruction of investor value and loss of investor confidence in the integrity of the financial markets. In addition, these cases led to criminal charges of company officials and the bankruptcy of Arthur Andersen LLP, at the time arguably the most prestigious independent auditing firm in the world.’ Fred Yeager and others, ‘US legislation designed to improve corporate governance: an exploration’ (2010) 33(1) Co Law 25.
under Article 45, thus, providing an incentive to ‘self refer’\textsuperscript{212} to SFO with the prospect of negotiating an outcome and incurring a civil rather than criminal penalty.\textsuperscript{213}

The opportunity for jurisdictional arbitrage is an interesting area. The MoJ point to the UK’s ‘double jeopardy’ law where, ‘under English law, there is a bar to prosecuting someone who has been already convicted or acquitted of the same offence.’\textsuperscript{214} The US does not have such a bar,\textsuperscript{215} and the MoJ highlight organisations which could be subject to UK authority choosing to engage instead with the US.\textsuperscript{216} Therefore, the historic disparity of enforcement mechanisms between UK and US prosecutors may mean that ‘[r]esolving a case in the US may also be attractive given the wider and more flexible range of enforcement tools, including (…) DPAs which do not result in a criminal conviction.’\textsuperscript{217}

Whilst it is quite clear that the UK was informed by US experience in creating its own DPA regime, it did not replicate its model instead creating a bespoke arrangement for the UK.\textsuperscript{218} The main difference between the two models is the involvement of the courts where the US is criticised for its lack of judicial oversight\textsuperscript{219} which would not be congruent with the UK constitution and legal traditions.\textsuperscript{220} Nevertheless, by mid-2014, there had not been any cases in the UK to test the new law.

9.5.2 United States

The US was an early adopter of measures to combat bribery of foreign officials, through enactment of the FCPA, whereas, the UK waited until 2001 to legislate.\textsuperscript{221} The catalyst for the US was the ‘Watergate’ scandal\textsuperscript{222} which, according to Giuffo, revealed ‘that many public companies were maintaining cash “slush funds” from

\textsuperscript{212}See chapter 6.5.4.
\textsuperscript{214}Ministry of Justice, Deferred Prosecution Agreements (n 206) 11.
\textsuperscript{215}Ministry of Justice, Deferred Prosecution Agreements (n 206) 12.
\textsuperscript{216}Ministry of Justice, Deferred Prosecution Agreements (n 206) 12.
\textsuperscript{217}Ministry of Justice, Deferred Prosecution Agreements (n 206) 12.
\textsuperscript{218}Ministry of Justice, Deferred Prosecution Agreements (n 206) 19.
\textsuperscript{219}Ministry of Justice, Deferred Prosecution Agreements (n 206) 19.
\textsuperscript{220}Ministry of Justice, Deferred Prosecution Agreements (n 206) 19.
\textsuperscript{222}Giuffo (n 71) 74.
which illegal [political] campaign contributions were being made in the United States and illegal bribes were being paid to foreign officials.\textsuperscript{223}

This research has examined both the FCPA and BA2010. Prior to the FCPA, it was not illegal in the US to bribe foreign officials but that did not change in the UK until 2001.\textsuperscript{224} Thus, both countries criminalise bribery and corruption both at home and abroad, though the FCPA has a wide interpretation of its territorial jurisdiction including ‘US and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (issuers).’\textsuperscript{225} US jurisdiction is, thus, established over ‘domestic concerns’\textsuperscript{226} and ‘issuers.’\textsuperscript{227} However, the ambit of FCPA extends further because it takes territorial jurisdiction over ‘foreign persons and foreign non-issuer entities that (...) engage in any act in furtherance of a corrupt payment (...) while in the territory of the United States.’\textsuperscript{228} The territory of the US is extended outside the US border because the statute includes the ‘use of the mails or any means of interstate commerce’.\textsuperscript{229} The use of ‘mails’ provides a link to Mail Fraud Statute\textsuperscript{230} and ‘interstate commerce’ to Wire Fraud Statute.\textsuperscript{231} There is, though, a significant point of difference between the US and UK (and also OECD) and that is the ‘exception for routine government action’.\textsuperscript{232} Salens state that these

\textsuperscript{223}Department of Justice, ‘Proposed Legislative History’ (n 76).
\textsuperscript{224}Anti-Terrorism, Crime and Security Act 2001, s 108, s 109.
\textsuperscript{226}‘A domestic concern is any individual who is a citizen, national or resident of the United States, or any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States.’ 15 U.S.C. § 78dd-2 US Department of Justice and US Securities and Exchange Commission. ‘FCPA. A Resource Guide to the U.S. Foreign Corrupt Practices Act.’ (n 210) 11.
\textsuperscript{230}18 U.S.C. § 1341.
are intended to be small “facilitation payments”, to expedite or secure the performance of a routine government action, but, according to Raphael, are alternatively considered to be ‘repetitive bribes which support a systemic culture of corruption and encourage the payment of low wages to public officials while continuing to foster low commercial ethical standards. There is a warning that such a payment must be properly recorded in the issuer’s books and records, failing which they will breach FCPA.

The UK position, which aligns with the OECD, is not to permit such payments.

Therefore, in terms of criminalising bribery and corruption, it is clear that the UK has taken cognisance of the US legislation in framing the BA2010, which has clear provisions but is stricter than the FCPA in not allowing facilitation payments. Thus, unsurprisingly, the UK legislation is not in need of improvement but, as discussed in chapter seven, there is international pressure for the US to adopt the UK stance on facilitation payments, as encouraged by the OECD.

9.5.3 Australia

The Australian Commonwealth government stated, in amending the Criminal Code (CC) in 1999, that ‘bribery of foreign public officials in the course of international trade is unacceptable.’ By this amendment, Australia implemented the OECD

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233 Salens (n 196).
234 Salens (n 196).
235 Raphael (n 189) 112.
238 RECOMMENDS, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:

1. i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;
2. ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies’ books and financial records.


In US, violations of the FCPA leave ‘corporations and other business entities are subject to a fine of up to $2 million’ for each violation. ‘Individuals, including officers, directors stockholders, and agents of companies are subject to a fine of up to $100,000 and imprisonment for up to five years.’ US Department of Justice and US Securities and Exchange Commission. ‘FCPA. A Resource Guide to the U.S. Foreign Corrupt Practices Act.’ (n 210) 20.

In Australia, the maximum penalties for individuals in breach of s.70 are ten years imprisonment and/or a AUD1.7 million fine. The penalty for companies are of the greater of: AUD 17 million fine; three times the value of the benefit attributed to the conduct (if it can be determined); or, 10% of the annual turnover. See chapter 5.2.3. This compares with the UK of ten years imprisonment and / or an unlimited fine. See chapter 7.4.1.

239 ‘Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999’
Convention well ahead of the UK but by 2011, only seven of the 37 signatories to the OECD Convention were considered active in enforcement (including the US and UK), whereas Australia was cited as ‘one of the 20 countries that is judged as exhibiting “little or no enforcement”’. Indeed, in Securency, the first such case had still not come to trial by late 2014, as discussed in chapter eight. This research has considered the CC provisions in light of the BA2010 and there is one significant difference: facilitation payments. Facilitation payments are permitted under the CC, as they are in the US, but the OECD noted a lack of understanding about what constitutes a facilitation payment under the CC pointing out that ‘facilitation payments appear to be frequently equated with any bribes of small value.’ Instead, although permitted, what is ‘[o]ften overlooked is the requirement that such payments must be made to secure routine government action of a minor nature that does not result in the obtaining of a business advantage.’ Although the Australian government launched a consultation in 2011 on the elimination of facilitation payments, by late 2014 there had not been an outcome. In 2013, the government changed and, in 2014, Australia is President of the G20 and also chairs the G20 Anti-corruption roundtable which states ironically that the G20 should lead by example in combatting foreign bribery. Although Australia adopted the OECD Convention ahead of the UK, its bribery legislation remains less extensive than the UK BA2010 and it has yet to take its first foreign bribery case to trial, notwithstanding having legislated in 1999.

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243 (Emphasis added).
244 OECD, ‘Phase 3 Report on implementing the OECD Anti-Bribery Convention in Australia’ (n 79).
9.6 Regulatory Enforcement

9.6.1 United Kingdom

The UK financial services regulator is the FCA. Following the financial crisis, the nature of UK regulation changed with the adoption of the twin peaks regulatory model, which ended the primacy of the financial services ‘super regulator’\textsuperscript{248}, the FSA and, instead, launched a new model headed by the BoE.\textsuperscript{249} The government’s intention for the FCA was of ‘delivering a regulatory regime under which the conduct of business of all retail financial services is regulated by a single body.’\textsuperscript{250} The FCA has ‘a single overarching strategic objective to ensure that markets function well’,\textsuperscript{251} unlike its predecessor the FSA which had four equal objectives, of which one was ‘the reduction of financial crime’,\textsuperscript{252} one of the FCA’s operational objectives is integrity:\textsuperscript{253} ‘protecting and enhancing the integrity of the UK financial system,’\textsuperscript{254} and includes ‘not being used for a purpose connected with financial crime.’\textsuperscript{255} In pursuit of these objectives, the FCA has continued the policy of ‘credible deterrence’, for which according to Cartwright ‘the imposition of a financial penalty is central.’\textsuperscript{256} Ryder is of the opinion that the challenge for the FCA is to demonstrate that it is not merely a rebranded FSA\textsuperscript{257} which is more difficult because the ‘credible deterrence’ strategy has certain fiscal attractions since significant monies are raised for the Exchequer.\textsuperscript{258} However, the ‘credible deterrence’ policy, whilst remunerative, has not answered the Rakoff question: ‘[w]hy have no high level executives been prosecuted?’\textsuperscript{259}

The scope of the FCAs activity was broadened in 2014 when it took over responsibility for regulating 50,000 consumer credit firms from the Office of Fair Trading.\textsuperscript{260} While it was the government’s intention that the FCA became the

\begin{footnotes}
\textsuperscript{248} Lomnicka. (n 21) 482.
\textsuperscript{249} The other ‘twin peak’ is the Prudential Regulation Authority.
\textsuperscript{250} House of Commons Library (n 22).
\textsuperscript{251} HM Treasury, ‘A new approach to financial regulation’ (n 46).
\textsuperscript{252} HM Treasury, ‘A new approach to financial regulation’ (n 46).
\textsuperscript{253} Financial Services and Markets Act 2000, s 6.
\textsuperscript{254} Financial Services Act 2012, s 1D(1).
\textsuperscript{255} Financial Services Act 2012, s 1D(2)(b).
\textsuperscript{256} Cartwright (n 52) 5.
\textsuperscript{257} Nicholas Ryder, The Financial Crisis and White Collar Crime – the Perfect Storm (Edward Elgar 2014) 18.
\textsuperscript{258} Wilson and Wilson (n 31) 4,5.
\textsuperscript{259} Rakoff, ‘The Financial Crisis’ (n 16).
\end{footnotes}
single body to regulate all financial services, it is a major increase from regulating the existing 26,000 firms. The FCA stated that they are ‘more committed than ever to showing firms and individuals that they must play by the rules; because if they do not, robust sanctions are a matter of course.’

The FCA Business Plan states that their ‘enforcement powers’ enable them, to deter firms and individuals from wrongdoing by making it clear that there are real and meaningful consequences for poor practice. The increase in the number of fines, according to Haines, appears to show that their strategy to prosecute a steady stream of cases to demonstrate that they ‘means business’ is bearing fruit. The total fines were at modest levels (£35m) until 2010 when they increased from £89.1m to £311.6m in 2012 and £476m in 2013. In the eight months of 2014, they amounted to £314m. However, the main engine for the increase in fines is the LIBOR scandal, which is noteworthy because the FCA was criticised by the Treasury Committee for not wishing to pursue criminal charges.

The FCA is also involved in measures to combat bribery and corruption, where criminal prosecutions fall within the purview of the SFO. As discussed earlier in this chapter, the SFO derives its powers from the BA2010 in which the FCA is not involved in enforcement. However, the FCA uses its regulatory powers ‘where

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261 HM Treasury, ‘A new approach to financial regulation’ (n 46).
262 Financial Conduct Authority, ‘Financial services regulation and enforcement’ (n 53).
264 ‘We use a wide range of Enforcement powers – criminal, civil and regulatory – to protect consumers and to take action against firms or individuals that do not meet our standards. We can take action such as: withdrawing a firm’s authorisation; prohibiting individuals from carrying on regulated activities; suspending firms or individuals from undertaking regulated activities; fining firms or individuals who breach our rules or commit market abuse; applying to the Court for injunctions and restitution orders; and bringing criminal prosecutions to tackle financial crime, such as insider dealing or unauthorised business.’ Financial Conduct Authority, ‘How we enforce the law’ http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law accessed 10 April 2014.
265 Fin.
266 For detailed analysis of fines, see chapter 6.2.1 footnote 143.
268 For detailed analysis of fines, see chapter 6.2.1 footnote 143.
269 Attorney General’s Office, ‘Fighting economic crime in the modern world’ (n 115).
270 House of Commons Treasury Committee, ‘Fixing LIBOR’ (n 123).
271 ‘Corruption and bribery are criminal offences under current UK legislation and the Bribery Act 2010, which came into force on 1 July 2011. Authorised firms have additional, regulatory, obligations to put in place and maintain policies and processes to prevent corruption and bribery and to conduct their business with integrity. These are set out in SYSC 3.2.6R/SYSC 6.1.1R and Principle 1 of our Principles for Businesses (PRIN 2.1.1R).’ Financial Conduct Authority, ‘Anti-Bribery and Corruption’ http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/firm-guides/systems/anti-bribery accessed 7 April 2014.
272 Financial Conduct Authority, ‘Anti-Bribery and Corruption’ (n 271).
authorised firms fail adequately to address corruption and bribery risk, and the FCA does not require evidence of corrupt conduct in order to take regulatory action. Clearly, the SFO as a prosecutor does require evidence of corrupt conduct in order to enforce under the BA2010 but if a commercial organisation can positively show it has adequate procedures to prevent bribery then it has a complete defence. This is a confusing picture where a prosecutor needs evidence on which to base a prosecution, whereas, a regulator can impose penalties in the absence of evidence. Clearly, such issues would benefit from a single agency being able to consider across its realm the appropriate regulatory or criminal course of action.

9.6.2 United States

In the US, the principal bodies for enforcement are the DoJ and SEC. The DoJ has ‘control over all criminal prosecutions and civil suits in which the United States had an interest’ and has a criminal division, fraud section to prosecute crime and the Federal Bureau of Investigation (FBI) to investigate, which means that it is responsible for fraud, bribery and corruption prosecutions. However, whilst the DoJ ‘is solely responsible for criminal enforcement it may institute civil proceedings.’ The SEC which shares responsibility for FCPA enforcement, can only institute civil proceedings, involving administrative and financial sanctions only, with any criminal prosecutions being referred to DoJ. In the UK, the SFO investigates and prosecutes fraud, bribery and corruption whereas the FCA only has limited prosecution powers relating generally to insider dealing. Both the SEC and FCA, as regulators, have the facility to impose financial penalties but the SFO as a prosecutor has only been able to prosecute, in contrast to the DoJ which

274 Financial Conduct Authority, ‘Anti-Bribery and Corruption’ (n 271).
275 ‘Section 7: Failure of commercial organisations to prevent bribery
A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.’ Ministry of Justice, ‘The Bribery Act 2010 – Guidance’ http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf accessed 3 April 2014.
279 Criminal Justice Act 1993, s 52.
can either prosecute or conclude ‘plea bargains’ with defendants instead of taking cases to trial. Such ‘plea bargains’ or, formally, DPA have been part of the DoJ’s armoury since the 1990’s, and have been utilised on a frequent basis whereas attempts by the SFO to agree outcomes with defendants in the absence of a DPA have been subject to judicial opprobrium. The DoJ’s reasoning was:

the increased use of DPAs has meant far greater accountability for corporate wrongdoing. Whereas prosecutors often declined when their only choice was to indict or walk away, now companies know that avoiding the disaster scenario of an indictment does not mean an escape from accountability.

This is clearly the issue that faced the SFO which, from 2014, also has the availability of DPAs and the first such use is awaited together with the level of court supervision in light of the court’s previous antipathetic views towards such agreements (albeit without legislative underpinning) and where the US courts complained about their role being merely to act as a ‘rubber stamp’. Thus, the historic disparity in tools to combat economic crime has now been eliminated and whilst this is an example of the UK adopting a successful US procedure, there does not appear to be any further procedure or legislation employed by the DoJ/SEC which the UK might beneficially duplicate.

It is the level of enforcement which has marked out the DoJ/SEC and even making allowances for its head-start in having the FCPA and DPAs the US has given a lead for the UK’s SFO and FCA to emulate.

9.6.3 Australia

The Australian criminal enforcement landscape is, unsurprisingly because of the constitutional structure, more complicated than the UK. At Commonwealth level, intelligence, investigation and prosecution are split between three bodies: The

281 The 2011 Year-End Update on Corporate Deferred Prosecution Agreements and Non Prosecution Agreements, by the American law firm Gibson Dunn, illustrates the variety of offences in relation to which DPAs and NPAs are used. A notable category is FCPA violations, which accounted for 41% of the total agreements in 2011, compared with about 44 % in 2010, 24% in 2009, 37% in 2008, 26% in 2007, and 9% in 2006. Ministry of Justice, Deferred Prosecution Agreements (n 206) 16.
Australian Transaction Reports and Analysis Centre (AUSTRAC), CDPP) and AFP.

AUSTRAC’s role is ‘to protect the integrity of Australia's financial system and (...) countering money laundering and the financing of terrorism’ and receives a significant number of transaction reports: 84 million in 2012-13. These reports cover a range of activities in combating ‘serious crimes such as drug trafficking, tax evasion, fraud and people smuggling.’ In this area, according to Ryder, Australia has reacted to criticism of its anti-money laundering (AML) regime by incorporating the Financial Action Task Force 40 Recommendations into primary legislation, in contrast to both US and UK which have a piecemeal approach to AML legislation.

In the key areas of Economic Crime, Australia’s constitutional structure means that deployment of its legislation follows a different pattern from the UK. Fraud is prosecuted at state level (apart from fraud against the Commonwealth body itself) with legislation differing between states. These measures do not offer benefits to the UK compared with the FRA2006. In relation to bribery, Australia has Commonwealth legislation to meet OECD obligations but has not by mid 2014 achieved a prosecution, which lack of experience does not suggest any lessons to improve BA2010.

However, Australia has particular experience of a different economic and regulatory structure which was seen to be of benefit and the UK has adopted the twin peaks approach.

9.7 Conclusion and Recommendations

The UK needs a cohesive and effective anti-economic crime policy and that government was right to propose an ECA as part of its white-collar crime agenda where it said that its mission was to hold people suspected of financial wrongdoing

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288 Ryder, Money Laundering – An Endless Cycle? (n 287) 105.
289 Ryder, Money Laundering – An Endless Cycle? (n 287) 107.
to account,\textsuperscript{290} in a day of reckonings,\textsuperscript{291} which demonstrated that the government was serious about white-collar crime.\textsuperscript{292} Notwithstanding such lofty ambitions, the government was wrong to be diverted from that course. Whilst, a generation earlier, Roskill advanced a clear rationale for the SFO’s creation, it can also be concluded that its limited role and remit owed more to political expediency and infighting rather than a firm belief in the finished article, with the consequence that it has failed to meet expectations. The government has successfully created the Competition and Markets Authority (CMA), which has overarching responsibility for its sector and subsidiary regulators. This is a template which should be employed for the economic crime arena by an ECA encompassing the SFO and FCA (and employing the resources of the COLP and regional police forces). The CMA is a credible agency in itself, whereas the current economic crime equivalent is merely a division of the NCA. What a strong ECA offers is the prospect of an independent authority to bring together the regulatory structure and enforcement regime of the FCA together with the investigation and prosecution powers of the SFO. Just as the CMA has the ability to take over actions by its constituent regulatory bodies, so an ECA should be able to deploy the powers of both the SFO and FCA to ensure that the correct sanction is advanced rather than each organisation being either hamstrung by its own powers or adopting civil remedies when a particular conduct demands a criminal sanction. In this regard, while the availability of an ‘offence relating to a decision causing a financial institution to fail’,\textsuperscript{293} or reckless banking, is of some benefit in relation to an insolvent financial institution, the gap between the tectonic plates of economic crime would be covered, suggests Fisher, by the addition of a further criminal sanction for ‘Reckless risk-taking on the financial markers.’\textsuperscript{294} This may be modern language but it harkens back to the conclusion of Roskill that:

\begin{quote}
The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right.\textsuperscript{295}
\end{quote}

\begin{footnotes}
\textsuperscript{290} BBC, ‘Cameron urges ‘day of reckoning’ (n 1).
\textsuperscript{291} BBC, ‘Cameron urges ‘day of reckoning’ (n 1).
\textsuperscript{292} HM Treasury, ‘Speech at The Lord Mayor’s Dinner’ (n 3).
\textsuperscript{293} Financial Services (Banking Reform) Act 2013, s 36.
\textsuperscript{294} Fisher (n 33) 2.
\textsuperscript{295} Roskill (n 12) 1.
\end{footnotes}
Thus, the creation of an ECA, adopting the CMA template and encompassing the existing bodies of SFO and FCA would remove both areas of overlap and underlap and, within an overarching structure, ensure that existing and new legislative powers are available to match the imperatives of dynamic financial markets.
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