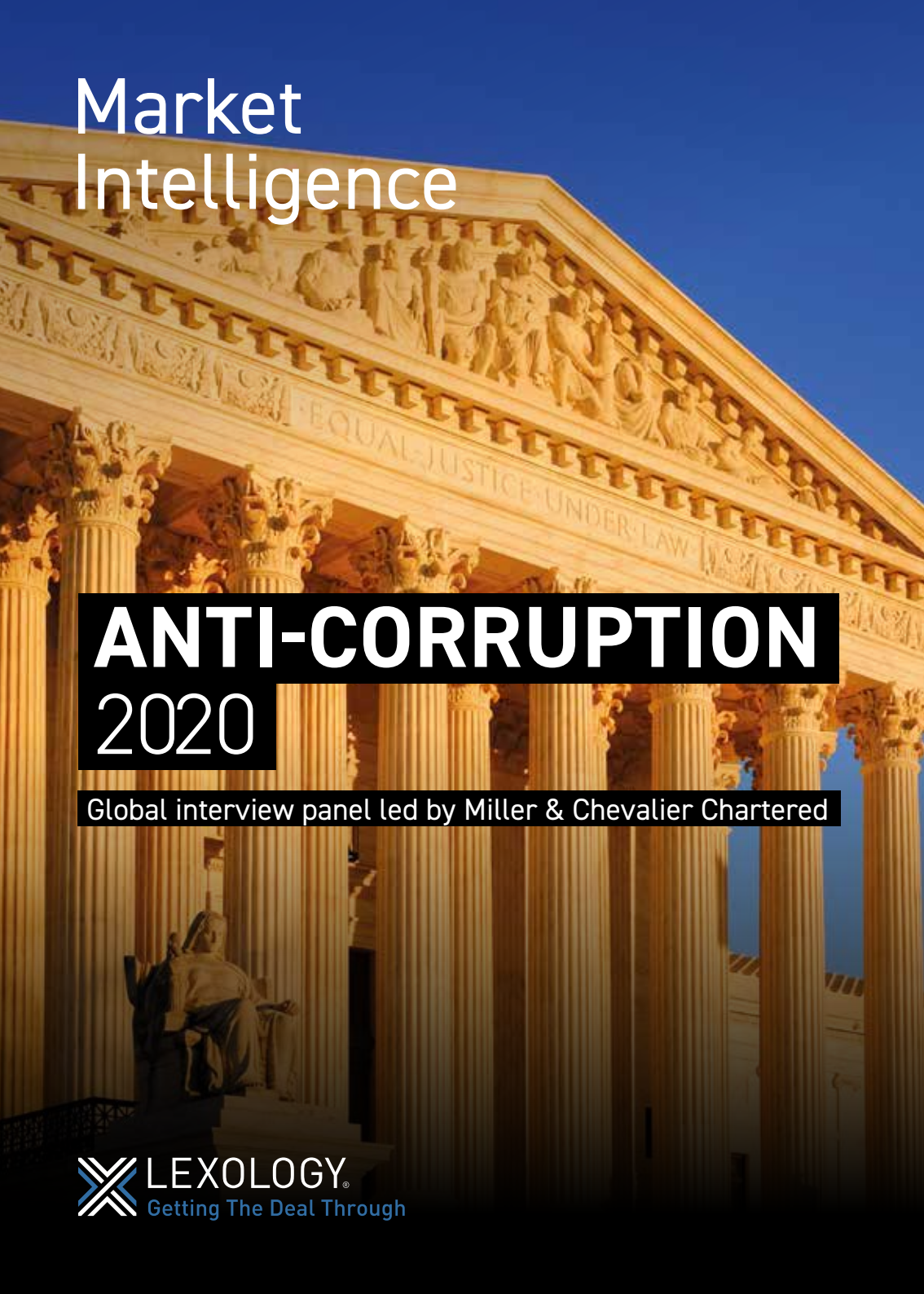
Market Intelligence

ANTI-CORRUPTION 2020

Global interview panel led by Miller & Chevalier Chartered



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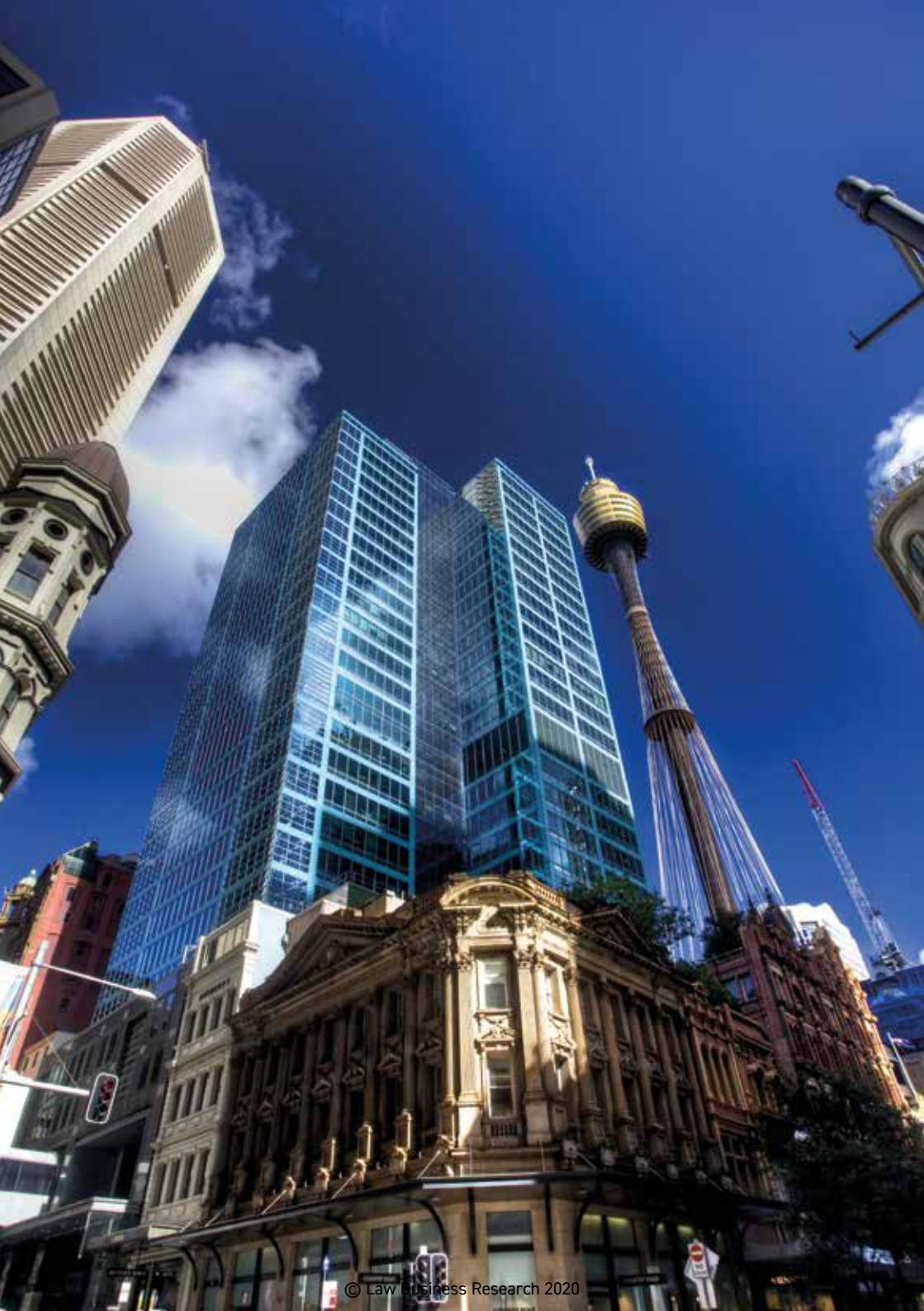
Anti-Corruption 2020



Australia

Dennis Miralis is a leading Australian defence lawyer at Nyman Gibson Miralis who specialises in international criminal law, with a focus on complex multi-jurisdictional regulatory investigations and criminal prosecutions. His areas of expertise include bribery and corruption, global tax investigations, anti-money laundering, Interpol and extradition, and mutual legal assistance law.

Dennis advises individuals and companies under investigation for suspected breaches of anti-bribery and corruption law both locally and internationally. He has extensive experience in dealing with international and local enforcement agencies, including the Federal Bureau of Investigation, the Securities and Exchange Commission, the Internal Revenue Service, the Serious Fraud Office, the Australian Federal Police and the Commonwealth Director of Public Prosecutions. Locally, he has extensive experience in advising and acting in Independent Commission Against Corruption matters.

1 What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction, and what lessons can compliance professionals learn from them?

Since 1999, Australia has been a signatory to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions. Since 2003, Australia has also been a signatory to the United Nations Convention against Corruption. These international agreements are complementary and mutually reinforcing.

The 2017 OECD Anti-Bribery Corruption Convention Phase 4 Australian Monitoring Report triggered a number of proposed legislative and investigative reforms in the area of anti-corruption enforcement and compliance in Australia. Some of these changes have recently come into effect; others are expected to commence in the near future.

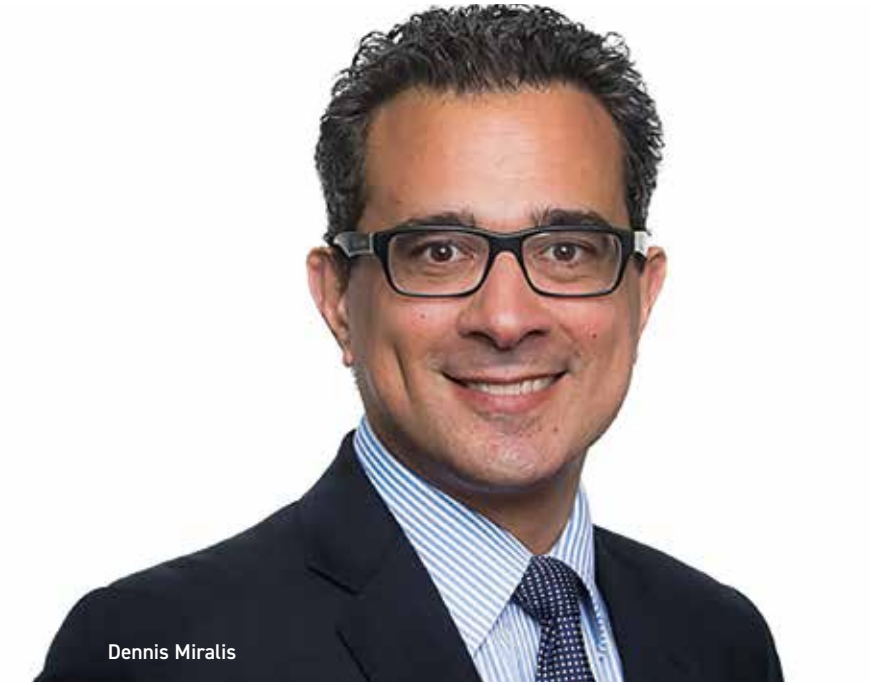
While the OECD Monitoring Report acknowledges the substantial steps taken by Australian authorities in combating foreign bribery and corruption, it also highlighted Australia's historically low number of foreign bribery prosecutions, when considered against other OECD members.

Key recommendations from the report emphasise the need for Australia to:

- reduce the risk of the Australian real estate sector being used to launder the proceeds of foreign bribery;
- ensure that Australian authorities have adequate resources to effectively enforce the offence of foreign bribery;
- take a proactive approach to the investigation and prosecution of companies for foreign bribery offences; and
- strengthen whistle-blower protections in the private sector.

In December 2019, Australia submitted its Phase 4 follow-up report to the OECD. The OECD Working Group has acknowledged that since the 2017 Monitoring Report, Australia has deployed efforts to address a number of recommendations. Significantly it was acknowledged that Australia made progress in its efforts to enhance detection on foreign bribery but concern was again expressed about the continued low level of foreign bribery enforcement in the jurisdiction.

Transparency International's 2018 Exporting Corruption Report ranked Australia as having moderate enforcement of corruption bribery. The classification ultimately indicates an insufficient level of overall regulation and deterrence in the jurisdiction. Transparency International's 2019 survey placed Australia as one of the top performers in the Asia-Pacific region. However, the report also highlighted the overall deficiencies in the region's ability to effectively control corruption. Transparency International is yet to publish updates for the 2019–2020 period.


Dennis Miralis

When considering these recommendations, it is also important to note that since the commission of the original OECD report, a number of prominent foreign bribery prosecutions have now been brought to public attention. In the lifting of long-standing court suppression orders on 28 November 2018, information relating to the successful prosecution of companies Note Printing Australia Limited and Securency International Pty Ltd became publicly available for the first time. Between 2012 and 2018, both companies, as well as executives, employees and agents of the companies, were convicted and sentenced for foreign bribery offences. Both companies were subsidiaries for the Reserve Bank of Australia and were involved in the manufacture and supply of polymer banknotes, which were used in Australia and sold internationally. The core offending conduct involved the payment of Indonesian and Malaysian agents engaged to assist in obtaining contracts with foreign banks. The conduct detected occurred in Indonesia, Malaysia, Vietnam and Nepal.

Similarly, brothers Ibrahim and Mamdouh Elomar were recently sentenced to periods of imprisonment for foreign bribery offences involving Iraqi officials, following a sentence appeal to the Court of Criminal Appeal in October 2018. These examples would suggest the 'tide is turning' to a degree in relation to the effective

"It is not uncommon for a foreign bribery case, including investigation and prosecution phases, to take in excess of five years."

investigation and prosecution of foreign bribery offences in Australia. Foreign bribery and transnational corruption offences are, by nature, difficult to detect. These offences present significant obstacles for law enforcement bodies to overcome prior to completion of a successful prosecution. Reasons for this include the fact that commonly neither the provider nor the recipient of a bribe is likely to disclose the offence. Both parties will often go to great lengths to mask or conceal the corrupt activity, which is often closely linked to non-corrupt, legitimate business activity. In an effort to obscure corrupt practices, illicit funds are often placed, layered and integrated into legitimate financial markets using money-laundering typologies. Unlike many other serious offences, there is rarely an easily identifiable victim of foreign bribery who is willing to come forward and report the crime. Witnesses to such offences often reside outside Australia's jurisdictional limits and may be reluctant to provide assistance in criminal proceedings conducted in Australia. For these reasons it is not uncommon for a foreign bribery case, including investigation and prosecution phases, to take in excess of five years.

The recent law enforcement successes evidenced by the Note Printing, Securency International and Elomar prosecutions are likely attributable in part to the prior

establishment of the Australian Federal Police-led (AFP) Fraud and Anti-Corruption Centre (FAC). The interagency approach utilised by the FAC is expected to result in comparable headway in addressing foreign bribery and corruption offences in the near future.

Recently, the AFP has received additional funding to assist dedicated foreign bribery investigative teams and an additional fraud and anti-corruption team. The Commonwealth Director of Public Prosecutions (CDPP), whose primary role is to prosecute offences against Commonwealth law such as foreign bribery, has also recently been consulted in relation to legislative reform in this area. The AFP does not operate independently to combat bribery or corruption. The domestic 'whole-government' approach adopted to combat such offences, as well as increased levels of international collaboration, is detailed under question 4 below.

One example is the legislative reforms to foreign bribery offence provisions currently being considered by the Australian Parliament as part of the Crimes Legislation (Combatting Corporate Crime) Bill 2019. While comparable legislative change was considered in 2017, the proposed reforms under the 2019 bill include the introduction of a new corporate offence for failing to prevent foreign bribery. On commencement, the new offence will apply to a corporation in the event 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. The term 'associate' is defined under the proposed bill as an officer, employee, agent, contractor, subsidiary or controlled entity of the person or company. It is also proposed that the definition of 'foreign public official' is expanded to include candidates for public office. Significantly, under the new offence, corporate criminal liability will be 'strict' or automatic and apply regardless of whether the employees involved are convicted.

However, a defence will be available to companies where it can be proven that adequate procedures were in operation to prevent and detect foreign bribery. Stated broadly, the aim of the proposed amendments is to remove perceived undue impediments to successful investigation and prosecution of foreign bribery offending in Australia.

A further key development is the introduction of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, which received assent on 19 March 2019. The revised whistle-blower regime is an important step towards improving corporate whistle-blower protections in Australia. The amending act makes it a requirement for companies to have formal whistle-blower policies and make such policies available to officers and employees. The act offers protection from criminal, civil and administrative liability for whistle-blowers who provide relevant disclosures to an eligible Commonwealth agency. The act also makes it an offence for a person to whom a qualifying disclosure is made to disclose confidential information

obtained in the disclosure, including identity of the whistle-blower. The increase in protections, including immunities, to whistle-blowers will further assist law enforcement in detecting future instances of foreign bribery and corruption. A large proportion of foreign bribery schemes are already detected through self-reporting and internal disclosure.

The AFP and the CDPP have recently released a joint guideline clarifying the principles and process that apply to corporations who self-report conduct involving a suspected breach of foreign bribery offence provisions. This is suggestive of an increased reliance on self-reporting in combating foreign bribery and corruption offences, as well as an acknowledgement of the public utility of self-reporting.

2 What are the key areas of anti-corruption compliance risk on which companies operating in your jurisdiction should focus?

Given the shifting legislative and investigative landscape highlighted above, there are a number of risks or 'red flags' that companies would be well advised to be aware of in regard to foreign bribery and corruption. The reforms signal a shift in onus with an increased need for companies to adopt a proactive, risk-based approach to compliance. Failure to do so can expose companies to criminal charges in the event a company associate engages in foreign bribery, even in circumstances unknown to the corporation.

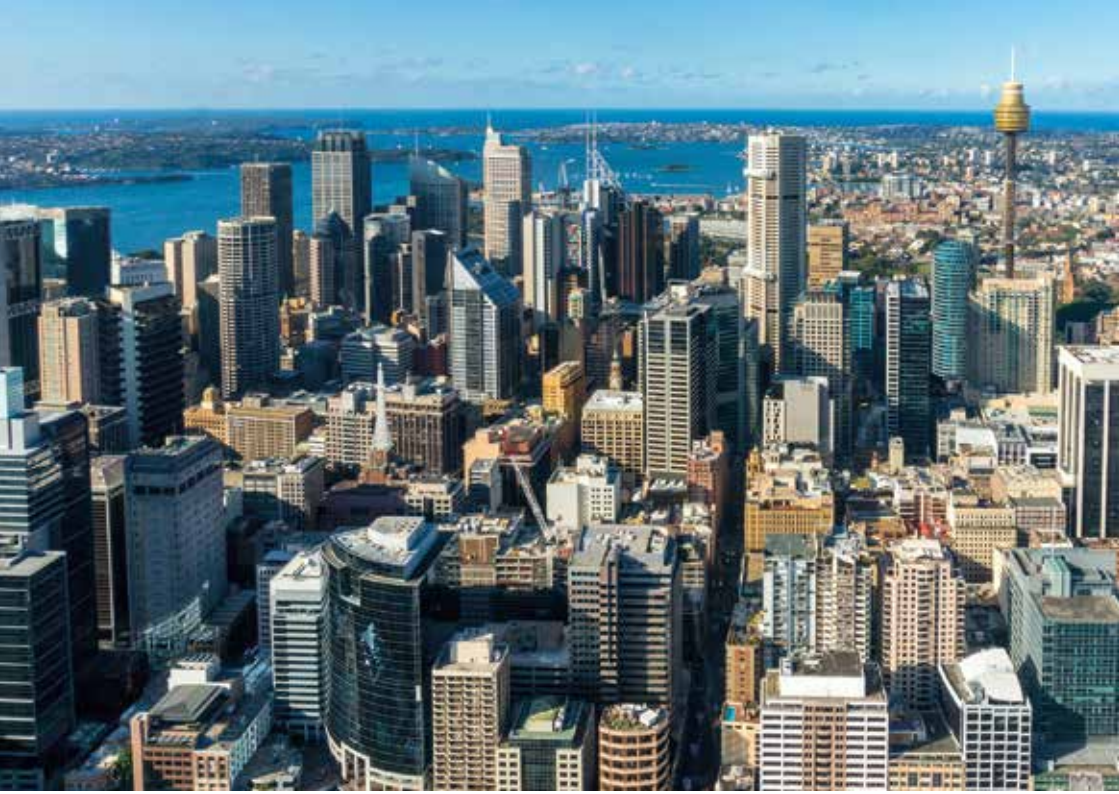
In a white paper recently published by TRACE International, specific examples of situations that may signal a heightened risk of foreign bribery are identified. Even after internal safeguards have been established, the need to conduct due diligence when dealing with third-party intermediaries is stressed in the report.

Factors that will affect the level of risk include:

- whether a company uses intermediaries;
- the control a company has over its subsidiaries, including foreign subsidiaries;
- whether a company is operating in multiple jurisdictions; and
- the prevalence of corruption in jurisdictions that the company operates in.

Transparency International provides an annual Corruption Perceptions Index, which ranks 180 countries and territories by their perceived levels of public sector corruption. This index provides a useful guide to assess risk and ultimately avoid corruption when conducting business in high-risk jurisdictions.

Australian anti-bribery and corruption laws, including the proposed revisions, present a complex management challenge for Australian companies operating in multiple jurisdictions within the global marketplace. Foreign bribery offences apply extraterritorially and can result in serious penalties including imprisonment. A



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number of common red flags for foreign bribery exist when dealing with third-party intermediaries, and companies would be best advised to acknowledge and take appropriate action in response to such warning signs. These indicators represent a variety of different risks across a range of severity levels and are situations that should raise heightened suspicion for companies. These indicators include:

- the intermediary having government links or links with politically exposed persons;
- a history of criminal convictions or a criminal record held by employees of an intermediary;
- evidence that the intermediary has inadequate controls or a lack of effective anti-bribery policies in place;
- suspicious circumstances including a lack of clear expertise in the relevant industry or unusual payment or compensation practices;
- a lack of transparency relating to true ownership or complex structures that appear to obscure beneficial ownership; and
- any other evidence of falsification or forgery on the part of the intermediate.

The proposed legislative changes discussed above will undoubtedly alter Australia's foreign bribery and anti-corruption landscape. In addition to checks relating to external parties, companies and compliance, professionals should respond proactively by way of increased diligence and appropriate internal policy reforms.

Anti-bribery risk assessments should be performed for all company associates. Risk assessment and due diligence procedures should be documented to create a clear audit trail in the event of incident or investigation. In light of the proposed reforms, it is expected that future investigations will place an increased emphasis on examining whether companies have facilitated a 'culture of compliance' hostile to bribery or comparable corrupt practices.

3 Do you expect the enforcement policies or priorities of anti-corruption authorities in your jurisdiction to change in the near future? If so, how do you think that might affect compliance efforts by companies or impact their business?

The Australian government is considering options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by companies. A key component in this area is the proposed introduction of a deferred prosecution agreement (DPA) scheme under the Crimes Legislation (Combatting Corporate Crime) Bill 2019.

The pros and cons of introducing DPAs have been considered in some detail by the Attorney-General's Department in its related public consultation paper. While the scope of any implemented DPA scheme may eventually cover a wide variety of criminal conduct, the proposed scheme is initially intended to be reserved for 'serious corporate crime', including fraud, bribery and money laundering. Although it remains unclear as to the exact form a DPA scheme would take in Australia, a DPA is essentially an agreement negotiated between a prosecutor and a corporate defendant, similar to a 'plea deal'. Offered at the discretion of the prosecution, a DPA would offer the deferral of a prosecution in exchange for compliance with a number of terms and conditions, which may include:

- full cooperation with any ongoing investigation;
- the admission of agreed facts;
- the implementation of an internal programme to promote and ensure future legal compliance; or
- the payment of a fine or penalty.

If the terms of the DPA are breached, it follows that the prosecution can reopen and proceed with the case subject to the DPA.

"It remains unclear as to the exact form a DPA scheme would take in Australia."

As discussed above, the Crimes Legislation (Combatting Corporate Crime) Bill 2019 is presently being considered in Parliament. If the Bill is passed, a DPA regime would become operational as soon as the legislation receives royal assent. Under the Bill, DPAs will be available for a range of serious corporate crimes, including foreign bribery, money laundering, fraud, breaches of sanctions laws and various criminal breaches of the Corporations Act. When considering the likely changes in law enforcement policy and procedure that may result from such changes, guidance can be taken from the United States and United Kingdom where established DPA schemes are currently operating.

Judicial consideration in these jurisdictions suggests that Australian corporations will need to not only have relevant anti-bribery policies and procedures in existence, but demonstrate that such procedures have been sufficiently implemented, communicated and 'embraced' by key stakeholders. Once implemented, such compliance procedures must be made subject to continued monitoring, training and review. The implementation of 'tokenistic' compliance measures will not constitute an 'all reasonable measures' defence and is unlikely to assist in DPA negotiations.

In the United Kingdom, only corporate bodies can participate in DPAs. In the United States, both corporations and individuals can enter into such agreements. Adding extra complexity, the Australian Constitution dictates that only Australian courts can exercise judicial powers. Courts must make an independent determination as to the appropriate course and cannot simply 'sign-off' on penalties agreed between the parties. As such, Australian DPAs would need to be characterised more in the manner of interim settlement agreements as opposed to final orders.

In my opinion, the intended deterrent effect of a DPA scheme is best achieved by permitting individuals to participate. Disallowing individual participation would disincentivise people who may have some personal liability or involvement in illicit activities from reporting corporate misconduct. This would, of course, be contrary to the intention of the newly implemented whistle-blower scheme discussed above.

There is also a risk that large companies, or the wider public, will view the introduction of a DPA scheme as a means for companies to 'buy their way out' of situations encompassing criminal wrongdoing. This, again, has the potential to undercut public confidence and the recent legislative changes intended to reinforce a greater level of corporate education in anti-corruption compliance.

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In November 2018, the 35th International Conference on the Foreign Corrupt Practices Act was held in Washington, DC. The keynote speaker at this event was Lisa Osofsky, director of the UK Serious Fraud Office. In her speech, Ms Osofsky stressed that despite competing business pressures, there is now more pressure than ever for corporations to take responsibility for the actions of their agents and ensure anti-corruption compliance. Osofsky also reinforced that favourable dispositions, such as DPAs, will not be available to corporations who do not have sufficient compliance systems in place. When considering recent changes relative to offences such as foreign bribery in Australia, it can be inferred that a similar position will be adopted by Australian law enforcement and prosecution authorities.

Further guidance on compliance and interaction with the day-to-day running of business can be taken from the joint guidelines release by the AFP and CDPP. The guideline was prepared specifically in relation to self-reporting for foreign bribery and other related offences.

The joint guidelines provide a useful insight into the factors the CDPP will consider in deciding whether to commence a prosecution against a company who self-reports wrongdoing involving bribery or corruption. Factors include the following.

- The fact that the corporation has self-reported the conduct, as well as the quality and timeliness of that self-report (with the burden being on the corporation to demonstrate timeliness).
- The extent to which the corporation is willing to, and does, cooperate with any investigation of the conduct by the AFP and any subsequent prosecution commenced by the CDPP against others in relation to the conduct.
- Whether the corporation or related bodies corporate have a history of similar misconduct, including any prior criminal, civil and regulatory enforcement action or prior warning by law enforcement or regulatory bodies.
- Whether the corporation had an appropriate governance framework in place to mitigate the risk of bribery (including specific anti-corruption policies and processes) and the extent to which there was a culture of compliance with that framework.
- Whether the alleged offending involved, or was expressly, tacitly or impliedly authorised or permitted by, any members of the board or other high managerial agents of the corporation, and if so, how many.
- Whether the corporation has taken steps to avoid a recurrence of the alleged offending; for example, by dismissing culpable individuals and improving governance processes.
- If the corporation has taken steps to redress any harm caused by the offending; for example, by compensating victims; the fact of that action.

- Whether the corporation has self-reported related offending in another jurisdiction and complied with any penalties or orders imposed by that jurisdiction and the nature of those penalties or orders.
- Whether the collateral consequences of any court-imposed penalty are likely to be disproportionate to the gravamen of the alleged offending by the corporation.

It can be assumed that comparable factors would be considered upon the introduction of a formal DPA scheme in Australia. Again, the need for companies to have an appropriate governance framework in place to mitigate the risk of bribery is vital if companies are to avoid liability. Such policies lower the risk of criminal wrongdoing taking place in the first instance, but also serve to protect the company from liability of the basis of an 'adequate procedures' defence.

The penalties for bribery and corruption offences can be severe. The offence of foreign bribery carries a fine of up to A$18 million or alternatively a proportionate penalty calculated to reflect the benefits obtained from the criminal conduct. The proportionate penalty is three times the value of the benefit obtained and can exceed A$18 million. If the value of the benefit cannot be obtained, a penalty of 10 per cent of the annual turnover of a company can also be imposed. Given the potential for such significant penalties to be enforced, it is not just ethically appropriate for companies to ensure anti-corruption compliance – it is also fiscally responsible practice.

4 Have you seen evidence of continuing or increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?

There has undoubtedly been a significant increase in recent years in law enforcement cooperation on both a national and international level. The rise of globalisation has caused a complete reinvention of the means that law enforcement agencies operate to tackle serious offences including bribery and corruption. Australian agencies are increasingly and commonly involved in cross-border investigations specifically implemented to combat crimes committed by corporations and individuals who engage in transnational commerce, including e-commerce. The strategic shift from 'as necessary' international collaborative operations towards proactive inter-agency action groups is consistent with the position set out in the 2017 Australian Foreign Policy White Paper (the White Paper). The White Paper expressly recognises the increased extraterritorial dimension of contemporary criminal practice and the fact that globalisation and technology impact not only legitimate business practice but also the means by which criminal syndicates and enterprises operate.

"Evidence is gathered internationally by law enforcement bodies for domestic use on a far greater scale than ever before."

The December 2018 launch of the National Strategy to Fight Transnational, Serious and Organised Crime is consistent with the governmental observations set out in the White Paper and aims to develop existing Australian law enforcement agencies onshore and abroad, as well as increasing overall inter-agency collaboration. This is further evidence of an increased strategic emphasis on increased cooperation by enforcement authorities.

Anecdotally, I have observed a far greater prevalence in inter-agency cooperation in recent years and a comparable shift in the approach adopted by Australian and foreign law enforcement bodies in investigating serious crime including bribery and corruption. Evidence is gathered internationally by law enforcement bodies for domestic use on a far greater scale than ever before. This is evident not just in relation to Australian investigations but also by way of observable encroachment by foreign agencies who investigate persons residing in Australia.

Australian law enforcement agencies operate within formalised and specialised international task forces. In addition to our UN and OECD obligations, Australia operates as a member of the International Foreign Bribery Task Force, the G20

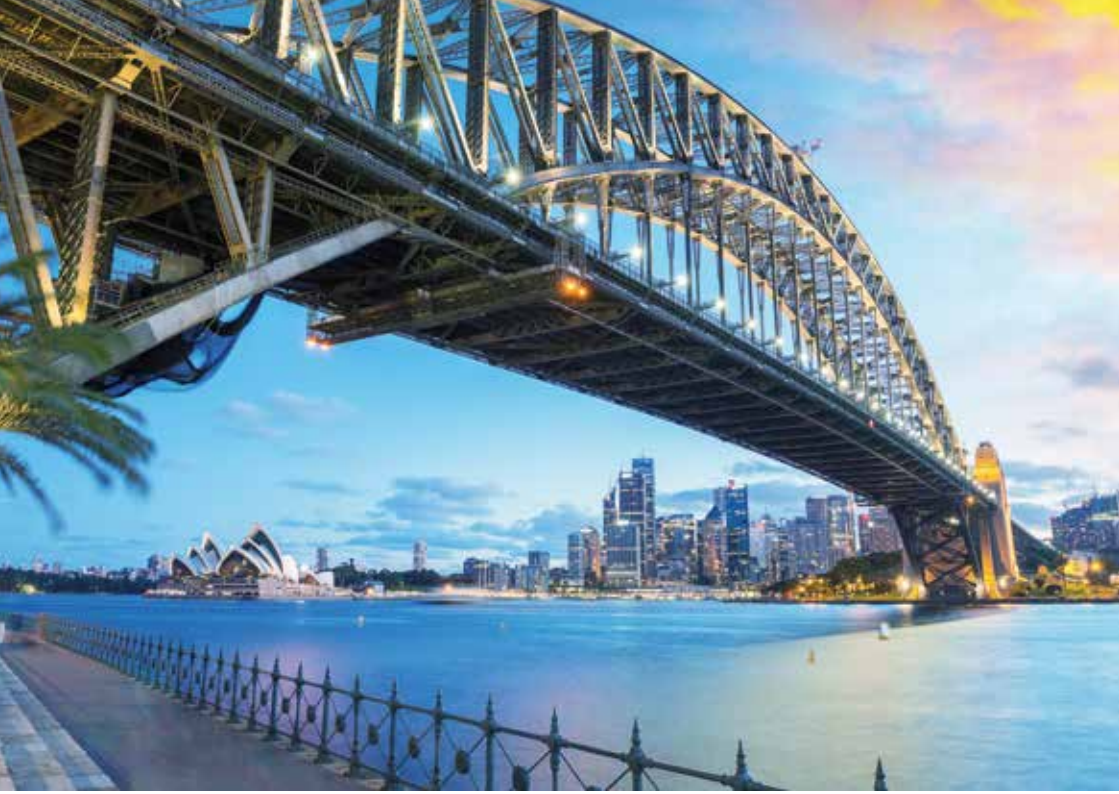
Anti-Corruption Working Group and the Asia-Pacific Economic Cooperation Anti-Corruption and Transparency Experts Taskforce.

Memorandums of understanding (MOUs) set out the framework for collaboration between Australian agencies and foreign partners. For example, an MOU is presently in place between the AFP and Federal Bureau of Investigation that focuses on collaboration between the two entities in addressing terrorism, illicit drugs, money laundering, illegal firearms trafficking, identity crime, cybercrime and transnational economic crime by way of exchange of intelligence, resources and technical and forensic capabilities. In addition to informal agreements and MOUs, Australia's system of mutual legal assistance with foreign states is governed by the Mutual Assistance in Criminal Matters Act 1987. The mutual assistance scheme provides an express diplomatic channel by which international law enforcement partner agencies may request the assistance of the Australian government and Australian law enforcement agencies.

The agreements are generally bilateral, meaning Australian authorities can request comparable assistance from foreign law enforcement counterparts. Requests for assistance include the exercise of powers of search and seizure and the taking of evidence in the form of oral evidence or written statements. All assistance provided must be in accordance with domestic laws and contracting member states have the ability to refuse requests for assistance. When perpetrators of bribery or corruption offences attempt to abscond or evade prosecution by leaving the jurisdiction, Australian law enforcement agencies collaborate with global law enforcement and intelligence partners such as Interpol to locate and detain wanted persons. Wanted persons may be liable for extradition or return to Australia upon the request of Australian law enforcement agencies. Laws that govern extradition operate at both the domestic and international level. At the international level, extradition of Australia residents is governed by the Extradition Act 1988 (Cth).

Given the serious nature and penalties associated with Commonwealth corruption and bribery offences, extradition requests represent a means by which Australian law enforcement can compel the return to the jurisdiction of fugitives wanted for prosecution.

Such investigative and enforcement tools, as well as an increase in international cooperation, have had an observable impact on the investigation and prosecution of bribery and corruption offences. The 2019 OECD follow-up report on Australia also indicated that eight foreign bribery and corruption matters are presently subject to investigation, involving 31 persons of interest. Investigations and prosecutions in this area are increasing and this trend will continue in the foreseeable future.



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5 | Have you seen any recent changes in how the enforcement authorities handle the potential culpability of individuals versus the treatment of corporate entities? How has this affected your advice to compliance professionals managing corruption risks?

Most importantly, companies need to be aware that they can be found liable for the actions of their employees and any other individual or entity deemed to be acting as an agent of the company. As with individuals, companies are prosecuted and sentenced in accordance with the provisions contained in the Crimes Act1914 (Cth).

It is also expected that Australia's existing corporate liability regime will soon be subject to change. The Australia Law Reform Commission (ALRC) is presently undertaking a comprehensive review under terms of reference that indicate broad changes should be expected, aimed to simplify and strengthen the existing statutory provisions that attribute criminal liability to companies in Australia. Two key changes to the existing statutory scheme, proposed by the ALRC, are as follows.

- Expanding the individuals whose conduct may be attributed to the corporate body from 'officers, employees and agents' to 'associates' acting on behalf of

"It is a common strategic decision for investigative bodies to prosecute companies in the first instance, prior to pursuing the individuals involved."

the corporation. An associate is proposed to be defined as 'any person who performs services for or on behalf of the body corporate'. Significantly, in addition to employees and agents, this may extend to parties such as contractors and subsidiaries.

- The introduction of a due diligence defence, of which the legal burden of proof rests on the corporation. Currently a corporation may be either vicariously or directly liable for the actions of its employees, without necessarily having recourse to a due diligence defence in certain situations. The question of whether a corporation has in fact exercised due diligence is a matter of fact that can again be established using various modes of proof.

With regard to treatment, in my experience it is a common strategic decision for investigative bodies to prosecute companies in the first instance, prior to pursuing the individuals involved. Corporate bodies often provide a higher level of assistance and cooperation when compared to investigated individuals. One explanation for this is the greater degree of financial motivation for companies to restrict reputational damage and mitigate the potential penalty on sentence. For individuals whose liberty

is ultimately at stake, assistance is often less forthcoming unless the prosecution case is demonstrably strong.

For enforcement and prosecuting authorities, a cooperating target corporation can represent a significant investigative advantage. Corporate cooperation with authorities can assist in securing further prosecutions of individuals operating within the company's corporate structure. A cooperating target company means searches can be performed by law enforcement without the need for investigative tools such as warrants and subpoenas. Companies may facilitate employee interviews or help address investigative inquiries in relation to internal practices. Further, a company may waive privilege, allowing access to documents that would otherwise be unavailable to the investigating body.

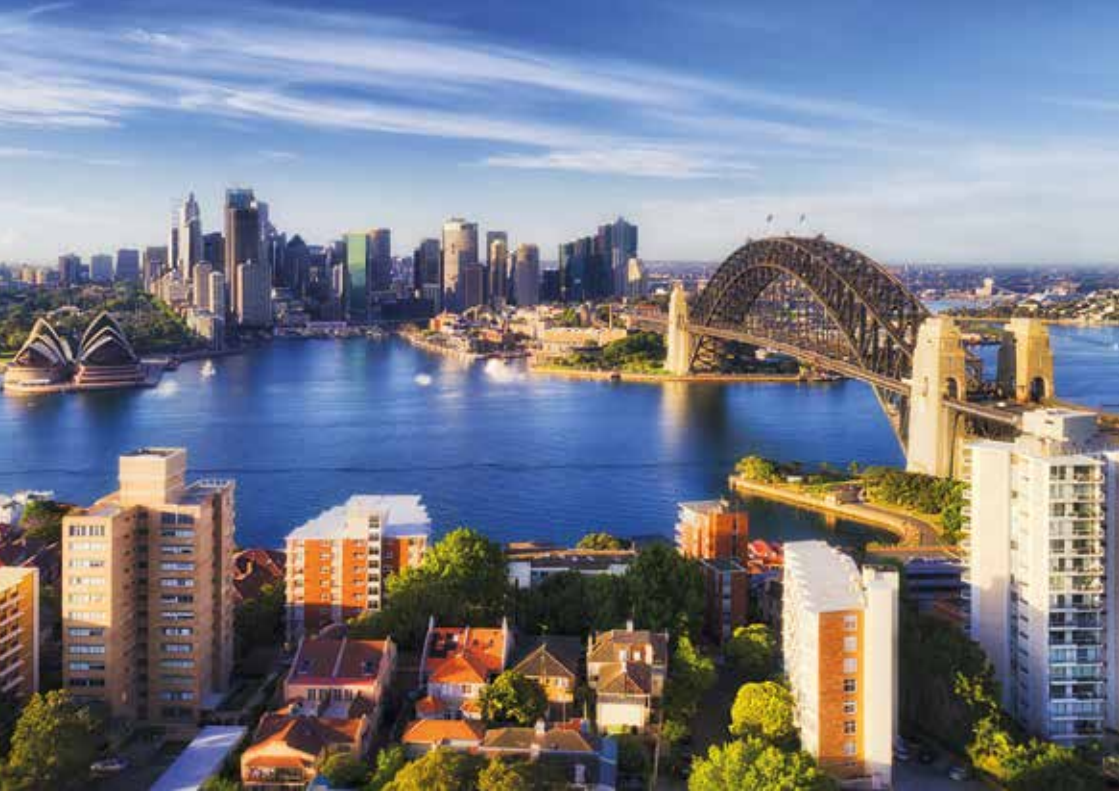
As discussed in question 6, legislative changes will place an increased investigative emphasis on examining whether companies have facilitated a 'culture of compliance' hostile to bribery or comparable corrupt practices. Corporate practice in the area of anti-corruption and bribery will be placed under greater scrutiny than ever before. As such, my advice is twofold. First, compliance professionals must ensure that comprehensive and robust anti-corruption and bribery policies and procedures are introduced, maintained and reviewed at regular intervals. Second, such internal controls should be implemented without exception in relation to not just a company's direct employees but also to contractors, intermediaries, agents and business partners operating in Australia or overseas.

6 Has there been any new guidance from enforcement authorities in your jurisdiction regarding how they assess the effectiveness of corporate anti-corruption compliance programmes?

The Attorney General's public consultation paper, relating to the proposed amendments to the foreign bribery offence provision, proposed that the relevant government minister would be required to publish guidance on the practical steps companies are expected to prevent their present its employees, agents and contractors from engaging in foreign bribery and comparable corrupt practices. As we await the introduction of this legislation, the Australian Trade and Investments Commission (Austrade) has published the Anti-Bribery & Corruption (ABC): A Guide for Australians Doing Business Overseas. This framework represents the most comprehensive governmental compliance guideline presently available. No comparable guideline has been published by Australian law enforcement authorities to date.

The 12 steps to anti-bribery and corruption compliance detailed in the guideline document are:

- commitment from the top;



- design a programme;
- oversee the programme;
- draft your ABC policy;
- develop detailed policies and processes;
- apply your programme to business partners;
- have internal controls and keep records;
- communication and training;
- incentivise ethical behaviour;
- seek guidance, detect and report;
- address violations; and
- review.

Austrade has also published a guide relating to the assessment of programme effectiveness titled Austrade Guide to the Meaning of Adequate Procedures. Drawing heavily on prior judicial consideration of the meaning of adequate compliance procedures in the United States and United Kingdom, the report identifies the following factors relevant to the determination as to whether a company has

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taken sufficient steps to prevent the commission of a bribery offence. These factors are listed as:

- a 'culture of compliance' and genuine engagement with anti-bribery obligations;
- quality of policies and training;
- dedicating a role to focus on compliance with anti-bribery obligations;
- record-keeping;
- recognition of higher risks in some jurisdictions;
- monitoring of subsidiaries; and
- independent evaluations.

7 How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?

In Australia, unauthorised access to computer systems is criminalised by both state and federal legislation, although access to employee work systems is commonly provided for in employee contracts of employment. Similarly, a company subject to a government agency inquiry can generally direct its employees to cooperate in an investigation. All officers and employees should subsequently seek independent legal advice on potential personal criminal or civil liability. While a company cannot compel an employee to cooperate in an external investigation, failure on the part of an employee to cooperate, including providing access to work-related data, may represent a breach of their employment contract in certain circumstances.

The Workplace Surveillance Act 2005 (NSW) (and uniform legislation in all other Australian states and territories) restricts the use of both overt and covert forms of surveillance of an employee by employers and other members of the public. Surveillance can include computer surveillance in instances where corruption-orientated offences are suspected. Significant penalties are imposed for breaches of the act, including imprisonment.

Conversely, the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office all have, in some form, compulsory powers that can require individuals and companies to produce documents and information. Upon the valid issuance of a notice to produce by an empowered agency, there is no privilege against self-incrimination and failure to comply with the terms of the notice may represent an offence in itself. While the AFP has no comparable powers of compulsory production, it commonly operates as part of joint-agency investigations with the above bodies.

Powers to compel production of documents are not limited or eroded by Australian data protection or privacy laws, although requesting agencies have the

obligation to protect personal and confidential information upon receipt. A number of well-established legal investigatory powers are deployed by law enforcement authorities during anti-bribery and corruption investigations. These powers can include the issuing of search warrants and the seizure of IT equipment for forensic analysis and decryption.

Section 3LA of the Crimes Act 1914 (Cth) also provides law enforcement authorities a mechanism by which a person must provide information or assistance that is reasonable and necessary to allow a constable to access data held in, or accessible from, a computer or data storage device that is on warrant premises or that has been moved to a place for examination. In the event that material produced is later relied upon in court, redactions can be sought to protect the release of certain personal information.

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The Inside Track

What are the critical abilities or experience for an adviser in the anti-corruption area in your jurisdiction?

It is necessary that advisers and legal representatives be aware of the evolving law enforcement landscape in which the individual or target company operates. Specific knowledge and experience dealing with mutual legal assistance requests, Interpol notices and compulsory examinations is increasingly necessary. An in-depth understanding of traditional investigative practices is also essential to protect the interests of individuals and corporations subject to investigation.

What issues in your jurisdiction make advising on anti-corruption compliance challenging or unique?

Many jurisdictions within the Asia-Pacific region have significant anti-corruption vulnerabilities. These vulnerabilities were evidenced in the recently published 'Note Printing and Securency International Prosecutions'. Australia is presently investing unprecedented resources and implementing significant law reform measures in an effort to combat domestic vulnerabilities to corruption as well as vulnerabilities evident in neighbouring jurisdictions. The use of unprecedented coercive powers by Australian law enforcement bodies in investigation of serious offences, and the subsequent flow-on effects relevant to a suspect's right to silence in criminal proceedings, is also an ever-expanding issue in corporate investigations.

What have been the most interesting or challenging anti-corruption matters you have handled recently?

Recently, our firm advised in proceedings where our client was investigated for significant allegations of bribery and corruption leading to a trial and conviction in a state in the Asia-Pacific region. We were tasked with assessing whether the criminal trial process that was undertaken accorded with generally accepted international standards of fair trials and human rights. In this particular case, as the country had recently suspended its democratic institutions under national emergency laws, aspects of the manner in which the investigation and prosecution of the offender were undertaken involved identifiable shortcomings and potential breaches. Such cases are extremely challenging and raise complex questions of local criminal law and international human rights law. The matter is still before the courts as an appeal.

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