

International Serious & Organised Crime Conference 2010 Anti-Corruption Regulation in Australia – Myth or Reality?

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JOHNSON
WINTER &
SLATTERY

LAWYERS



Anti-Corruption in Australia – Myth or Reality?

Why are we here and why do we care?

- Is “the cost of doing business” greater than the law?
- The law imposes **significant fines** and **individuals** may be **imprisoned**
- What do you do when the regulator arrives with a warrant?
- *How do you answer these questions?*
 - What is your culture?
 - Does the company practice what it preaches?
 - Do your staff know what to do or who to ask?
 - What are your agents or third parties doing (in your name or on your behalf)?
 - Is your conduct compliant with local law?
 - What records exist?
 - Are your records accurate?
 - If you cannot answer these questions – an interrogation may await you!

Anti-Corruption in Australia – Myth or Reality?

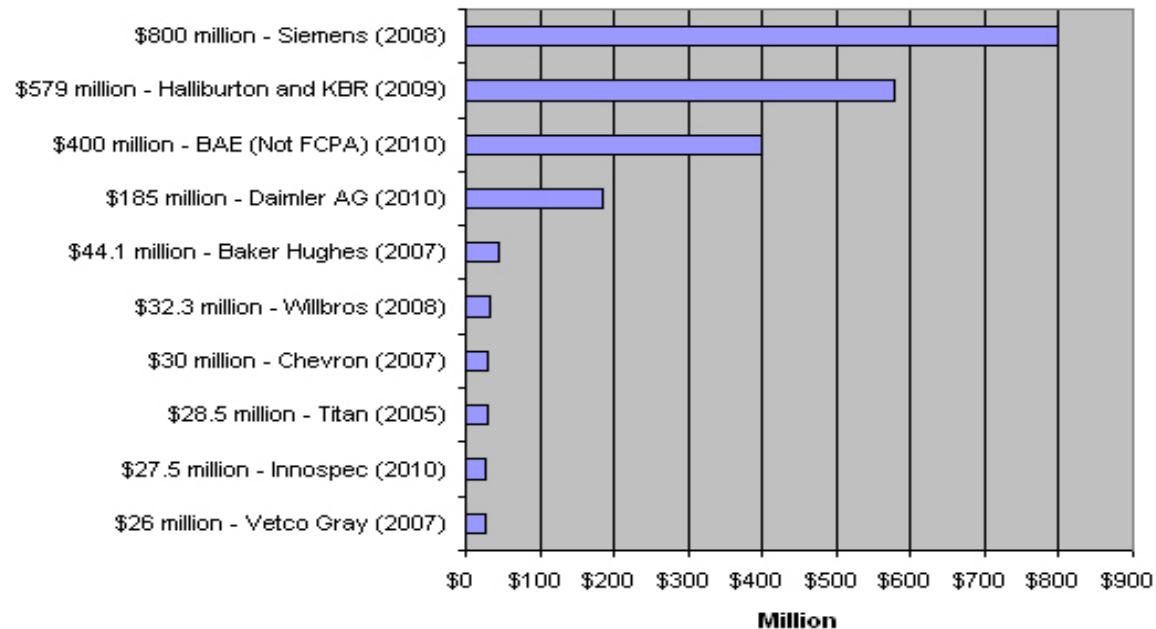
Transparency International – 2009 Bribes Payers Index

- **“The BPI provides evidence that a number of companies from major exporting countries still use bribery to win business abroad, despite awareness of its damaging impact on corporate reputations and ordinary communities,”** said Transparency International Chair, Huguette Labelle. “The inequity and injustice that corruption causes makes it vital for governments to redouble their efforts to enforce existing laws and regulations on foreign bribery and for companies to adopt effective anti-bribery programmes. In this spirit, all major exporting countries should commit to the provisions of the OECD Anti-Bribery Convention.”
- While most of the world’s wealthiest countries already subscribe to a ban on foreign bribery, under the OECD Anti-Bribery Convention, **there is little awareness of the convention among the senior business executives** interviewed in the Bribe Payers Survey. Governments have a key role to play in ensuring that foreign bribery is stopped at the source – and by making good on commitments to prevent and prosecute such practices.
- “The unfolding financial crisis has shown us just how integrated the world’s markets have become. **Accountability must be guaranteed across borders, include improved risk management and reach all the way down a company’s supply chain,**” said Cobus de Swardt, TI Managing Director. “Businesses face a complex challenge, but efforts to improve labour practices, for instance, by working with intermediaries, suppliers and affiliates, show that there is no excuse to not extend anti-bribery standards globally in a similar fashion.”

Anti-Corruption in Australia – Myth or Reality?

2010 1st QTR DOJ FCPA Enforcement Activity (Miller Chevalier, 2010)

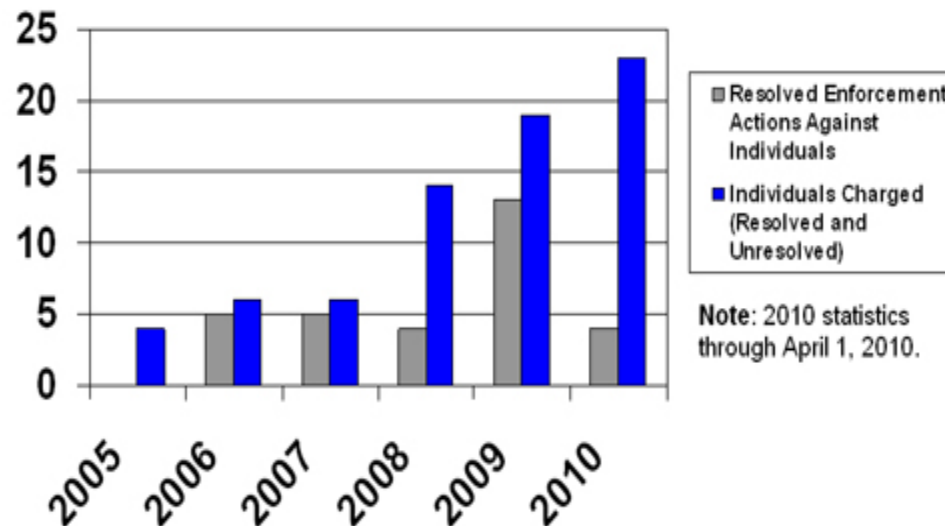
Largest FCPA Settlements in Terms of Combined Penalties



Anti-Corruption in Australia – Myth or Reality?

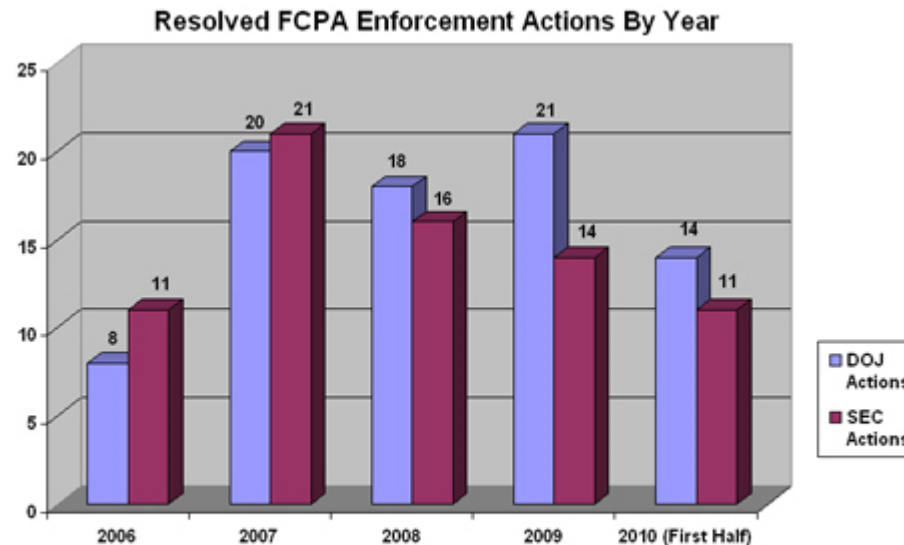
2010 1st QTR DOJ FCPA Enforcement Activity (Miller Chevalier, 2010)

Increase in DOJ Enforcement Against Individuals



Anti-Corruption in Australia – Myth or Reality?

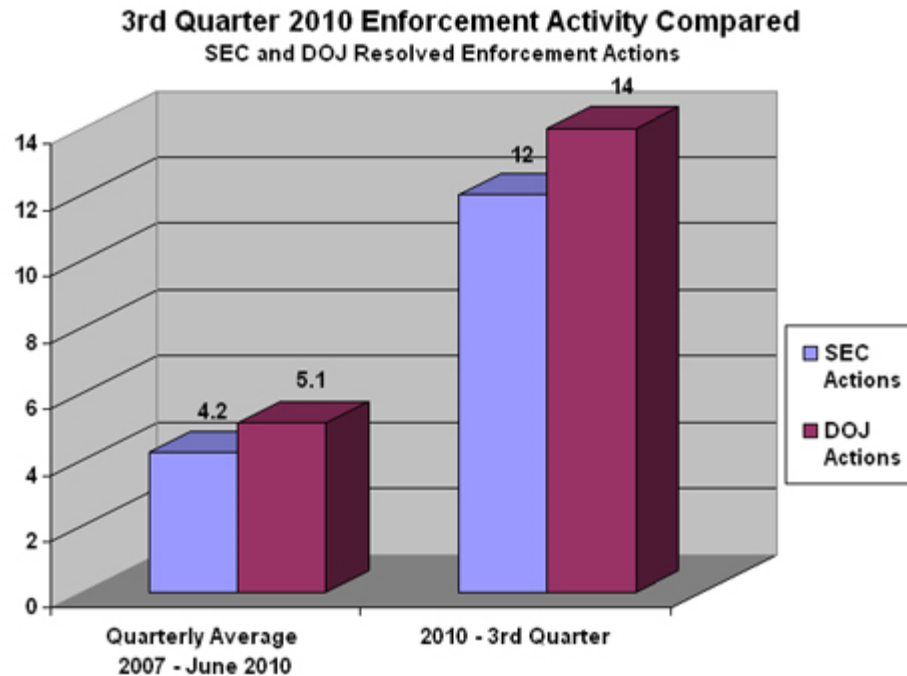
2010 2nd QTR FCPA Enforcement Activity (Miller Chevalier, 2010)



Note: Updated through July 19, 2010. The 2010 figures count the SEC's settlement with ENI/Snamprogetti as two enforcement actions and includes the bribery-related enforcement action against BAE Systems plc, which involved no actual FCPA charges. In tallying these statistics, we have counted dispositions by the DOJ and SEC separately. For resolutions involving multiple distinct companies and/or individuals in a single settlement, we have counted each distinct person or entity as a separate enforcement action.

Anti-Corruption in Australia – Myth or Reality?

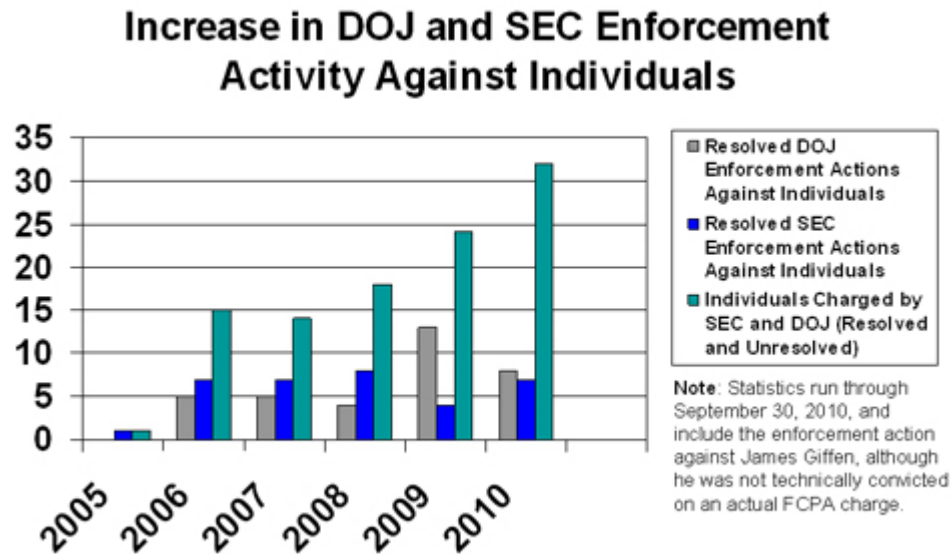
2010 3rd QTR FCPA Enforcement Activity (Miller Chevalier, 2010)



Note: These statistics count resolutions involving multiple distinct companies and/or individuals in a single settlement or case as separate enforcement actions. They also include the resolved enforcement actions against BAE and James Giffen, although neither was technically convicted on an actual FCPA charge.

Anti-Corruption in Australia – Myth or Reality?

DOJ and SEC Enforcement Action against Individuals to September 2010 (Miller Chevalier 2010)



Anti-Corruption in Australia – Myth or Reality?

US SEC “books and records” prosecutions (Part 1)

- Every issuer (of securities) must:
 - Make and keep books, records and accounts
 - Which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer
- What constitutes “books, records and accounts” is very broad
- Reasonable detail focuses on substance
 - SEC looks at a “clearly significant lack” of detail or records intentionally falsified
- The level of detail, completeness and accuracy of the prudent official conducting his own affairs, but recognising subjective standards
- Necessity for a system of internal accounting controls
- If the records are not accurate, why not?

Anti-Corruption in Australia – Myth or Reality?

US SEC “books and records” prosecutions (Part 2)

- SEC corruption related enforcement based solely on violation of books and records and internal accounting control rules
 - *Matter of Oil States International Inc* (April 2006)
 - *SEC v El Paso Corp* (2007)
 - *In re Con-way Inc* (August 2008)
 - *In re United Indus Corp* (May 2009)
- UN Oil-For-Food Program prosecutions
 - SEC charged numerous corporations, alleging they (or subsidiaries) failed to accurately record illicit surcharges and kickbacks and failed to maintain adequate internal controls to detect and prevent the illicit payments
 - July 2010 – General Electric plus subsidiaries charged with making \$7.45m illicit payments to Iraq for contracts for medical & water purification equipment
 - GE generated contracts worth \$18.2m
 - GE paid SEC \$23.4m penalties, disgorgement & interest, no DOJ prosecution
 - SEC avoided bribery violations as illicit payments made to Iraq Government rather than public officials

Anti-Corruption in Australia – Myth or Reality?

US Wall Street Reform & Consumer Protection Act 2010 (Dodd-Frank reform legislation)

- **Oil, Gas and Minerals' issuers** – disclose all payments to foreign governments in connection with commercial projects
- **Whistleblower** who discloses violation of anti-bribery books & records or internal control provisions of FCPA will receive an award of between 10 to 30% of any monetary penalty or a monetary sanction imposed by the SEC exceeding US1m
- Disgorgement of profits gained from bribes and interest = monetary sanction
- Disgorgement penalties
 - Siemens - \$330 million
 - Halliburton/KBR - \$177 million
 - ENI SpA & Snamprogetti Netherlands BVI - \$125 million
 - Technip SA - \$98 million
 - Daimler AG - \$91.4 million

Anti-Corruption in Australia – Myth or Reality?

UK Bribery Act 2010 (in force April 2011), Guidelines for Commercial Organisations to prevent bribery

- Section 7
 - Offence for corporation which fails to prevent bribery
 - Defence – adequate procedures to prevent persons engaging in bribery
- Proposed Defence Principles
 - Regular and comprehensive assessment on nature and extent of risks relating to bribery to which corporation is exposed
 - Board and top management committed to preventing bribery
 - Due diligence policies & procedures covering all operations, business relationships and third parties
 - Policies & procedures are clear, accessible and are enforced
 - Anti-bribery policies are embedded in corporation and effectively implemented
 - Monitor & review compliance

Anti-Corruption in Australia – Myth or Reality?

Australia enforcement history

- 1999 Criminal Code prohibits bribery of foreign public officials
- 2010 penalties in Criminal Code significantly increased
- Investigations – **VERY FEW**
- Criminal prosecutions – **ZERO**
- Civil proceeding – **ZERO**
- Judgments or Convictions – **ZERO**
- Conclusion
 - Australian corporations & individuals do not bribe or corrupt foreign public officials; or
 - Australia conceals its bribery and corruption of foreign officials



Anti-Corruption in Australia – Myth or Reality?

Australia Legislation

- UN and OECD Conventions accepted by Australia
 - Combating Bribery of Foreign Public Officials (1999)
 - Convention against Transnational Organised Crime (2004)
 - Convention against Corruption (2005)
 - Local Asia Pacific initiatives and APEC strategies
- *Criminal Code 1995 (Cth) – Section 70*
- *Corporations Act 2001 (Cth)*
- *Income Tax Assessment Act 1997 (Cth) and Taxation Administration Act 1953 (Cth)*
- Australian State and Territory *Crimes Acts*

Anti-Corruption in Australia – Myth or Reality?

Bribery of Public Officials in Australia (criminal law)

- You commit a bribe or engage in corrupt conduct if
 - person A (you) provides or causes to provide a **benefit** to person B;
 - **offers or promises to offer** to provide a benefit to person B;
 - where the **benefit is not legitimately due** to person B;
 - person A (you) acts with the **intention** of inducing a **public official** (who may or may not be person B) in the **exercise of the official's duties** in order to:
 - **obtain or retain business**; or
 - **obtain or retain a business advantage** that is not legitimately due to the recipient or intended recipient

Anti-Corruption in Australia – Myth or Reality?

Bribery of Foreign Public Officials in Australia – Limited Defences

- In limited circumstances, where conduct is lawful (in writing) in the relevant foreign country, there is no offence.
- **Facilitation payments are permitted where certain payments are made to a foreign public official:**
 - The value of a benefit must be “of a minor nature”
 - The conduct undertaken must be “*for sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature*”
 - After the conduct, a record of the conduct/payment is created which is retained, but if lost or destroyed, only in circumstances beyond the control of the record creator
 - Issues to address with facilitation payments:
 - What constitutes a “routine government action”?
 - What is a “minor” or a more significant government action?
 - What amount is a legitimate facilitation payment?
 - Under what circumstances was the payment made?

Anti-Corruption in Australia – Myth or Reality?

Sanctions for Foreign Bribery – Australia

- Maximum terms of imprisonment
 - 2 years (summary)
 - 10 years (indictment)
- Maximum Fines
 - \$13,200 each summary offence (individual)
 - \$1,100,000 each indictable offence (individual)
 - \$11,000,000 each offence or 3 times the value of the illegal benefit or 12 months turnover (corporation)
- Other Sanctions
 - Disqualification on individuals from managing corporations
 - Suspension of financial services licences
- Confiscation of assets

Anti-Corruption in Australia – Myth or Reality?

Australian domestic criminal & civil offences

- If you engage in conduct which involves:
 - deception, false statements and dishonesty
 - conspiracy
 - the payment of secret commissions
 - the payment of offering of corrupt benefits in commercial or other transactions
 - influencing or conspiring to influence a public official
 - obtaining property or a financial advantage by deception
 - money laundering
 - financing or funding of terrorism
 - a breach by a director or corporate officer of statutory duties
- You are liable to:
 - imprisonment and/or
 - fines.

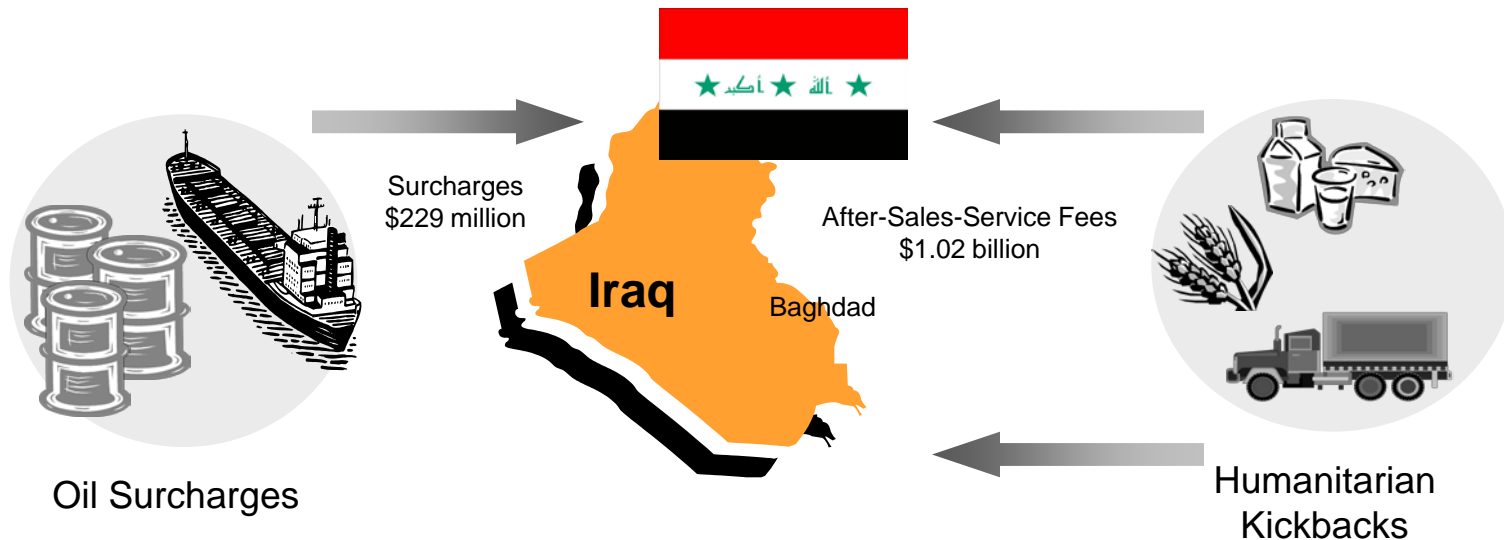
Anti-Corruption in Australia – Myth or Reality?

Books & Record Keeping Obligations

- Criminal law
 - Prohibit forged, false or materially misleading records
- Civil law
 - Corporations Act
 - Correct explanation of transactions
 - True and fair financial reports
 - Prohibit false or misleading statements
 - Primary and accessorial liability
 - ASIC Act
 - Penalties for concealing or altering books the subject of investigation
 - ASX and Listing Rules
 - Continuous disclosure
 - Material effect of information on price or value of securities

Anti-Corruption in Australia – Myth or Reality?

UN Oil-For-Food Program – the Iraqi kickback scheme



Total Illicit Income: \$1.8 billion

Source: UN IIC Report Oct 2005

Anti-Corruption in Australia – Myth or Reality?

UN Oil-For-Food Program – the allegations against AWB

- 2000 – Canadian Wheat Board suggested AWB paying “transport costs” to Iraq
- 2003 - US Wheat Associates repeat and extend allegations to cover all pre 2003 wheat contracts
- 2004 – legal advice to AWB from Senior Counsel concluded
 - In the absence of commercial justification for the introduction, increases and decreases in the trucking fee and the lack of specific approval for the fee and its quantum by the UN there is reason to suspect that the fee (or part of it) was used as a kick-back to the IGB or persons associated with it.
 - In absence of evidence that Alia sent money to IGB or any other arm of the Iraq Government, AWB did not contribute to a contravention (of the relevant UN Resolution)
- 2005 – UN IIC Inquiry Report
 - AWB generated wheat contracts (face value) – US\$1,536,280,854
 - AWB paid US\$224,128,189.98 in inland transport and after sales service fees
- 2006 – Cole Inquiry – “was it the right thing to do?”
- 2010 - Price Paid by AWB? – incalculable!

Anti-Corruption in Australia – Myth or Reality?

Vic Supreme Court, Re AWB Ltd – ASIC v Flugge, Lindberg, Ingolby, Stott, Geary & Long

- ASIC allegations
 - Various wheat contracts with Iraq contained terms for payment of “inland transportation fees” from 1999 to 2002
 - No legitimate basis for AWB to pay fees to Alia, Jordanian entity
 - Payments contravened UN Resolutions 661 & 986
 - Defendants knew or ought to have known of contracts, amounts in fact paid to Iraq entities, the UN prohibited such payments and the transactions harmed AWB
 - Defendants breached statutory duties (as director/officer) under ss180 & 181 *Corporations Act 2001*
 - Defendants failed to prevent the fees being paid
- Defendants defending civil penalty proceedings
- 2008 – 2010 – numerous contested hearings, appeals and amended pleadings

Anti-Corruption in Australia – Myth or Reality?

Reform – does Australia need to lift its game?

- Is criminal enforcement realistic?
- If so, should Australia introduce any immunity/leniency laws to promote and encourage self-reporting?
- Are adequate, experienced resources available to investigate and prosecute complex overseas financial transactions?
- Should Australia sanction facilitation payments?
- Should civil enforcement be pursued?
 - Deliberate use of “books and records” accounts laws to prosecute corporations, follow SEC trends
 - Encouraging whistleblowers
 - Available evidence
 - Balance of probability v beyond reasonable doubt
 - Seizure or confiscation of assets in civil jurisdiction

