Government Investigations 2022

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LEXOLOGY
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2014
Eighth edition
ISBN 978-1-83862-667-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Government Investigations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, John D Buretta of Cravath, Swaine & Moore LLP, for his assistance with this volume.

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Getting The Deal Through

London
July 2021

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This article was first published in July 2021
For further information please contact editorial@gettingthedealthrough.com

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Australia

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Nyman Gibson Miralis

ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The Australian government has empowered numerous regulatory bodies to investigate and prosecute corporate misconduct.

The Australian Federal Police

The Australian Federal Police (AFP) is the national law enforcement policing body, tasked with combating serious organised crime and enforcing Commonwealth criminal law, which includes the offences of cybercrime, tax evasion, terrorism financing, foreign bribery and money laundering.

In relation to the investigation of money laundering and terrorism financing offences, the AFP works closely with the Australian Transaction Reports and Analysis Centre (AUSTRAC), Australia's financial intelligence agency.

The Australian Security and Investments Commission

The Australian Security and Investments Commission (ASIC) regulates Australia's corporate, market and financial sectors, and assumes the enforcement and regulatory role of maintaining compliance of financial service providers including banks, brokers and credit unions.

Following the release of the final report in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 1 February 2019, the ASIC Office of Enforcement was established and is operational following a A$404 million federal government investment package. A marked shift towards increased investigation and litigation by the agency is evidenced by a 20 per cent increase in ASIC enforcement investigations and a 206 per cent increase in wealth management investigations between July 2018 and June 2019. This trend of increased enforcement by way of litigation is set to continue in the foreseeable future.

The Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory authority whose principal role is to enforce the Competition and Consumer Act 2010, including investigations into cartel conduct and related anticompetitive conduct.

A majority of the ACCC's enforcement work is conducted under the provisions of the Competition and Consumer Act 2010.

The Australian Taxation Office

The Australian Taxation Office (ATO) is a government statutory agency. It is the principal tax and revenue collection body for the government and assumes the role of combating tax-related crime.

The ATO is responsible for administering the Australian federal taxation system, superannuation legislation and other associated matters. It conducts independent and collaborative investigations and has broad investigative powers.

The Commonwealth Director of Public Prosecutions

The Commonwealth Director of Public Prosecutions (CDPP) is Australia's national prosecutorial agency and is responsible for the prosecution of alleged offences against Commonwealth law.

When the above agencies decide to bring a criminal prosecution, it is generally the CDPP that conducts the proceedings. The CDPP is not an investigative body in itself and is referred matters for prosecution from the above agencies following the investigative phase.

The Australian Transaction Reports and Analysis Centre

AUSTRAC is a government regulatory and financial intelligence agency. AUSTRAC has regulatory responsibility for anti-money laundering and counter-terrorism financing, and is tasked with identifying emerging threats and existing contraventions within the financial system. AUSTRAC receives and analyses financial data that can, in turn, be disseminated as intelligence to revenue authorities, law enforcement, national security agencies, human services, regulatory bodies, and other partner agencies in Australia and overseas.

Scope of agency authority

2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

The scope of each federal agency's enforcement authority is prescribed by the empowering statute relevant to each agency.

AFP

Under the Australian Federal Police Act 1979, the AFP provides policing services in relation to laws of the Commonwealth. The AFP also investigates and combats complex, transnational and organised crime as well as terrorism-related crime contrary to the interests of Australia.

The AFP also has powers to trace, restrain and confiscate proceeds of crime under the Proceeds of Crime Act 2002.

ASIC

Under the Australian Securities and Investments Commission Act 2001, ASIC is responsible for maintaining, facilitating and improving the performance of the financial system and the entities within that system in the interests of commercial certainty.

ASIC assumes enforcement authority for Australian companies, financial services, financial markets organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking, and credit.

ACCC

Under the Competition and Consumer Act 2010 (formally the Trade Practices Act 1974), the ACCC enforces compliance relating to laws covering product safety, unfair market practices, price monitoring, industry codes, industry regulation, and mergers and acquisitions.

Stated broadly, the ambit of the ACCC's authority is limited to matters relating to consumer protection, fair trading and competition.

ATO

Under the Taxation Administration Act 1953, the ATO investigates alleged tax offences and enforces tax and superannuation law.

This act prescribes the ATO broad powers of investigation, including powers for the issue of notices requiring the recipient to give information, attend to give evidence, produce documents and others.

AUSTRAC

AUSTRAC's regulatory and investigative powers are set out under the Anti-Money Laundering Counter-Terrorism Financing Act 2006 (Cth) and the Financial Transactions Reports Act 1988 (Cth), and prescribe AUSTRAC's authority in investigating anti-money laundering and counter-terrorist financing.

AUSTRAC supports other government agencies including the AFP and the CDPP in the investigation of financial crime offences. AUSTRAC has a number of enforcement powers including issuing infringement notices, issuing remedial directions and seeking injunctions or civil penalty orders in the Federal Court.

Simultaneous investigations

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Australian law enforcement, investigative, intelligence and prosecution agencies collaborate under formal partnerships and specialised inter-agency partnerships as well as on an informal basis. To this end, multiple government agencies can simultaneously investigate a single business target.

The rise of globalisation and transnational organised crime has also increased the involvement of government agencies in cross-border investigations with international partners.

In 2017, the Foreign Policy White Paper and the launch of the National Strategy to Fight Transnational, Serious and Organised Crime signalled the current stance of Australian law enforcement and investigative bodies in relation to international engagement. It is expressly acknowledged that Australia's ability to effectively detect and investigate serious corporate crime rests on increased collaboration between domestic agencies, as well as effective collaboration with international government partners in the Asia-Pacific and worldwide. Examples include the Serious Financial Crime Taskforce, Interpol, the Five Eyes Intelligence Alliance, the Vestigo Task Force, the Financial Action Task Force and the Asia/Pacific Group on Money Laundering, the Egmont Group of Financial Intelligence Units, the Organisation for Economic Co-operation and Development, and the Joint International Taskforce on Shared Intelligence and Collaboration.

A memorandum of understanding (MOU) is a bilateral agreement that formalises the means by which inter-agency collaboration is conducted and information sharing takes place. MOUs are currently in place between Australian government entities as well as with foreign government agencies. Such agreements prescribe and consolidate the methods by which agencies exchange information, resources, and technical and forensic capabilities. Multilateral MOUs also connect international regulators working in comparable areas of investigation with ASIC's involvement in the International Organization of Securities Commissions' Multilateral Memorandum of Understanding offering a contemporary example.

While inter-agency assistance can also be provided on an informal basis outside the ambit of an MOU, the High Court of Australia has recently held that bodies legislated to use coercive powers such as compulsory examinations cannot simply act as a 'facility' for the use of such powers at the request of a separate law enforcement or investigative body.

Civil fora

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

Civil proceedings instigated by the above agencies are generally determined within the jurisdiction of the Federal Court of Australia. For example, the ACCC brings proceedings for consumer-related matters to the Regulator and Consumer Protection Federal Court practice area.

The AFP also has statutory powers in relation to civil proceedings brought under the Proceeds of Crime Act 2002. Actions under the proceeds of crime regime are brought in state and territory supreme courts.

Criminal proceedings are initiated and determined in both state and federal courts of both superior and summary jurisdiction.

Corporate criminal liability

5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

In Australia, corporate liability is derived from statute and common law. The standard of proof in criminal proceedings is that the accused be proven guilty 'beyond a reasonable doubt'.

Statutory corporate liability is expressly defined under Chapter 2, Part 2.5, Division 12 of the Criminal Code 1995 (Cth) (the Criminal Code). This definition applies to all corporate offence provisions under the statute.

Unless otherwise specified, the Criminal Code applies to bodies corporate in the same way it applies to individuals. Corporations can be found guilty of offences under the Criminal Code, including offences punishable by imprisonment.

Offences under the Criminal Code have physical elements (action or conduct). With the exemption of strict liability offences, a fault element (intention, knowledge, recklessness or negligence) must also be established. All physical elements and fault elements must be established to the criminal standard in the same manner as in proceedings brought against a natural person.

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.

Corporate liability can also be established under common law. For offences not contained within statute or in instances where corporate liability is not defined, a corporation is still liable for the conduct and guilty mind of a person or persons who are the directing will and mind of the corporation. In most cases, this person will be acting in a senior position such as the managing director or a member of the board of directors, or a person who has the authority to act on the corporation's behalf.

Criminal liability can also be extended 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.

Authorisation or permissions may be established by various modes of proof, including employee testimony.

Other legislation containing corporate offence provisions, including the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth), contain comparable statutory frameworks for establishing corporate liability.

Australia's corporate and criminal laws also have extraterritorial application in certain circumstances. Typically, the laws require that the act, omission or person have some connection with Australia.

The regulation of corporations under the Corporations Act 2001 (Cth) extends to foreign corporations that are carrying on business in Australia. Under the Criminal Code, a person has not committed an offence unless the conduct of the alleged offence or the result of the conduct occurred wholly or partly in Australia. Geographical jurisdiction is also extended for offences such as foreign bribery when the offending conduct occurs outside the Australian jurisdiction by an Australian citizen or a company incorporated in Australia.

On 10 April 2019, the Australian government commissioned the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of the corporate criminal responsibility regime. On 31 August 2020, the Attorney-General tabled in Parliament the ALRC's report into Australia's corporate criminal responsibility regime that made 20 recommendations following comprehensive consideration of federal criminal laws and their application to companies. One recommendation sought to introduce criminal legislation to address patterns of behaviour that result in multiple contraventions of civil penalty provisions to discourage the culture of treating civil penalties as the 'cost of doing business'. The recommendations have the potential to prompt radical legislative transformation of Australia's existing criminal liability regime for corporate bodies.

Bringing charges

6 | Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

The CDPP is the authority empowered to prosecute alleged contraventions of Commonwealth law, including corporate crime.

The Prosecution Policy of the Commonwealth (the Guidelines) is a set of guiding principles used by the CDPP in making decisions in relation to various stages of the prosecution process. The Guidelines are based on the principles of fairness, openness, consistency, accountability and efficiency.

The Guidelines prescribe that, prior to commencing a prosecution:

- there must be prima facie evidence of the elements of the offence and a reasonable prospect of obtaining a conviction; and
- having had consideration to all facts and circumstances, the prosecution is in the public interest.

Public interest factors of particular relevance to corporate crime include:

- whether the offence is serious or trivial;
- special vulnerability of the alleged victim or victims;
- the corporation's prior record, including the record of criminal behaviour or non-compliance;
- the passage of time since the alleged offence;
- the prevalence of the offence and the need for general deterrence;
- the need to give effect to regulatory or punitive imperatives; and
- the likely outcome upon a guilty verdict.

Under the deferred prosecution agreement reforms introduced in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, the CDPP would also have the option to invite a corporation that is alleged to have engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions, increasing the range of tools available for investigators and prosecutors to deal with serious corporate crime. This bill is currently before the senate.

INITIATION OF AN INVESTIGATION

Investigation requirements

7 | What requirements must be met before a government entity can commence a civil or criminal investigation?

The decision to investigate is highly discretionary and based on a variety of separate factors.

Notwithstanding this, guidelines such as the Australian Government Investigations Standards have been developed for all government agencies to consolidate procedure and ensure quality investigative practices. The best-practice investigative planning process set out under these guidelines includes formal consideration of the investigation's objectives, ambit of the conduct investigated, scope and possible outcomes.

The primary consideration is whether a reasonable suspicion exists that a contravention of the law has taken place.

Triggering events

8 | What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

Potential breaches of the law and regulations applicable to corporate entities can be identified from a variety of sources, including, but not restricted to:

- members of the public and media reporting;
- agency intelligence activities;
- Australian government staff;
- complaints to police or as a result of police investigations;
- internal or external audit or review processes;
- internal fraud control mechanisms;
- government or ministerial referrals as well as state or Commonwealth commissions;
- whistle-blowers; and
- international governments or agency tip-offs.

Whistle-blowers

9 | What protections are whistle-blowers entitled to?

The remedies available to whistle-blowers who suffer detriment because of a qualifying disclosure in the Corporations Act 2001 (Cth) were expanded under the Treasury Laws Amendment (Whistleblowers) Bill 2017 (the Bill).

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

Under the revised legislation:

- whistle-blowers are not required to identify themselves when making a disclosure;
- persons who make a qualifying disclosure are protected from any civil, criminal or administrative liability and no contractual or other remedy may be exercised against the disclosing person on the basis of the disclosure;

- persons who make a qualifying disclosure may seek a court order for reinstatement where a person has been dismissed from their employment because he, she or another person made a protected disclosure; and
- if the disclosure qualifies for protection, the information is not admissible in evidence against the person in criminal proceedings or in proceedings for the imposition of a penalty, other than proceedings in respect of the falsity of the information.

The Bill also creates a civil penalty provision to address the victimisation of whistle-blowers and facilitate the criminal prosecution of victimisers.

Investigation publicity

10 | At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

Investigative actions such as the execution of search warrants can often play out in a public forum in advance of any establishment of wrongdoing. This may negatively affect a corporation's reputation or standing.

Although government law enforcement and investigative agencies generally do not make public comment on an ongoing investigation or prosecution, there are very few available remedies for corporations seeking anonymity in relation to the criminal or civil investigative process.

Upon reaching investigative milestones, such as arrest or prosecution, a government entity may make a public comment or statement if it is deemed in the public interest that such activities be made transparent.

Upon proceedings being initiated, an application to the court for a suppression order will rarely be granted on the grounds of potential reputational damage alone.

EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

Covert phase

11 | Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

Government agencies commonly engage in covert and undercover investigations into serious corporate crime and employ controlled or covert operations.

There is no temporal factor or limiting term on a criminal investigation, and the duration of covert investigations will depend on the nature and complexity of the matter.

12 | What investigative techniques are used during the covert phase?

Government agencies commonly use covert investigative techniques, such as:

- telephone and telecommunication interception;
- surveillance;
- deployment of undercover operatives, including civilians; and
- asset tracing.

These techniques generally supplement traditional investigative practices.

Investigation notification

13 | After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

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 internal investigative and reporting practices adopted by some of Australia's largest corporate entities.

Upon receiving notice of a government investigation into the conduct of a corporation or its employees, the advantages of an effective internal review include obtaining information that may limit legal and reputational damage, informing choices regarding future cooperation with investigative agencies and providing a means of demonstrating compliance with corporate law, regulation or policy. Conversely, delay and inactivity may exacerbate reputational and legal liability.

Commonly, internal investigations are undertaken by a lawyer or team of in-house lawyers. Increasingly, because of the scope or complexity of an investigation, external law firms will be briefed alongside specialist investigators, auditors and accountants.

Evidence and materials

14 | Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

In relation to litigation or a regulatory investigation, various duties and obligations rest on corporations involved, including an obligation to:

- preserve data or evidence that is relevant to both current or reasonably anticipated proceedings; and
- provide complete and defensible discovery once litigation is commenced or upon compulsion by an empowered body.

A party found guilty of destroying relevant documents can face criminal prosecution for perverting the course of justice.

Legal practitioners, including in-house lawyers, also have ethical obligations not to advise a client to destroy a document in circumstances where it is likely that legal proceedings will be commenced in relation to which the document may be required.

Corporations should seek legal advice on the retention of potential evidence, including hard-copy evidence and soft-copy data, upon receiving notice of agency investigation or in the case of allegations of wrongdoing that may reasonably be anticipated to represent an offence.

Providing evidence

15 | During the course of an investigation, what materials - for example, documents, records, recorded communications - can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

The Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO) all have, in some form, compulsory powers that can require individuals and companies to produce documents and information. Upon the valid issue 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 Australian Federal Police has no comparable powers of compulsory production, it commonly operates as part of joint-agency investigations with the above bodies.

Powers to compel the 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.

In the event material produced is later relied upon in court, redactions can be sought to protect the release of certain personal and intelligence information.

16 | On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

The legal grounds by which a corporation subject to investigation may resist a request for production of material is entirely dependent on the form of the demand. Investigative mechanisms such as search warrants or subpoenas can be challenged on the basis of unlawfulness or inadmissibility. Evidence obtained covertly, such as by way of telephone interception, can also be scrutinised and challenged on comparable grounds.

Unless an agency is exercising compulsory or coercive powers, client legal or legal professional privilege can be claimed over confidential communications or documents brought into existence for the dominant purpose of either obtaining legal advice or in anticipation of litigation.

After some conflicting authority, the superior courts in Australia have taken the view that legal professional privilege will be attached to a document or communication if an in-house lawyer is acting in his or her professional capacity in relation to a professional matter and the confidential communications came into existence for the dominant purpose of legal advice.

Notably, the involvement of in-house lawyers, including conduct relating to an internal investigation, will not automatically be enough to confer privilege on communication. The privilege can only be established following careful consideration of the document and its purpose, including in relation to notes of interviews conducted for the investigation. The primary question is whether or not the particular communication was for the dominant purpose of providing legal advice or provision of legal services in connection with existing or anticipated litigation.

Although not binding in Australia, decisions such as the English High Court decision of *The RBS Rights Issue Litigation, Re* [2016] EWHC 3161 (Ch) illustrate that communications, such as notes taken by in-house lawyers conducting internal investigations into wrongdoing, are not necessarily protected by legal professional privilege.

In *Glencore International AG & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors* [2019], the High Court of Australia considered the issue of whether the law of legal professional privilege operates merely defensively as a means of resisting production or if such privilege, once established, also provides a positive right entitling the holder to a remedy such as an injunction, restraining the use of privileged material by investigating bodies.

In a unanimous judgment, the High Court dismissed the proceedings brought by the plaintiff and in doing so upheld that legal professional privilege is not a legal right that, in itself, can found a cause of action. Significantly, it was settled that the privilege only represents an immunity to resist powers that would otherwise compel production of the communications subject to the privilege.

In light of such developments, corporations should be diligent in identifying privileged communications to enable a proactive claim to be made upon the execution of search warrants on company premises and exercise increased caution prior to any act of disclosure.

Employee testimony

17 | May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

ASIC, the ACCC and the ATO all have, in some form, compulsory powers that can compel individuals, including company employees, to attend compulsory examinations where there is no privilege against self-incrimination.

In such circumstances, there are limitations on the ways in which the truthful responses provided by a compelled person can later be used in subsequent criminal or civil proceedings against the employee.

All government investigative and law enforcement bodies may also request that an employee voluntarily participate in an interview with a view to progressing an investigation into corporate wrongdoing.

Upon referral to the Commonwealth Director of Public Prosecutions for a criminal prosecution, subpoenas to attend court and give evidence may also be issued to employees of target companies or related corporate entities.

18 | Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

Upon receiving contact from government investigative agencies relating to corporate crime, it is advisable that employees immediately seek independent legal advice to assist in identifying potential conflicts of interest with the employing corporation.

Employees can be represented by the same counsel as the target business in circumstances where no conflict arises. Conflict can arise on a change in circumstances or available information at any stage during an investigation or subsequent legal proceedings.

Sharing information

19 | Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

There is no common law or statutory prohibition against target businesses sharing information on an informal basis with the view to build a defence in anticipation of criminal or regulatory proceedings. Exceptions to this general proposition include:

- provision of information contrary to requirements not to disclose evidence provided during a compulsory examination or hearing empowered by statute;
- disclosure in breach of client confidentiality, data sharing or privacy obligations; and
- disclosure contrary to an express court order.

Strategic reasons to avoid dissemination of information to separate target businesses include:

- the risk of perceived waiver of privilege;
- the risk of efforts to conceal, hinder or prevent findings of wrongdoing may later be used to establish an aggravating feature of offending by a prosecuting authority; and
- the risk that disclosed information may be used by separate target businesses, against the disclosing business, in seeking a favourable settlement outcome with an investigating or prosecuting agency.

Investor notification

20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

ASX listing rules require listed entities to publicly disclose information concerning the company that a reasonable person would expect to have a material effect on the price or value of the entity's securities.

Disclosure is not required if the information is a matter of supposition or is insufficiently definite to warrant disclosure.

There are criminal and civil penalties available in instances where companies are shown to have failed to notify investors of relevant information in circumstances where disclosure is required.

In the absence of internal knowledge of wrongdoing, disclosure is unlikely to be required at the outset of proceedings as the results of an investigation have not been concluded. The anticipated outcome of a preliminary investigation is likely to be deemed insufficiently definite. If, however, settlement negotiations with an investigating agency are advanced and wrongdoing is accepted, it would be reasonable to assume that this information would have a material effect on a company's stock value or security price.

The requirement for a target business to disclose relevant information to the public increases as the probability of criminal or civil penalties increases, especially in circumstances involving significant criminal or pecuniary penalties. The timing at which such obligations arise will vary in light of the particular circumstances of the investigation.

COOPERATION

Notification before investigation

21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

Potential or suspected wrongdoing can be reported at any time directly to the government entity to which the conduct applies. For example, evidence of bribery of foreign officials would be reported to the Australian Federal Police (AFP), illegal cartel conduct would be referred to the Australian Competition and Consumer Commission (ACCC) as this conduct falls within its ambit of operations and voluntary disclosures may be made to the Australian Taxation Office (ATO) prior to formal audits or penalties being issued.

Following disclosure, the type of investigation and the wrongdoing investigated will dictate the levels and type of cooperation requested by an investigating government agency. Cooperation is commonly provided in the form of written statements, recorded interviews, document disclosure and voluntary audits.

Voluntary disclosure programmes

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

There are formal voluntary disclosure programmes that may qualify a disclosing corporate entity for civil or criminal immunity. The Australian Transaction Reports and Analysis Centre, the ACCC and the Australian Security and Investments Commission (ASIC) all have specific mechanisms for self-reporting, whether mandatory or voluntary.

Specific formal policies include the ACCC's immunity and cooperation policy for cartel conduct. The cartel conduct immunity regime was created in recognition of the difficulty involved in detecting cartel conduct, a practice that often involves significant deception and secrecy.

The AFP and the Commonwealth Director of Public Prosecutions have released a joint set of guidelines clarifying the principles and process that apply to corporations that self-report conduct involving a suspected breach of foreign bribery offence provisions.

Voluntary self-reporting is also actively encouraged by investigative bodies such as ASIC and the ATO, and is acknowledged as a key component of regulatory oversight. Depending on the investigative value of the disclosure made, the following action may be taken:

- immunity of civil indemnity;
- letters of comfort;
- enforceable undertaking in place of further sanction;
- charge negotiation outcomes; and
- settlement in civil matters.

For matters that do proceed to prosecution and conviction, cooperation is recognised as a mitigating factor on sentencing. There are also reputational benefits for proactive and transported disclosures of corporate wrongdoing.

Timing of cooperation

23 Can a target business commence cooperation at any stage of the investigation?

Yes. Timing may be relevant to an assessment of the level of cooperation provided. It is likely that cooperation at an early stage will be welcomed and may positively impact any future settlement negotiations.

Cooperation requirements

24 What is a target business generally required to do to fulfil its obligation to cooperate?

The level of cooperation required or requested will be determined on a case-by-case basis. Cooperation requirements will generally be dictated by the investigating or prosecuting agency. Common forms of cooperation include:

- the provision of sworn statements and agreements to give evidence in proceedings;
- transparency in the form of document disclosure;
- the implementation of improved compliance regimes;
- public statements and admissions of wrongdoing;
- payments of compensation;
- enacting internal investigations; and
- the suspension or termination of employees involved in wrongdoing.

Employee requirements

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

A target business can generally direct its employees to cooperate in an investigation, although all officers and employees should subsequently seek independent legal advice on potential personal criminal or civil liability. Although a company cannot compel an employee to cooperate in an external investigation, failure on the part of an employee to cooperate may represent a breach of their employment contract in certain circumstances.

Prior to any findings of guilt, the provision of legal representation and payment of legal fees to employees is not prohibited. Use of in-house counsel or payment of legal fees may, however, raise separate issues as to the impartiality of the legal advice provided.

A company's efforts in facilitating legal representation of its employees is not a relevant consideration on sentencing, although there is a risk that such steps may be viewed as obstructive to investigating authorities prior to charges being laid or a prosecution commencing.

Why cooperate?

26 | What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

Relevant considerations for an employee of a business subject to a government investigation include:

- individual liability to criminal or civil sanction;
- the availability of whistle-blower protections and benefits of cooperation otherwise; and
- the prior knowledge of wrongdoing held by the employee as well as the employee's seniority within the corporation.

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 his or her powers and discharge his or her 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.

Given the potential for individuals to be prosecuted under the Corporations Act 2001 (Cth) for serious contraventions, it is exceedingly important that employees obtain independent legal advice prior to any involvement in an investigation undertaken by a government agency.

An employment contract may expressly set out the obligations of an employee in relation to internal investigations. Failure to cooperate with an external government investigation is not a matter within the general ambit of a contract of employment and non-cooperation is not a ground for dismissal.

Privileged communications

27 | How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

In assessing the ability of a corporation to assert legal professional privilege over a particular document, the confidentiality of the communication is a relevant factor. A claim of privilege may be unsuccessful in the event the communication becomes a matter of public knowledge.

Targeted legal advice as to the potential impact of disclosure should always be sought prior to the provision of material to a government entity or any other external party.

RESOLUTION

Resolution mechanisms

28 | What mechanisms are available to resolve a government investigation?

An investigation may be resolved by:

- prosecution or litigation involving criminal or civil sanctions;
- the issue of a fine or pecuniary penalty;
- an enforceable undertaking; and
- a separate negotiated resolution.

A matter that has been adjudicated and determined to finality by an Australian court will generally cease investigation, subject to any avenues of appeal. For non-litigated matters, investigative and law enforcement bodies have a wide discretion to resume, initiate or discontinue investigations into matters of corporate wrongdoing.

Admission of wrongdoing

29 | Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

A public admission of wrongdoing will often form part of an agreed enforceable undertaking. A separate negotiated resolution, however, may not require admissions to be made.

The circumstances under which an admission can later be used in civil proceedings will vary depending on the facts of a particular matter and the conduct subject to the admission. As a general rule, evidence of an admission is permitted in proceedings subject to statutory discretions to exclude if the prejudicial effect would outweigh the probative value.

Civil penalties

30 | What civil penalties can be imposed on businesses?

Statutory fines have defined maximum limits, either expressed by a maximum number of penalty units that can be imposed or by a monetary figure. The primary civil penalty imposed on a corporate body is a fine.

In response to the review of the Australian Security and Investments Commission's (ASIC) Enforcement Review Taskforce, the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 was introduced to and was passed by both Houses of Parliament on 18 February 2019.

Under the amendments to the Corporations Act 2001 (Cth) and the Australian Securities and Investment Commission Act 2001 (Cth), the maximum civil penalty amounts for individuals are either 5,000 penalty units (amounting to A$1.05 million), or three times the financial benefits obtained or losses avoided, whichever is the greater.

For corporations, the increase to civil penalty amounts is either 50,000 penalty units (amounting to A$10.5 million), 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)), whichever is the greater.

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 not generally utilised for more serious regulatory contraventions.

Criminal penalties

31 | What criminal penalties can be imposed on businesses?

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

As with civil penalties, specific criminal offences have defined maximum penalties, either expressed by a maximum number of penalty units that can be imposed or by a monetary figure.

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, corporate criminal offences can also lead to confiscation proceedings being brought by the Australian Federal Police pursuant to the Proceeds of Crime Act 2002.

Sentencing regime

32 | What is the applicable sentencing regime for businesses?

The maximum penalty for an offence of corporate wrongdoing will be specified under a statutory offence provision and will set a 'guidepost' to indicate the objective seriousness of the offence.

While sentencing is a matter of judicial consideration, relevant matters for consideration on sentence are set out as a non-exhaustive list of factors under section 16A of the Crimes Act 1914 (Cth) for federal offences. Comparable provisions exist under state and territory legislation.

Future participation

33 | What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

Beyond reputational damage and its resulting business effects, admissions of wrongdoing do not formally preclude a company from business operation.

However, ASIC can impose conditions on a company's financial services licence and also has the power to revoke licences entirely.

Similarly, individuals can be disqualified from directing corporations following findings of corporate misconduct or a breach of directors' duties.

UPDATE AND TRENDS

Key developments of the past year

34 | Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

It is anticipated that the next 12 months will be a period of increased legislative and policy reform in the area of corporate crime. Legislative reform has natural knock-on effects on the conduct subject to government investigation and the investigative techniques used to scrutinise this conduct.

Cryptocurrency

Foreseeable and emerging trends include enforcement and regulatory supervision of anti-money laundering and counter-terrorism financing laws that have recently been implemented by the Australian Transaction Reports and Analysis Centre (AUSTRAC). These laws regulate digital currency exchange providers operating in Australia. Corporations and businesses that are operating in Australia must register with AUSTRAC and meet the Australian government's anti-money laundering and counter-terrorism 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 AUSTRAC any transactions or activities that are suspicious or involve large amounts of cash (over A$10,000). Regulatory investigations into digital currency exchange compliance with Australia's anti-money laundering legislation will be given increased regulatory emphasis. In May 2020, charges were laid against an individual in New South Wales for trading in digital currency, without obtaining registration under the Act, marking the first prosecution of this kind in Australia.

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The Australian Taxation Office (ATO) will continue to shape its regulatory response to cryptocurrency, including partaking in a data-matching program with designated cryptocurrency service providers to check data against ATO records and identify non-compliance with registration, reporting and lodgement obligations.

Civil penalties

Further reforms can be expected to certain penalty provisions of the Criminal Code to bring the legislation in line with the Senate Economics References Committee March 2017 report.

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 ASIC to have disgorgement powers. Following the commencement of the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018, a number of these proposed changes are presently in force.

Banking, superannuation and financial services

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was established on 14 December 2017. The Final Report of The Commissioner, the Honourable Kenneth Hayne AC QC, was released on 1 February 2019. The report includes 76 recommendations relating to the conduct of banks, mortgage brokers, financial advisers and superannuation trustees as well as Australia's financial services regulators.

Corporate criminal responsibility

Following the submission of the Australian Law Reform Commission's (ALRC) report on corporate criminal responsibility, the Attorney-General indicated that the Australian government would now carefully consider the recommendations with a view to seeking opportunities for future law reform, though any statutory reform may take years to be enacted. While there is no mandate on the government to implement or respond to the ALRC's recommendations, as the report is the first comprehensive review of corporate criminal responsibly since the Criminal Code Act 1995 (Cth) was enacted, legislative reform is expected in the future.

Coronavirus

35 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

All Australian states and territories have introduced measures to reduce the spread of covid-19, including restrictions on non-essential travel and public gatherings. In New South Wales (NSW), the COVID-19 Legislation Amendment (Emergency Measures) Bill 2020 was introduced and passed in May 2020. This bill amended over 40 state acts and regulations to address public challenges presented by the pandemic. Public health directives were also made under the broad emergency powers of the Public Health Act 2010 (NSW), criminalising non-essential travel and public gatherings. Essential travel relating to employment was a notable exception to such restrictions.

There has been a significant delay in all levels of the Australian court system, with a suspension of jury trials and in-person hearings. There have been further changes in court procedure to allow remote appearances by parties. Provisions have also been made for the remote witnessing of sworn documents, including affidavits. Video-link technology has become an indispensable tool to facilitate ongoing court appearances and legal representation but also more broadly as a means to maintain essential day-to-day business activities.

In addition to such restrictions, the federal government has also announced and implemented a series of economic stimulus packages in an effort to combat the financial impact of the pandemic and reduce the number of job losses across the country.

As restrictions and covid-19 related criminal sanctions began to ease in the latter period of 2020, workplaces were advised to remain cognisant of health risks and adopt diligent workplace practices, in line with existing government recommendations.

* *The authors would like to thank Lara Khider, solicitor, for her invaluable contribution to the writing of this chapter. Lara assists the partners on international criminal law cases and cross-border investigations.*

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ISBN 978-1-83862-667-9