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ANTI-CORRUPTION 2022

Global interview panel led by John E Davis of Miller & Chevalier

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About the editor



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John E Davis is a member and coordinator of Washington DC-based Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and international anti-corruption practice group, and he focuses his practice on international regulatory compliance and enforcement issues. He has over 25 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the US FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ), and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union, Southeast Asia and Latin America.

Mr Davis has worked extensively with clients in developing and implementing internal compliance programmes, conducting due diligence on third parties, assessing compliance risks in merger and acquisition contexts, and auditing and evaluating the effectiveness of compliance processes. Additionally, Mr Davis focuses his practice on a range of other issues relating to structuring and regulating international trade and investment transactions.

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INSIDE TRACK



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Australia

Dennis Miralis is a leading Australian defence lawyer at Nyman Gibson Miralis who specialises in international criminal law, with a focus on complex multi-jurisdictional regulatory investigations and criminal prosecutions. His areas of expertise include bribery and corruption, global tax investigations, anti-money laundering, Interpol and extradition, and mutual legal assistance law.

Dennis advises individuals and companies under investigation for suspected breaches of anti-bribery and corruption law both locally and internationally. He has extensive experience in dealing with international and local enforcement agencies, including the Federal Bureau of Investigation, the Securities and Exchange Commission, the Internal Revenue Service, the Serious Fraud Office, the Australian Federal Police and the Commonwealth Director of Public Prosecutions. Locally, he has extensive experience in advising and acting in Independent Commission Against Corruption matters.



1 What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction, and what lessons can compliance professionals learn from them?

Since 1999, Australia has been a signatory to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions. Since 2003, Australia has also been a signatory to the United Nations Convention against Corruption. These international agreements are complementary and mutually reinforcing.

In 2012, the OECD raised concerns regarding very low levels of enforcement for foreign bribery laws in Australia, noting only one referral out of 28 cases had been prosecuted over 13 years. The OECD Working Group on Bribery made a number of recommendations in this regard, including encouraging proactive information gathering, better coordination between state and federal authorities and vigorous enforcement of false accounting practices.

The 2017 OECD Anti-Bribery Corruption Convention Phase 4 Australian Monitoring Report triggered a number of proposed legislative and investigative reforms in the area of anti-corruption enforcement and compliance in Australia.

While the OECD Monitoring Report acknowledges the substantial steps taken by Australian authorities in combating foreign bribery and corruption, it also highlighted Australia's historically low number of foreign bribery prosecutions, when considered against other OECD members.

Key recommendations from the report emphasise the need for Australia to:



Dennis Miralis

- reduce the risk of the Australian real estate sector being used to launder the proceeds of foreign bribery;
- ensure that Australian authorities have adequate resources to effectively enforce the offence of foreign bribery;
- take a proactive approach to the investigation and prosecution of companies for foreign bribery offences; and
- strengthen whistle-blower protections in the private sector.

Australia submitted Phase 4 follow-up reports to the OECD in two-year intervals of December 2019 and 2021. The OECD Working Group has acknowledged that since the 2017 Monitoring Report, Australia has deployed efforts to address a number of recommendations. Significantly, it was acknowledged that Australia made progress in its efforts to enhance detection of foreign bribery, but concern was again expressed about the continued low level of



“We have also witnessed a surge in the number of specialist disputes-only boutiques over recent years.”

foreign bribery enforcement in the jurisdiction, with Australia being invited to report back at the end of 2022.

When considering these recommendations, it is also important to note that since the commission of the original OECD report, a number of prominent foreign bribery prosecutions have now been brought to public attention. In the lifting of long-standing court suppression orders on 28 November 2018, information relating to the successful prosecution of companies Note Printing Australia Limited and Securrency International Pty Ltd became publicly available for the first time. Between 2012 and 2018, both companies, as well as executives, employees and agents of the companies, were convicted and sentenced for foreign bribery offences. Both companies were subsidiaries for the Reserve Bank of Australia and were involved in the manufacture and supply of polymer banknotes, which were used in Australia and sold internationally. The core offending conduct involved the payment of Indonesian and Malaysian agents engaged to assist in obtaining contracts with foreign banks. The conduct detected occurred in Indonesia, Malaysia, Vietnam and Nepal.

Similarly, brothers Ibrahim and Mamdouh Elomar were recently sentenced to periods of imprisonment for foreign bribery offences involving Iraqi officials, following a sentence appeal to the Court of Criminal Appeal in October 2018. These examples would suggest the ‘tide is turning’ to a degree in relation to the effective investigation and prosecution of foreign bribery offences in Australia. Foreign bribery and transnational corruption offences are, by nature, difficult to detect. These offences present significant obstacles for law enforcement bodies to overcome prior to completion of a successful prosecution. Reasons for this include the fact that commonly neither the provider nor the recipient of a bribe is likely to disclose the offence. Both parties will often go to great lengths to mask or conceal the corrupt activity, which is often closely linked to non-corrupt, legitimate business activity. In an effort to obscure corrupt practices, illicit funds are often placed, layered and integrated into legitimate financial markets using money-laundering typologies. Unlike many other serious offences, there is rarely an easily identifiable victim of foreign bribery who is willing to come forward and report the crime. Witnesses to such offences often reside outside Australia’s jurisdictional limits and may be reluctant to provide assistance in criminal proceedings conducted in Australia. For these reasons, it is not uncommon for a foreign bribery case, including investigation and prosecution phases, to take in excess of five years. The recent law enforcement successes evidenced by the Note Printing, Securrency International and Elomar prosecutions are likely attributable in part to the prior establishment of the Australian Federal Police-led (AFP) Fraud and Anti-Corruption Centre (FAC). The interagency approach utilised by the FAC is expected to result in comparable headway in addressing foreign bribery and corruption offences in the near future.

Recently, the AFP has received additional funding to assist dedicated foreign bribery investigative teams and an additional fraud and anti-corruption team. The Commonwealth Director of Public Prosecutions (CDPP), whose primary role is to prosecute offences



against Commonwealth law such as foreign bribery, has also recently been consulted in relation to legislative reform in this area. The AFP does not operate independently to combat bribery or corruption. The domestic 'whole-government' approach adopted to combat such offences, as well as increased levels of international collaboration, is detailed under question 4.

Since December 2019, Australian authorities have commenced confiscation action under proceeds of crime legislation and have also considered several other foreign bribery matters through the AFP-led Criminal Assets Confiscation Taskforce.

Legislative reforms to foreign bribery offence provisions are also currently being considered by the Australian Parliament as part of the Crimes Legislation (Combatting Corporate Crime) Bill 2019. In 2020, the Australian Senate's Legal and Constitutional Affairs Legislation Committee recommended that the Senate pass the bill. In February 2021 the Australian government confirmed that it agreed with the Committee's recommendation.

The proposed reforms under the bill include the introduction of a new corporate offence for failing to prevent foreign bribery. On commencement, the new offence will apply to a corporation in the event an 'associate' of the body corporate commits an offence under section 70.2 of the Criminal Code for the profit or gain of the corporation. The term 'associate' is defined under the proposed bill as an officer, employee, agent, contractor, subsidiary or controlled entity of the person or company. It is also proposed that the definition of 'foreign public official' is expanded to include candidates for public office. Significantly, under the new offence, corporate criminal liability will be 'strict' or automatic and apply regardless of whether the employees involved are convicted. However, a defence will be available to companies where it can be proven that adequate procedures were in operation to prevent and detect foreign bribery. The bill also proposes a Commonwealth deferred prosecution

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agreement scheme, to encourage companies to self-report serious misconduct to Australian authorities. Stated broadly, the aim of the proposed amendments is to remove perceived undue impediments to successful detection, investigation and prosecution of foreign bribery offending in Australia.

A further key development was the enactment of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019, which came into force in July 2019. The revised whistle-blower regime is an important step towards improving corporate whistle-blower protections in Australia. The Act makes it a requirement for companies to have formal whistle-blower policies and make such policies available to officers and employees. The act offers protection from criminal, civil and administrative liability for whistle-blowers who provide relevant disclosures to an eligible Commonwealth agency. The act also makes it an offence for a person to whom a qualifying disclosure is made to disclose confidential information obtained in the disclosure, including identity of the whistle-blower. The increase in protections, including immunities, to whistle-blowers will further



“A large proportion of foreign bribery schemes are already detected through self-reporting and internal disclosure.”

assist law enforcement in detecting future instances of foreign bribery and corruption. A large proportion of foreign bribery schemes are already detected through self-reporting and internal disclosure.

The AFP and the CDPP have also recently released a joint best practice guideline clarifying the principles and process that apply to corporations that self-report conduct involving a suspected breach of foreign bribery offence provisions. This is suggestive of an increased reliance on self-reporting in combating foreign bribery and corruption offences, as well as an acknowledgement of the public utility of self-reporting.

Despite the above developments, Transparency International's 2020 Exporting Corruption Progress Report ranked Australia as having moderate enforcement of corruption bribery. It found that Australia's enforcement system remains inadequate and its prosecutions low. Transparency International recommendations include the following:

- enact the Crimes Legislation (Combatting Corporate Crime) Bill 2019;
- develop a database of foreign bribery investigations and enforcement outcomes;
- adopt laws on the disclosure of beneficial ownership and establish a publicly accessible central register to increase transparency around corporate beneficial ownership;
- abolish the facilitations payments defence;
- remove exemptions from the Anti-Money Laundering and Countering Financing of Terrorism Act so that real estate agents, accountant, auditors and lawyers are covered by the regime; and
- introduce a debarment regime granting agencies the power to preclude companies found guilty of foreign bribery offences from being awarded contracts.

In a December 2021 addendum to the Working Group's report, the OECD provided its conclusions on the implementation status of its previous recommendations to Australia. Prosecution funding for



foreign bribery was deemed fully implemented, but converted to a follow up issue due to the ad hoc nature of such funding. The OECD also deemed its recommendation on prosecuting legal persons and corporations as partially implemented, noting the increase of such cases, but making some reservations on the stalled status of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (CLACCC).

Several misconduct and corruption scandals involving politicians and government ministers in recent years have strengthened calls for greater transparency in Australian governing bodies, and renewed efforts to establish a national integrity commission. Federal ministers are currently only subject to a non-binding ministerial code of conduct, with no such code for parliamentarians in general. Notable instances have included ministers taking up consultancy positions with companies that came within the ambit of their ministries after leaving government. As an example, Christopher Pyne, Minister for Defence in the 45th government, took on a role as a consultant to defence giant Ernst and Young shortly after leaving office.

In addition to the Exporting Corruption Progress Report mentioned earlier, Transparency International also provides an annual Corruption Perceptions Index, which ranks 180 countries and territories by their perceived levels of public sector corruption. Over the past decade, Australia's ranking on the Index has slid 11 places, from 7th in 2012 to 18th in 2021. It stands to reason that the abovementioned scandals have impacted this decline. Other factors such as delays in establishing a national anti-corruption agency, stalled anti-corruption legislation on foreign bribery (such as the CLACCC above), prosecutions of federal whistle-blowers, and limited follow up on money laundering in large institutions can be seen as further impacting factors. These have caused concern in a country once tied with Norway as one of the least corrupt places in the world.

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Reliance on self-reporting and a trust-based system for corruption allegations in politics have also been cause for criticism. Additionally, federal anti-corruption agencies such as the Commonwealth Ombudsman and the Australian Commission for Law Enforcement Integrity (ACLEI) have long been hampered by having insufficient powers, resources and scope. The ACLEI is empowered to investigate misconduct relating to certain federal law enforcement bodies, while an important area of corruption risk, defence spending, is outside its scope. Budget constraints and a more limited definition of corrupt conduct than that of state and territory counterparts, have also been written into the ACLEI's establishing legislation. It is not permitted to investigate corruption and bribery allegations among parliamentarians, ministers, former ministers, government contractors or the judiciary. It is also unable to make findings of corrupt conduct. The other currently existing federal integrity agency, the Commonwealth Ombudsman, acts largely as a complaints body, with no power to apply for search warrants. The Australian Law Reform Commission has emphasised the need for sufficient power



and resources for any national integrity agency, including the ability to investigate general corruption rather than criminal conduct only.

The Australian Labor Party, elected in May of 2022, campaigned on a platform (among others) of greater transparency and accountability in government. The new Australian Attorney General has put together a task force of senior officials to work on enabling legislation for a federal anti-corruption agency, which is to be introduced by the end of 2022. The new agency is projected to be up and running by mid 2023.

There have also been calls for the federal ICAC to have retrospective powers, as well as, more contentiously, the power to dismiss parliamentarians. The latter will likely turn on constitutionality and the tension between the push for greater accountability and the attendant risks to rule of law for an unelected investigative body to have such a broad ambit.

Transparency in government became a major issue among the Australian voters and directly affected the 2022 election outcome, shifting the balance of power away from traditional major parties. This is a strong indicator that anti-corruption is likely to gain increasing momentum in public discourse, and hence push initiatives on law reform and stronger accountability regimes even further. A further point is that with the ever-increasing overlap of private and public entities and privatisation of services, public anti-corruption dialogue must also include accountability and anti-bribery measures for corporate actors.

2 What are the key areas of anti-corruption compliance risk on which companies operating in your jurisdiction should focus?

Given the shifting legislative and investigative landscape highlighted above, there are a number of risks or 'red flags' that companies would be well advised to be aware of in regard to foreign bribery

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and corruption. The reforms signal a shift in onus with an increased need for companies to adopt a proactive, risk-based approach to compliance. Failure to do so can expose companies to criminal charges in the event a company associate engages in foreign bribery, even in circumstances unknown to the corporation.

In a white paper recently published by TRACE International, specific examples of situations that may signal a heightened risk of foreign bribery are identified. Even after internal safeguards have been established, the need to conduct due diligence when dealing with third-party intermediaries is stressed in the report.

Factors that will affect the level of risk include:

- whether a company uses intermediaries;
- the control a company has over its subsidiaries, including foreign subsidiaries;
- whether a company is operating in multiple jurisdictions; and
- the prevalence of corruption in jurisdictions that the company operates in.

The Corruption Perceptions Index, noted above, provides a useful guide to assess risk and ultimately avoid corruption when conducting business in high-risk jurisdictions.

Australian anti-bribery and corruption laws, including the proposed revisions, present a complex management challenge for Australian companies operating in multiple jurisdictions within the global marketplace. Foreign bribery offences apply extraterritorially and can result in serious penalties including imprisonment. A number of common red flags for foreign bribery exist when dealing with third-party intermediaries, and companies would be best advised to acknowledge and take appropriate action in response to such warning signs. These indicators represent a variety of different risks across a range of severity levels and are situations that should raise heightened suspicion for companies. These indicators include:



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- the intermediary having government links or links with politically exposed persons;
- a history of criminal convictions or a criminal record held by employees of an intermediary;
- evidence that the intermediary has inadequate controls or a lack of effective anti-bribery policies in place;
- suspicious circumstances including a lack of clear expertise in the relevant industry or unusual payment or compensation practices;
- a lack of transparency relating to true ownership or complex structures that appear to obscure beneficial ownership; and
- any other evidence of falsification or forgery on the part of the intermediate.

The proposed and enacted legislative changes discussed above will undoubtedly alter Australia's foreign bribery and anti-corruption landscape. In addition to checks relating to external parties, companies and compliance, professionals should respond proactively by way of increased diligence and appropriate internal policy reforms.



“While arbitration proceedings can sometimes be less time-consuming and more cost-effective, this is not always the case.”

Anti-bribery risk assessments should be performed for all company associates. Risk assessment and due diligence procedures should be documented to create a clear audit trail in the event of incident or investigation. In light of these reforms, it is expected that future investigations will place an increased emphasis on examining whether companies have facilitated a ‘culture of compliance’ hostile to bribery or comparable corrupt practices.

An additional risk factor are facilitation payments, which are still legally permissible but difficult to distinguish from bribery. The Australian Attorney General strongly discourages companies from making such payments and risk falling foul of foreign bribery laws both in Australia and overseas jurisdictions.

3 Do you expect the enforcement policies or priorities of anti-corruption authorities in your jurisdiction to change in the near future? If so, how do you think that might affect compliance efforts by companies or impact their business?

The Australian government is considering options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by companies. As noted above, a key component in this area is the proposed introduction of a deferred prosecution agreement (DPA) scheme under the Crimes Legislation (Combatting Corporate Crime) Bill 2019.

The pros and cons of introducing DPAs have been considered in some detail by the Attorney-General’s Department in its related public consultation paper. While the scope of any implemented DPA scheme may eventually cover a wide variety of criminal conduct, the proposed scheme is initially intended to be reserved for ‘serious corporate crime’, including fraud, bribery and money laundering. Under the DPA scheme, the Commonwealth Director of Public Prosecutions will be able to invite corporations suspected of serious corporate



crime to negotiate an agreement to comply with a range of specified conditions, in exchange for deferral of prosecution. Such conditions may include:

- full cooperation with any ongoing investigation;
- the admission of agreed facts;
- the implementation of an internal programme to promote and ensure future legal compliance;
- the payment of a fine or penalty; or
- any further terms as appropriate, such as the removal of the profits of the corporation's misconduct or paying compensation to victims.

If the terms of the DPA are breached, it follows that the prosecution can reopen.

In the Second Reading of the bill, it was noted that a DPA will not be appropriate in every case. The Australian government has recently stated that DPAs will not be a substitute for prosecution if prosecution would be in the public interest and consistent with the Prosecution Policy of the Commonwealth.

As discussed above, the Crimes Legislation (Combatting Corporate Crime) Bill 2019 is presently being considered in Parliament. If the Bill is passed, a DPA regime would become operational as soon as the legislation receives royal assent. Under the Bill, DPAs will be available for a range of serious corporate crimes, including foreign bribery, money laundering, fraud, breaches of sanctions laws and various criminal breaches of the Corporations Act. When considering the likely changes in law enforcement policy and procedure that may result from such changes, guidance can be taken from the United States and United Kingdom where established DPA schemes are currently operating.

Judicial consideration in these jurisdictions suggests that Australian corporations will need to not only have relevant anti-bribery policies

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and procedures in existence, but demonstrate that such procedures have been sufficiently implemented, communicated and 'embraced' by key stakeholders. Once implemented, such compliance procedures must be made subject to continued monitoring, training and review. The implementation of 'tokenistic' compliance measures will not constitute an 'all reasonable measures' defence and is unlikely to assist in DPA negotiations.

In the United Kingdom, only corporate bodies can participate in DPAs. In the United States, both corporations and individuals can enter into such agreements. Adding extra complexity, the Australian Constitution dictates that only Australian courts can exercise judicial powers. Courts must make an independent determination as to the appropriate course and cannot simply 'sign-off' on penalties agreed between the parties. As such, Australian DPAs would need to be characterised more in the manner of interim settlement agreements as opposed to final orders.



“The implementation of ‘tokenistic’ compliance measures will not constitute an ‘all reasonable measures’ defence.”

In my opinion, the intended deterrent effect of a DPA scheme is best achieved by permitting individuals to participate. Disallowing individual participation would disincentivise people who may have some personal liability or involvement in illicit activities from reporting corporate misconduct. This would, of course, be contrary to the intention of the newly implemented whistle-blower scheme discussed above.

There is also a risk that large companies, or the wider public, will view the introduction of a DPA scheme as a means for companies to ‘buy their way out’ of situations encompassing criminal wrongdoing. This, again, has the potential to undercut public confidence and the recent legislative changes intended to reinforce a greater level of corporate education in anti-corruption compliance.

In November 2018, the 35th International Conference on the Foreign Corrupt Practices Act was held in Washington, DC. The keynote speaker at this event was Lisa Osofsky, director of the UK Serious Fraud Office. In her speech, Ms Osofsky stressed that despite

competing business pressures, there is now more pressure than ever for corporations to take responsibility for the actions of their agents and ensure anti-corruption compliance. Osofsky also reinforced that favourable dispositions, such as DPAs, will not be available to corporations who do not have sufficient compliance systems in place. When considering recent changes relative to offences such as foreign bribery in Australia, it can be inferred that a similar position will be adopted by Australian law enforcement and prosecution authorities.

Further guidance on compliance and interaction with the day-to-day running of business can be taken from the joint guidelines release by the AFP and CDPP. The guideline was prepared specifically in relation to self-reporting for foreign bribery and other related offences.

The joint guidelines provide a useful insight into the factors the CDPP will consider in deciding whether to commence a prosecution against a company who self-reports wrongdoing involving bribery or corruption. Factors include the following.

- The fact that the corporation has self-reported the conduct, as well as the quality and timeliness of that self-report (with the burden being on the corporation to demonstrate timeliness).
- The extent to which the corporation is willing to, and does, cooperate with any investigation of the conduct by the AFP and any subsequent prosecution commenced by the CDPP against others in relation to the conduct.
- Whether the corporation or related bodies corporate have a history of similar misconduct, including any prior criminal, civil and regulatory enforcement action or prior warning by law enforcement or regulatory bodies.
- Whether the corporation had an appropriate governance framework in place to mitigate the risk of bribery (including specific anti-corruption policies and processes) and the extent to which there was a culture of compliance with that framework.



- Whether the alleged offending involved, or was expressly, tacitly or impliedly authorised or permitted by, any members of the board or other high managerial agents of the corporation, and if so, how many.
- Whether the corporation has taken steps to avoid a recurrence of the alleged offending; for example, by dismissing culpable individuals and improving governance processes.
- If the corporation has taken steps to redress any harm caused by the offending; for example, by compensating victims; and the fact of that action.
- Whether the corporation has self-reported related offending in another jurisdiction and complied with any penalties or orders imposed by that jurisdiction and the nature of those penalties or orders.
- Whether the collateral consequences of any court-imposed penalty are likely to be disproportionate to the gravamen of the alleged offending by the corporation.

It can be assumed that comparable factors would be considered upon the introduction of a formal DPA scheme in Australia. Again, the need for companies to have an appropriate governance framework in place to mitigate the risk of bribery is vital if companies are to avoid liability. Such policies lower the risk of criminal wrongdoing taking place in the first instance, but also serve to protect the company from liability of the basis of an 'adequate procedures' defence. Calls have been made for the proposed DPA laws to ensure that the entire process is transparent and open. As corruption often undermines trust in government and legal structures, this transparency would serve the important function of increasing public confidence in government anti-corruption efforts.

The penalties for bribery and corruption offences can be severe. The offence of foreign bribery when committed by a body corporate carries a fine of up to A\$22.2 million. Alternatively, if the court can determine the value of the benefit that the company obtained and that benefit is

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reasonably attributable to the offending conduct, the company can be fined three times the value of that benefit. If the value of the benefit cannot be determined, a penalty of 10 per cent of the annual turnover of the company can alternatively be imposed. Given the potential for such significant penalties to be enforced, it is not just ethically appropriate for companies to ensure anti-corruption compliance – it is also fiscally responsible practice.

4 Have you seen evidence of continuing or increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?

There has undoubtedly been a significant increase in recent years in law enforcement cooperation on both a national and international level. The rise of globalisation has caused a complete reinvention of the means that law enforcement agencies operate to tackle serious



“The white paper expressly recognises the increased extraterritorial dimension of contemporary criminal practice.”

offences including bribery and corruption. Australian agencies are increasingly and commonly involved in cross-border investigations specifically implemented to combat crimes committed by corporations and individuals who engage in transnational commerce, including e-commerce. The strategic shift from ‘as necessary’ international collaborative operations towards proactive inter-agency action groups is consistent with the position set out in the 2017 Australian Foreign Policy White Paper (the White Paper). The white paper expressly recognises the increased extraterritorial dimension of contemporary criminal practice and the fact that globalisation and technology impact not only legitimate business practice but also the means by which criminal syndicates and enterprises operate.

The December 2018 launch of the National Strategy to Fight Transnational, Serious and Organised Crime is consistent with the governmental observations set out in the white paper and aims to develop existing Australian law enforcement agencies onshore and abroad, as well as increasing overall inter-agency collaboration. This

is further evidence of an greater strategic emphasis on increased cooperation by enforcement authorities.

Anecdotally, I have observed a far greater prevalence in inter-agency cooperation in recent years and a comparable shift in the approach adopted by Australian and foreign law enforcement bodies in investigating serious crime including bribery and corruption. Evidence is gathered internationally by law enforcement bodies for domestic use on a far greater scale than ever before. This is evident not just in relation to Australian investigations but also by way of observable encroachment by foreign agencies that investigate persons residing in Australia.

Australian law enforcement agencies operate within formalised and specialised international task forces. In addition to our UN and OECD obligations, Australia operates as a member of the International Foreign Bribery Task Force, the G20 Anti-Corruption Working Group and the Asia-Pacific Economic Cooperation Anti- Corruption and Transparency Experts Taskforce.

Memoranda of understanding (MOU) set out the framework for collaboration between Australian agencies and foreign partners. For example, an MOU is presently in place between the AFP and Federal Bureau of Investigation that focuses on collaboration between the two entities in addressing terrorism, illicit drugs, money laundering, illegal firearms trafficking, identity crime, cybercrime and transnational economic crime by way of exchange of intelligence, resources and technical and forensic capabilities. In addition to informal agreements and MOUs, Australia’s system of mutual legal assistance with foreign states is governed by the Mutual Assistance in Criminal Matters Act 1987 (Cth). The mutual assistance scheme provides an express diplomatic channel by which international law enforcement partner agencies may request the assistance of the Australian government and law enforcement agencies.



The agreements are generally bilateral, meaning Australian authorities can request comparable assistance from foreign law enforcement counterparts. Requests for assistance include the exercise of powers of search and seizure and the taking of evidence in the form of oral evidence or written statements. All assistance provided must be in accordance with domestic laws and contracting member states have the ability to refuse requests for assistance. When perpetrators of bribery or corruption offences attempt to abscond or evade prosecution by leaving the jurisdiction, Australian law enforcement agencies collaborate with global law enforcement and intelligence partners such as Interpol to locate and detain wanted persons. Wanted persons may be liable for extradition or return to Australia upon the request of Australian law enforcement agencies. Laws that govern extradition operate at both the domestic and international level. At the international level, extradition of Australia residents is governed by the Extradition Act 1988 (Cth).

Given the serious nature and penalties associated with Commonwealth corruption and bribery offences, extradition requests represent a means by which Australian law enforcement can compel the return to the jurisdiction of fugitives wanted for prosecution.

Such investigative and enforcement tools, as well as an increase in international cooperation, have had an observable impact on the investigation and prosecution of bribery and corruption offences. The 2019 OECD follow-up report on Australia also indicated that eight foreign bribery and corruption matters are presently subject to investigation, involving 31 persons of interest. Investigations and prosecutions in this area are increasing and this trend will continue in the foreseeable future.

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5 Have you seen any recent changes in how the enforcement authorities handle the potential culpability of individuals versus the treatment of corporate entities? How has this affected your advice to compliance professionals managing corruption risks?

Most importantly, companies need to be aware that they can be found liable for the actions of their employees and any other individual or entity deemed to be acting as an agent of the company. As with individuals, companies are prosecuted and sentenced in accordance with the provisions contained in the Crimes Act 1914 (Cth).

It is also expected that Australia's existing corporate liability regime will soon be subject to change.

In April 2020, the Australia Law Reform Commission (ALRC) published a report reviewing existing statutory provisions and other mechanisms for attributing criminal liability to companies in Australia. The ALRC made the following recommendations:



“Australia has partially implemented the recommendations of the report regarding the liability of legal persons.”

- Under current legislation, authorisation of the commission of an offence can be established by proving that a ‘high managerial agent of the body corporate’ authorised the offence. The ALRC recommended that ‘high managerial agent of the body corporate’ be changed to an ‘officer, employee or agent of the body corporate’.
- Under current legislation, it is a defence to the above if the body corporate proves that it exercised due diligence to prevent the criminal conduct or its authorisation. The ALRC recommends amending the defence of due diligence to one where the body corporate must prove it took ‘reasonable precautions’.

The ALRC report was tabled to parliament in August 2020; however, the implementation of its recommendations has stalled in the senate and has yet to have been enacted into law.

In the follow-up addendum to its phase 4 report, The OECD working group on anti-bribery critiqued Australia for its low level of prosecution against legal persons, calling it ‘very concerning’ and ‘hopes that Australia will address its long-standing challenges in attributing wrongdoing to corporate entities’.

Australia has partially implemented the recommendations of the report regarding the liability of legal persons. The addendum to the OECD working group report found that Australia had fully implemented recommendations to facilitate the process of the self-reporting for matters concerning foreign bribery and for the promotion of mechanisms for the reporting of such matters. However, the report found that Australia has only partially implemented recommendations for more robust prosecution, finding that Australia had only one active prosecution at the time of the addendum’s publications, despite several allegations of foreign bribery.

With regard to treatment, in my experience it is a common strategic decision for investigative bodies to prosecute companies in the first instance, prior to pursuing the individuals involved. Corporate bodies



often provide a higher level of assistance and cooperation when compared to investigated individuals. One explanation for this is the greater degree of financial motivation for companies to restrict reputational damage and mitigate the potential penalty on sentence. For individuals whose liberty is ultimately at stake, assistance is often less forthcoming unless the prosecution case is demonstrably strong.

For enforcement and prosecuting authorities, a cooperating target corporation can represent a significant investigative advantage. Corporate cooperation with authorities can assist in securing further prosecutions of individuals operating within the company's corporate structure. A cooperating target company means searches can be performed by law enforcement without the need for investigative tools such as warrants and subpoenas. Companies may facilitate employee interviews or help address investigative inquiries in relation to internal practices. Further, a company may waive privilege, allowing access to documents that would otherwise be unavailable to the investigating body.

As discussed in question 6, legislative changes will place an increased investigative emphasis on examining whether companies have facilitated a 'culture of compliance' hostile to bribery or comparable corrupt practices. Corporate practice in the area of anti-corruption and bribery will be placed under greater scrutiny than ever before. As such, my advice is twofold. First, compliance professionals must ensure that comprehensive and robust anti-corruption and bribery policies and procedures are introduced, maintained and reviewed at regular intervals. Second, such internal controls should be implemented without exception in relation to not just a company's direct employees but also to contractors, intermediaries, agents and business partners operating in Australia or overseas.

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6 Has there been any new guidance from enforcement authorities in your jurisdiction regarding how they assess the effectiveness of corporate anti-corruption compliance programmes?

The Attorney General's public consultation paper, relating to the proposed amendments to the foreign bribery offence provision, proposed that the relevant government minister would be required to publish guidance on the practical steps companies are expected to take to prevent its employees, agents and contractors from engaging in foreign bribery and comparable corrupt practices. As we await the introduction of this legislation, the Australian Trade and Investments Commission (Austrade) has published the 'Anti-Bribery & Corruption (ABC): A Guide for Australians Doing Business Offshore'. This framework represents the most comprehensive governmental compliance guideline presently available. No comparable guideline has been published by Australian law enforcement authorities to date.



“Compliance professionals must ensure that comprehensive and robust anti-corruption and bribery policies and procedures are introduced, maintained and reviewed.”

The 12 steps to anti-bribery and corruption compliance detailed in the guideline document are:

- commitment from the top;
- design a programme;
- oversee the programme;
- draft your ABC policy;
- develop detailed policies and processes;
- apply your programme to business partners;
- have internal controls and keep records;
- communication and training;
- incentivise ethical behaviour;
- seek guidance, detect and report;
- address violations; and
- review.

Austrade has also published a guide relating to the assessment of programme effectiveness titled Austrade Guide to the Meaning of Adequate Procedures. Drawing heavily on prior judicial consideration of the meaning of adequate compliance procedures in the United States and United Kingdom, the report identifies the following factors relevant to the determination as to whether a company has taken sufficient steps to prevent the commission of a bribery offence. These factors are listed as:

- a ‘culture of compliance’ and genuine engagement with anti-bribery obligations;
- quality of policies and training;
- dedicating a role to focus on compliance with anti-bribery obligations;
- record-keeping;
- recognition of higher risks in some jurisdictions;
- monitoring of subsidiaries; and
- independent evaluations.



7 How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?

In Australia, unauthorised access to computer systems is criminalised by both state and federal legislation, although access to employee work systems is commonly provided for in employee contracts of employment. Similarly, a company subject to a government agency inquiry can generally direct its employees to cooperate in an investigation. All officers and employees should subsequently seek independent legal advice on potential personal criminal or civil liability. While a company cannot compel an employee to cooperate in an external investigation, failure on the part of an employee to cooperate, including providing access to work-related data, may represent a breach of their employment contract in certain circumstances.

The Workplace Surveillance Act 2005 (NSW) (and uniform legislation in all other Australian states and territories) restricts the use of both overt and covert forms of surveillance of an employee by employers and other members of the public. Surveillance can include computer surveillance in instances where corruption-orientated offences are suspected. Significant penalties are imposed for breaches of the act, including imprisonment.

Conversely, the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office all have, in some form, compulsory powers that can require individuals and companies to produce documents and information. Upon the valid issuance of a notice to produce by an empowered agency, there is no privilege against self-incrimination and failure to comply with the terms of the notice may represent an offence in itself. While the AFP has no comparable powers of

compulsory production, it commonly operates as part of joint-agency investigations with the above bodies.

Powers to compel 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. A number of well-established legal investigatory powers are deployed by law enforcement authorities during anti-bribery and corruption investigations. These powers can include the issuing of search warrants and the seizure of IT equipment for forensic analysis and decryption.

Section 3LA of the Crimes Act 1914 (Cth) also provides law enforcement authorities a mechanism by which a person must provide information or assistance that is reasonable and necessary to allow a constable to access data held in, or accessible from, a computer or data storage device that is on warrant premises or that has been moved to a place for examination. In the event that material produced is later relied upon in court, redactions can be sought to protect the release of certain personal information.

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The Inside Track

What are the critical abilities or experience for an adviser in the anti-corruption area in your jurisdiction?

It is necessary that advisers and legal representatives be aware of the evolving law enforcement landscape in which the individual or target company operates. Specific knowledge and experience dealing with mutual legal assistance requests, Interpol notices and compulsory examinations is increasingly necessary. An in-depth understanding of traditional investigative practices is also essential to protect the interests of individuals and corporations subject to investigation.

What issues in your jurisdiction make advising on anti-corruption compliance challenging or unique?

Many jurisdictions within the Asia-Pacific region have significant anti-corruption vulnerabilities. These vulnerabilities were evidenced in the recently published 'Note Printing and Secrecy International Prosecutions'. Australia is presently investing unprecedented resources and implementing significant law reform measures in an effort to combat domestic vulnerabilities to corruption as well as vulnerabilities evident in neighbouring jurisdictions. The use of unprecedented coercive powers by Australian law enforcement bodies in investigation of serious offences, and the subsequent flow-on effects relevant to a suspect's right to silence in criminal proceedings, is also an ever-expanding issue in corporate investigations.

What have been the most interesting or challenging anti-corruption matters you have handled recently?

Recently, our firm advised in proceedings where our client was investigated for significant allegations of bribery and corruption leading to a trial and conviction in a state in the Asia-Pacific region. We were tasked with assessing whether the criminal trial process that was undertaken accorded with generally accepted international standards of fair trials and human rights. In this particular case, as the country had recently suspended its democratic institutions under national emergency laws, aspects of the manner in which the investigation and prosecution of the offender were undertaken involved identifiable shortcomings and potential breaches. Such cases are extremely challenging and raise complex questions of local criminal law and international human rights law. The matter is still before the courts as an appeal.