IN-DEPTH

International Investigations

AUSTRALIA

LEXOLOGY

International Investigations

EDITION 14

Contributing Editor

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Gibson Dunn & Crutcher LLP

In-Depth: International Investigations (formerly The International Investigations Review) answers the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations worldwide. It highlights the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction.

Generated: June 19, 2024

Australia

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Summary

Introduction

The Australian government has empowered several regulatory bodies to investigate and prosecute corporate misconduct. These include:

1. the Australian Securities and Investments Commission (ASIC), which is Australia's primary corporate regulator. ASIC enforces and regulates company law;
2. the Australian Competition and Consumer Commission (ACCC), which enforces and regulates competition and consumer laws;
3. the Australian Tax Office (ATO), Australia's principal revenue collection agency, which enforces and administers the federal taxation system; and
4. the Australian Transaction Reports and Analysis Centre (AUSTRAC), which is the national financial intelligence agency. It enforces anti-money laundering and counterterrorism financing laws.

When a matter is referred for criminal investigation, it is typically investigated by the Australian Federal Police (AFP), the national enforcement agency. The AFP is responsible for investigating contraventions of commonwealth criminal law. The Commonwealth Director of Public Prosecutions (CDPP), the national prosecutorial agency, is in turn responsible for the prosecution of alleged offences against commonwealth law.

The regulatory agencies, alongside the AFP, can also conduct joint investigations. In 2015, the federal government established the Serious Financial Crime Taskforce (SFCT), which is an ATO-led joint-agency task force that includes the AFP, the Australian Criminal Intelligence Commission, AUSTRAC, ASIC and CDPP. The SFCT focuses on serious financial crime typologies such as offshore tax evasion, illegal phoenix activity and investment fraud. The SFCT facilitates inter-agency information, resource and skills sharing to identify and address the most serious and complex forms of these crimes, both in Australia and overseas.

All these agencies have, in some form, compulsory powers that can require individuals and companies to produce documents and information, including attendance at compulsory examinations where there is no privilege against self-incrimination. They also encourage cooperation when exercising their investigative functions.

When Australian legal practitioners conduct an internal investigation, it is likely to be in the context of a regulatory probe by one of these Australian government bodies, which may also include a concurrent criminal investigation by the AFP.

Year in review

Australia continues to maintain a strong stance against corporate misconduct. In 2023 and 2024, Australia commenced ongoing legislative reform designed to simplify the governing framework and better deal with the complexities of corporate and white-collar crime. At

the same time, increased funding and enforcement action by corporate regulators remains ongoing.

On 18 January 2024, the Australian Law Reform Commission's final report, Confronting Complexity, Reforming Corporations and Financial Services Legislation (the ALRC Final Report) was tabled in Parliament by the Attorney-General of Australia, the Hon Mark Dreyfus KC MP. The inquiry was referred to the ALRC in response to the Final Report of the Financial Services Royal Commission, published on 4 February 2019, which found that the existing legislative framework for corporations and financial services regulation was unnecessarily complex and hindered compliance.[1]

The ALRC Final Report made 58 recommendations to simplify the laws governing the financial services industries, providing clarity around compliance requirements and enforcement. Thirteen of these recommendations were implemented in 2023 by legislative amendment. The ALRC Final Report found that the old laws were unnecessarily complex, poorly structured, excessively prescriptive and without a coherent hierarchy. The report cited judges who described the regime as being like ‘porridge’, ‘tortuous’, ‘treacherous’, and ‘labyrinthine’. Accordingly, the recommendations seek to:

- Redesign financial services legislation to give it a clear home and identity as the ‘Financial Services Law,’ making it easier and less costly to find, navigate, and understand.
- End the use of almost invisible notional amendments that make the law deeply inaccessible, and instead use thematic, consolidated rulebooks to provide flexibility for regulating particular products, persons, services, or circumstances.
- Make it easier to tell when something is a ‘financial product’ or ‘financial service’ by introducing a single, simplified definition of both terms.
- Make offence and penalty provisions less complex and more obvious by consolidating them into a smaller number of provisions that cover the same conduct, making them easier to identify, and making the consequences of breach clear on the face of the law.[2]

The government has stated that it is 'now carefully considering the report and recommendations',[3]

- a new corporate offence of failure to prevent foreign bribery;
- the existing offences capture a greater range of corporate conduct; and
- increased penalties for corporations found guilty of an offence.

This offence does two things: it makes companies liable for failing to prevent foreign bribery by an 'associate'; and it gives companies a defence for failure to prevent foreign bribery

by an associate if they can show they had adequate procedures in place to prevent the commission of the offence. This is also an absolute liability offence, meaning there is no requirement for the prosecution to show that the company was otherwise involved, authorised or permitted the offence.

These legislative changes have occurred alongside the increased funding for regulators that has been ongoing since the Royal Commission, and strong enforcement action by regulators seeking to stay abreast of developing crime typologies.

For example, ASIC has increased its focus on enforcing protection for retail investors.[4] There has been a proliferation of online trading platforms since the covid-19 pandemic, which saw one in five Australian investors starting to invest using exchange-traded products. ASIC conducted a review of online trading providers and noted concerns with, among other things, investors being offered access to high-risk products, unsuited to their investment needs, as well as misleading statements about brokerage fees and other costs associated with trading.

Additionally, ASIC has focused its enforcement efforts on poor design, pricing and distribution of financial products, misleading and deceptive claims in respect of financial products and protecting financially vulnerable consumers of investment products.[5]

ASIC took enforcement action against online platforms that were not in compliance with their obligations to ensure that the financial services covered by their licence are provided efficiently, honestly and fairly under Section 912A(1)(a) of the Corporations Act 2001 (the Corporations Act). This saw ASIC claw back funds for over 2,000 traders from over-the-counter derivatives providers.[6] Greenwashing has been a particular focus of ASIC. There have been prevalent concerns about consumers being misled with respect to the environmental, social and corporate governance claims of investment products. Infringement notices were issued to Morningstar Investment Management Australia Pty Ltd, alleging that investors were exposed to controversial weapons investments despite providing representations to the contrary.[7]

Further, ASIC has continued its focus on fees for no service breaches. The Federal Court fined Mercer, a superannuation provider, A$12 million dollars for failing to meet its disclosure obligations and charging 761 client fees for which they received no service. Similar actions have been taken against Aware Super, Westpac bank and AMP group, with fines leveraged against these entities of almost A$80 million dollars.[8] ASIC also took enforcement action against Insurance Australia Limited, resulting in the imposition of a A$40 million dollar fine, one of largest ever issued for breaches of consumer protection law.[9]

In a separate matter brought by ASIC on 3 May 2023, Gabriel Govinda (known online as 'Fibonarchery') was sentenced to two and a half years imprisonment, to be released immediately on a five-year bond, and fined A$42,840. In 2022, Mr Govinda had pleaded guilty to charges under Section 1041D of the Corporations Act, including manipulation of shares listed on the Australian Securities Exchange and illegal dissemination of information. Between September 2014 and July 2015, Mr Govinda used 13 different share trading accounts, held in the names of friends and relatives, to manipulate the share price of 20 different listed stocks. Mr Govinda then disseminated information about his trades on HotCopper, seeking to increase the share price then sell the listed stocks at a higher price.

This area of law has also seen an increased focus on general and specific deterrence as a sentencing principle over the past few years, as well as an increase in overall lengths of terms of imprisonment imposed for serious white-collar offending.

In 2023, the CDPP secured convictions against a a group of co-offenders in one of Australia largest tax frauds. The conspirators planned for the parent company, Plutus Payroll, to appear legitimate while the subsidiary subcontracting companies would process the payroll and retain the pay-as-you-go and GST liabilities. These subsidiaries had straw directors who were installed to conceal that the entities were in fact controlled by the conspirators. The agreement was that these subcontracting companies would be periodically phoenixed with new subsidiaries created, to avoid ATO attention and allow the scheme to continue. The five co-offenders, two of whom were children of a former deputy commissioner of the ATO, were each convicted of one count of conspiring to dishonestly cause a loss to the Commonwealth, contrary to Section 135.4(3) of the Criminal Code 1995 (Cth) (the Criminal Code), and one count of conspiring to deal with the proceeds of crime being A$1 million or more contrary to Sections 11.5(1) and 400.3(1) of the Criminal Code. The offenders, including eight co-offenders convicted during ancillary proceedings, received sentences ranging from four to 15 years.[10]

Former director of Secure Investments Pty Ltd and Aquila Group Pty Ltd, Mudasir Mohammed Naseeruddin, was sentenced to a total prison sentence of four years and four months for dishonest conduct and other charges. He will serve a non-parole period of two years and nine months.[11] The sentence was handed down after Mr Naseeruddin pleaded guilty to two charges of dishonest conduct in the course of carrying on a financial services business contrary to subsections 1041G(1) and 1311(1) of the Corporations Act and two charges of failing to exercise powers and discharge duties in good faith in the best interests of a corporation contrary to subsection 184(1) of the Corporations Act. Mr Naseeruddin encouraged investors to roll over their superannuation monies into newly created self-managed superannuation funds and to lend those funds to his two companies (Secure Investments Pty Ltd and Aquila Group Pty Ltd). Mr Naseeruddin was a director of both companies.[12]

Conduct

Self-reporting

Australian regulators have had long-standing formal mechanisms in place for self-reporting of both civil and criminal wrongdoing, whether it be mandatory or voluntary. The ACCC, for example, has a detailed immunity and cooperation policy to encourage the reporting of cartel conduct, which in turn assists the ACCC in detecting and preventing cartel conduct.-[13] Similarly, ASIC relies heavily on self-reporting to fulfil its regulatory oversight of the financial services sector. If a corporate cooperates with ASIC, it can:

1. fully recognise that cooperation (taking into account whether the corporate has a self-reporting obligation);
2. negotiate alternative resolutions to the matter;
3.

take into account the degree of cooperation provided during the investigation when determining the type of remedy or remedies sought, depending on all the circumstances of the case;

4. in administrative and civil matters (other than civil penalty matters), make particular submissions to the tribunal or court as to what the outcome should be;
5. in civil penalty matters, take the corporate's cooperation into account; and
6. in criminal matters, take the corporate's cooperation into account.[14]

Another notable example of self-reporting is the recent formalisation of policy concerning foreign bribery, reflective of Australia's ever-growing presence on the international stage. In 2017, the AFP and the CDPP released joint guidelines clarifying the principles and processes that apply to corporations who self-report conduct involving a suspected breach of Division 70 of the Criminal Code[15] concerned with the bribery of foreign public officials. While there is no obligation to self-report suspected breaches of Division 70, a corporate may report to the AFP suspected criminal conduct by the corporation, its officers, employees or agents. A corporation may self-report conduct by its officers or employees without admitting criminal responsibility on the part of the corporation. There are, as the guidelines suggest, many reasons why a corporate would choose to self-report wrongdoing:

1. to proactively identify and address wrongdoing within the company;
2. to comply with directors' statutory and fiduciary duties to act in the best interests of the company;
3. to limit corporate criminal liability;
4. to minimise reputational damage;
5. to demonstrate a cooperative intent with the AFP in investigating the conduct;
6. to maximise the sentencing discount that will be available to the company in any relevant prosecution of the company; and
7. to be a good corporate citizen.[16]

A corporation that has self-reported is subsequently expected to provide full and frank disclosure and assistance to investigating authorities. The corporation is expected to give full access to related documents, including the provision of reports prepared by the corporation or its lawyers, and access to any potential witnesses who may ultimately give evidence in court. Assistance has clear benefits: the corporation can be given an undertaking that evidence given by the corporation as a witness is not admissible, whether directly or derivatively, against the corporation in any civil or criminal proceedings.[17] The corporation can also be given an indemnity from prosecution, but this indemnity does not prevent a proceeds of crime authority from commencing civil confiscation proceedings under the Proceeds of Crime Act 2002 (Cth).

The implementation of the guideline is in line with Australia's overall commitment to combating foreign bribery. Australia is a signatory to the Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention. The Phase IV review of Australia's implementation of the Anti-Bribery Convention occurred in December 2017,

and the Phase IV follow-up was completed in 2019. The 2021 addendum to the follow-up notes that Australia continues to progress several recommendations, including adequately funding the CDPP to ensure that the agency is sufficiently resourced to prosecute foreign bribery cases, including against corporate persons.[18]

Internal investigations

The 2017 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) shed light on the practices and culture of the financial services industry, revealing inadequacies in the investigative and reporting practices adopted by some of Australia's largest corporate entities. Common criticisms levelled at these entities concern the delay in reporting misconduct, general obfuscation, misleading behaviour and interference with functions of the corporate regulator, and questionable 'independent reporting' by law firms retained to conduct internal investigations and respond to regulatory probes.

The final report of the Commissioner, the Honourable Kenneth M Hayne AC KC, was submitted on 1 February 2019. The report included 76 recommendations relating to the conduct of banks, mortgage brokers, financial advisers and superannuation trustees as well as Australia's financial services regulators. The Commissioner invited ASIC to investigate 11 potential instances of criminal misconduct, with the view of instigating criminal or other legal proceedings as appropriate. The report stressed the need for supervisory bodies such as the Australian Prudential Regulation Authority and ASIC to build a supervisory programme 'focused on building culture that will mitigate the risk of misconduct'.[19]

Following the release of the final report, ASIC announced that it would establish an internal Office of Enforcement, creating a separate department for enforcement staff with a specific focus on court-based outcomes.[20] The ASIC Office of Enforcement is now established and is operational following a A$404 million federal government investment package. A marked shift by the agency towards increased investigation and litigation is evidenced by the 62 investigations that it commenced between October and December 2022, with 102 investigations ongoing, and the laying of 173 criminal charges. In 2024, ASIC is prioritising misconduct, including:

1. misleading conduct in relation to sustainable finance, including greenwashing;
2. high-cost credit and predatory lending practices to consumers and small businesses;
3. misconduct resulting in the systematic erosion of superannuation balances; and
4. compliance with financial hardship obligations.[21]

The inadequacies revealed by the Royal Commission illustrate that the decision to investigate can be a difficult one, particularly where there is a grave risk of reputational damage and the consequent erosion in public confidence in the organisation. Of primary concern is whether an internal investigation is required to comply with a relevant law, regulation or corporate policy. A secondary concern must always be the exercise of balancing the costs associated with any internal investigation and the effects of inactivity, delay and failing to investigate.

Commonly, internal investigations are undertaken by a lawyer or team of in-house lawyers. Sometimes, because of the scope or complexity of an investigation, external law firms will be briefed alongside specialist investigators, auditors and accountants. These firms usually specialise in civil litigation and corporate law more generally. However, the emerging understanding of the internationalisation of economic crime may change this paradigm. Advances in digital technology have driven an increase in incidences of white-collar crime and cybercrime. Corporations may think it prudent to use specialist criminal lawyers to provide advice much earlier in the investigation process and, where appropriate, assist in the conduct of the internal investigations. Where there is a concurrent regulatory probe with parallel criminal investigations in multiple jurisdictions, complex transnational criminal issues may arise that concern:

1. the right against self-incrimination;
2. the use of the exchange of information and data between jurisdictions for criminal investigation and prosecution; and
3. if there is a request for extradition, whether dual criminality or double jeopardy is applicable.

In-house lawyers need to be aware of the possibility that an internal investigation can lead to both civil and criminal proceedings, sometimes running concurrently, and sometimes crossing multiple jurisdictions.

Whistle-blowers

In 2019, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (the Act) came into force, some 13 years after the introduction of the first legislative protection for whistle-blowers in the Corporations Act 2001 (Cth) (the Corporations Act).

The Act created a single, consolidated whistle-blower protection regime under Part 9.4AAA of the Corporations Act and a regime in the Taxation Administration Act 1953 (Cth) through various legislative amendments. It also repealed previous financial whistle-blower regimes.

The Act was introduced because of perceived deficiencies in the existing regime, namely gaps in whistle-blower protection. Prior to its introduction, statutory protection for some whistle-blowers was non-existent or only piecemeal in other areas, and some protections had not been adjusted to reflect the actual remits of regulators.

The amendments to the Corporations Act were designed to encourage the disclosure of civil and criminal wrongdoing, particularly in the private sector, to improve overall compliance with laws and regulations by corporations. The government considers that whistle-blowers play a critical role in uncovering corporate crime, particularly because of the difficulties faced by law enforcement in detecting corporate misconduct.

The changes to protections in the Corporations Act are overwhelmingly positive. Whistle-blowers are no longer required to identify themselves when making a disclosure, and the types of persons and bodies that are allowed to disclose the identity of whistle-blowers have been comprehensively clarified. A qualifying disclosure now exists where the whistle-blower 'has reasonable grounds to suspect' that the information concerns:

1. misconduct;
2. an improper state of affairs or circumstances;
3. conduct that represents a danger to the public or the financial system; or
4. a contravention of any law.

Previously the disclosure had to have been made in good faith to qualify.

Existing immunities have been extended and the amendments ensure that information that is part of a protected disclosure is not admissible in evidence against that whistle-blower in a prosecution for an offence (other than in proceedings concerning the falsity of the information). The remedies available to whistle-blowers who suffer detriment because of a qualifying disclosure have been expanded. The Act creates a civil penalty provision to address the victimisation of whistle-blowers and allows for the criminal prosecution of individuals who cause, or threaten to cause, detriment or harm to a whistleblower. Other remedies, such as compensation, have been simplified. A person can seek compensation for loss, damage or injury suffered as a result making their disclosure.

As of 1 January 2020, the Act also addresses corporate governance concerns by introducing a requirement for large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to implement whistle-blower policies. The policies must detail the protections available to whistle-blowers, how and to whom disclosures can be made, the support that the corporate will offer to whistle-blowers, the corporate's investigation process and how the corporate will ensure fair treatment of employees mentioned or referred to in whistle-blower disclosures.

Comparable amendments to the Taxation Administration Act 1953 (Cth) introduced protections and remedies for whistler-blowers who make disclosures about breaches or suspected breaches of Australian taxation law or taxation-related misconduct. As with the amendments to the Corporations Act, the revised Act offers protection for whistle-blowers from civil, criminal and administrative liability in respect of qualifying disclosures, the creation of offences in respect of conduct that causes detriment to a person, and offers a mechanism for court-awarded compensation to persons who suffer damage in respect of a qualifying disclosure.

In March 2023, ASIC published a report on good practices for handling whistle-blower disclosure.[22] This report identifies best practices for whistle-blower disclosure, recommending, inter alia, that firms:

1. document their whistle-blower policy, including with information required under Section 1317AI if relevant;
2. define and allocate roles and responsibilities for their programme;
3. design and establish supporting procedures or guidelines to manage whistle-blowing in line with the Corporations Act; and
4. ensure their programme has adequate information technology resources and organisational measures to keep whistle-blowers' personal information secure.[23]

Enforcement

Corporate liability

Civil and criminal corporate liability can be derived from common law or from statute. The standard of proof in civil proceedings is 'on the balance of probabilities', while in criminal proceedings it is 'beyond a reasonable doubt'.

Under common law, a corporation is liable for the conduct and guilty mind of a person or persons who are the directing will and mind of the corporation. Commonly, that person or persons will be the managing director, board of directors or a person who has the authority to act on the corporation's behalf. Corporate criminal liability can also extend to employees or agents acting within the actual or apparent scope of their employment, if the corporate expressly, tacitly or impliedly authorises or permits the conduct that is the subject of the offence.

Statutory liability is more clearly defined. Chapter 2, Part 2.5, Division 12 of the Criminal Code outlines corporate criminal responsibility as it applies to the Code. The Criminal Code applies to bodies corporate in the same way it applies to individuals (or where provided, with modifications). For the most part, offences under the Criminal Code have physical elements (action or conduct) and fault elements (intention, knowledge, recklessness or negligence). These elements must be satisfied beyond reasonable doubt for an offence to be proven beyond reasonable doubt. Notably, a body corporate may be found guilty of any offence under the Criminal Code, including one punishable by imprisonment.

Where a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of their employment, or within their actual or apparent authority, the physical element must also be attributed to the body corporate. If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Authorisation or permissions may be established by various modes of proof.

Other acts of Parliament, such as the Corporations Act and the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act) contain similar liability provisions.

However, it is hoped that, like Australia's corporate and financial services legislation, Australia's corporate liability regime will eventually be subject to radical transformation. In 2019, the Attorney-General of Australia referred to the ALRC for inquiry and report a consideration of whether and, if so, what reforms are necessary or desirable to improve Australia's corporate criminal liability regime. The ALRC delivered its report on Corporate Criminal Responsibility to the Attorney-General on 30 April 2020, concluding that:

> In its current form, the law relating to corporate misconduct is both unjust and unfair. The civil regulatory regime does not adequately reflect the culpability of individuals who commit the crimes for the advantage of a business . . . [under the current law] the model for corporate liability was and remains manifestly at odds with the realities of the diffusion of managerial powers in large corporations.

The report made 20 recommendations for reform intended to simplify and standardise the law. The ALRC recommended that the Australian government:

1. ensure there is a principled basis for criminalising corporate conduct, justify new offence provisions and stop the use of infringement notices for criminal offences applying to corporations;
2. use one clear method to determine whether a corporation is responsible for a crime, hold corporations responsible for persons acting on their behalf regardless of their job title and ensure organisational fault is required for conviction of corporations;
3. introduce new criminal laws to prevent repeated civil penalties from being treated as a 'cost of doing business';
4. give courts specific factors to consider and allow courts to impose non-monetary penalties, dissolve a corporation and disqualify its management. Provide the ability to order pre-sentence reports and consider victim impact statements. Develop a national debarment regime to restrict corporations convicted of criminal offences from obtaining government contracts;
5. review individual accountability mechanisms for corporate misconduct within five years of the new Financial Accountability Regime coming into force;
6. consider laws to hold corporations responsible when they fail to prevent an associate from committing serious crimes overseas on the corporation's behalf; and
7. require judicial oversight and publication of reasons in open court.

While the federal government has acknowledged the ALRC's recommendations, the extent to which they will be implemented remains to be seen. However, the shift towards more assertive enforcement action has already commenced, with reform focusing on simplification of Part 2.5 of the Code and consolidation of the presently diverse corporate liability regulatory landscape in Australia. This will further strengthen and simplify means by which the regime can be used to attribute corporate criminal liability and create an environment hostile to criminal contraventions on the part of corporate bodies.

Penalties

The main form of penalty imposed on a corporate body is a fine.

Statutory fines have defined maximum limits, either expressed by a maximum number of penalty units that can be imposed or by a monetary figure. As of 1 July 2023, in a law of the commonwealth or territory ordinance, unless the contrary intention appears, one penalty unit amounts to A$313. The quantum of the fine can be significant. For example, if a corporate body is found guilty of the offence of bribery of a commonwealth public official, the maximum fine that can be imposed is 100,000 penalty units (amounting to more than A$31 million).

Serious offences can, in certain circumstances, lead to the company being wound up pursuant to Section 461 of the Corporations Act 2001 (Cth). Similarly, serious offences can lead to confiscation proceedings being brought by the AFP pursuant to the Proceeds of Crime Act 2002 (Cth) (the Act). The Act provides a scheme to trace, restrain and confiscate the proceeds of crime against commonwealth law. In some circumstances, it

can also be used to confiscate the proceeds of crime against foreign law or the proceeds of crime against state law (if those proceeds have been used in a way that contravenes commonwealth law). It is expected that the proceeds of crime laws will increasingly be applied to white-collar matters where, in the past, they have been mostly applied to general crime.

Under 2018 amendments to the Corporations Act and the ASIC Act, the maximum civil penalty amounts for individuals are at least 5,000 penalty units (amounting to A$1.6 million) or three times the financial benefits obtained or losses avoided; and, for corporations, at least 50,000 penalty units (amounting to A$15.6 million) or three times the value of benefits obtained or losses avoided, or 10 per cent of annual turnover in the 12 months preceding the contravening conduct (but not more than 2.5 million penalty units (A$782.5 million)).

Other penalties include enforceable undertakings, where the company must carry out or refrain from certain conduct. These are not available where the penalty imposed is dealt with by criminal sanction and are only appropriate for minor breaches of the law.

Compliance programmes

A corporate's compliance programme will be relevant to the corporate's criminal liability. For example, liability for some offences charged pursuant to the Criminal Code can be established on the basis that the corporate impliedly authorised the offending conduct by failing to create and maintain a culture that required compliance with the relevant provision. In addition, the existence of a compliance programme would be relevant under Section 12.3(3) of the Criminal Code, which holds that Section 12.3 (2)(b), relating to the requisite intent, does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission. The proposed ALRC recommendations considered above suggest that a compliance programme be expressly provided for as a defence.

Notably, a corporation may rely on the defence of mistake of fact pursuant to Section 9.2 of the Criminal Code. To do so, the corporate must prove that the corporation exercised due diligence, in which case, a compliance programme would be a relevant consideration. Additionally, the existence and effectiveness of a compliance programme may be a relevant factor in sentence proceedings, as it can change the court's assessment of the objective criminality of the offence.

The requirements or recommended elements of any corporate compliance programme are dependent on the statutory regime engaged. For example, the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 requires 'reporting entities' to have an anti-money laundering and counterterrorism financing compliance programme specifying how they comply with the relevant legislation and how they identify, mitigate and manage the risk of products or services being used for money laundering or terrorism financing. The relevant regulatory body, AUSTRAC, can impose a range of legal actions against entities that fail to comply with the regime, including the issuance of infringement notices and the imposition of civil penalty orders of up to 100,000 penalty units (A$31.3 million) for a corporate.

Prosecution of individuals

Chapter 2D, Part 2D.1, Division 1 of the Corporations Act provides for the general duties of officers and employees of a corporation. Section 180 imposes a civil obligation of care and diligence; Section 181 imposes a civil obligation to act in good faith in the best interests of the corporation; Section 184 makes it a criminal offence if a director or other officer of a corporation is reckless or intentionally dishonest in failing to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose. Furthermore, under Section 184, if an employee of a corporation uses their position or uses information dishonestly to gain an advantage, they are also liable to a criminal penalty.

Whether an individual is prosecuted or not for contraventions of the Corporations Act will depend on the severity and nature of the contravention.

International

Extraterritorial jurisdiction

Australia's corporate and criminal laws have limited extraterritorial application. Typically, the laws require the act, omission or person to have some connection with Australia.

Under the Criminal Code, a person does not commit an offence unless the conduct of the alleged offence occurred wholly or partly in Australia, or the result of the conduct occurs wholly or partly in Australia.[24] Geographical jurisdiction is extended in certain circumstances; for example, where at the time of the alleged offence the offence occurs wholly outside the jurisdiction of Australia, and the person is an Australian citizen or the person is a body corporate incorporated by or under a law of the Commonwealth or of a state or territory.[25]

The regulation of corporations under the Corporations Act only extends to foreign corporations 'carrying on business' in Australia.[26] For example, the power to disqualify individuals under the Corporations Act does not apply to individuals managing a foreign corporation, unless the act or omission occurred in connection with the foreign company carrying on business in Australia; or if the act or omission was done or proposed to be done in Australia; or if the act or omission was a decision made by the foreign company whether to carry out or to refrain from doing an act in Australia.[27]

International cooperation

Australia cooperates with overseas law enforcement and regulatory bodies through both formal and informal channels, across multilateral and bilateral treaties and under international conventions.

Inter-agency cooperation

ASIC, for example, has agreements with several other countries' law enforcement authorities, including Austria, Brazil, China, France and Japan. These memorandums of understanding enable the exchange of information and mutual cooperation and

assistance for investigations.[28] However, there are some restrictions on the extent to which ASIC can provide assistance to foreign authorities. Sections 6 and 7 of the Mutual Assistance in Business Regulation 1992 (Cth) require ASIC to receive authorisation from the Attorney-General prior to obtaining documents and testimony on behalf of foreign authorities.

Other Australian law enforcement agencies also have agreements with their international counterparts. Notably, the AFP is part of the International Foreign Bribery Taskforce. This force involves the Federal Bureau of Investigations, the Royal Canadian Mounted Police, the AFP and the United Kingdom's National Crime Agency working together to provide information and cooperation on cross-border anti-corruption investigations; it allows for the agencies involved to share knowledge, investigative techniques, methodologies and best practice.[29]

Australia is also a member of the Joint Chiefs of Global Tax Enforcement (J5), established in 2018 in response to a call from the OECD for countries to better tackle enablers of tax crime. The J5, which includes the United Kingdom, the United States, Canada and the Netherlands, seeks to combat the interrelated issues of global tax evasion, money laundering and cryptocurrency. Australia participates in the J5 through the ATO and SFCT. The partner nations share information and intelligence. In 2023, the ATO announced that there have been hundreds of data exchanges between J5 partner agencies and estimated that more data was exchanged in the past year than in the previous 10 years combined.[30] This information and resource sharing allows the SFCT to more effectively combat financial crime that operates across multiple tax jurisdictions.

Tax information exchange agreements

International cooperation on issues of corporate crime is also achieved through Australia's involvement in tax information exchange agreements (TIEAs) as developed by the OECD. These agreements allow for an obligation between Australia and non-OECD countries to assist each other by requesting the exchange of tax information to eliminate the avoidance of tax. The information that can be exchanged is limited to when a specific investigation is occurring.[31] Australia has TIEAs with a number of countries, including the Bahamas, the Cayman Islands, Guatemala, Liechtenstein and Vanuatu.[32]

Treaties and conventions regulating international criminal cooperation

Australia is party to several treaties regulating international criminal cooperation between state parties. Extradition requests (either made by Australia or received by Australia) are governed by the operation of the Extradition Act 1988 (Cth), while requests for investigative assistance are governed by the Mutual Assistance in Criminal Matters Act 1987 (Cth) (the MLA Act). Extradition is most commonly used for offences committed against the person; however, the MLA Act is regularly used in respect to white-collar offences and increasingly for asset confiscation proceedings, which could have ongoing utility for corporate misconduct. Notably, mutual legal assistance requests can be made by a defendant with the approval of a court. However, the court will consider several matters, which the defendant ought to demonstrate, including a legitimate forensic interest in the documents and unfair prejudice in the substantive proceedings should the material not be available.[33]

Similarly the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters allows for evidence to be taken through Australian courts for use in a foreign civil proceeding following a request by a foreign court.[34] Every state and territory in Australia has legislation that allows for evidence to be taken in this way, and often when such evidence is being sought, it is not uncommon for there to be a criminal investigation already underway. Notably, some protections are preserved under the Convention; the fifth amendment, for example, can be claimed in Australia where the subpoenaed party faces criminal charges in the United States. The use of international mechanisms such as the Hague Convention, when corporations are subjected to both regulatory and criminal prosecutions, is likely to become more prevalent, until an international convention or treaty specifically focusing on economic crime is adopted. In the meantime, substantive legal issues such as mutual assistance across jurisdictions, including adequate safeguards for human rights such as the right to a fair trial and privacy, will need to be considered by the courts on a case-by-case basis, under domestic law's interpretation of the Hague Convention.

Local law considerations

Privacy is a major concern when information is shared with overseas entities and authorities. Schedule 1 of the Privacy Act 1988 (Cth) contains the Australian Privacy Principles (APPs). These principles outline that where information is being shared by an APP entity (including the AFP and bodies established by a commonwealth enactment such as ASIC) to an overseas recipient, the entity must take reasonable steps to ensure that the recipient does not breach the principles.[35] However, this principle does not apply where disclosure is required or authorised by an international agreement relating to information sharing, or is reasonably necessary for enforcement-related activities.[36] This means that the principles will not apply in instances such as when the AFP or ASIC sends information to other regulatory agencies to provide information relevant to ongoing investigations. Currently, there is little jurisprudence in Australia dealing with the proper parameters on the exchange of information across jurisdictions where criminal sanctions may apply. This is an area in which Australian courts may become more involved, as the internationalisation of economic crime has been attended by a significant increase in the dissemination and sharing of information about individuals and corporations with, to date, very little oversight by Australia's judiciary.

Outlook and conclusions

It is anticipated that white-collar crime will remain subject to both ongoing legislative reform and ongoing aggressive enforcement action from corporate regulators. While the extent to which the ALRC's 58 recommendations for corporate and financial services legislation will be implemented remains to be seen, the ultimate government response has the potential to transform Australia's existing liability regime for corporate bodies.

Endnotes

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