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Asia-Pacific Overview

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Introduction

The Asia-Pacific (APAC) region is made up of a number of jurisdictions within Asia and Oceania. These include Australia, New Zealand, Vietnam, Thailand, Malaysia, Singapore, Indonesia, India and Pakistan, the People's Republic of China (PRC), Hong Kong and Japan. A number of Pacific Island nations are also included within the region.

Across the APAC region, there is a growing focus on implementing strengthened anti-corruption policies, with increased attention on appropriate legislation and enforcement measures. While this focus is necessary, an unavoidable side effect is that the anti-corruption landscape is becoming much more complex. This creates an enormous challenge for companies that must be aware of the risks imposed by extra-territorial legislation as well as the demanding local regulatory regimes that may conflict with cross-jurisdictional laws. Additionally, they must be conscious of the onerous restrictions surrounding the movement of data and the diversity in approaches to information sharing across jurisdictions.

Governments have recognised the need to respond to borderless financial crimes and, as such, have become increasingly involved in cross-border investigations and the encouragement of ethical corporate practices. They have also begun to address the challenges in detecting corporate crime by implementing self-reporting schemes; all while constantly evolving to respond to rapid technological advancement.

This chapter will provide a brief overview of bribery and corruption in the APAC region, addressing the:

- increasingly robust regulatory and enforcement measures, including the introduction of vicarious liability offences for corporations, reporting obligations for financial institutions, and the development of structural integrity through "E-government";
- challenges of cross-jurisdictional coordination, particularly information sharing;
- rise of the ethical business, including self-reporting schemes;
- era of the whistleblower; and
- impact of grass-roots activism.

Strengthened anti-corruption and bribery regulatory and enforcement measures

Vicarious liability

APAC jurisdictions are implementing more robust measures to hold legal persons liable for criminal conduct by individuals. One reason behind this is that the economic interest behind bribery and corruption often lies with the legal person, meaning criminal prosecution solely against the natural person will not suffice. Companies are, however, encouraged to implement effective procedures and practices to avoid liability.

The Australian government has proposed reforms to Australian foreign bribery laws, including the introduction of an offence for corporations that fail to prevent foreign bribery.[1] Companies will be strictly liable for bribery committed by employees, contractors and representatives, both foreign and domestic, unless the company can demonstrate that adequate procedures to prevent such conduct were in place. The proposed maximum penalty is the greater of the following:

1. AUD 22.2 million;
2. if the benefit value can be determined, three times the benefit; or
3. if the benefit cannot be determined, 10% of the annual turnover of the body corporate for the 12 months prior to the offence.[2]

Due to the pandemic currently facing the globe, the Australian Parliament has not yet determined the fate of the bill.

In Singapore, the case law provides that companies can be liable where a crime is committed by an individual who is "the embodiment of the company" (primary liability) or who acts "within the scope of a function of management properly delegated" (vicarious liability).[3] Although possible, such prosecutions are rare due to the complexities involved in proving the *mens rea* of the company. Further, vicarious liability is currently not legislated in Singapore.[4]

While prosecution may be rare, it is still a matter of prosecutorial discretion. In 2015, the then Attorney-General of Singapore, VK Rajah, stated in an opinion-editorial that "[s]ignificant attention is also given to the culpability of corporations […] especially if the offending conduct is institutionalised and developed into an established practice in an entity over time".[5]

In the PRC, the Amended Anti-Unfair Competition Law (AUCL) 2018 similarly provides at Article 7 that "bribery committed by a staff member of a business operator shall be deemed the conduct of the business operator, unless the business operator has evidence to prove that such acts of the staff member are unrelated to seeking business opportunities or competitive advantage for the business operator". The onus shifts to the operator to persuade prosecutors that they should not be held vicariously liable for employees' conduct. It is suggested that this signals a "paradigm shift" in Chinese corporate crime jurisprudence, and as a result, high-profile companies are outing their own executives with claims of bribery, precipitating criminal investigations.[6]

By shifting the onus onto the company, the regime creates an incentive for companies to develop robust anti-bribery and corruption policies and procedures. These developments are in line with US and UK laws, and further implement the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention.[7]

In 2016, the International Organisation for Standardisation (ISO) published an anti-bribery management system (ISO 37001) providing a global "good practice" framework to assist companies in implementing, maintaining and improving compliance programmes. Although helpful, following the ISO management system is not an automatic legal defence to bribery charges.

Apart from significant monetary penalties, in some jurisdictions, legal persons also face other punishments, including disqualification from public tender processes on findings of bribery and corruption.

Role of financial institutions

Given the nature of bribery and corruption, financial institutions such as banks and companies dealing with securities, insurance and financial asset management are often

abused as intermediaries in corruption schemes.[8] Due to the prevalence of such institutions, APAC jurisdictions have recognised the importance of appropriate regulation, supervision and associated reporting obligations within such financial institutions as a step towards preventing high-level corruption that would ordinarily go undetected.

With a view to conforming to an international standard, the Asia/Pacific Group (APG) on Money Laundering, established by the Financial Action Task Force (FATF) Asia Secretariat, works to ensure the adoption, implementation and enforcement of internationally accepted Anti-Money Laundering and Counter Terrorism Finance (AML/CTF) financing standards as set out in the FATF Forty Recommendations and the FATF Eight Special Recommendations.[9] In addition, most APAC jurisdictions have adhered to the International Organisation of Securities Commissions (IOSCO) standards which outline 38 principles of securities regulation based on the objectives of: protecting investors; ensuring a fair, efficient and transparent market; and reducing systemic risk.[10] As a result, across an increasing number of APAC jurisdictions, financial institutions are required to report suspicious or threshold transactions.

As of 1 July 2017, financial institutions in the PRC including banks, securities and insurance companies, along with other entities determined and announced by the People's Bank of China, are required to report large-sum and suspicious transactions to the China Anti-Money Laundering Monitoring and Analysis Centre (CAMLMAC). The large-sum transaction threshold is a cash transaction reaching RMB 50,000 or, if the client is a natural person, a cross-border transfer between bank accounts reaching RMB 200,000.

Other APAC jurisdictions, such as Australia, also enforce the reporting of threshold transactions. AUSTRAC, the Australian financial intelligence body, issued an AUD 252,000 infringement notice to a money transfer business for failing to report international fund transfers between 2018 and 2019. AUSTRAC Chief Executive Officer, Nicole Rose PSM, reiterated that the reporting of money flowing in and out of Australia is critical to detecting criminal activity.[11] Additionally, in Australia, "cash dealers", including solicitors, have distinct obligations to report threshold cash transactions reaching AUD 10,000.[12]

Within the APAC region, there is also an increased focus on financial institutions implementing "know-your-customer" (KYC) policies and practices in an effort to combat financial crime. In 2015, Laos enacted the Law on Anti-Money Laundering and Counter-Financing of Terrorism (AML/CFT Law) which requires reporting units, both in financial sector and non-financial sector institutions, to comply with KYC and customer due diligence processes as prescribed. Reporting units must, amongst other things: request identification papers; ensure that customer business operations accord with business operation records (e.g. accurate sources of funds and properties); and keep detailed and accurate records. In 2016, the Lao government passed the Agreement on KYC and Customer Due Diligence, expanding on the AML/CFT Law, "in order to strictly implement the work of AMLCTF at the reporting unit level".[13]

As a point of difference, Hong Kong aimed to open virtual banks by the end of 2019. As at 30 June 2021, a total of eight banks had received licences to operate through the Hong Kong Monetary Authority. It is important to note that virtual banks are subject to the same AML/CFT requirements as their bricks-and-mortar counterparts. They must also comply with the KYC requirements. Although many of these standards may need to be revised to accommodate the challenges associated with online banking, the virtual banking sector is at an advantage in its ability to integrate new and improving technologies into such systems.

Structural change – E-government

Given that corruption and bribery are caused by systemic weakness,[14] there is a great

need to strengthen both regulatory and enforcement provisions. In order to do so, any changes need to be aimed at enhancing the structural integrity and transparency of various administrations.

The use of information and communication technologies (ICT), also known as "E-government", is rapidly growing, despite it being a relatively new concept. Although the literature on the effectiveness of E-government at combatting bribery and corruption is divided, it has been found to reduce opportunities for such actions in a significant way. One study indicates that a country's 1% increase in the United Nations (UN) E-government Index may contribute to a 1.17% decrease in corruption.[15] It does so by ensuring that transactions are depersonalised, thereby limiting opportunities for individuals to interfere with the standardised process. With a greater focus on automation, E-government also reduces the risk of discretionary decision-making and ensures that alterations or bypasses can be tracked.[16]

E-government processes have been adopted by many APAC jurisdictions. For example, in Korea, citizens can monitor in real time the progress of applications for licences online. Additionally, Pakistan recently restricted its tax department and introduced ICT in order to reduce contact between tax collectors and payers.[17]

Extended jurisdictions

Jurisdictions must also be aware of foreign corruption statutes and their extra-territorial impact. Of course, in this respect, no corruption overview would be complete without mentioning the omnipotent Foreign Corrupt Practices Act (FCPA), the provisions of which apply to companies listed on the US Securities Exchange Commission, legal or natural persons who have their principal place of business in the United States, and any foreign legal or natural persons suspected of involvement in criminal activity while in US territory, to name only a few. Notably, under the FCPA, the conduct of one individual is enough to bring US jurisdiction over non-US subsidiaries, resulting in an unprecedented extra-territorial extension of legal jurisdiction.

As a result of this extended jurisdiction, in 2016 alone, 30 companies from around the globe paid over USD 2.4 billion to resolve cases brought about under the FCPA.[18] In 2019, the US Securities and Exchange Commission (SEC) saw the enforcement of the FCPA against 17 companies/individuals. In 2020, eight companies were subjected to enforcement action, including Goldman Sachs Group, Inc. which agreed to pay more than USD 1 billion to settle SEC charges. At the time of writing, 2021 has seen three companies subjected to enforcement action.[19]

APAC is quickly becoming a primary target of the FCPA. In 2015, there were approximately 115 FCPA investigations in Asia; more than double the number of investigations in any other region.[20] There are indications that this may be due to longstanding business practices in parts of the APAC region that are in contravention of the FCPA, and that until recently were not sanctioned in APAC jurisdictions, or are still not sanctioned. For example, in some APAC jurisdictions, many companies are still expected to make informal payments to government officials in order to ensure contracts are secured or that the company has access to the necessary resources. Surprisingly, within the APAC region in 2019, 47.9% of firms made informal payments to public officials in order to "get things done".[21]

In Vietnam, US foreign investors rely on local managers, agents, consultants and vendors to liaise with government officials. The local staff will often use bribes to attract business or sell products. Unsurprisingly, the FCPA covers payments that have the intention of influencing foreign officials to obtain advantages. For this reason, what may be "normal practice in Vietnam" is in fact an FCPA violation for which foreign investors are liable.[22]

As a point of distinction, "facilitating" payments which are made to foreign officials to further, or expedite, the performance of their duties are exempt under the FCPA. These payments, however, remain controversial and there is no clarity regarding how such payments would be interpreted by US authorities.

Cross-jurisdictional coordination and collaboration

Established networks

The APAC region demonstrates its commitment to cooperation in fighting corruption and bribery through a number of longstanding law enforcement and financial intelligence agencies. These multi-agency collaborations are tasked with combatting transnational crime (with a focus on financial crime) and promoting international standards of regulation and enforcement. Below are just a few examples of such agencies:

1. The Pacific Transnational Crime Network (PTCN) was developed in 2002 and is a police-led criminal intelligence and investigation entity. Its members include, among others: Australia (Australian Federal Police); New Zealand (New Zealand Police); Samoa (Samoa Police Service); and Solomon Islands (Royal Solomon Islands Police Force).[23]
2. The Egmont Group of Financial Intelligence Units is a global network of 167 Units committed to collaboration and information exchange. APAC members include: Australia (Australian Transaction Reports and Analysis Centre); Hong Kong and the PRC (Hong Kong Special Administrative Region and China Joint Financial Intelligent Unit (JFIU)); Indonesia (Indonesian Financial Transaction Reports and Analysis Centre (PPATK)); and Thailand (Anti-Money Laundering Office (AMLO)).[24]
3. The APG consists of 41 member jurisdictions, 11 of which are permanent members of the associate FATF. The APG is dedicated to examining and developing measures to combat money laundering.[25]
4. In 2001, 23 countries of the APAC jointly developed an Anti-Corruption Action Plan within the framework of the Asian Development Bank (ADB) and the OECD Anti-Corruption Initiative for Asia and the Pacific. The plan sees governments resolve to cooperate and curb cooperation within the APAC. Membership now stands at 31 countries.

Information sharing

Despite these multi-agency networks, coordination and collaboration remain complex and at times restricted. This is best exemplified in the area of information and data sharing.

Mutual Legal Assistance Treaties

Formal requests for information are by way of Mutual Legal Assistance (MLA) requests. Any such request is made pursuant to bilateral and/or multilateral treaties between signatory countries. In order for MLA requests to be made and granted, signatory countries must have incorporated the treaties into their respective domestic laws.

Multilateral treaties to which APAC jurisdictions are signatories include the United Nations Convention against Corruption and the United Nations Convention against Transnational Organised Crime. In addition, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam are signatories to the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty.

Bilateral MLA treaties between individual jurisdictions are also popular. For example, a bilateral treaty exists between Hong Kong and the PRC. Additionally, Australia is a party to over 25 bilateral MLA treaties with countries such as Canada, Ecuador, Italy, the

Republic of Korea, the US and Vietnam.[26] The advantage of such bilateral agreements is that information can be kept confidential between parties to that agreement.

Although such treaties exist, any country can make an MLA request to another for assistance, including a request for the provision of information. Assistance is provided on the understanding of reciprocity – that the providing country will receive assistance should the need arise.

While MLA requests provide a convenient avenue for information sharing, they also come with a number of issues. The request processes usually suffer from lengthy delays as well as a lack of coordination and sharing of resources between agencies.[27] A UN study revealed that responses to formal MLA requests were reported to be in the order of months rather than days. By this time, important ephemeral electronic evidence could be lost.[28]

Aside from these formal requests, the APAC jurisdictions also rely on informal assistance requests to foreign governments or other providers. The downside to such requests is that they may not be legally enforceable, and turn on the willingness of countries to assist voluntarily.[29] Interestingly, in 2014, 13% of foreign bribery cases were brought to the attention of law enforcement authorities through the use of formal and informal MLA requests.[30]

Other methods of request

As an alternative to MLA requests, different sectors are developing their own information-sharing channels, including the addition of regulators and enforcement authorities within the financial sector.[31] Typically, these alternative channels are developed under "soft law" including action plans, resolutions and bilateral or multilateral Memoranda of Understanding (MOU). Many jurisdictions within the APAC region have adopted these alternative channels of information sharing.

The Hong Kong Monetary Authority (HKMA), which is the central banking institution responsible for Hong Kong's financial stability, integrity and international status, has entered into multiple MOUs and other formal cooperation agreements with APAC banking supervisory authorities. Some of these authorities include the National Bank of Cambodia, Australian Prudential Regulation Authority, and China Banking and Insurance Regulatory Commission. Arrangements such as these enable the HKMA and other authorities to share and exchange supervisory information (to the extent they are permitted under law) and consult one another regarding cross-border issues, all while ensuring any shared information remains confidential.

APAC jurisdictions such as Australia, Hong Kong and Japan are also signatories to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMOU). International ordinary or associate members of IOSCO are eligible to apply to sign the MMOU. Out of 159 eligible members, 124 were MMOU signatories as of July 2021.[32]

The MMOU sets out the specific requirements for:

1. what information can be exchanged and how to do so;
2. the legal capacity to compel someone to produce information;
3. the types of information that one can be compelled to produce;
4. the legal capacity for sharing information; and
5. the permissible use of that information.[33]

Under the MMOU, securities regulators can provide information and assistance, including information identifying the beneficial owner and controller of a company or an account. In relation to transactions, they may identify the amount purchased or sold, the time and price of the transaction, and the entity that handled the transaction.

In addition to MOUs, in 2018, the US passed the Clarifying Lawful Overseas Use of Data (CLOUD) Act to expedite access to electronic information held by US-based global service providers. The Act permits foreign governments to enter into bilateral agreements with the US whereby foreign law enforcement authorities can make requests directly to providers, as an alternative to MLA requests. CLOUD requests are conditional on reciprocity; that is, the foreign jurisdiction must allow the US to request electronic data from its own service providers.[34]

Data protection and transfers

With the rapid technological advancements in today's society, along with the explosive use of social media in a professional context, there has been a dramatic transformation in the way in which business is conducted. These changes inevitably impact access to information, including data protection and cross-border transfers. The APAC jurisdictions are no exception. For example, in the PRC, a vast amount of sensitive information is communicated using the application WeChat, a transient messaging platform. As a result of such platforms, the laws on business record retention for the purposes of investigation need to be reconsidered. Indeed, in March 2019, the US Department of Justice (DOJ) announced revisions to its FCPA Corporate Enforcement Policy requiring companies to implement "appropriate guidance and controls" over these types of communications in the event of a US investigation into a Chinese company, or Chinese subsidiary of a multinational company.[35]

Although reform is occurring, many jurisdictions are conflicted in their approach to data transfer. In 2018, the PRC enacted the International Criminal Judicial Assistance Law (ICJA), which is essentially a "blocking statute" for international assistance. Under the ICJA, individuals based or working in China cannot provide assistance in foreign criminal proceedings without first obtaining approval from the Chinese government. Approval is needed to disclose evidence located in China to overseas law enforcement authorities. As a result, multinational companies can only comply with, for example, foreign production orders after government approval. If consent is not forthcoming, the company is forced to choose between reaching Chinese law and being held in contempt of a foreign court.

An example of such a choice can be seen in a US appeals court decision, where three Chinese banks were held in contempt for refusing to comply with subpoenas in a US investigation into the violation of international sanctions on North Korea, specifically the movement of tens of millions of dollars.[36] According to the court file, the three banks said that the Chinese government ordered them not to provide the requested records. The first instance Judge, District of Columbia Chief Judge Beryl Howell, dismissed the banks' argument that the Chinese government requires an MLA request for records in US criminal investigations, citing China's abysmal compliance record with such requests.[37]

The PRC also relies on the Law on Guarding State Secrets of the People's Republic of China (State Secrets Law), revised in 2010. The State Secrets Law prohibits the transfer of state secrets outside China and violators are subject to criminal penalties. "State secrets" are generally held to include any data or information that is related to the following:

1. major policy decisions on state affairs;
2. national defence;
3. diplomatic activities;
4. national economic and social development;
5. science and technology;
6. state security; and
7. other matters that are classified by the national department.[38]

The rise of the ethical business

In 2015, the then Attorney-General of Singapore, VK Rajah, opined that:

> "[T]he enforcement of laws and regulation alone, however, is insufficient. The fight against financial crime in Singapore also requires a spirit of compliance that guides behaviour. Without the prevalence of this spirit of compliance, no enforcement regime, no matter how competent, can avoid being inundated and overwhelmed – even, perhaps, to the point of becoming dysfunctional."[39]

This is not an idea singular to Singapore. Throughout the APAC region, the public and private sectors must, at the very least, be perceived to proactively strengthen anti-corruption enforcement laws and improve mechanisms of investigation. Additionally, they must be seen to take steps to minimise potential liabilities.

According to a 2017 survey from Transparency International, 50% of people in the APAC region said that their government was doing "a bad job" in the fight against corruption. This is perhaps unsurprising when, at the time of the survey, one in four people in the region had paid a bribe to access public services in the previous 12 months.[40]

Since then, Transparency International has ranked 180 countries according to their Corruption Perceptions Index (CPI) which is based on their perceived levels of public sector corruption, according to experts and business people. Each country is given a score between 0 (highly corrupt) and 100 (very clean). In 2020, more than two-thirds of countries scored below 50 and the average score was a shamefully low 43. However, a number of APAC jurisdictions including Australia, Hong Kong, Japan, New Zealand and Singapore scored within the top 20 countries. Unfortunately, APAC jurisdictions such as Afghanistan, Cambodia and North Korea also scored within the bottom 20 countries.[41]

The importance of addressing corruption cannot be understated. According to the UN Secretary-General, Antonio Guterres, the annual cost of international corruption amounts to USD 3.6 trillion, consisting of bribes and stolen money.[42] It is also, according to the UN, one of the biggest impediments to eliminating poverty and hunger and to improving education, infrastructure and health. Given the global cost, it is therefore imperative that APAC jurisdictions harness the "spirit of compliance".

In Japan, regulators are attempting to harness this spirit by putting company compliance programmes at the forefront of the private sector agenda. In 2018, the Japan Exchange Regulation published Principles for Preventing Corporate Scandals, following a number of corporate scandals emerging in listed companies. Although these Principles are not legally binding and a failure to abide by them will not lead to any adverse consequences, listed companies are expected to implement the Principles as a means of self-discipline. Furthermore, management are expected to demonstrate integrity and leadership in respect of any compliance issues.[43]

There is also evidence, within other APAC countries, of the introduction of such compliance programmes. In the PRC, developments in anti-bribery and anti-corruption laws have been rapid due to trade tensions, although it can be argued that these changes also represent expected reforms in the area.[44] As a result of these developments, multinational companies operating out of China are more proactive in implementing compliance programmes, internal audits and risk assessments to identify potential liabilities and develop strategies to mitigate them. In addition to instilling a culture of compliance, companies are subject to new reporting regimes aimed at facilitating cooperation and collaboration with law enforcement bodies, and offering a reprieve from increasingly severe penalties.

In order to foster the "spirit of compliance", general reporting obligations are used widely across the APAC region. In Singapore, a "recognised market operator" must, after becoming aware of a financial irregularity or other matter which might affect its ability to discharge its financial obligations, notify the relevant authority as soon as practicable.[45] The operator must also submit periodic reports and provide any assistance the authority requires for the performance of the authority's functions and duties. Should the operator not comply with these requirements, it is guilty of an offence and liable on conviction to significant monetary penalties.

Other APAC countries go even further and actively incentivise reporting. Further, some jurisdictions have been known to offer cash rewards. For example, Nepal authorises the provision of an appropriate reward, by the investigating authority, to a person assisting with inquiries, investigations, or collection of evidence relating to corruption.[46] In addition to these incentives, some APAC jurisdictions grant immunity from prosecution. Under these types of scheme, entities and individuals may be absolved from criminal responsibility for participation in corruption and/or bribery if they disclose the act and persons involved.

Such schemes are not entirely new and have been piloted in the UK and the US. In 2016, the UK Serious Fraud Office entered into its second Deferred Prosecution Agreement (DPA) in relation to bribery and corruption offences. In 2017, the DOJ under the Trump administration issued a declination letter requiring the "disgorgement of associated gains" to CDM Smith Inc., a Massachusetts-based construction firm which allegedly paid nearly USD 2 million in bribes to Indian government officials between 2011 and 2015 in exchange for infrastructure projects.

DPA schemes are slowly being introduced in Singapore and Australia. For Singapore, the scheme represents a departure from enforcement against individuals.[47] Under the Criminal Justice Reform Act which was brought into force on 31 October 2018, there is now a formal framework for DPAs. Companies are encouraged to cooperate with the public prosecution office by satisfying certain conditions and requirements in exchange for amnesty. Requirements may include production of documentary evidence, providing assistance with investigations against former managers and directors or undertaking corporate reform measures.[48]

In Australia, the Attorney-General's Department had introduced the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*. This Bill lapsed on 1 July 2019. Consequently, the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* was introduced. The Bill borrows from its UK counterpart and encourages voluntary negotiation between companies and relevant prosecutorial bodies, where the company is required to comply with a range of specific conditions, which may include admission of criminal liability, payment of a monetary penalty, cooperation with ongoing investigations, and consent to publicising the DPA. The 2019 Bill goes slightly further than its 2017 counterpart by also proposing the introduction of "dishonest" practices.[49]

The era of the whistleblower

Where public bodies or companies engage in criminal behaviour, it is usually those within the organisation who are best placed to suspect such behaviour or to know the nature and extent of the criminal activity. Unfortunately, the fear of retaliation remains a major deterrent for whistleblowers. Given the importance of whistleblowers, it is imperative that legal and physical protections are implemented to ensure that individuals have the necessary confidence required to come forward. This includes feeling assured that their report will be acted on, that the entity or individual they report to is serious about addressing corruption

and/or mismanagement, that their complaint will be treated confidentially and that they will not face reprisal, whether it be prosecution, dismissal from employment or physical harm.

In recent years, there has been a significant positive cultural shift toward whistleblowers and the need for their protection. It is internationally accepted that whistleblower policy and practice must be two-pronged; that is, proactive in changing culture while providing a series of protections and incentives.[50] Although the intention is unified, protections vary across the APAC jurisdictions. In some countries such as Japan and the PRC, whistleblowing is at the forefront of the legal and political agenda, whereas in others such as Hong Kong, the express protections are limited.

In Hong Kong, the current regime offers little or no protection for whistleblowers, as there are no express whistleblowing laws.[51] To gain protection, a whistleblower must rely on piecemeal employment, anti-corruption and/or criminal laws which offer a limited scope of protection. For example, although a person is liable to criminal prosecution if they disclose a whistleblower's identity or information that could lead to the identity of a whistleblower, the lack of specific whisteblower laws makes the subject rather ambiguous. It is for this reason that Hong Kong lags behind other major business jurisdictions, and why a legal framework that supports whistleblower confidentiality is imperative.

In India, the Whistleblowers Protection Act (WBPA) was enacted to safeguard against whistleblower victimisation. Under the Act, the Central Vigilance Commission (CVC), designated by government, is empowered to receive confidential complaints. The CVC does, however, maintain discretion as to whether the identity of the whistleblower remains confidential.

Where confidentiality cannot be assured, protection of the whistleblower's rights and security and adequate incentives must follow. For example, in Malaysia and Singapore, whistleblowers are exempted from both civil and criminal charges where information is provided in good faith. Additionally, Japan and the PRC currently outlaw detrimental treatment of whistleblowers in the workplace. Within some APAC jurisdictions, whistleblowers may also be entered into witness protection programmes when their wellbeing or safety is at risk.

Jurisdictions are also moving to ensure that comprehensive protection regimes exist across the public and private sectors. In Australia, a comprehensive protection regime already existed for the public sector under the Public Interest Disclosure Act 2013. As of 1 July 2019, the whistleblower protection regime under the Corporations Act 2013 was expanded to provide greater protection. Additionally, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 was brought into effect on 1 January 2020, requiring certain companies (public, large proprietary, registrable superannuation entities) to implement clear and accessible whistleblower policies.

Grass-roots activism

The rapid development of whistleblower protections would not and does not occur without the attention of and pressure from the public. High-profile cases such as the Edward Snowden revelations, WikiLeaks scandal, Commonwealth Bank of Australia financial planning advice investigations and Chinese pharmaceutical company bribery cases (*GlaxoSmithKline*) have all fostered public discussion, and garnered public support for legislative reforms.

The clandestine and systemic nature of bribery and corruption means that enforcement authorities must rely on their citizens as a source of information and a means by which misconduct can be detected and prevented. APAC jurisdictions are thus increasingly harnessing the efforts of their public, the media, trade unions and other non-governmental

players. For example, in Bangladesh, Transparency International, a grass-roots organisation, has established local voluntary watchdog committees across some 36 locations that work on local corruption issues. They do so by providing citizens with information and advice, undertaking monitoring activities, and publicly reporting on corruption.[52]

In India, the Children's Movement for Civil Awareness (CMCA) established school-based "Civic Clubs" that run socially conscious programmes for students on civic values, active citizenship, urban local government, and rights and responsibilities, educating young people about the widespread impact of corruption.[53]

Conclusion

Jurisdictions across the APAC region have taken steps to increase awareness of corruption and strengthen legal and regulatory frameworks. It is telling that the aforementioned are only a few of the developments and challenges facing the APAC region in fighting corruption. Others include integrity and transparency in public procurement, facilitating confiscation and asset recovery across jurisdictions, and addressing freedom-of-information issues.

There are also many varied definitions of corruption, and standards in approaching bribery and corruption, across the different jurisdictions. It is imperative for any entity seeking to work or invest in the APAC region to be well abreast of the local regulatory regime, and the rapid developments in corruption laws, both regional and foreign.

* * *

Endnotes

1. Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (2020), 13.
2. Explanatory Memorandum, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth), 18–19.
3. See *Tom Reck Security Services Pte Ltd v Public Prosecutor* (2001) 2 SGHC 72.
4. WongPartnership LLP, 'Singapore Law and Practice' in Chambers and Partners (eds) *Global Practice Guide: Anti-Corruption* (Unknown, Second Edition), 9.
5. VK Rajah, 'Financial crime: Leaders can instil spirit of compliance', *Business Times*, 4 November 2015.
6. Dora W Wang, Michael Lowell, Peter Witherington and Jessica Tian, 'China: A New Normal Amid Rising Trade Tensions' in *GIR Insight Asia-Pacific Investigations Review 2020* (London: Law Business Research Limited, 2019), 96.
7. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
8. Jak Jabes and Frederic Wehrle, 'Anti-Corruption Policies in Asia and the Pacific', ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (2004), 20.
9. 'APG History and Background', Asia/Pacific Group on Money Laundering, accessed 14/08/20, <http://www.apgml.org/about-us/page.aspx?p=91ce25ec-db8a-424c-9018-8bd1f6869162>; also 'Asia/Pacific Group on Money Laundering (APG)', Financial Action Task Force, accessed 14/08/20, <http://www.fatf-gafi.org/pages/asiapacificgruponmoneylaunderingapg.html>.
10. IOSCO, Objectives and Principles of Securities Regulation (May 2017).
11. Australian government – AUSTRAC, 'AUSTRAC issues $252,000 infringement notice to Compass' (Media Release, 10 September 2019), accessed 14/08/20, <https://www.

austrac.gov.au/about-us/media-release/austrac-issues-252000-infringement-notice-compass>.
12. Financial Transaction Reports Act 1988 (Cth) s. 15A.
13. Lao People's Democratic Republic Agreement on Know Your Customers and Customer Due Diligence (15 January 2016); also Lao People's Democratic Republic Decree of the President of the Lao People's Democratic Republic on the Promulgation of the Law on Anti-Money Laundering and Counter-Financing of Terrorism (4 February 2015).
14. 'Anti-Corruption Policies in Asia and the Pacific', ADB/OECD, 7.
15. 'New perspectives in e-government and the prevention of corruption', Basel Institute on Governance Working Paper 23 (July 2017), 9.
16. 'New perspectives', Basel Institute, 9.
17. 'Anti-Corruption Policies in Asia and the Pacific', ADB/OECD, 13.
18. Jan Wolfe and David Brunnstrom, 'U.S. appeals court upholds ruling against Chinese banks in North Korea sanctions probe', *Reuters*, 31 July 2019, accessed 17/08/20, <https://www.reuters.com/article/us-usa-trade-china-banks/us-appeals-court-upholds-ruling-against-chinese-banks-in-north-korea-sanctions-probe-idUSKCN1UQ03U>.
19. US Securities and Exchange Commission, SEC Enforcement Actions: FCPA Cases (8 July 2021), accessed 22/07/21, <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases>.
20. Lily Kuo, 'Asia is becoming the global epicenter of corporate corruption', genpact, 8 April 2015, accessed 17/08/20, <https://qz.com/378710/asia-is-becoming-the-global-epicenter-of-corporate-corruption>.
21. Trading Economics, East Asia & Pacific (IDA & IBRD Countries) – Informal Payments to Public Officials (% Of Firms) (August 2020), accessed 17/08/20, <https://tradingeconomics.com/east-asia--pacific-ida--ibrd-countries/informal-payments-to-public-officials-percent-of-firms-wb-data.html>.
22. John Frangos, 'Vietnam: Compliance Risks' in *GIR Insight Asia-Pacific Investigations Review 2020* (London: Law Business Research Limited (2019), 186.
23. Pacific Islands Chiefs of Police Secretariat, Pacific Transnational Crime Network, (2021), accessed 13/09/21, <https://picp.co.nz/our-work/pacific-transnational-crime-network>.
24. Egmont Group, About (2020), accessed 17/08/20, <https://egmontgroup.org/en/content/about>.
25. 'APG History and Background', Asia/Pacific Group on Money Laundering, accessed 17/08/20, <http://www.apgml.org/about-us/page.aspx?p=91ce25ec-db8a-424c-9018-8bd1f6869162>.
26. 'Australia's bilateral mutual assistance relationships', Attorney-General's Department, Australian government (November 2019), accessed 17/08/20, <https://www.ag.gov.au/sites/default/files/2020-03/bilateral-treaties-on-mutual-assistance-in-criminal-matters.pdf>.
27. Gillian Dell and Andrew McDevitt, 'Exporting Corruption – Progress Report 2018: Assessing Enforcement of the OECD Anti-Bribery Convention', Transparency International (2018), 16.
28. 'Comprehensive Study on Cybercrime', United Nations (February 2013), xxv.
29. Dell and McDevitt, 'Exporting Corruption', 16.
30. OECD, 'OECD Foreign Bribery Report, An Analysis of the Crime of Bribery of Foreign Public Officials' (OECD Publishing: 2014), 9.

31. Kyle Wombolt, Jeremy Birch and Christine Cuthbert, 'The Long Arm of Law Enforcement in Multi-Jurisdictional Investigations', in *GIR Insight Asia-Pacific Investigations Review 2020* (London: Law Business Research Limited, 2019), 43.
32. International Organization of Securities Commissions, Signatories to Appendix A and Appendix B List, accessed 23/07/21, <https://www.iosco.org/about/?subSection=mmou&subSection1=signatories>.
33. International Organization of Securities Commissions, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (2020), accessed 18/08/20, <https://www.iosco.org/about/?subsection=mmou>.
34. 'Promoting Public Safety, Privacy, and the Rule of Law Around the World: The Purpose and Impact of the CLOUD Act', White Paper, US Department of Justice (April 2019).
35. Wang, Lowell, Witherington and Tian, 'China: A New Normal', 97.
36. Spencer S Hsu, 'Chinese bank involved in probe on North Korean sanctions and money laundering faces financial "death penalty"', *Washington Post*, 24 June 2019.
37. Ranina Sanglap, 'Three Chinese banks held in contempt by US court in North Korea sanction probe', S&P Global Market Intelligence, 25 June 2019, accessed 18/08/20, <https://www.spglobal.com/marketintelligence/en/news-insights/trending/EEDYRsgzZbUv41mVLTsnDQ2>.
38. Law of the People's Republic of China on Guarding State Secrets, Chapter II, article 9 (1 October 2019).
39. VK Rajah, 'Financial crime'.
40. 'People and Corruption: Asia Pacific – Global Corruption Barometer', Transparency International, 7 March 2017, 14.
41. 'Corruption Perceptions Index' (2020), Transparency International, accessed 23/07/21, <https://www.transparency.org/en/cpi/2020/table/nzl>.
42. S Johnson, 'Corruption is costing the global economy $3.6 trillion dollars every year', World Economic Forum, 13 December 2018, accessed 18/08/20, <https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n>.
43. Wendy Wyson, 'Your Asia-Pacific Anti-Corruption Rundown', in *Corporate Compliance Insights*, 31 July 2018, accessed 18/08/20, <https://www.corporatecomplianceinsights.com/asia-pacific-anti-corruption-rundown>; see also 'Principles for Preventing Corporate Scandals', Japan Exchange Group, accessed 18/08/20, <https://www.jpx.co.jp/english/regulation/ensuring/listing/preventive-principles/index.html>.
44. Wang, Lowell, Witherington and Tian, 'China: A New Normal', 94.
45. Securities and Futures Act 2006 s. 34.
46. Prevention of Corruption Act 2002 s. 58.
47. 'Your Asia-Pacific Anti-Corruption Rundown', *Corporate Compliance Insights*.
48. Ministry of Law, Strengthening Singapore's Criminal Justice Framework – Implementation of Criminal Justice Reform Act 2018 and Evidence (Amendment) Act 2018 Provisions, 31 October 2018, accessed 19/08/20, <https://www.mlaw.gov.sg/news/press-releases/strengthening-singapore-criminal-justice-framework-implementation-of-criminal-justice-reform-act-2018-and-evidence-amendment-act-2018-provisions>.
49. Kate Hilder and Mark Standen, 'DPA scheme? Combatting Corporate Crime Bill introduced (again)' on MinterEllison Blog (4 December 2019), <https://www.minterellison.com/articles/overview-crimes-legislation-amendment-combatting-corporate-crime-bill-2019>.

50. David Banisar, 'Whistleblowing: International Standards and Developments', in *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, World Bank – Institute for Social Research, 2006, 64.
51. *Whistleblowing – An Employer's Guide to Global Compliance*, Second Edition, DLA Piper, 2015, 4.
52. Kathy Richards, 'What works and why in community-based anti-corruption programs', Transparency International Australia, December 2006, 14.
53. Richards, 'What works and why', 27.

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