THE INTERNATIONAL INVESTIGATIONS REVIEW

NINTH EDITION

Editor
Nicolas Bourtin

THE LAWREVIEWS

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PREFACE

In the United States, it is a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike have faced increasing scrutiny by US authorities for several years, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in the past many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice has increasingly sought and obtained guilty pleas from corporate defendants. While the new presidential administration in 2017 brought uncertainty about certain enforcement priorities, and while US authorities in 2018 announced policy modifications intended to clarify or rationalise the process of resolving corporate investigations, the trend towards more enforcement and harsher penalties has continued.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors who have contributed to this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a

realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its ninth edition, this publication covers 25 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts of time and thought. The subject matter is broad and the issues raised are deep, and a concise synthesis of a country's legal framework and practice was challenging in each case.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
June 2019

Chapter 6

AUSTRALIA

Dennis Miralis, Phillip Gibson and Jasmina Ceic[1]

I INTRODUCTION

The Australian government has empowered a number of regulatory bodies to investigate and prosecute corporate misconduct.

a The Australian Securities and Investments Commission (ASIC) is the main corporate regulator. It enforces and regulates company law.

b The Australian Competition and Consumer Commission (ACCC) enforces and regulates competition and consumer laws.

c The Australian Tax Office enforces and administers the federal taxation system and superannuation law. It is Australia's principal revenue collection agency.

d The Australian Transaction Reports and Analysis Centre (AUSTRAC) is the national financial intelligence agency. It enforces anti-money laundering and counter-terrorism financing laws.

All these regulatory bodies have, in some form, compulsory powers that can require individuals and companies to produce documents and information, including attendance at compulsory examinations where there is no privilege against self-incrimination. They also encourage cooperation when exercising their investigative functions.

When a matter is referred for criminal investigation, it is often investigated by the Australian Federal Police (AFP), the national law enforcement agency. The AFP is solely responsible for investigating contraventions of Commonwealth criminal law. The Commonwealth Director of Public Prosecutions (CDPP), the national prosecutorial agency, is in turn responsible for the prosecution of alleged offences against Commonwealth law.

When Australian legal practitioners conduct an internal investigation it is likely to be in the context of a regulatory probe by one of these Australian government bodies, which may also include a concurrent criminal investigation by the AFP.

II CONDUCT

i Self-reporting

Australian regulators have had long-standing formal mechanisms in place for self-reporting of both civil and criminal wrongdoing. The AUSTRAC, the ACCC and the ASIC, for example,

1 Dennis Miralis and Phillip Gibson are partners and Jasmina Ceic is a senior associate at Nyman Gibson Miralis.

all have specific mechanisms for self-reporting, whether it be mandatory or voluntary. The ASIC, in particular, relies heavily on self-reporting to fulfil its regulatory oversight of the financial services sector. If a corporate cooperates with the ASIC, it can:[2]

a fully recognise that cooperation (taking into account whether the corporate has a self-reporting obligation);
b negotiate alternative resolutions to the matter;
c take into account the degree of cooperation provided during the investigation when determining the type of remedy or remedies sought, depending on all the circumstances of the case;
d in administrative and civil matters (other than civil penalty matters), make particular submissions to the tribunal or court as to what the outcome should be;
e in civil penalty matters, take the corporate's cooperation into account; and
f in criminal matters, take the corporate's cooperation into account.

A notable development in self-reporting is the recent formalisation of policy concerning foreign bribery, reflective of Australia's ever-growing presence on the international stage. On 21 December 2017, the AFP and the CDPP released a joint guideline clarifying the principles and process that apply to corporations who self-report conduct involving a suspected breach of Division 70 of the Criminal Code 1995 (Cth).[3]

Division 70 of the Criminal Code is concerned with the bribery of foreign public officials. Section 70.2 provides for the offence of bribing a foreign official. Contraventions of Section 70.2 carry significant penalties for an individual or corporation (up to 10 years' imprisonment and a fine of 10,000 penalty units for an individual, 100,000 penalty units for a corporation or three times the value of the benefit provided or 10 per cent of the corporation's annual turnover over a defined turnover period). Presently, there is no obligation to self-report suspected breaches of Division 70 of the Criminal Code.

Although self-reporting is not mandatory, providing full and frank disclosure and assistance to investigating authorities is an appropriate action following the discovery or detection of a contravention of Section 70.2. There are, as the guideline suggests, many reasons why a corporate would choose to self-report wrongdoing:[4]

a proactively identify and address wrongdoing within the company;
b comply with directors' statutory and fiduciary duties to act in the best interests of the company;
c limit corporate criminal liability;
d minimise reputational damage;
e demonstrate a cooperative intent with the AFP in investigating the conduct;
f maximise the sentencing discount that will be available to the company in any relevant prosecution of the company; and
g be a good 'corporate citizen'.

The guideline suggests that assistance which the corporate entity could provide would include the provision of reports prepared by the corporation or its lawyers to investigators, and access

2 ASIC Information Sheet 172 (INFO 172), issued in May 2015.
3 AFP and CDPP Best Practice Guidelines: Self-reporting of Foreign Bribery and Related Offending by Corporations.
4 ibid.

to any witnesses that may ultimately give evidence in court. Assistance has its clear benefits; the corporation can be given an undertaking that evidence given by the corporation as a witness is not admissible, whether directly or derivatively, against the corporation in any civil or criminal proceedings.[5] The corporation can also be given an indemnity from prosecution, but this indemnity does not prevent a proceeds of crime authority from commencing civil confiscation proceedings under the Proceeds of Crime Act 2002 (Cth).

The implementation of the guideline is in line with Australia's overall commitment to combat foreign bribery. Australia is a signatory to the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention. A Phase 4 review of Australia's implementation of the Anti-Bribery Convention occurred in December 2017. The report following the Phase 4 review detailed several recommendations that indicate the Australian government's increased commitment to detecting and prosecuting foreign bribery. These include:[6]

a improving the potential for detecting foreign bribery through Australia's anti-money laundering system;

b enhancing whistle-blower protection for private sector employees;

c continuing to investigate and prosecute foreign bribery and ensuring appropriate resourcing of authorities to facilitate those improvements; and

d engaging with the private sector to encourage adoption of robust anti-bribery procedures.

Amendments to the Director of Public Prosecutions Act 1983 (Cth) under the proposed Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) amend the function of the CDPP to allow the director to negotiate, enter into and administer deferred prosecution agreements.[7] The regime will empower the CDPP to invite corporate bodies that have engaged in criminal wrongdoing to enter into an agreement to comply with specified conditions. If the conditions are complied with, the corporate body will be subsequently protected from criminal prosecution for the offence or offences specified in the deferred prosecution agreement.

Significantly, the amendments will also introduce a new corporate offence of failing to prevent foreign bribery. The offence will apply to a corporation if an 'associate' of the body corporate commits an offence under Section 70.2 of the Criminal Code for the profit or gain of the corporation. An associate can include an officer, employee, agent or contractor of a company, as well as its subsidiaries.[8] As proposed, an available defence exists in instances where the relevant body corporate can establish that it had adequate procedures in place that were designed to prevent the commission of a foreign bribery offence.

With the anticipated introduction of deferred prosecution agreements, Australia's enforcement landscape regarding foreign bribery will become more aligned with international developments in the United Kingdom and the United States, where self-reporting and the resolution of matters through sentencing alternatives for corporations other than criminal sanctions, remains an important part of the sentencing options available to government and the courts.

5 ibid.

6 Implementing the OECD Anti-Bribery Convention Phase 4 Report: Australia.

7 Schedule 2 of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017.

8 Schedule 1 of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017.

ii Internal investigations

Established on 14 December 2017, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has shed light on the practices and culture of the financial services industry, revealing inadequacies in the investigative and reporting practices adopted by some of Australia's largest corporate entities. Common criticisms levelled at these entities concern the delay in reporting misconduct, general obscurification, misleading behaviour and interference with functions of the corporate regulator, and questionable 'independent reporting' by law firms retained to conduct internal investigations and respond to regulatory probes.

The final report of the Commissioner, the Honourable Kenneth M Hayne AC QC, was submitted on 1 February 2019. The report included 76 recommendations relating to the conduct of banks, mortgage brokers, financial advisers and superannuation trustees as well as Australia's financial services regulators. The Commissioner invited ASIC to investigate 11 potential instances of criminal misconduct, with the view of instigating criminal or other legal proceedings as appropriate. The report stressed the need for supervisory bodies such as the Australian Prudential Regulation Authority and ASIC to build a supervisory programme 'focused on building culture that will mitigate the risk of misconduct'.[9]

Following the release of the final report, ASIC has announced that it will establish an internal 'office of enforcement', creating a separate department for enforcement staff with a specific focus on court-based outcomes.[10]

The inadequacies revealed by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry illustrate that the decision to investigate can be a difficult one, particularly where there is a grave risk of reputational damage and the consequent erosion in public confidence in the organisation. Of primary concern is whether an internal investigation is required in order to comply with a relevant law, regulation or corporate policy. A secondary concern must always be the exercise of balancing the costs associated with any internal investigation and the effects of inactivity, delay and failing to investigate.

Commonly, internal investigations are undertaken by a lawyer or team of in-house lawyers. Sometimes, because of the scope or complexity of an investigation, external law firms will be briefed alongside specialist investigators, auditors and accountants. These firms usually specialise in civil litigation and corporate law more generally. However, the emerging understanding of the internationalisation of economic crime may change this paradigm. Advances in digital technology have driven an increase in incidences of white-collar crime and cybercrime. Corporations may think it prudent to use specialist criminal lawyers to provide advice much earlier in the investigation process and, where appropriate, assist in the conduct of the internal investigations. Where there is a concurrent regulatory probe with parallel criminal investigations in multiple jurisdictions, complex transnational criminal issues may arise concerning the right against self-incrimination; the use of the exchange of information and data between jurisdictions for criminal investigation and prosecution; and, if there is a request for extradition, whether dual criminality or double jeopardy are applicable.

In-house lawyers need to be particularly aware of the possibility that an internal investigation can lead to both civil and criminal proceedings, sometimes running concurrently, and sometimes crossing multiple jurisdictions. The Hague Convention on the Taking of

9 Recommendation 5.7, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

10 ASIC update on implementation of Royal Commission recommendations, 19 February 2019.

Evidence Abroad in Civil or Commercial Matters allows for evidence to be taken through Australian courts for use in a foreign civil proceeding following a request by a foreign court.[11] Every state and territory in Australia has legislation that allows for evidence to be taken in this way, and often when such evidence is being sought, it is not uncommon for there to be a criminal investigation already under way. Notably, some protections are preserved under the Convention, the fifth amendment, for example, can be claimed in Australia where the subpoenaed party faces criminal charges in the United States. The use of international mechanisms such as the Hague Convention, when corporations are subjected to both regulatory and criminal prosecutions, is likely to become more prevalent, until such time as an international convention or treaty specifically focusing on economic crime is adopted. In the meantime, substantive legal issues such as mutual assistance across jurisdictions, including adequate safeguards for human rights such as the right to a fair trial and privacy, will need to be considered by the courts on a case-by-case basis, under domestic law's interpretation of the Hague Convention.

iii Whistle-blowers

In December 2016, as part of its Open Government National Action Plan, the Australian government made a commitment to ensure that there were appropriate protections for persons reporting corruption, fraud, tax evasion or avoidance and misconduct within the corporate sector.[12] A year later, on 13 December 2017, the Treasury Laws Amendment (Whistleblowers) Bill 2017 (Cth) was introduced in Parliament, some 13 years after the introduction of legislative protection for whistle-blowers under the Corporations Act 2001 (Cth). The Act has now passed both Houses of Parliament and is expected to come into force 1 July 2019.

The Bill was introduced because of perceived deficiencies with the existing regime, namely, gaps in whistle-blower protection. Statutory protection for some whistle-blowers is non-existent and only piecemeal in other areas, and some protections have not adjusted to reflect the actual remits of regulators.

The proposed amendments to the Corporations Act 2001 (Cth) are designed to advance the government's goal of encouraging the disclosure of civil and criminal wrongdoing, particularly in the private sector, to improve overall compliance with laws and regulations by corporations. The government considers whistle-blowers to be playing a critical role in uncovering corporate crime, particularly because of the difficulties faced by law enforcement in detecting corporate misconduct.

The Bill creates a single, consolidated whistle-blower protection regime in the Corporations Act 2001 (Cth) and a whistle-blower protection regime in the Taxation Administration Act 1953 (Cth) through various legislative amendments. It also repeals the financial whistle-blower regimes.

The changes to protections in the Corporations Act 2001 (Cth) are overwhelmingly positive. No longer are whistle-blowers required to identify themselves when making a disclosure, and the types of persons and bodies that are allowed disclose the identity of whistle-blowers have been comprehensively clarified in the Bill. Existing immunities have

11 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

12 See https://ogpau.pmc.gov.au/.

been extended, the amendments ensuring that information that is part of a protected disclosure is not admissible in evidence against that whistle-blower in a prosecution for an offence (other than in proceedings concerning the falsity of the information).

The remedies available to whistle-blowers who suffer detriment because of a qualifying disclosure in the Corporations Act 2001 (Cth) have been expanded. The Bill creates a civil penalty provision to address the victimisation of whistle-blowers, and allows for the criminal prosecution of victimisers. Other remedies, such as compensation, have been simplified. A person can seek compensation for loss, damage or injury suffered as a result of a victimiser's conduct, where that conduct causes any detriment to another person or threatens to cause detriment to another person, believing or suspecting that a person made, may have made, proposes to make, or could make a qualifying disclosure; and the belief or suspicion is the reason, or part of the reason, for the conduct.

The Bill also addresses corporate governance concerns by introducing a requirement for large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to implement whistle-blower policies. The policies have to detail the protections available to whistle-blowers, how and to whom disclosures can be made, the support that the corporate will offer to whistle-blowers, the corporate's investigation process and how the corporate will ensure fair treatment of employees mentioned or referred to in whistle-blower disclosures.

The proposed amendments to the Taxation Administration Act 1953 (Cth) introduce protections and remedies for whistler-blowers who make disclosures about breaches or suspected breaches of Australian taxation law or taxation-related misconduct. The amendments are comparable to the proposed amendments to the Corporations Act 2001 (Cth), namely, protection for whistle-blowers from civil, criminal and administrative liability in respect of qualifying disclosure, the creation of offences in respect of conduct that causes detriment to a person, and a mechanism for court-awarded compensation to persons who suffer damage in respect of a qualifying disclosure.

The Treasury Laws Amendment (Whistleblowers) Bill 2017 (Cth) will apply to whistle-blower disclosures made on or after 1 July 2018. The Honourable Senator Mathias Cormann (Minister for Finance and Deputy Leader of the Government in the Senate) commented during the second reading of the Bill that the 'reforms will also improve practices within Australian businesses, including in the areas of corporate governance and integrity. Officers, employees and taxpayers will now be aware that there is a significantly higher likelihood that misconduct will be reported'. The new whistle-blower amendments will align Australia with international developments and it is expected that this will lead to an increase in regulatory and criminal investigations as well as prosecutions of corporations. Time will tell, however, if the Bill will be the catalyst for immediate change.

III ENFORCEMENT

i Corporate liability

Civil and criminal corporate liability can be derived from common law or from statute. The standard of proof in civil proceedings is 'on the balance of probabilities', while in criminal proceedings it is 'beyond a reasonable doubt'.

Under common law, a corporation is liable for the conduct and guilty mind of a person or persons who are the directing will and mind of the corporation. Commonly, that person or persons will be the managing director, board of directors or a person who has the authority

to act on the corporation's behalf. Criminal liability can also extend to employees or agents acting within the actual or apparent scope of their employment, if the corporate expressly, tacitly or impliedly authorises or permits the conduct that is the subject of the offence.

Statutory liability is more clearly defined. Chapter 2, Part 2.5, Division 12 of the Criminal Code 1995 (Cth), for example, outlines corporate criminal responsibility as it applies to the Code. The Criminal Code 1995 (Criminal Code) applies to bodies corporate in the same way it applies to individuals (or where provided, with modifications). For the most part, offences under the Criminal Code have physical elements (action or conduct) and fault elements (intention, knowledge, recklessness or negligence). These elements must be satisfied beyond reasonable doubt in order for an offence to be proven beyond reasonable doubt. Notably, a body corporate may be found guilty of any offence under the Criminal Code, including one punishable by imprisonment.

Where a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate. If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Authorisation or permissions may be established by various modes of proof.

Other acts of Parliament, such as the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth), contain similar liability provisions.

Most criminal conduct is investigated by the AFP and prosecuted by the CDPP.

ii Penalties

The main form of penalty imposed on a corporate body is a fine.

Statutory fines have defined maximum limits, either expressed by a maximum number of penalty units that can be imposed or by a monetary figure. In a law of the Commonwealth or Territory ordinance, unless the contrary intention appears, one penalty unit amounts to A$210. The quantum of the fine can be significant. For example, if a corporate body is found guilty of the offence of bribery of a Commonwealth public official, the maximum fine that can be imposed is 100,000 penalty units (amounting to A$21 million).

Serious offences can, in certain circumstances, lead to the company being wound up pursuant to Section 461 of the Corporations Act 2001 (Cth). Similarly, serious offences can lead to confiscation proceedings being brought by the AFP pursuant to the Proceeds of Crime Act 2002 (Cth) (the Act). The Act was passed on 11 October 2002 and came into operation on 1 January 2003. The Act provides a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth law. In some circumstances it can also be used to confiscate the proceeds of crime against foreign law or the proceeds of crime against State law (if those proceeds have been used in a way that contravenes Commonwealth law). It is expected that the proceeds of crime laws will increasingly be applied to white-collar matters where, in the past, they have been mostly applied to general crime.

The Corporations Act 2001 (Cth) and The Australian Securities and Investment Act (Cth) provide similar sanctions. Notably, a recent review by the ASIC Enforcement Review Taskforce has called for an increase in civil penalty amounts in legislation administered by the Commission: for individuals, 2,500 penalty units (amounting to A$525,000) and for corporations the greater of 50,000 penalty units (amounting to A$10.5 million) or three times the value of benefits obtained or losses avoided or 10 per cent of annual turnover in

the 12 months preceding the contravening conduct (but not more than 1 million penalty units (A$210 million). Additionally, it was recommended that ASIC be provided with similar powers to the AFP and be directly able to freeze and forfeit proceeds of crime.

In response to the review of the ASIC Enforcement Review Taskforce, the Treasury Laws Amendment (Strengthen Corporate and Financial Sector Penalties) Bill 2018 was introduced to Parliament on 24 October 2018 and passed by both Houses of Parliament on 18 February 2019. The legislative response includes reforms that ultimately exceed the penalty regime as proposed by the Taskforce.

Under the amendments to the Corporations Act 2001 (Cth) and the Australian Securities and Investment Act (Cth), the maximum civil penalty amounts for individuals are at least 5,000 penalty units (amounting to A$1.05 million) or three times the financial benefits obtained or losses avoided; and, for corporations, at least 50,000 penalty units (amounting to A$10.5 million) or three times the value of benefits obtained or losses avoided, or 10 per cent of annual turnover in the 12 months preceding the contravening conduct (but not more than 2.5 million penalty units (A$525 million).

Other penalties include enforceable undertakings, where the company must carry out or refrain from certain conduct. These are not available where the penalty imposed is dealt with by criminal sanction, and are only appropriate for minor breaches of the law.

iii Compliance programmes

A corporate's compliance programme will be relevant to the corporate's criminal liability. For example, liability for some offences charged pursuant to the Criminal Code can be established on the basis that the corporate impliedly authorised the offending conduct by failing to create and maintain a culture that required compliance with the relevant provision. The existence of a compliance programme and the exercise of due diligence will be relevant under Section 12.3(3) of the Criminal Code.

Notably, a corporation may rely on the defence of mistake of fact pursuant to Section 9.2 of the Criminal Code. The corporate must prove that the corporation had a compliance programme and exercised due diligence.

Additionally, the existence and effectiveness of a compliance programme may be a relevant factor at sentence proceedings, as it can change the court's assessment of objective criminality of the offence.

iv Prosecution of individuals

Chapter 2D, Part 2D.1, Division 1 of the Corporations Act 2001 (Cth) provides for the general duties of officers and employees of a corporation. Section 180 imposes a civil obligation of care and diligence; Section 181 imposes a civil obligation to act in good faith in the best interests of the corporation; Section 184 makes it a criminal offence if a director or other officer of a corporation is reckless or intentionally dishonest in failing to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose. Further, under Section 184, if an employee of a corporation uses his or her position or uses information dishonestly to gain an advantage, he or she is also liable to a criminal penalty.

Whether an individual is prosecuted or not for contraventions of the Corporations Act 2001 (Cth) will depend on the severity and nature of the contravention.

IV INTERNATIONAL

i Extraterritorial jurisdiction

Australia's corporate and criminal laws have limited extraterritorial application. Typically the laws will require that the act, omission or person to have some connection with Australia.

The regulation of corporations under the Corporations Act 2001(Cth) extends to foreign corporations who are 'carrying on business' in Australia.[13] For example, the power to disqualify individuals under the Corporations Act 2001 is limited to the time when those individuals are managing a foreign corporation, unless the act or omission occurred in connection with the foreign company carrying on business in Australia; or if the act or omission was done or proposed to be done in Australia; or if the act or omission was a decision made by the foreign company whether or not to carry out, or to refrain from doing an act in Australia.[14]

Under the Criminal Code, a person does not commit an offence unless the conduct of the alleged offence occurred wholly or partly in Australia, or the result of the conduct occurs wholly or partly in Australia.[15] However, geographical jurisdiction is extended in certain circumstances, for example, where at the time of the alleged offence the offence occurs wholly outside the jurisdiction of Australia, and the person is an Australian citizen or the person is a body corporate incorporated by or under a law of the Commonwealth or of a state or territory.[16]

ii International cooperation

Australia cooperates with overseas law enforcement and regulatory bodies in a number of ways through both formal and informal channels, across multilateral and bilateral treaties as well as through international conventions.

The ASIC, for example, has agreements with a number of other countries' law enforcement authorities, which allow for cooperation between countries. These memorandums of understanding enable the exchange of information and for mutual cooperation and assistance to investigations. Australia has such agreements with a wide range of countries, such as Austria, Brazil, China, France and Japan.[17] However, there are some restrictions on the extent to which the ASIC can provide assistance to foreign authorities. Sections 6 and 7 of the Mutual Assistance in Business Regulation 1992 (Cth) require the ASIC to receive authorisation from the Attorney-General prior to obtaining documents and testimony on behalf of foreign authorities.

International cooperation is also achieved through Australia's involvement in a number of tax information exchange agreements (TIEAs) as developed by the OECD. These agreements allow for an obligation between Australia and non-OECD countries to assist each other by requesting the exchange of tax information in order to eliminate the avoidance

13 Part 5.B, Division 2, Corporations Act 2001 (Cth).

14 Section 206H, Corporations Act 2001 (Cth).

15 Division 14, Criminal Code 1995 (Cth).

16 Division 15, Criminal Code 1995 (Cth).

17 http://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/memoranda-of-understanding-and-other-international-agreements/.

of tax. The information that can be exchanged is limited to when a specific investigation is occurring.[18] Australia has TIEAs with a number of countries, including The Bahamas, Cayman Islands, Guatemala, Liechtenstein and Vanuatu.[19]

Australia is party to a number of bilateral and multilateral extradition treaties. Extradition requests (either made by Australia or received by Australia) are governed by the operation of the Extradition Act 1988 (Cth). Extradition is used only for serious offences, and most commonly for offences committed against the person.

Australia also has agreements with international law enforcement agencies. In particular, the AFP is part of the International Foreign Bribery Taskforce. The taskforce involves the Federal Bureau of Investigations, the Royal Canadian Mounted Police, the AFP and the United Kingdom's National Crime Agency working together to provide information and cooperation on cross-border anti-corruption investigations; it allows for the agencies involved to share knowledge, investigative techniques, methodologies and best practice.[20]

iii Local law considerations

Privacy is a major concern when information is shared with overseas entities and authorities. Schedule 1 of the Privacy Act 1988 (Cth) contains the Australian Privacy Principles (APPs). These principles outline that where information is being shared by an APP entity (which includes the AFP and bodies established by a Commonwealth enactment such as the ASIC) to an overseas recipient, the entity must take reasonable steps to ensure that the recipient does not breach the principles.[21] However, this principle does not apply where disclosure is required or authorised by an international agreement relating to information sharing, or is reasonably necessary for enforcement-related activities.[22] This means that the principles will not apply in instances such as when the AFP or the ASIC sends information to other regulatory agencies to provide information relevant to ongoing investigations. Currently there is little jurisprudence in Australia dealing with the proper parameters on the exchange of information across jurisdictions where criminal sanctions may apply. This is an area in which Australian courts may become more involved, as the internationalisation of economic crime has been attended by a significant increase in the dissemination and sharing of information about individuals and corporations with, to date, very little oversight by Australia's judiciary.

V YEAR IN REVIEW

There has been a number of high-profile cases during the past year across a broad area of white-collar crime offending that has required Australian courts to consider the appropriate sentencing principles and penalties to be applied to corporate offenders. Most of the court cases have involved individuals rather than corporations.

18 https://www.ato.gov.au/general/international-tax-agreements/in-detail/tax-information-exchange-agreements-(tiea)/tax-information-exchange-agreements---overview/.

19 https://treasury.gov.au/tax-treaties/tax-information-exchange-agreements/.

20 https://www.afp.gov.au/news-media/media-releases/global-effort-tackle-foreign-bribery-and-corruption-strengthened; https://www.dentons.com/en/insights/alerts/2017/january/19/the-international-foreign-bribery-taskforce.

21 Section 6, Privacy Act 1988 (Cth); Australian Privacy Principle 8.1.

22 Australian Privacy Principle 8.2.

In *R v. Raines* [2017] NSWDC 217, the defendant was sentenced after pleading guilty to two counts of conspiracy to falsify books relating to the affairs of a corporation in contravention of Section 1307(1) of the Corporations Act 2001 (Cth) and one count of conspiracy to knowingly make false information available to an auditor of a corporation contrary to Section 1309(1) of the Corporations Act 2001 (Cth) and Section 11.5(1) of the Criminal Code.

The offences occurred between 7 November 2008 and 30 June 2011 and concerned the falsification of financial records of Hastie Services Pty Ltd. The offences were engaged in with three other employees, including the chief executive officer, the general manager and the finance manager of Hastie Services. The defendant was the chief financial officer of Hastie Services, a public company that provided technical installation and maintenance of smaller-scale fit-outs for commercial air-conditioning systems.

The conspiracy in relation to all offences was discussed in person and via email. The matters taken into account on sentence was that the offending was objectively serious, was committed by a senior employee in a position of trust and responsibility, that the conduct was persistent and deliberate, that the defendant had shown a significant degree of contrition, that the offender was willing to provide future assistance and had prior good character.

The terms of imprisonment, after a 50 per cent discount, were nine months for the first offence, eight months for the second offence, and one year six months for the third offence. The defendant was referred to Community Corrections to be assessed for a community sentencing option.

Hui (Steven) Xiao v. R [2018] NSWCCA 4 was an appeal to the Court of Criminal Appeal on the severity of a sentence. The appellant had pleaded guilty to one count of procuring another person to acquire financial products while possessing inside information contrary to Sections 1043A(1)(d) and 1311(1) of the Corporations Act 2001 (Cth) and one count of entering into an agreement to commit an offence under Sections 1043A(1)(d) and 1311(1) of the Corporations Act 2001 (Cth). The appellant had been sentenced to an overall term of imprisonment of eight years three months with a non-parole period of five years six months.

The appellant was the managing director of Hanlong Mining Investment Pty Ltd, a subsidiary of the Chinese corporation, Sichuan Hanlong Group Co Ltd. The appellant's role was to identify possible opportunities for investment. In 2010, Bannerman Resources Ltd and Sundance Resources Ltd were identified as investment targets. In early 2011, the appellant was involved in the preparation of a potential takeover of both companies. In July 2011, Sichuan Hanlong decided to make takeover offers. Because of his involvement with Sichuan Hanlong, the appellant was aware of the decision shortly after it was made.

The appellant used his wife's trading account and the trading company he owned and controlled to purchase financial products in both Bannerman and Sundance prior to the announcement of the takeover. There was an agreement made with a Mr Zhu and others, whereby Mr Zhu would purchase financial products in Bannerman and Sundance for the benefit of the appellant and others using funds borrowed from Hanlong Mining.

The Court of Criminal Appeal had quashed the original sentence and imposed an overall term of imprisonment of seven years with a non-parole period of four years six months because of parity concerns, and because of the possibility that the sentencing judge erred in not taking account of evidence that the appellant would experience more onerous custody as he was a foreign national.

Notably, no error was established in respect of the sentencing judge's findings that the conduct was 'carefully planned and premeditated', that the appellant's attempts to conceal

his involvement in procuring illegal trades was an aggravating feature of the offending, or by having multiple regard to the appellant's concealment of his identity by making purchases that were not in his own name, or to the fact that the loan to finance the purchases was drawn from a related party of Hanlong Mining.

In *R v. Issakidis* [2018] NSWSC 378, the defendant was found guilty on 13 June 2017 by a jury of two conspiracy offences, one contrary to Section 135.4(5) of the Criminal Code and one contrary to Sections 11.5(1) and 400.3(1) of the Criminal Code. The defendant and his co-conspirator were directors of Neumedix Health Australasia Pty Ltd. The defendant and his co-conspirator agreed to cause Neumedix Health to make false depreciation claims in its tax returns of many hundreds of millions of dollars. The depreciation claims were in respect of the alleged cost of acquisition by Neumedix Health of certain medical technologies, even though it was agreed that no such cost was to be incurred. This enabled Neumedix Health to avoid incurring tax liabilities on income it was deemed to have received as the owner of units in a number of trusts. These trusts generated very large taxable profits.

The defendant and his co-conspirator agreed to deal with the 'proceeds of crime', that is to say amounts in various bank accounts that represented the cash distributions from the trusts to Neumedix Health. It was agreed that the funds be distributed offshore to various accounts controlled by entities associated with the defendant and then repatriated to Australia, largely for the benefit of the defendant and his co-conspirator.

Ultimately, an aggregate sentence of 10 years three months was imposed with a non-parole period of seven years six months, the sentencing judge determining that the offending was motivated by greed and that there was a strong need for deterrence as the offences were in the worst category (the loss to the Commonwealth was in excess of A$100 million).

Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha [2017] FCA 876 represented the first company to be criminally prosecuted in Australia since the criminalisation of cartel conduct. Nippon Yusen Kabushiki Kaisha (NYK) pleaded guilty to a single charge of 'giving effect to a carte provision' contrary to Section 44ZZRG of the Competition and Consumer Act 2010 (Cth). NYK is a Japanese company whose business includes the supply of ocean shipping services, primarily the shipping of motor vehicles, to Australia. It was established that NYK had intentionally made arrangements with other companies (not party to proceedings) to fix freight rates in respect of shipping routes to Australia. There was also evidence of contracts affected by the rigging of bids by motor vehicle manufacturers. The company was fined $A25 million with a further $A30 million to be paid if non-compliance with an undertaking were to be established.

In the case of *ACCC v Yazaki Corporation* [2018] FCAFC 73, it was found that Yazaki Corporation had engaged in collusive conduct with a competitor, Sumitomo Electric Inductries Ltd, in the course of supplying Toyota Australia with goods in the form of wire harnesses for motor vehicles. The offending cartel conduct involved an agreement, observed over an extended period, relating to requests for quotations issued by Toyota. Following the ACCC's successful appeal against the fine imposed at first instance, the Full Federal Court of Australia imposed a penalty of A$45 million. This represents the highest financial penalty imposed under the Competition and Consumer Act 2010 (Cth).

These cases demonstrate an increased appetite on the part of the ACCC to commence proceedings against companies operating in Australia in relation to cartel conduct, as well as a trend of increasing financial penalties imposed by the courts in response to such conduct.

On 28 November 2018, following the lifting of long-standing suppression orders, previously restricted sentence proceedings relating to foreign bribery prosecutions against Note Printing Australia Limited (NPA) and Securency International Pty Ltd (Securency) were released. On the facts as agreed in *The Queen v Note Printing Australia Limited & Anor* [2012] VSC 302, both companies were subsidiaries for the Reserve Bank of Australia and were involved in the manufacture and supply of polymer banknotes used in Australia and internationally. The core offending conduct involved the payment of Indonesian, Malaysian, Vietnamese and Nepalese agents, engaged by the companies to assist in obtaining contracts with banks in the aforementioned countries.

While the substantial commission paid to overseas agents did not represent an offence, significantly it was demonstrated that Securancy and NPA employees, including persons acting in the roles of general manager and chief financial officer, were aware that the local agents were paying a portion of their commission to bank officials with the intention of improperly influencing them in the exercise of their duties. These payments were described by Securancy and NPA employees as 'special commission'. Both companies were fined A$480,000, reduced by virtue of an undertaking on the part of both companies to provide future assistance to authorities.

As new legislation is introduced with increased maximum penalties, it is likely that the courts will approach sentencing principles such as general and specific deterrence against the new maximum penalties that will apply. This is likely to lead to an overall increase in the length of terms of imprisonment that will be imposed as punishment for serious white-collar offences.

VI CONCLUSIONS AND OUTLOOK

It is anticipated that the next 12 to 18 months will be a period of increased legislative and policy reform in the area of white-collar crime.

This includes the new anti-money laundering and counterterrorism financing laws that have just been implemented by the AUSTRAC. These laws regulate digital currency exchange (DCE) providers operating in Australia. Businesses that are operating in Australia must register with the AUSTRAC and meet the Australian government's anti-money laundering and counterterrorism compliance and reporting obligations. The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) requires regulated entities to collect information to establish a customer's identity, monitor transactional activity, and report to the AUSTRAC any transactions or activities that are suspicious or involve large amounts of cash (over A$10,000). It is foreseeable that regulatory investigations into DCE compliance with Australia's anti-money laundering legislation will be on the regulators' agenda in the next 12 months.

It is also expected that amendments will be made to certain penalty provisions of the Criminal Code to bring it in line with the Senate Economics References Committee March 2017 report, 'Lifting the fear and suppressing the greed: Penalties for white-collar crime and corporate and financial misconduct in Australia'. The report recommended an increase in civil penalties under the Corporations Act 2001 (Cth) for individuals and companies, a change in the manner in which civil penalties are calculated and empowering the ASIC to have disgorgement powers. Following the commencement of the Treasury Laws Amendment (Strengthen Corporate and Financial Sector Penalties) Bill 2018, a number of these proposed changes are presently in force.

Appendix 1

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Dennis Miralis is a leading Australian defence lawyer who acts and advises in complex domestic and international criminal law matters in the following areas: white-collar and corporate crime, money laundering, serious fraud, cybercrime, international asset forfeiture, international proceeds of crime law, bribery and corruption law, transnational crime law, extradition law, mutual assistance in criminal law matters, anti-terrorism law, national security law, criminal intelligence law and encryption law. He appears in all courts throughout Australia and regularly travels outside Australia for complex international and transnational criminal law matters.

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