PANORAMIC

GOVERNMENT INVESTIGATIONS

Australia

LEXOLOGY

Government Investigations

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UPDATE AND TRENDS

Key developments of the past year

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Australia

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ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

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

Legislative reforms are significantly impacting on government investigations in Australia. Below are some key trends.

Stricter sanctions and defence export reform

On 27 March 2024, the Australian government passed the Defence Trade Controls Amendment 2024, which introduces three new criminal offences under the Defence Trade Controls Act 2012. The amendments brings in a more rigorous assessment process, especially for sensitive goods and technologies with potential military applications. For instance, the heightened focus on dual-use technologies – that is, those with civilian and potential military applications – are likely to trigger investigations into the potential misuse or unauthorised export of such items. Similarly, businesses in the defence export sector will be under scrutiny to ensure they obtain the necessary permits. The number of investigations targeting breaches of Defence Trade Controls Act 2012 is therefore likely to rise.

Increased focus on corporate accountability for Foreign Bribery

The recent enactment of the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (Cth) on 8 March 2024 introduces a significant shift. This law establishes a new offence for corporate bodies that fail to prevent foreign bribery. This highlights a growing emphasis on holding companies accountable for their employees' actions and implementing anti-bribery compliance programmes.

The Attorney-General Department's draft guidance on adequate procedures for preventing foreign bribery provides valuable insights for companies to navigate this evolving landscape.

Expansion of Anti-Money Laundering and Counter-Terrorist Financing regime

On 2 May 2024, the Attorney-General Department announced the second stage of consultation of the Tranche 2 reform to the Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) laws, marking a significant expansion of the AML regulatory framework. This reform proposes designating lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals as 'reporting entities' under the AML/CTF regime.

This broader scope will require these professions to implement measures to prevent and minimise money laundering and terrorist financing risks. Government investigations in these areas are likely to increase as authorities enforce these obligations.

Public consultation on proposed Scams Code Framework

On 30 November 2023, the Australian Treasury announced that the proposed Scams Code Framework (framework) was launching a public consultation to seek feedback on the framework to strengthen its design and effectiveness. The consultation seeks feedback on areas such as:

- proposed obligations for regulated businesses;
- requirements to develop and maintain an anti-scam strategy;
- clear dispute resolution pathways for consumers; and
- the role of regulators in monitoring and enforcing the framework.

The primary consideration is whether a reasonable suspicion exists that a contravention of the law has occurred. However, the decision to investigate is highly discretionary and based on various factors.

In addition to the Prosecution Policy of the Commonwealth, the Attorney General has created the Australian government Investigations Standards to enable government agencies to unify procedures and ensure quality investigative practices. These guidelines articulate Australian government policy and serve as a foundational standard for accountability and security in investigations relating to government programmes and legislation. The best-practice investigative planning process set out under these guidelines includes formal consideration of the investigation's objectives, the ambit of the conduct investigated, scope and possible outcomes.

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, under the Criminal Code 1995 (Cth) section 70.5A, where if a corporate body is found guilty of the offence of failing to prevent foreign bribery of a public official, the maximum fine that can be imposed is 100,000 penalty units (amounting to A$33 million), three times the value of the benefit, or 10 per cent of the annual turnover if the benefit cannot be determined.

Serious offences can, in certain circumstances, lead to the company being wound up pursuant to section 461 of the Corporations Act 2001 (Cth). Pecuniary penalties in the Corporations Act 2001 (Cth) or some serious criminal offences were increased for companies. For criminal offences punishable by 10 years imprisonment or more, companies can face the greater of 45,000 penalty units (A$14.85 million), three times the benefit gained, or loss avoided or up to 10 per cent of annual revenue turnover.

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 (Cth).

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 Penal
ties) Bill 2018 was introduced to and 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, the maximum civil penalty amounts for individuals are either 5,000 penalty units (amounting to A$1.65 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$16.5 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$825 million), whichever is the greater. The value of a penalty unit is prescribed and indexed by the Crimes Act 1914 (Cth) on 1 July 2024.

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.

The Australian government has empowered numerous regulatory bodies to investigate and prosecute corporate misconduct. The agencies' powers and responsibilities derive from the establishing legislation of each.

The Australian Federal Police

The Australian Federal Police (AFP) is the national law enforcement policing body. It is tasked with enforcing Commonwealth criminal law, including those related to business and corporate crime. This includes serious organised crime, 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, ASIC established the Office of Enforcement to enhance its regulatory and enforcement capabilities. This initiative was part of a broader national government investment package aimed at strengthening ASIC's role.

The Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory authority tasked with promoting a healthy market by enforcing primarily the Competition and Consumer Act 2010, promoting competition, fair trading and regulating national infrastructure.

The ACCC's enforcement work includes investigations into cartel conduct and related anti-competitive conduct, which are regarded as long-term priorities.

The Australian Taxation Office

The Australian Taxation Office (ATO) is a government statutory agency and the principal tax and revenue collection body for the Australian government. It fights tax-related crime, among other things by collaborating with other agencies such as the AFP and AUSTRAC.

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 agencies mentioned above decide to initiate a criminal prosecution, it is generally the CDPP that conducts the proceedings. The CDPP is not an investigative body in itself; instead, the above agencies refer matters for prosecution to it following the investigative phase.

The Australian Transaction Reports and Analysis Centre

AUSTRAC is a government regulatory and financial intelligence agency. It is responsible for regulating and overseeing compliance with anti-money laundering and counter-terrorism financing laws in Australia, 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.

The Australian Criminal Intelligence Commission

The ACIC's role is to protect Australia from serious criminal threats by coordinating a strategic response and collecting, assessing and disseminating intelligence and policing information. One of its focus areas is financial crime, and it is empowered to investigate corporate entities suspected of being involved in such wrongdoing. The Commission is also involved in developing intelligence products that better inform the response to financially motivated criminal activity.

Several of the above agencies, including ASIC, ACIC, AUSTRAC and others, led by the Australian Taxation Office joined forces in 2015 to form a multi-agency body called the Serious Financial Crime Taskforce (SFCT). Suspected serious corporate financial crime involving very large sums and/or overseas tax evasion may be referred to the SFCT and businesses may face simultaneous or concurrent regulatory investigations by several agencies.

Scope of agency authority

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 their respective empowering statutes. In many instances, the statutes enable action to be taken against individuals as well as corporations.

AFP

Under the Australian Federal Police Act 1979, the AFP provides policing services in relation to Commonwealth laws. 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 Act permits the lifting of the corporate veil in certain circumstances.

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 providers, financial markets organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit. It has the power to investigate and seek enforcement action against companies as well as natural persons.

ACCC

Under the Competition and Consumer Act 2010 (formerly 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. In certain circumstances and specific offences, the Act enables action to be taken against individuals.

ATO

Under the Taxation Administration Act 1953, the ATO investigates alleged tax offences and enforces tax and superannuation laws by companies as well as individuals. The Act affords 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.

Law stated - 3 July 2025

Simultaneous investigations

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?

In Australia, the ability of multiple government entities to investigate the same target business is supported by the distinct statutory mandates and jurisdictions each agency possesses. The aforementioned agencies often operate independently within their legislative frameworks, allowing for simultaneous investigations.

Australian law enforcement, investigative, intelligence and prosecution agencies collaborate under formal partnerships and specialised inter-agency partnerships as well as on an informal basis.

State and territory legislation can govern the criteria or restrictions on the manner and scope of intelligence sharing between various law enforcement bodies.

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 Phoenix Task Force, the Financial Action Task Force and the Asia/Pacific Group on Money Laundering, the Egmont Group of Financial Intelligence Units, the Global Coalition to Fight Financial Crime, the Organisation for Economic Co-operation and Development, and the Joint International Taskforce on Shared Intelligence and Collaboration.

Memorandums of understanding (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. ASIC's involvement in the International Organisation of Securities Commissions' Multilateral Memorandum of Understanding is a current 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. The power to compel examination must be used for a purpose in line with the agency's legislative mandates, and the subsequent sharing and use of materials obtained through coercive powers is subject to legal frameworks and specific arrangements.

Law stated - 3 July 2025

Civil forums

In what forums can civil charges be brought? In what forums can criminal charges be brought?

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

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

Criminal proceedings against corporations are initiated and determined in state and territory as well as federal courts, of both summary and superior jurisdiction.

Law stated - 3 July 2025

Corporate criminal liability

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 their employment, or within their 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 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. In August 2020, the Australian Attorney-General tabled the ALRC's report into Australia's corporate criminal responsibility regime in Parliament. The report 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'. While these recommendations have the potential to significantly reform corporate criminal liability in Australia, they are yet to be fully implemented. The federal government has expressed support for many of the proposals and is considering the necessary legislative changes.

Law stated - 3 July 2025

Bringing charges

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 and prescribe that the following test be satisfied prior to commencing a prosecution:

- there must be sufficient evidence to prosecute; and
- upon consideration of all facts and surrounding circumstances, it must be evident that the prosecution is in the public interest.

Public interest factors of particular relevance to corporate crime include:

- whether the offence is serious or trivial;
- the 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.

The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019, first introduced in 2017, proposed the implementation of deferred prosecution agreement reforms, under which the CDPP would have the option to invite a corporation 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. The bill proved controversial, with concerns that it would create a 'two-tiered' justice system enabling corporate offenders to negotiate their own punishments. After the election of a new government in May 2022, the bill lapsed and did not progress to further parliamentary debate. Recent reforms under the 2023 bill, which passed the Senate on 29 February 2024, exclude a deferred prosecution agreements scheme, with the government considering future implementation based on effectiveness.

Law stated - 3 July 2025

INITIATION OF AN INVESTIGATION

Investigation requirements

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

The primary consideration is whether a reasonable suspicion exists that a contravention of the law has occurred. However, the decision to investigate is highly discretionary and based on various factors.

In addition to the Prosecution Policy of the Commonwealth, the Attorney General has created the Australian Government Investigations Standards to enable government agencies to unify procedures and ensure quality investigative practices. These guidelines articulate Australian government policy and serve as a foundational standard for accountability and security in investigations relating to government programmes and legislation. The best-practice investigative planning process set out under these guidelines includes formal consideration of the investigation's objectives, the ambit of the conduct investigated, scope and possible outcomes.

Law stated - 3 July 2025

Triggering events

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

Triggering events for many of the above enforcement agencies can be similar. 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.

Different enforcement entities may have specific triggering events based on their mandate. For example, the Australian Taxation Office (ATO) may focus on irregular tax filings, while the Australian Securities and Investments Commission (ASIC) might investigate market manipulation or securities fraud.

Law stated - 3 July 2025

Whistle-blowers

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 were expanded under the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (the Act).

The Act created a consolidated whistle-blower protection regime within the Corporations Act 2001 and a parallel whistle-blower protection regime in the Taxation Administration Act 1953 through various legislative amendments. The previous financial whistle-blower regimes were repealed.

Key provisions under this Act include:

- 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 remedies may be exercised against the disclosing person based on the disclosure;
- persons who make a qualifying disclosure may seek a court order for reinstatement if they have been dismissed from their employment because they 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 Act also created a civil penalty provision to address the victimisation of whistle-blowers and facilitate the criminal prosecution of victimisers.

Law stated - 3 July 2025

Investigation publicity

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, especially if the matter is of significant public interest or involves high-profile entities. The Corporations Act 2001 and specific regulatory guidelines also detail circumstances under which ASIC may disclose information about investigations by making public statements and issuing infringement notices and public warnings. These may negatively affect a corporation's reputation or standing.

Although government law enforcement and investigative agencies generally do not comment publicly 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.

Law stated - 3 July 2025

EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

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

Yes. 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 the covert phase of criminal investigation, the duration of which will depend on the nature and complexity of the matter. By their nature, corporate criminal investigations are often complex and lengthy, taking between months to a year or longer.

Law stated - 3 July 2025

Covert phase
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 and are governed by legal frameworks to ensure compliance with laws and regulations.

Law stated - 3 July 2025

Investigation notification
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 2017 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 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. While not guaranteed, it may also reduce or eliminate the risk of eventual criminal prosecution. Conversely, delay and inactivity may exacerbate reputational and legal liability.

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

Law stated - 3 July 2025

Evidence and materials

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.

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

Law stated - 3 July 2025

Providing evidence

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 regulators the Australian Security and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO) all have compulsory powers that can require individuals and companies to produce documents and information. These powers override the privilege against self-incrimination. Therefore, upon the issue of a valid notice to produce by an empowered agency, the subject of the notice cannot assert a right to silence, and failure to comply with the terms of the notice may constitute an offence in itself. While the Australian Federal Police (AFP) has no comparable powers of compulsory production, it commonly operates as part of joint-agency investigations with the above bodies.

Privacy Act 1988 (Cth) does not limit statutory production powers. Agencies must protect personal information collected. 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 that material produced pursuant to a notice is later relied upon in court, redactions can be sought to protect the release of certain personal and/or intelligence information.

Law stated - 3 July 2025

Providing evidence

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 their 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 be established only 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.

It was confirmed in ***Glencore International AG v Commissioner of Taxation*** [2019] HCA 26 that legal professional privilege operates as an immunity rather than as a positive right. In ***Glencore International AG v Commissioner of Taxation*** [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 judgement, 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 be 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.

Furthermore, in September 2021, the ATO introduced guidance under the legal professional privilege protocol, recommending a structured approach for identifying communications protected by legal professional privilege and to assist taxpayers making legal professional privilege claims to the ATO. This protocol delineates a multi-step process for legal advisers to follow when asserting legal professional privilege claims with the ATO. It is advisable when making claims of legal professional privilege with the ATO that taxpayers and legal advisers carefully consult this protocol. By adhering to these guidelines, taxpayers can streamline their interactions with the ATO and potentially avoid further scrutiny of their legal professional privilege claims. In June 2022 the ATO published further recommendations in regards to taxpayers responding to formal notices issued by the ATO involving legal professional privilege claims and addressed comments from stakeholders on the protocol in their compendium legal professional privilege protocol.

Law stated - 3 July 2025

Employee testimony

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 are all empowered by statute to compel individuals, including company employees, to attend compulsory examinations. These powers abrogate the common law privilege against self-incrimination.

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

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.

Law stated - 3 July 2025

Employee testimony

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 if no conflict arises. Conflict can arise on a change in circumstances or available information at any stage during an investigation or subsequent legal proceedings.

Law stated - 3 July 2025

Sharing information

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.

Businesses should also consider Australian competition law risks where information sharing could be perceived as anti-competitive, although such risks are rarely engaged in the context of purely defensive cooperation in response to regulatory investigations.

Law stated - 3 July 2025

Investor notification

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

The Australian Securities Exchange 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, including the nature of the potential contravention, the stage of regulatory engagement, and the likelihood of material financial impact.

Law stated - 3 July 2025

COOPERATION

Notification before investigation

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); a company might voluntarily report the misconduct of a former director or financial adviser to the Australian Security and Investments Commission (ASIC) 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 level 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.

Relevantly, in 2017 the AFP and the Commonwealth Director of Public Prosecutions (CDPP) released Best Practice Guidelines for when company self-reports conduct that involves a breach, or a suspected breach, of Australia's foreign bribery laws. The Guidelines state that the CDPP will have regard to various factors in determining whether a prosecution of a self-reporting corporation is in the public interest, including the fact that the corporation has self-reported the conduct, as well as the quality and timeliness of that self-report. Further factors include the extent to which the corporation is willing to and does cooperate with the investigation by the AFP, and whether the corporation has a history of similar misconduct.

On 8 November 2024, the Attorney-General's Department published guidance on implementing anti-bribery compliance programs for corporations. There is an expectation that self-reporting bribery is a risk management procedure that is expected to be implemented into the compliance programme. This was part of the Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024 reforms.

Law stated - 3 July 2025

Voluntary disclosure programmes

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 (AUSTRAC), the Australian Competition and Consumer Commission (ACCC) and the ASIC all have specific mechanisms for self-reporting, whether mandatory or voluntary.

Specific formal policies such as the ACCC's immunity and cooperation policy for cartel conduct, published in 2024. 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 policy is intended to encourage insiders to provide information

to disclose illegal and harmful conduct, which incentivises the formation of cartels while providing immunity to the informant.

One of the criteria for immunity is for the applicant business to enter into a 'cooperation agreement' whereby the business undertakes to provide a certain level of cooperation with the ACCC in exchange for immunity.

As noted above, the AFP and the CDPP released a joint set of guidelines in 2017 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 regulatory bodies such as ASIC and the ATO, where is acknowledged as a key component of regulatory oversight. It will depend on the investigative value of the disclosure made, the following outcomes may be offered:

- immunity from civil liability;
- 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 in sentencing. There are also reputational benefits for proactive disclosures of corporate wrongdoing.

Law stated - 3 July 2025

Timing of cooperation

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

Yes, the timing may be relevant to an assessment of the level of cooperation provided. Cooperation at an early stage may positively impact on any future settlement negotiations or penalties at the conclusion of any criminal matter.

Law stated - 3 July 2025

Cooperation requirements

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

The cooperation requirements will generally be dictated by the investigating or prosecuting agency. There are common forms of cooperation, which 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.

Law stated - 3 July 2025

Employee requirements

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 are not prohibited. Use of in-house counsel or payment of legal fees may, however, raise questions 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 in 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.

Law stated - 3 July 2025

Why cooperate?

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 directors, officers and employees of a corporation. The notable sections are section

180, which imposes a civil obligation of care and diligence and section 181 imposes a civil obligation to act in good faith in the best interests of the corporation.

At section 184, it is a criminal offence if a director or other officer of a corporation is reckless or intentionally dishonest in failing to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose. Further, if an employee of a corporation uses their position or uses information dishonestly to gain an advantage, they are also liable to a criminal penalty.

Since July 2019, Part 9.4AAA of the Corporations Act 2001 (Cth) has been expanded to provide corporate whistle-blowers with further protections. At section 1317AAA of the Corporations Act 2001 (Cth) now also offers protection for whistle-blowers who are both current and past employees while also further expanding the meaning of eligible whistle-blower. Further, section 1317AAE now provides civil penalty provisions alongside existing criminal offences for companies that breach a whistle-blower's confidentiality, adding a further layer of protection for corporate whistle-blowers.

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.

Law stated - 3 July 2025

Privileged communications

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.

Law stated - 3 July 2025

RESOLUTION

Resolution mechanisms

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 wide discretion to resume, initiate or discontinue investigations into matters of corporate wrongdoing.

Law stated - 3 July 2025

Admission of wrongdoing

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 discretion to exclude, if the prejudicial effect would outweigh the probative value of the admission.

Law stated - 3 July 2025

Civil penalties

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 Penal
ties) Bill 2018 was introduced to and 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, the maximum civil penalty amounts for individuals are either 5,000 penalty units (amounting to A$1.65 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$16.5 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$825 million), whichever is the greater. The value of a penalty unit is prescribed and indexed by the Crimes Act 1914 (Cth) on 1 July 2024.

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.

Law stated - 3 July 2025

Criminal penalties

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, under the Criminal Code 1995 (Cth) section 70.5A, where, if a corporate body is found guilty of the offence of failing to prevent foreign bribery of a public official, the maximum fine that can be imposed is 100,000 penalty units (amounting to A$33 million), three times the value of the benefit, or 10 per cent of the annual turnover if the benefit cannot be determined.

Serious offences can, in certain circumstances, lead to the company being wound up pursuant to section 461 of the Corporations Act 2001 (Cth). Pecuniary penalties in the Corporations Act 2001 (Cth) or some serious criminal offences were increased for companies. For criminal offences punishable by 10 years imprisonment or more, companies can face the greater of 45,000 penalty units (A$14.85 million), three times the benefit gained, or loss avoided or up to 10 per cent of annual revenue turnover.

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 (Cth).

Law stated - 3 July 2025

Sentencing regime

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.

Some of these include:

- the nature and circumstances of the offence;

- other offences that are required or permitted to be taken into account;
- whether the offence forms part of a course of criminal conduct;
- the personal circumstances of any victim;
- any injury, loss or damage resulting from the offence;
- the fact and timing of any guilty plea and whether this resulted in any benefit to the community, victim or witness;
- any cooperation with law enforcement; or
- the deterrence effect of any sentence.

Comparable provisions exist under state and territory legislation.

Law stated - 3 July 2025

Future participation

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. There can be licensing and disqualification implications.

This is demonstrated practically by ASIC's ability to impose licensing conditions on a company's financial services licence and its power to revoke licences entirely. Similarly, individuals can be disqualified from directing corporations following findings of corporate misconduct or a breach of directors' duties.

Law stated - 3 July 2025

UPDATE AND TRENDS

Key developments of the past year

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

Legislative reforms are significantly impacting on government investigations in Australia. Below are some key trends.

Stricter sanctions and defence export reform

On 27 March 2024, the Australian government passed the Defence Trade Controls Amendment 2024, which introduces three new criminal offences under the Defence Trade Controls Act 2012. The amendments brings in a more rigorous assessment process, especially for sensitive goods and technologies with potential military applications. For instance, the heightened focus on dual-use technologies – that is, those with civilian and potential military applications – are likely to trigger investigations into the potential misuse or unauthorised export of such items. Similarly, businesses in the defence export sector will

be under scrutiny to ensure they obtain the necessary permits. The number of investigations targeting breaches of Defence Trade Controls Act 2012 is therefore likely to rise.

Increased focus on corporate accountability for foreign bribery

The recent enactment of the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (Cth) on 8 March 2024 introduces a significant shift. This law establishes a new offence for corporate bodies that fail to prevent foreign bribery. This highlights a growing emphasis on holding companies accountable for their employees' actions and implementing anti-bribery compliance programmes.

The Attorney-General Department's draft guidance on adequate procedures for preventing foreign bribery provides valuable insights for companies to navigate this evolving landscape.

Expansion of Anti-Money Laundering and Counter-Terrorist Financing regime

On 2 May 2024, the Attorney-General Department announced the second stage of consultation of the Tranche 2 reform to the Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) laws, marking a significant expansion of the AML regulatory framework. This reform proposes designating lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals as 'reporting entities' under the AML/CTF regime.

This broader scope will require these professions to implement measures to prevent and minimise money laundering and terrorist financing risks. Government investigations in these areas are likely to increase as authorities enforce these obligations.

Public consultation on proposed Scams Code Framework

On 30 November 2023, the Australian Treasury announced that the proposed Scams Code Framework ('framework') was launching a public consultation to seek feedback on the the framework to strengthen its design and effectiveness. The consultation seeks feedback on areas such as:

- proposed obligations for regulated businesses;
- requirements to develop and maintain an anti-scam strategy;
- clear dispute resolution pathways for consumers; and
- the role of regulators in monitoring and enforcing the framework.

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Law stated - 3 July 2025