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Anti-Corruption 2024

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Australia: Trends & Developments

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Trends and Developments

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Nyman Gibson Miralis is a market leader in all aspects of general, complex and international criminal law and is widely recognised for its involvement in some of Australia's most significant cases. The firm's team in Sydney has expertise in dealing with complex national and international cybercrime investigations and advising individuals and businesses who are the

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AUSTRALIA TRENDS AND DEVELOPMENTS

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Introduction

The Australian anti-corruption regulatory and enforcement landscape is rapidly changing, as the current Australian government seeks to maintain its stance of developing a strong regulatory framework that targets private and public corruption.

This section analyses the changing Australian regulatory landscape at two levels, legislative and litigatory, as they most clearly showcase the government's efforts to create a strengthened anti-corruption regulatory framework.

At the legislative level, the Australian government has introduced wholesale changes to its anti-corruption framework. This includes the recent establishment of an anti-corruption commission. The government has also signalled further legislative amendments, including to strengthen its anti-bribery laws and anti-money laundering and counter-terrorism financing (AML/CTF) regime.

At a litigatory level, recent judicial decisions demonstrate regulators' re-energised focus on enforcement and increased penalties for corporate entities.

This section finally discusses Australia's most recent update to the United Nations Convention Against Corruption's (UNCAC) review mechanism, which indicated various legislative changes enacted by Australia, intended to align it with international obligations and to globally signal its aim to clamp down on corrupt actors, both private and public.

An Evolving Legislative Framework

Establishment of the National Anti-Corruption Commission

On 30 November 2022, the Federal Parliament passed the National Anti-Corruption Commis-

sion Act 2022 (the "NACC Act"). The Act established the National Anti-Corruption Commission (NACC), an independent agency that detects, investigates and reports on serious or systemic corrupt conduct in the federal public sector. The Commission can also refer matters for criminal prosecution. The National Anti-Corruption Commissioner commenced operating in mid-2023.

The NACC, while focusing on corruption in the public sector, will have an impact on the businesses that work with the government.

Under the NACC Act, the NACC will be able to investigate any person, if they have potentially done something that has or could adversely affect a public official's honesty or impartiality in the way they carry out their official duties. This broad definition allows NACC to investigate companies, their officers, directors or employees and a "Commonwealth public official". The latter term is broadly defined to include individuals "engaged in assisting" any federal agency and also a service provider under a Commonwealth contract.

As a result, the NACC may potentially investigate private entities such as companies engaging with Parliamentarians and their staff, federal agencies' staff, or contract service providers to the Australian government. Further, various indirect corporate entities may also be potentially captured.

Additionally, the NACC's threshold to investigate private entities and individuals for "serious and systemic" corrupt conduct is unclear as the NACC Act does not define "serious and systemic" corrupt conduct. Instead, the Commissioner of the NACC will decide whether, in their opinion, a matter could involve "serious or systemic" corrupt conduct.

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If the NACC investigates a private entity, it will have the power to issue notices to the company, or any of its officers or employees, requiring the production of documents; compel officers or employees to attend a hearing to give evidence; search the company's premises; and use covert investigative powers, including intercepting telecommunications, using surveillance devices and authorising covert law enforcement operations, subject to satisfying the existing procedures enlivening the use of those powers by law enforcement agencies.

Individuals or corporations may face criminal penalties for failing to attend or obstruct NACC hearings, destroying documents, or producing false or misleading documents or information.

As a result, it is crucial for entities to ensure that their compliance and best practice documents are up to date and to develop policies for responding to a potential NACC inquiry, noting that NACC will be able to investigate both current and past conduct.

Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023

The Australian Parliament has introduced the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (the "Bill").

The Bill aims to increase corporate accountability by measures including introducing absolute liability for corporations if an associate of the corporation engages in foreign bribery for the profit or gain of the corporation. The offence can attract penalties of the greater of AUD27.5 million; three times the value of the benefit obtained by the offence; or 10% annual turnover during the 12-month period ending after the month the offence was committed.

The only defence available is if the body corporate had "adequate procedures" designed to prevent bribery of foreign public officials. The test is objective and will ultimately require the court to determine, on a case-by-case basis, whether the procedures were adequate. This provision is modelled on the United Kingdom's Bribery Act 2010.

The Bill requires that the Attorney General publish guidance on steps that a body corporate can take to prevent an associate from bribing foreign public officials. Such guidance may also be modelled on the UK Serious Fraud Office's 2020 guidance for "adequate procedures", which accompanies Section 7 of the Bribery Act 2010 that deals with a commercial organisation's failure to prevent bribery.

This is the third instance of a foreign bribery bill being tabled in Parliament, the previous versions having each lapsed. The first two versions included a Deferred Prosecution Agreement scheme, however, this has now been removed, indicating the current government's stricter stance towards corporate offending. The Bill is currently before the Senate.

AML/CTF legislation and Tranche 2

The Australian Transaction Reports and Analysis Centre (AUSTRAC) is leading the "Tranche 2 reforms" of the Australian AML/CTF regime. These reforms are the ongoing focus of several government agencies and departments including the Attorney-General's Department and the Australian Taxation Office.

Tranche 1 comprised of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the "AML/CTF Act"), which was passed in December 2006; while Tranche 2 comprises a set of regulations that will simplify and mod-

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ernise the Australian AML/CTF system and bring it in line with the Financial Action Task Force's recommendations and other countries, including the United Kingdom, Canada and New Zealand. The regulations include extending the AML/CTF regime to non-financial professions, including real estate and law.

In March 2022, the Senate's Legal and Constitutional Affairs Committee published its report on the adequacy and efficacy of Australia's existing AML law and regulation. The report recommended the acceleration of the implementation of the Tranche 2 reforms.

Between 20 April 2023 and 16 June 2023, the Attorney-General held a public consultation on the Tranche 2 reforms. A second consultation was expected to commence in September 2023, which would have likely included draft legislation, however, at the time of writing, the second consultation has not taken place.

AUSTRAC has already indicated that feedback from the initial round of reforms will be used to inform subsequent drafting of the reforms over the course of 2023.

Litigatory Landscape

AUSTRAC v Crown Melbourne, AUSTRAC v Crown Perth

In July 2023, the Federal Court of Australia ordered Crown Melbourne and Crown Perth (Crown) to pay a combined AUD450 million penalty for serious breaches of the AML/CTF Act. This is the third-largest fine in Australian corporate history.

The Federal Court approved the settlement between the AUSTRAC and the two subsidiaries of Crown Resorts Limited, Australia's largest gaming and entertainment group, based on find-

ings that Crown had failed to adequately monitor and report suspicious transactions and had facilitated money transactions involving high-risk customers.

The litigation was the result of AUSTRAC's industry-wide casino compliance campaign, which launched in 2019. AUSTRAC'S AML/CTF investigations into the casino and gambling industry were expected following its publications in December 2020 setting out its first risk assessment programme. This programme focused on the banking, remittance and gambling services sectors associated with the examination of junket tour operations (JTO) in Australia. It targeted these industries to identify, mitigate and manage risks of exposure to financial crime. AUSTRAC expressed concern over the high ML/TF risks faced by the JTO sector and detected that one of the leading casinos, the Star, maintained ongoing ties with many junkets that are linked to organised criminal groups in Asia.

AUSTRAC announced proceedings in the Federal Court of Australia against the Crown in March 2022. This followed an investigation that found poor governance, poor risk management, and failure to maintain a compliant AML/CTF programme at the Crown. The proceedings were for alleged serious and systemic non-compliance with Australia's AML/CTF laws.

Additionally, the publications revealed that Australian regulators had identified that casino accounts were being misused to make political donations to expand foreign influence. As a result of these risks and concerns, AUSTRAC launched "Operation Slalom" for enhanced compliance investigations and enforcement actions against casino and gambling industries.

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In November and December 2022, AUSTRAC also commenced proceedings in the Federal Court against Star Entertainment Group entities and SkyCity Adelaide Pty Ltd for similar reasons.

High Court decision raises maximum penalties for corporations

On 2 August 2023, the High Court handed down its decision in *The King v Jacobs Group (Australia Pty Ltd)* [2023] HCA 23. The High Court overturned the New South Wales Court of Criminal Appeal's decision concerning the maximum penalty that may be imposed under Section 70.2(5)(b) of the Criminal Code Act 1995 (Cth) for conspiracy to bribe a foreign official.

In 2020, the respondent had pleaded guilty to three counts of conspiracy as a body corporate to bribe foreign officials under the Criminal Code Act 1995 (Cth). The appeal to the High Court concerned the approach to calculating the maximum penalty that could be imposed with respect to only one of the counts, as its relevant offending had occurred when the maximum penalty provision was amended.

Section 70.2(5), as amended, prescribes a maximum monetary penalty for the offence of a corporation bribing, or conspiring to bribe, a foreign public official, a fine not more than the greatest of:

- 100,000 penalty units;
- three times the value of the benefit (if a court can determine that value); or
- if the court cannot determine the value, 10% of the corporation's annual turnover in a 12-month period ending the month in which the offending conduct occurred.

The High Court unanimously held that the “gross benefit” approach was correct. The High Court

held that for the purposes of ascertaining the maximum available penalty, the “value of a benefit” obtained by the respondent consisted of the amount received in performing construction contracts procured by the conspiracy, without deducting the costs of performing the contracts.

The High Court found this approach to be consistent with international law, as the provision is part of Australia's response to complying with its obligations under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.

This decision has potential implications for calculating maximum penalties for other corporate offences. Formulations similar to the “three-pronged” approach to calculating a penalty under Section 70.2(5) of the Criminal Code are also used in a number of other Commonwealth statutes that impose penalties, including the Corporations Act and the Competition and Consumer Act.

This HCA decision may also have consequences for monetary penalties arising from contravention of other criminal and civil penalty provisions of Commonwealth laws where the penalty is assessed by reference to the value of a “benefit” directly or indirectly obtained from the offending conduct. This may be so, both in relation to penalties imposed by the courts and in the negotiation of monetary penalties by regulators or prosecuting authorities.

UNCAC Review

On 10 November 2022, the Australian government provided an update to the UNCAC Implementation Review Mechanism (IRM) about steps that Australia has taken to implement the IRM's recommendations in its 2020 report of Australia.

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The 2020 report concluded IRM's second cycle review of Australia, while its first cycle review was completed in 2012. The 2020 report evaluates the effectiveness of Australia's legal and institutional framework in implementing the preventive measures and asset recovery provisions of the UNCAC. It also identifies the successes, good practices, challenges and technical assistance needs of Australia in these areas.

The report made 13 recommendations to strengthen Australia's implementation of the UNCAC, including in relation to access to beneficial ownership and director identification information, regulation of former public officials working in the private sector and regulation of non-financial businesses and professions under anti-money laundering legislation.

Australia's 2022 update to the IRM outlined steps taken and proposed to be taken to implement the IRM's recommendations, including the following.

- The Australian government has committed to establishing a beneficial ownership register.
- In 2020, the Australian government passed the Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020 (Cth) (the "RMOM Act"), which consolidated 30 existing business registers onto a modernised business registry platform.
- The RMOM Act also introduced the requirement for directors to obtain a Director ID by November 2021. The requirement for a Director ID was introduced to help address illegal phoenixing and will provide visibility over a director's relationships across companies and over time.

- In June 2021, a majority of provisions under the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020 (Cth) commenced. The Act included amendments to strengthen protections on correspondent banking by prohibiting correspondent banking relationships with shell banks. The amendments also require banks to conduct due diligence assessments before entering, and during, all correspondent banking relationships.

The Australian government also identified the NACC and, at the time, proposed amendments to the corporate foreign bribery provisions as steps taken to comply with the IRM recommendations and UNCAC.

Conclusion

Australia's update to the IRM, in 2022, illustrates the Australian government's energised efforts to develop a comprehensive anti-corruption framework, supported by a federal legislative scheme that implements Australia's UNCAC and OECD obligations. Further, the discussed judicial decisions and enforcement action have also contributed to the most energetic regulatory and enforcement environment Australia has seen in decades.

These changes, at the legislative and enforcement level, will have profound implications for the country's regulatory and corporate landscape, and require corporate entities to review their current operations, frameworks and policies.

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