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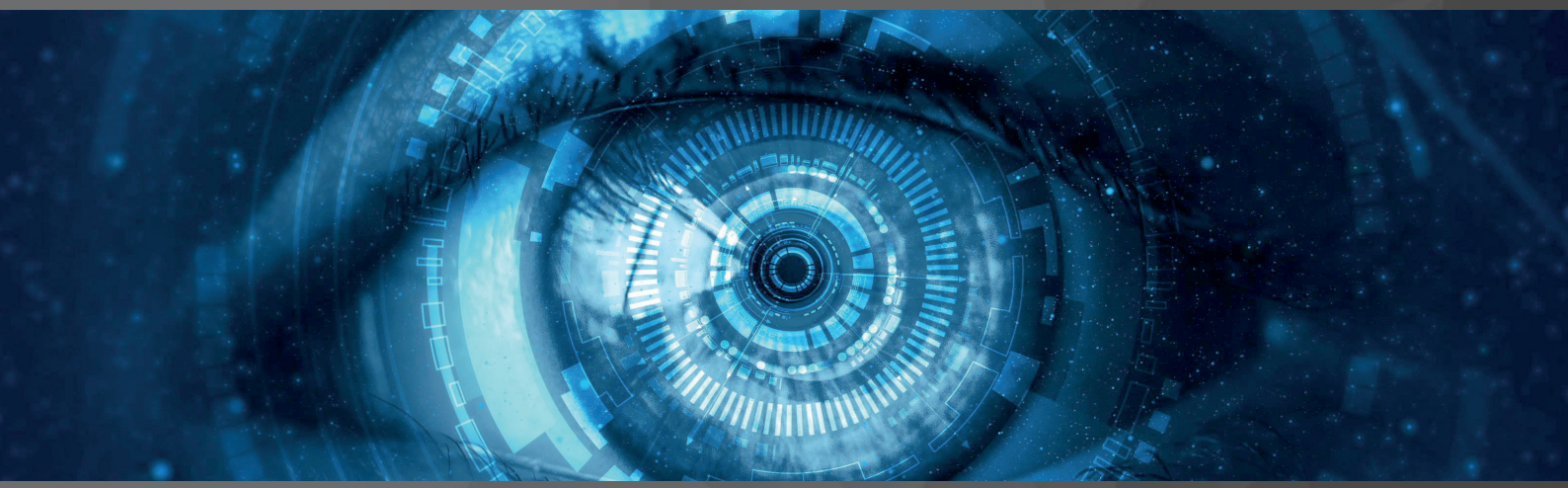

Corporate Investigations 2020

A practical cross-border insight into corporate investigations

Fourth Edition

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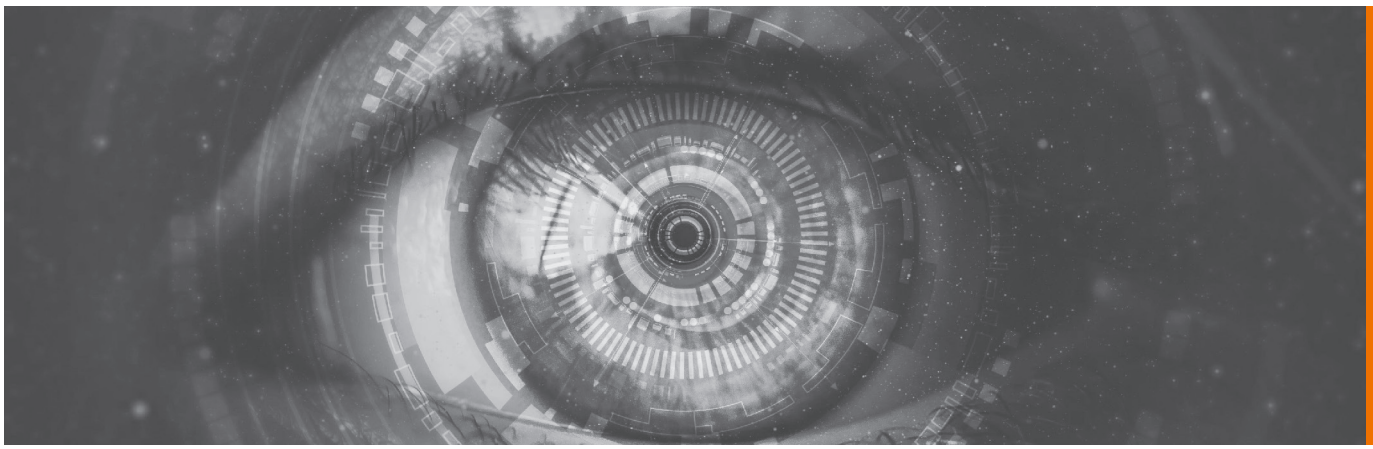

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Asia Pacific Overview


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The Asia-Pacific (APAC) region covers a number of jurisdictions: Australia; Cambodia; China; Hong Kong; India; Indonesia; Laos; Myanmar; Singapore; Thailand; and Vietnam.

Across the APAC region, corporations face increasingly stringent regulatory and enforcement standards, new offences extending criminal liability to legal persons, and extraterritorial reach of foreign statutes.

This article will address the following:

1. Investigations: spirit of compliance, obligation to conduct internal investigations, whistleblowers, and self-reporting.
2. Enforcement: obligation to show leniency, vicarious liability, DPA schemes.
3. Cross-border issues: diversification of roles; extended jurisdictions; and information-sharing including conflicts in cross-border data transfer.

Investigations

"Spirit of compliance"

In 2015, the then Attorney-General of Singapore, VK Rajah SC, 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".[1]

This is not an idea limited to Singapore. Increasingly, APAC jurisdictions particularly in the private sector must (at the very least) be perceived to take steps towards improved mechanisms of investigation, and importantly proactive steps to minimise potential liabilities.

In 2016, the Japan Exchange Regulation published 'Principles for Preventing Corporate Scandals' as a result of a number of corporate scandals emerging in listed companies. Listed companies are expected to implement these principles to self-regulate, and management must demonstrate compliance. Although the principles are not legally binding, and there are no adverse consequences for failing to abide by the principles, the development indicates that compliance programs are at the forefront of the regulators' agendas.[2]

Similar compliance programs, as well as internal audits and risk assessments, are now being conducted in China, specifically by multinational companies operating out of China, to identify potential liabilities and develop strategies to mitigate them.

Although the existence of compliance programs will not exempt a company from liability, or act as an automatic defence to misconduct, such programs can mitigate sanctions.

In addition, across the APAC region, it is common for entities to cooperate with government authority investigations as an adversarial attitude and lack of cooperation generally leads to prolonged or repeated inspections, and broader investigations.

Authorities can also impose penalties for non-cooperation. For example, in Singapore, it is an offence to refuse or fail to appear before the Monetary Authority of Singapore as well as render assistance in investigations. The Penal Code also criminalises conduct against any public servant such as failing to produce a document or furnishing false information.[3]

Obligation to conduct internal investigations

Yet, despite the cultural paradigm shift toward compliance, it is common across the APAC region that corporations are under no statutory or regulatory obligation to conduct their own internal investigations.

Internal investigations are conducted either in accordance with self-imposed internal policies and procedures, or as a result of other statutory or regulatory obligations that companies must adhere to where compliance would necessitate conducting an internal investigation.

In Australia, authorities cannot compel an entity to conduct an internal investigation. However, for example, financial services licensees may be requested by a regulator to answer particular questions, which would require some form of investigation. Furthermore, licensees may also in limited circumstances have a condition imposed on the licence which requires them to conduct an investigation.

In China, there are no current statutory or regulatory obligations requiring companies to conduct internal investigations. However, as part of a government investigation, Chinese enforcement authorities can demand and seize documents which might require a corporation to conduct an internal investigation. Furthermore, where multinational companies operate in China, they must comply with statutory and regulatory obligations of other jurisdictions that require internal investigations.

Generally, internal investigations are voluntarily undertaken after the discovery of a compliance or regulatory issue.

There are benefits to a proactive approach.

First, the internal investigation allows an entity to identify the full nature of the issue that it is facing, determine its level of exposure to regulatory and enforcement action, and develop a response strategy.

Also, by undergoing internal investigations, corporations can be better prepared in the event they are called on to respond to compulsory powers exercised by a regulator, including powers to compel the product of documents, inspect premises and documents, and conduct compulsory examinations or interviews of employees.

Finally, companies are voluntarily conducting internal investigations in response to the changing cultural tendency of the public to criticise corporate wrongdoing, which has been shown to impact significantly on the corporation's long-term viability. Most noticeably in Japan, if a company is the subject of public scandal, it must proceed with an internal investigation to quell public condemnation.[4]

Whistleblowers as facilitators of internal investigations

Where entities engage in misconduct or criminal behaviour, usually those in the organisation are best placed to suspect or have actual knowledge of the nature and extent of the prohibited activity.

However, whistleblowers continue to fear retaliation, and deterring people coming forward to report genuine illegal activity or misconduct. It is therefore imperative that robust and transparent whistleblower policies are established, ideally both internally by entities and statutorily enshrined by governments.

It is widely accepted that these policies must be two-pronged: proactive in changing culture; and providing a series of protections and incentives.[5]

With respect to the first, without a positive culture toward whistleblowers, individuals cannot have confidence that their report will be acted on, that the entity or individual they report to is serious about addressing corruption, mismanagement or misconduct, that their complaint will be treated confidentially, and that they will not face reprisal, whether it be prosecution, dismissal from employment or even physical harm.

A shift in public attitude will ideally lead to an increase in the number of legitimate reports. In Korea, where previously whistleblower reports were uncommon, a changed public perception of whistleblowers has seen an increase in the number of reports.[6]

However, with respect to protections and incentives, statutory whistleblower protections vary considerably across the APAC region.

For example, in China, whistleblowers are protected if they report on crimes committed by government officials or state-owned enterprises. However, there is no similar statutory protection for whistleblowers who report wrongdoing within private companies. Nonetheless, private companies are advised to implement policies that would prohibit retaliation against whistleblowers for reporting misconduct as a matter of good governance and best practice.

Singapore does not generally have any specific statutory protection for whistleblowers. Specifically, in relation to corruption, whistleblowers are exempt from both civil and criminal charges where information is provided in good faith, and no witnesses are permitted to disclose identifying information of a whistleblower in proceedings. However, the law does not set out any requirements in respect of the assessment of a complaint.

In Australia, while robust protections for whistleblowers were longstanding in the public sector, a new whistleblower protection regime now addresses the private corporate, financial and tax sectors. This regime was only implemented as recently as 1 July 2019. As a result, by 2020, public and large proprietary companies must implement whistleblower policies, protecting certain whistleblower activities and the persecution of whistleblowers.

In Hong Kong, what whistleblower protection regime is in place offers little or no protection.[7] There are no comprehensive, separate laws solely for the protection of whistleblowers. For example, whistleblowers are protected from claims by employers of breach of confidentiality by a number of piecemeal laws, including employment, anti-corruption and criminal laws, which apply depending on the nature and content of the disclosure.

Certain regulated industries may face additional whistleblower protections.

As a result, it is often left to entities to develop robust internal policy frameworks to address complaints by whistleblowers, examine with sensitivity the credibility of complaints, and maintain the whistleblower's confidentiality. In some APAC jurisdictions, entities conduct confidential assessments of the seriousness of the allegations, the complainant themselves, the specificity of the complaint, evidence supporting the allegation, and any risks posed to the entity.

Piecemeal laws may also provide some guidance to companies. For example, in India, companies are not statutorily required to act on anonymous or verbal complaints or complaints that fall outside of a statutorily prescribed limitation period. Furthermore, when dealing with allegations of financial fraud, best practice stipulates that when conducting internal audits, 'reasonable care' and 'professional skepticism' must be exercised.[8]

Ultimately, the use of whistleblower policies will better ensure that a corporate entity does not breach statutory protections where they exist. Furthermore, the implementation of policies ensures that both corporations and whistleblowers are clear as to process, treatment and implications.

Self-reporting

In some contexts, companies are subject to reporting regimes aimed at facilitating cooperation and collaboration with law enforcement bodies and offering a reprieve from increasingly severe penalties.

General reporting obligations are used widely across the APAC. For example, a 'recognised market operator' in Singapore must as soon as practicable, after becoming aware of a financial irregularity or other matter which might affect its ability to discharge its financial obligations, notify the relevant authority.[9] This obligation is in addition to the submission of periodic reports and provision of assistance as required by the relevant authority. It is an offence for operators not to comply with these obligations.

In addition, in China, specific sectors are subject to *ad hoc* government directives to undergo inspections and report misconduct identified. In 2016, medical device companies were required to conduct inspections regarding licence approvals, and to disclose non-compliant activities. They were also required to take steps to correct these activities to reduce sanctions. Failure to comply would result in revocation of licences.[10]

However, there is generally no express obligation on companies to self-report instances of internal wrongdoing or fraud, which may be discovered in the context of internal investigations.

Indeed, when entities decide to undergo internal investigations, a recommended 'best-practice' investigation plan includes both a regulatory engagement strategy whether or not the matter should be voluntarily reported to a regulator, and delivery strategy including assessing implications of the results of the investigation, and regulatory notification (i.e. self-disclosure).

Enforcement

Obligation to show leniency

The reality is that there are few incentives to self-report instances of misconduct. Indeed, self-reporting is no guarantee that applicable penalties will be reduced or leniency shown. This is particularly problematic because most illegal activity is clandestine in nature and not easily identified from outside the organisation. For example, in Australia, out of 57 foreign bribery allegations that proceeded to investigation, only eight came to the attention of authorities through self-reporting.[11]

Laws that obligate authorities to show leniency in response to an entity's voluntary disclosure are sparse or non-existent in the APAC region. India has no laws that provide for leniency towards corporations that voluntarily self-report.[12]

In China, lenient treatment varies greatly depending on the nature of the misconduct. Criminal and antitrust laws expressly provide for leniency. Anti-bribery administrative laws are vague as to whether leniency can be granted for self-reporting.

There are some exceptions. For example, Thailand has instituted 'settlement programs' between the Customs Department and the business sector where the department can waive penalties if it is satisfied that there was no intent to evade taxes.

With respect to cartel conduct, there is a trend to incentivise disclosures by participants in anti-competitive cartels. For example, the Competition Commission of India can impose a lesser penalty in cases where the disclosure is held to be vital. In Australia, an entity may apply for immunity to the Australian Competition and Consumer Commission (ACCC) in relation to potential cartel conduct. Whether or not immunity is granted will depend on a number of factors, including the entity's full cooperation and whether or not they are the first of the cartel to apply for immunity.

Moreover, other regions go further and incentivise reporting, even offering 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.[13]

Vicarious liability

As an added incentive not to disclose, APAC jurisdictions are implementing more robust measures to hold legal persons liable for criminal conduct by their employees, contractors, representatives or agents.

In Australia, for example, companies will be strictly liable for bribery committed by natural persons, both foreign and domestic, unless the company can demonstrate that adequate procedures to prevent such conduct were in place.

In Singapore, companies may 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).[14] It is a matter of prosecutorial discretion as to whether the individual or company will be pursued. However, 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".[15]

A significant effect of this paradigm shift in corporate jurisprudence is that companies must be proactive in implementing effective procedures and practices to avoid liability. However, it may also have an adverse impact on self-reporting schemes.

Deferred Prosecution Agreements (DPAs)

In favour of self-reporting is the introduction of deferred prosecution agreements (DPAs) in the APAC region.

DPA schemes are well established in the US. An interesting example in connection with the APAC region occurred in 2017 when the Department of Justice under the then new 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 $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;[16] the prosecutor can enter into DPAs with companies, partnerships and unincorporated associations; it is not open to individuals.[17] Under the new reforms, companies may be required to adhere to certain requirements in exchange of amnesty, including paying an agreed financial penalty, compensating victims, implementing or reworking compliance programs, and assisting with investigations.

Australia has borrowed heavily from its UK counterpart encouraging negotiations between entities and relevant authorities, where the company would be required to comply with a set of conditions, including admission of criminal liability, payment of a monetary penalty, cooperation with ongoing investigations, and consent to publicising the DPA. The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* is not yet enacted.

In both regions, an important factor for the prosecution in determining whether a DPA is a viable alternative to criminal prosecution is whether the entity has been genuinely cooperative. DPA schemes go some way to encouraging self-reporting, however greater certainty in outcome, and more compelling incentives, may be required to fundamentally change corporate behaviour.[18]

Cross-border Issues

Corporate investigations are increasingly globalised. Government authorities create prosecutorial alliances and share evidence; external counsel are called on to advise clients on the implications of regulatory and/or criminal investigations outside their own jurisdictions; multinational corporations are subject to not only increasingly stringent and complex regional laws and regulations, but also punitive extraterritorial laws.
A brief review of trending developments and resulting issues:

Diversification of roles

Fundamental to any internal investigation are the resources utilised by the entity. These include in-house and external counsel, internal auditing, finance departments, and external forensic accountants.

Roles of particularly external counsel and forensic accountants are changing as international investigations increase in number and scale as a response to globalisation and the increasingly international nature of business, as well as extraterritorial reach of regulatory investigations.

Traditionally, the role of the forensic accountant was limited to the analysis of financial and accounting records, as well as the interviewing of witnesses and suspects who may provide context and direction in respect of the analysis of the records.

The modern forensic accountant does not just rely on accounting. They take on an investigative role, and must understand the principles of asset/funds tracing, analyse financial, corporate and banking records to trace assets, be experienced in predictive coding in e-disclosures, and ultimately provide litigation support during the recovery process.

Generally, external counsel is introduced to internal investigations early, particularly where the independence and integrity of 'internal' lawyers may be in question. The diversification of roles means that counsel can focus on strategy and litigation in large international matters and provide legal advice on regulatory and compliance matters.

Counsel must be increasingly familiar with the laws, language and culture of the region, as well as the cross-border statutory or regulatory impact of foreign jurisdictions, and work closely with forensic accountants.

Extended jurisdiction

Across the APAC region, and indeed globally, laws are increasingly extraterritorial in effect, and corporations must navigate a complex myriad of regulations with respect to investigations and enforcement. Particularly for multinational corporations, parallel investigations across several jurisdictions exposes companies to conflicting statutes, rules of procedure and evidence laws.

The most obvious example is the omnipotent FCPA where notably the conduct of one individual is enough to bring US jurisdiction over non-US subsidiaries, resulting in an unprecedented extraterritorial extension of legal jurisdiction. The US government has also in practice asserted jurisdiction even when minimum statutory requirements are not met. For example, foreign subsidiaries are also now charged with 'aiding and abetting' a violation by its US parent.[19] Under the FCPA regime, US and non-US corporations have faced extreme scrutiny from overseas, and are punished severely with record-breaking fines, and prosecution of corporate employees. Furthermore, the expense of litigating FCPA cases forces most parties to settle, and therefore there are few precedents constraining the extraterritorial reach of the FCPA.

APAC is quickly becoming a primary target of the FCPA. In 2015, there were over 100 FCPA investigations in Asia, more than double the number of investigations in any other region.[20]

In addition, other countries are starting to look extraterritorially to target illegal conduct. Generally, individuals remain subject to sanctions if they are citizens and commit offences overseas. In the context of money laundering, laws can extend to restrain property situated outside the jurisdiction.

Specifically, in Japan, a foreign company may be subject to Japanese law if it conducts anti-competitive activities that would impede or influence competition in the Japanese market (for example, the Japan Fair Trade Commission's investigation under the Antimonopoly Act in respect of BHP Billiton).[21]

In addition, in Australia, it is an offence to provide, offer or promise to provide a benefit not legitimately due to another person with the intention of influencing the exercise of a foreign public official's duties in order to gain a business advantage.

Information sharing

Formal requests

Where documents are located in multiple jurisdictions, formal requests for information can be made by regulators by way of mutual legal assistance (MLA) requests pursuant to bilateral and/or multilateral treaties to which countries are signatories, and which have been incorporated into domestic law.

Multilateral treaties to which APAC jurisdictions are signatories include the United Nations Convention against Corruption, Convention against Transnational Organised Crime, Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

In addition, Cambodia, Indonesia, Malaysia, Brunei, Laos, Myanmar, Philippines, Singapore, Thailand and Vietnam are signatories to the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty.

Individual jurisdictions have also entered into bilateral MLA treaties. For example, Australia is party to over 25 bilateral MLA treaties.[22]

However, there are a number of issues with MLA requests, including lengthy delays, lack of resources and coordination between agencies.[23] A UN study revealed that responses to formal MLA requests were reported to be in the order of months, not days, by which time, ephemeral electronic evidence could be lost.[24]

In addition, assistance is generally provided on the basis of reciprocity – that the providing country will receive assistance should the need arise.

'Informal' requests

APAC jurisdictions also rely on informal assistance requests to foreign governments or other providers. However, these requests may not be legally enforceable, and turn on the willingness of countries to assist voluntarily.[25]

Moreover, different sectors are developing their own information sharing channels, including regulators and enforcement authorities in the financial sector.[26] Typically, these channels are developed under 'soft law' including action plans, resolutions and bilateral or multilateral Memoranda of Understanding (MOU).

For example, APAC jurisdictions are signatories to the multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMOU). Under the MMOU, securities regulators provide information and assistance, including information identifying persons who beneficially own or control companies, or accounts, and in relation to transactions, the amount purchased or sold, the time and price of the transaction, and the entity that handled the transaction.[27]

In addition, the Hong Kong Monetary Authority has entered into multiple MOUs and other formal cooperation agreements with APAC banking supervisory authorities including Cambodia, Australia and China. These agreements facilitate the share and exchange of supervisory information (as permitted under regional laws), and consultations. Under the agreement, information shared remains confidential. In addition, Singapore is signatory to a number of MOUs including the International Association of Insurance Supervisors and the International Organisation of Securities Commissions.

Finally, the Clarifying Lawful Overseas Use of Data (CLOUD) Act permits foreign governments to enter into bilateral agreements with the US specifically for the purpose of making requests directly to US-based global service providers,

bypassing the formal MLA system. CLOUD requests are conditional on reciprocity; the foreign jurisdiction must allow the US to request electronic data from their own service providers.[28]

Conflicts in cross-border data transfers

Notwithstanding developing mechanisms for information sharing, data privacy and protection regimes in the APAC region pose a challenge to corporate investigations, specifically in respect of onerous conditions on the transfer and disclosure of data even where corporations are compelled by court orders and/or foreign subpoenas, or formal or informal requests for information, as well as in the context of voluntary disclosure.

Generally, the transfer of personal information is conditional. For example, in Australia, an entity must not use or disclose information held for a primary purpose about an individual for a second purpose without consent from the individual[29] or if an exception applies. Relevantly, these exceptions include where use of disclosure of information is required by or under Australian law or order of court or tribunal, or the entity reasonably believes that the use of disclosure of the information is reasonably necessary for one or more enforcement-related activities conducted by, or on behalf of, an enforcement body, etc.

Even with such exceptions, some APAC jurisdictions such as Australia, Japan and Singapore require that where companies transfer data overseas, that data must be afforded a standard of protection comparable to that indulged in the originating jurisdiction.

As part of the Asia-Pacific Economic Cooperation (APEC) initiatives, standards for privacy and data protection are at the forefront. The Cross-Border Privacy Rules System is voluntary and facilitates the exchange of personal information among participating APEC members. There are currently eight participants, including Australia, Japan, Taiwan, Singapore and South Korea. In addition, the Privacy Recognition for Processors System outlines requirements intended for processors of personal information to meet relevant privacy obligations.

However, jurisdictions clash in their approach to data transfer arising in the context of corporate investigations.

Notably, Chinese data protection and cybersecurity laws restrict the cross-border transfer of data where documents contain 'state secrets', implicate cybersecurity laws, or involve information that is otherwise subject to Chinese regulations.

The PRC prohibits individuals based or working there from providing assistance in foreign criminal proceedings without first obtaining approval from the Chinese government 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 would be forced to choose between being held in contempt by a foreign court, and liable for potential obstruction of justice offences, and breaching Chinese law.

Relatedly, three Chinese banks have been held in contempt by a US court for refusing to comply with subpoenas in a US investigation.[30] The banks had argued that the Chinese government had ordered them not to provide the requested records, and that the US government should have relied on formal channels to request the information (i.e. MLA requests). However, at first instance, this argument was dismissed, and the Chinese government's abysmal compliance record with such requests cited.[31]

The PRC also relies on the Law on Safeguarding State Secrets of the People's Republic of China which prohibits the transfer of state secrets outside China without approval. It provides a very broad, very vague definition of 'state secrets'. 'State secrets' are generally held to include any data or information that is related to China's economic and social development, information related to science and technology, or any information that if released could pose a threat to Chinese national security.[32] Violators are subject to criminal penalties.

Conclusion

It is telling that the aforementioned issues are only a brief introduction to corporate investigations in the APAC region. Additional areas of interest include confidentiality and legal privilege arising in investigations, rapid technological advancements that affect data retention, as well as the use of artificial intelligence to manage the staggering volume of data, and the daunting task of advising on criminal and regulatory regimes outside of a legal practitioner's jurisdiction.

A key takeaway for corporations practising within the APAC region is that they must be across local regulatory and enforcement regimes, as well as the extraterritorial impact of foreign laws on corporate governance. This is particularly so where APAC jurisdictions are increasingly reliant on parallel investigations and collaborations.

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Dennis Miralis is a leading Australian defence lawyer who specialises in international criminal law, with a focus on complex multi-jurisdictional regulatory investigations and prosecutions. His areas of expertise include cybercrime, global investigations, proceeds of crime, bribery and corruption, anti-money laundering, worldwide freezing orders, national security law, Interpol Red Notices, extradition and mutual legal assistance law. Dennis advises individuals and companies under investigation for economic crimes both locally and internationally. He has extensive experience in dealing with all major Australian and international investigative agencies.

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