

WHITE COLLAR CRIME

Regulating Bitcoin Exchanges: Preventing AML

Dennis has acted in some of Australia's most complex fraud matters involving global financial institutions and has advised multinational banks and corporations on the practice and procedure of investigations focussing on fraud and money laundering. He speaks with Lawyer Monthly on changes occurring in Australia to prevent economic fraud, especially with the rise of Bitcoin.

About Dennis Miralis



Dennis Miralis is a leading Australian criminal defence lawyer and adviser who specialises in complex white collar crime, including national and international criminal investigations and prosecutions, with a focus on money laundering, tax evasion, bribery, corruption, cybercrime and regulatory offences. Dennis has expertise in advising and

representing commercial institutions and individuals being investigated by the Australian Federal Police, the Australian Securities Investment Commission, the Australian Transactions Reports and Analysis Centre Financial Reporting Centre, the Australian Tax Office, the Australian Criminal Intelligence Commission, the Commonwealth and State Director of Public Prosecutions, as well some of the largest law enforcement and financial regulators world-wide, including the US Department of Justice, the Securities Exchange Commission, the Federal Bureau of Investigation and the UK Serious Economic Fraud Unit.

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Have there been any recent regulatory changes or interesting developments in your jurisdiction in white collar crime?

Australia is experiencing an active period of legislative reform covering white collar crime, which is likely to continue into the next 12-18 months as a number of important pieces of proposed legislation are debated and introduced by the Federal Government.

Broadly speaking, the changes cover a wide spectrum of white collar crime activity and include changes to: foreign bribery laws; the introduction of deferred prosecution agreements; whistleblower protection in the private sector; increased powers of the corporate regulator ASIC to investigate and prosecute breaches of the corporations law; an increase in the available penalties applicable to white collar/corporate crime, and changes to the anti money laundering laws to regulate bitcoin exchanges. Many of these reforms have been on the horizon for some time. The focus of the regulatory and legal changes is to address some of the perceived challenges involved in the detection and prosecution of white collar crimes. These changes therefore will seek to make it easier to allow white collar crimes to be identified,

detected and investigated and ultimately successfully prosecuted.

Additionally, in late 2017, the Federal Government announced a Royal Commission into Banks which will be given significant powers to examine alleged bank misconduct in the banking, superannuation and financial services industry. These changes will better align Australia's domestic laws with international developments that have already taken place across the Europe and in the USA in the past few years.

Can you outline the key fraud and white collar crime trends in Australia?

The key white collar crime and fraud trend appears to be a shift towards an increase in criminal penalties and providing the regulators and law enforcement with more powers to investigate and prosecute white collar crime. This has been accompanied by the recognition of the harm that such offences create to Australia's economy, and a recognition that the penalties for white collar crime have to date, not adequately reflected the objective seriousness of such offending. We are also likely to continue to see heightened activity by ASIC against banks who may have had failed to properly comply with their obligations

to regarding issuing credit and for breaches of Australia's AML regime along with increased powers in the areas of exchange of information and the ability to freeze assets.

Additionally, the Australian Federal Police are being provided with more resources and training to investigate international fraud matters including bribery of foreign officials. The new proposed bribery laws have been drafted to broaden the offence of bribery of a foreign public official by creating a new strict liability offence for failing to prevent foreign bribery.

The amendments to Australia's AML laws will ensure that "bitcoin exchanges" will be regulated and will impose reporting and record-keeping obligations on digital currency exchange providers, and require them to enrol and register on the Digital Currency Exchange Register maintained by Australian Transaction Reports and Analysis Centre (AUSTRAC) and to comply with protocols to identify and mitigate the risks of money laundering and terrorism financing. A Bill to establish an Australian Home Affairs portfolio was introduced into the Australian Parliament on 7 December 2017, which is likely to lead to centralisation of federal agencies working more collaboratively to investigate sophisticated white collar crimes, including those with an international dimension. As Australia's key intelligence agencies and law enforcement agencies will now come under this new portfolio, there will be a significant increase in the investigative capacities to

detect serious international financial crime with an Australian nexus.

The introduction of new whistleblower laws will assist in the identification of white collar crimes and will expand the scope of whistleblower protection beyond the Corporations Act including protections to a broader class of persons, including former employees, contractors and relatives. The legislation will also increase the kinds of disclosures that are protected under the Corporations Act to include disclosures of conduct which constitutes misconduct or an improper state of affairs or circumstances. The combination of all of these changes occurring in parallel demonstrates a paradigm shift that will align Australia with changes seen across the UK and the USA.

What complications or difficulties arise from international cross-border fraud & white collar crime?

From a defence perspective, one of the main complications in the investigation of cross border fraud and white collar crime is the need to acquire a detailed understanding of the laws governing fraud offences, data exchange, extradition, mutual assistance and the right to silence, across multiple jurisdictions, which often can have very different laws covering these areas and sometimes different legal system altogether. The above areas of law will generally play a significant role in how a cross border investigation will be conducted and ultimately, if there is an indictment and a trial, where and how the criminal trial will be undertaken. The focus

remains on ensuring that a client's right to a fair trial(s) is not prejudiced because of any irregularities in the area of data exchange, mutual assistance and potential breaches of fundamental human rights, such as the right to silence, across each jurisdiction where criminal and regulatory exposure exists. Having access to up to date local knowledge concerning which Government lawyers will be taking on the case, profiling the appetite of the particular prosecution team to try and resolve the matter through a negotiated plea/settlement/DPA and making the key forensic decisions very early on about your client's potential value to the Prosecution are some additional challenges that arise in cross border investigations. It is advisable to work collaboratively with experienced lawyers in all the jurisdictions where your client may be facing criminal and regulatory exposure to navigate some of these challenges.

In an ideal world what would you like to see implemented or changed in the area of international white collar crime?

As the internationalisation of white collar crime continues apace, unprecedented cooperation between regulators and law enforcement bodies will exponentially increase in the areas of tax fraud, cyber fraud, foreign bribery, bitcoin investigations and money laundering. The legal mechanism which will give effect to this cooperation will include mutual assistance, Memorandums Of Understanding, and informal contact between

financial regulators and law enforcement with their partner agencies across the globe. These developments are necessary to properly deal with the complexities of a globalised world where the nature of de regulated markets and the fluidity of capital through the internet has eroded the concept of national crime. Often, however, much of what is occurring in this space is not sufficiently subjected to the necessary regulatory and or judicial oversight required. Given that these developments have the capacity to interfere with the protection of fundamental rights I would like to see a clearer framework developed that strikes the right balance between the need for appropriate powers to be provided to Governments and the protection of important rights, such as the right to an a fair trial and the right to silence. More work needs to be done at an international level in the area of harmonisation of data exchange between jurisdictions, determinations concerning where someone will be tried in circumstances where multiple trials are possible and agreements about extradition across states when multiple indictments have been found. I believe these are areas which will ultimately need to be dealt with by the courts if sensible international standards through bilateral or multilateral agreements cannot be implemented. **LM**