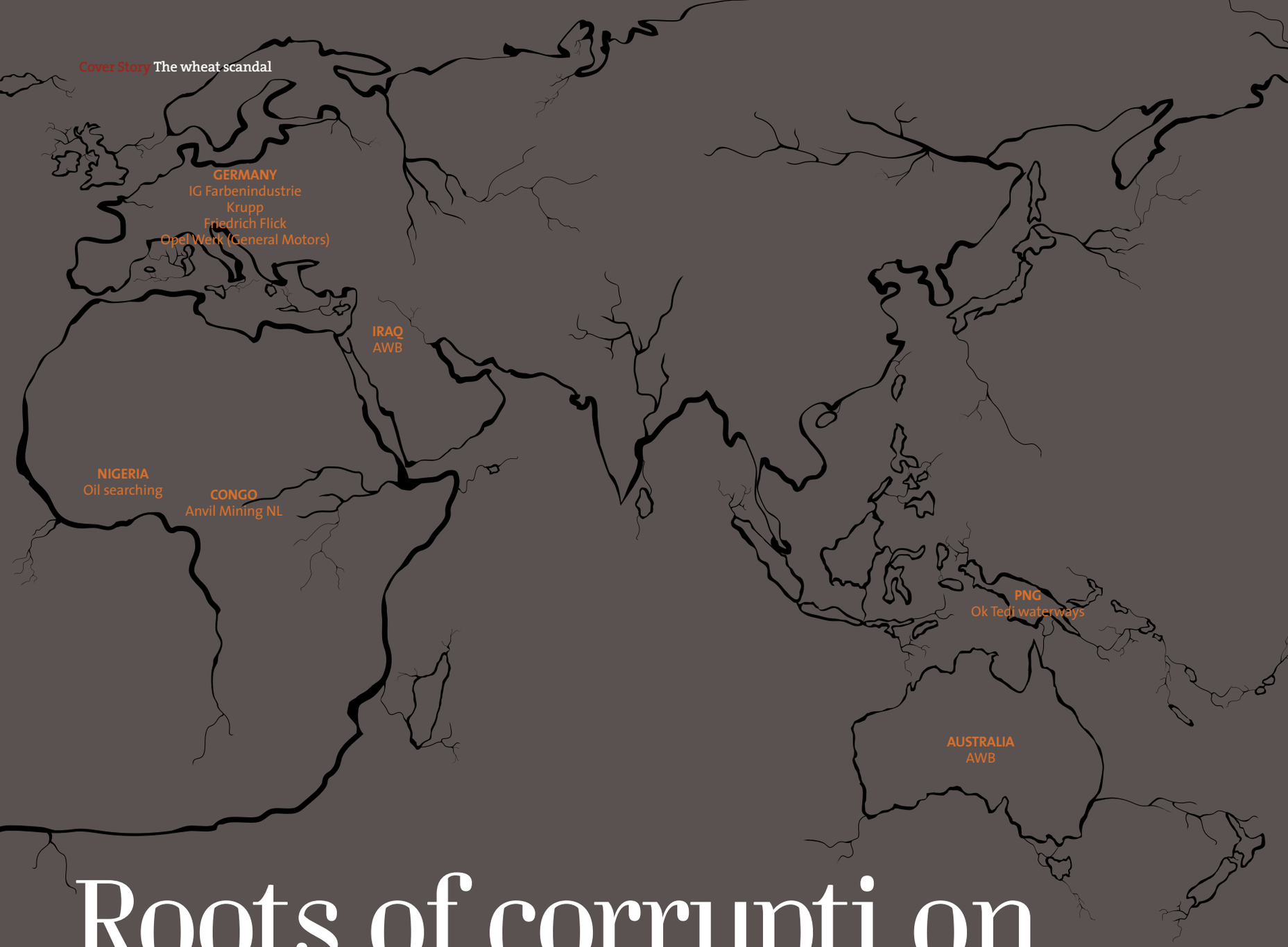

Roots of corrupti on

Globalisation may have created a brave new world of opportunity for international trade but it has also exposed corporate leaders to a whole new world of liability, warns *Andrew Field*.

Until recently most business overseas has been conducted away from homeland scrutiny and regulations. However, as recent events like the exposure of the Australian Wheat Board (AWB) have shown, globalisation often means what happens away from home does not always stay there.

This type of global liability is not new and stretches back to the Nuremberg trials at the end of World War 2 which not only tried the likes of Göring and Ribbentrop but also the leaders of companies like German chemical conglomerate IG Farbenindustrie AG, the gun and steel manufacturer Krupp of Essen and the steel business Friedrich Flick.

Despite their use of slave labour, seizure of foreign plant and equipment and manufacture of weapons, there was scepticism that they would – or could – be tried. Plus, there was the small matter of double standards as pointed out by Hitler's economics minister, Hjalmer Schacht, who said to his examining American psychologist at Nuremberg: "If you want to indict industrialists who helped to rearm Germany, you will have to indict your own, too. The Opel Werke, for instance, which did nothing but war production, were owned by your own General Motors."

However, business proprietors were, in fact, tried and a rule established in international law by which individuals could be liable for the actions of their businesses. In the Krupp case, the proprietor Alfried Krupp and 11 other officials from his company were imprisoned for the seizure of plant and machinery and for the enslavement of thousands of forced foreign workers, prisoners of war and concentration camp inmates. The same fate met officials from IG Farbenindustrie AG chemical and synthetics business who were convicted of similar offences.

In these cases, the defence of 'necessity', intended to amount to a version of 'duress' under the Common Law, was successful for four defendants in the Flick case. However, mostly 'necessity' amounted to little more than a civilian version of the ineffective military

defence of 'following orders'. These defendants argued they no longer had control over their businesses, being overborne by the national government which was seeking to increase production to fight a war. The defence was dismissed because it was found these businesses were doing more than merely 'following orders'.

Krupp, for example, specifically sought conscripted foreign and POW workers for its operations and supplied weapons to beat workers, thus undermining its claims of ignorance of the terrible conditions under which these workers toiled. Similarly, the initiative by which IG Farbenindustrie AG established a factory at Auschwitz so as to make use of concentration camp labour was anything but reluctant and more about cheap labour. The defence was disallowed and the precedent set.

Whether other businesses trading today are so careful is an open question, and in Australia this became a very live issue when the ABC television program Four Corners aired a documentary on 6 June 2005 regarding the activities in the Democratic Republic of Congo of Anvil Mining NL. Anvil Mining conducts a lucrative copper and silver mining operation in the Congo. Four Corners alleged that in October 2004, Anvil allowed its vehicles to be used to transport Congolese government troops to put down an uprising that resulted in more than 100 deaths, many by summary execution. The UN report also stated that Anvil's vehicles were subsequently used to move looted goods and transport corpses to mass graves.

Over the next six months and well into the new year, Four Corners maintained its coverage of Anvil's assistance to the Congolese government on its website, while Anvil issued multiple press releases denying any wrongdoing, claiming its vehicles were taken at gunpoint, and that it had "no reason to suspect" anything other than the lawful enforcement of the laws of the Congo would be enforced. And yet, as revealed in the UN report, such commandeering was not unexpected with Anvil vehicles having previously been commandeered at gunpoint. Similarly, despite Anvil's protestation in the same press release, that it was "co-operating fully" with UN investigations, access to its internal report was refused "because of anticipated legal action against the company".

Anvil's explanation of its behaviour sounds similar to the 1940s defence of 'necessity', although it is probable it would hold when a person is staring down the barrel of a gun as Anvil alleged. The difficulty for Anvil is that although the extent of what occurred might have been unexpected, this can no longer be argued in future.

Just as Anvil was aware that force would be used to commandeer its vehicles based on its past experience, it can now no longer plead ignorance as to the possible consequences of this use. It is in this context that the Nuremberg precedent is relevant. It is also relevant to recall the United Nations Norms regarding Responsibility of Transnational Companies and Other Companies in the Matter of Human Rights that not only excludes companies from engaging in crimes against humanity, but also requires they do not profit from these actions.

It may seem unfair to single out Anvil Mining as it is not the only business to face such issues. Indeed, a review of the 1990s is replete with accounts of questionable corporate conduct in the search for profit overseas, be it in the search for oil in Nigeria, or the polluting of waterways in Ok Tedi in New Guinea.

The investigation of AWB Ltd's activities in the Middle East raises the immediate danger of criminal prosecution under Australian law. Until very recently Australian farmers sold Australian wheat to foreign buyers through one desk operated by AWB Ltd. Before the downfall of Saddam Hussein, AWB was responsible for negotiating wheat sales to Iraq. In January and February 2006 the media reported on how AWB had paid bribes worth $300 million to Iraqi officials to secure sales worth $2.3 billion, disguised as transport payments and paid to third parties to circumvent United Nations sanctions. In the opinion of UN investigators, AWB was the largest payer of bribes to the former Iraqi regime. An apologist might attempt to argue that in developing and non-western countries, bribery is a part of business and but bribery debases human rights and derails confidence in the democracy and legitimacy of a government. It encourages government officials to exercise their power for self gain as opposed to serving their people.

The OECD's 1997 Convention on Combating Bribery of Foreign Officials in International Business Transactions provides the basis for Australia's laws against the bribery of foreign officials. The relevant provisions were incorporated into Australia's Criminal Code Act in 1999. Division 70, section 70.2 of the Code provides that a person is guilty of an offence if that person provides 'a benefit' to another person, a benefit which is not legitimately due to the other person, and which is provided with the intention of 'influencing a foreign public official' so as to obtain or retain business or a business advantage. Significantly, the 'benefit' – or bribe in layman's terms – need not have been paid directly to the foreign official, thus covering payments to intermediaries as well.

On first appraisal the penalties for this offence are a mixed bag and in some respects plainly inadequate. For example, the penalty for corporations is a maximum fine of $330,000 which in light of payments of $300 million to guarantee sales worth billions of dollars is chicken feed. However, a company director or officer who pays the bribe or causes the corporation to pay it faces a stronger penalty of $66,000 or up to 10 years imprisonment.

Nevertheless, although the anti-bribery laws are in place, their effect is still moot. At the time of writing, there have been no prosecutions commenced under Division 70. This striking criticism was raised as part of the OECD Working Group on Bribery report into the progress of Australia's anti-bribery laws in January 2006. The report suggested a number of possible explanations for the lack of prosecutions. Firstly, the initiation of the investigations process by the Australian Federal Police (AFP) needed improvement.

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An AFP investigation is triggered by either (a) a formal referral of allegations to the AFP; (b) pro-active intelligence gathering by the AFP; (c) identification of bribery during another investigation; or (d) pro-active investigation where bribery is suspected. However, despite the breadth of even this last category, the working group was concerned the AFP ignored significant sources of information. The working group cited an unnamed television report containing allegations of bribery of foreign officials by an Australian company that failed to attract the AFP's interest. This was despite the report appearing on a program described by the Attorney General's Department as "credible investigative journalism". The AFP's view was that the allegations would only be investigated if they were formally referred to it, or there was independent supporting information. Evidently, a credible media report alone was insufficient to trigger an investigation or to raise the AFP's suspicion.

Secondly, the working group questioned the system of referrals itself, identifying a lack of procedures in government departments and agencies to refer bribery allegations to the AFP. In one example, it noted a complaint received by the Australian

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Securities and Investments Commission in 2001 about an Australian company that allegedly won overseas contracts through bribery which resulted in an investigation. However, the matter was not even informally referred to the AFP and the complaint was dismissed. The working group considered that the AFP with its wider powers of investigation should have been consulted.

Even in cases where there was a prescribed procedure for referrals, the working group detected a lack of pro-activity in detecting offences. Specifically, having identified the Department of Foreign Affairs and Trade (DFAT) as the only department with a system for referrals in force, it claimed none of DFAT's overseas staff were encouraged to actively liaise with Australian companies trading overseas so as to provide advice on the issue of corruption. The working group considered that this might have at least assisted in the detection and reporting of foreign bribery offences.

Other areas identified by the working group ranged from the communication of allegations from state police forces to the AFP, to the inadequacy of Australia's tax laws in stamping out deductions for the bribing of foreign officials – even though such deductions were made illegal in 1999.

The working group's other substantial criticism related to the penalties. As noted above, although the possible term of 10 years imprisonment might be adequate, the working group had no actual cases to examine. Accordingly, it considered the recent history of sentences for domestic bribery cases and observed that in the vast majority of cases, sentences of imprisonment imposed were of less than 12 months – a far less daunting prospect than 10 years.

The criticism of the monetary penalties was less ambiguous. As noted above, the maximum fines of $66,000 for an individual and $330,000 for a corporation are manifestly inadequate. The working group questioned whether such fines could be "effective, proportionate and dissuasive". However, in this view, the working group was in agreement with the Australian government which advised that new penalties would soon be enacted, prescribing as the new corporate penalties whichever was the greater of either: (1) $10 million; (2) three times the gain from the contravention; or where this latter sum cannot be readily ascertained: (3) 10 per cent of the turnover of the company. By any measure, these would undoubtedly be formidable penalties.

The good news for leaders of businesses who seek to engage in illegal conduct in their business activities overseas is that thus far prosecutions have been the exception rather than the rule. The bad news is that today there is greater scrutiny than ever before. True, the mechanics of making the law and enforcing it may take time; even the cases forming the Nuremberg precedent were not without problems, the trial of Alfried Krupp (who was initially confused with his father) being described subsequently by one of the prosecutors as a fiasco and the result of early sloppiness. However, if it were not already incumbent on the Australian government to legislate and investigate such matters of its own volition, then it is now also doing so through the encouragement of other international bodies. The Cole Inquiry into AWB was a direct result, and evidence of, the willingness of the Australian government to act on suggestions by the OECD and the UN.

Thus, the message for corporate leaders engaged in international operations is very clear.

First, what you might once have done with impunity in other countries may now attract prosecution. Second, what might have once made good business sense may now cripple your business. And third, what might have once made you rich may now land you in gaol – for a long time. In summary, it is good business sense to be a good global citizen.

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