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# White-Collar Crime 2023

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## Australia: Law & Practice and Trends & Developments

Richard Harris, Peter Munro, Catherine Kelso and Jason Oliver
Gilbert + Tobin

# AUSTRALIA


## Law and Practice

**Contributed by:**
Richard Harris, Peter Munro, Catherine Kelso and Jason Oliver
**Gilbert + Tobin**

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**Gilbert + Tobin** is a leading Australian law firm, with a disputes and investigations practice comprising 26 partners and special counsel, supported by over 150 lawyers across the firm's offices in Sydney, Melbourne and Perth. The team has experience working with some of Australia's leading companies, executives and directors on complex regulatory enforcement and compliance matters, including investigations, civil proceedings, criminal prosecutions and public inquiries. The firm's lawyers have a commercial focus and possess a comprehensive understanding of legal requirements, as well as the best practices for investigating, defending proceedings, advocating for clients, negotiating with investigators and prosecutors, and managing risk.

## Authors

**Richard Harris** leads the disputes and investigations practice at Gilbert + Tobin, where he specialises in major disputes and contentious regulatory issues, assisting large corporates through significant litigation, class actions, investigations and regulatory enforcement proceedings. He regularly advises banks, large corporations and their boards on major dispute, regulatory and governance issues. Richard regularly acts for directors and senior management in investigations or allegations of misconduct. He continues to have a very substantial disputes practice including a number of the most significant and reputational sensitive conflicts and investigations in the Australian market.

**Peter Munro** is a partner in Gilbert + Tobin's disputes and investigations group, specialising in commercial and corporate disputes and contentious matters. He has extensive experience advising significant clients in relation to high-stakes litigation in state and federal courts, regulatory investigations and enforcement, as well as government inquiries and Royal Commissions. Peter provides advice that is pragmatic, commercial and strategic. He assists clients to navigate significant investigations and multi-party litigation, including class actions and regulatory proceedings, and has represented both plaintiffs and defendants in multi-billion dollar complex commercial disputes in both Australia and the US across highly regulated industries such as financial services and health care.

**Catherine Kelso** is a partner in Gilbert + Tobin's disputes and investigations team. She has deep experience in navigating financial services participants through regulatory investigation and enforcement activity. She also advises in relation to compliance and governance issues. Prior to joining Gilbert + Tobin, Catherine worked for the Australian Government Solicitor and was seconded as part of the team managing the Financial Services Royal Commission. As such, Catherine brings a deep understanding of the unique challenges and environment in which government and public bodies operate. She is also skilled at navigating the complex and significant demands of responding to and participating in Royal Commissions and public inquiries.

**Jason Oliver** is a special counsel in Gilbert + Tobin's disputes and investigations group. Jason has over 16 years' experience in significant commercial disputes, Royal Commissions and inquiries, investigations and enforcement, administrative law matters, white-collar crime and minimising financial and reputational risk. Jason has practised in multiple jurisdictions in Australia and internationally, and has acted for the Australian government and its departments and agencies, as well as several major multinationals, banks, financial services firms and professional services firms in some of their most highly complex, high-profile and high-value disputes and regulatory matters.

## Gilbert + Tobin

Level 35, Tower Two, International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4000
Email: info@gtlaw.com.au
Web: www.gtlaw.com.au

# 1. Legal Framework

## 1.1 Classification of Criminal Offences

Australia, as a constitutional federation, has a complex system of criminal laws comprising offences against the laws of the Commonwealth of Australia as well as offences against the laws of each of the Australian states and territories (including, for some states, both common law and statutory offences).

Commonwealth and state and territory offences are generally classified as either:

- summary offences (sometimes called "simple offences") – triable before a judge without a jury; or
- indictable offences – triable before a judge and jury (some of which may be tried summarily).

Most offences will only be established if the prosecution proves, beyond a reasonable doubt, that:

- the accused's conduct satisfied the physical element(s) for the offence; and
- the accused had the relevant state of mind, such that the physical element(s) coincided with the requisite fault element(s) for the offence (eg, intention, knowledge, wilful blindness, recklessness or negligence, depending on the offence).

Some offences, particularly in relation to the management of corporations and financial services licensees, are "strict liability" or "absolute liability", meaning there is no requirement to prove state-of-mind elements for the physical elements of the offence.

It is not necessary for the prosecution to prove a motive (since intention and motive are distinct concepts at law in Australia), although proof of a motive may assist a judge or jury more readily to infer intention and, potentially, the identity of the person who committed the offence.

Under both Commonwealth and state and territory laws, a person who attempts to commit an offence may be held criminally liable and punished as if the offence had been committed, even if the offence is not completed.

Financial penalties in Australia are framed in terms of "penalty units"; a set amount which is subject to indexation. For offences committed on or after 1 July 2020, a "penalty unit" is AUD222. Where a maximum penalty amount is specified in the legislation, this penalty applies per contravention.

## 1.2 Statute of Limitations

At the Commonwealth level, limitation periods will apply where the maximum penalty which may be imposed for the offence is six months imprisonment for an individual (or less), or 150 penalty units for a body corporate (or less). In those cases, the applicable limitation period is one year, unless that limitation period has been modified by statute. For example, in the case of offences against the Corporations Act 2001 (Cth) (Corporations Act), the limitation period is five years after the act or omission alleged to constitute the offence (but this period is capable of being extended with Ministerial consent).

Otherwise, Commonwealth offences are not subject to a limitation period.

Each of the states and territories has its own statute(s) of limitations. In general, limitation periods tend to be prescribed for summary

offences and not for indictable offences (including indictable offences which are triable summarily). The applicable limitation periods for summary offences range from six months to two years from the date of the alleged offence, depending on the jurisdiction and the offence in question.

There is no specific legislation dealing with concealed and/or continuing offences at Commonwealth or state and territory level. Generally, any applicable limitation period will run regardless of whether the offence has been concealed.

## 1.3 Extraterritorial Reach

Australian law presumes that criminal legislation has only domestic effect. This presumption is capable of being displaced by clear language demonstrating a legislative intention to create an offence with extraterritorial operation.

The Parliaments of Australia and each of the states and territories are able to enact offences with extraterritorial operation, provided there is a substantial and bona fide connection between the subject matter and the Commonwealth or the state or territory in question (eg, offences committed abroad by Australian citizens or offences involving conduct partially within Australia and partially overseas).

Examples of offences with extraterritorial operation include anti-money laundering and counter-terrorism finance offences, fraud offences, offences involving the use of carriage services, conspiracy offences and accessory offences.

## 1.4 Corporate Liability and Personal Liability

Commonwealth and state and territory criminal laws treat corporations as legal persons that are capable of committing crimes.

For example, under Section 4 of the Crimes Act 1900 (NSW) (the "NSW Crimes Act"), "person" is defined to include "any society, company or corporation", such that a corporation could in theory be prosecuted for any of the various offences under that Act, provided that the requisite physical and fault elements are capable of being attributed to the corporation through the conduct of one or more individuals. Furthermore, Section 16 of the Crimes (Sentencing Procedures) Act 1999 (NSW) (NSW Sentencing Procedure Act) prescribes fines for corporations in respect of offences that are otherwise punishable by imprisonment.

### Commonwealth General Test of Attribution

Part 2.5 of the Criminal Code Act 1995 (Cth) (Commonwealth Criminal Code) extends criminal liability for Commonwealth offences to corporations and specifies the general test for attribution of physical and fault elements. The Crimes Act 1914 (Cth) (Commonwealth Crimes Act) prescribes monetary penalties for corporations in respect of those offences which otherwise only carry prison sentences. The general test of attribution in Part 2.5, however, has been displaced in respect of various Commonwealth offences by other legislation.

In 2021 corporate criminal liability was identified by the Australian Law Reform Commission (ALRC) as an area requiring legislative simplification, since the variety of attribution tests has the potential to lead to confusion as to the circumstances in which a corporation may be criminally responsible and complicates the litigation process. The Federal Government is considering the ALRC's recommendations, but it has yet to implement any of them.

The following applies under the Commonwealth's existing general test of attribution.

If a physical element of an offence is committed by an employee, agent or officer of a corporation within the scope of their employment, the physical element will be attributed to the corporation.

If a fault element of an offence is intention, knowledge or recklessness, that fault element will be attributed to a corporation that expressly, tacitly or impliedly authorised or permitted the commission of the offence. This can be established by proving:

- that the board of directors or a high managerial agent of the corporation intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- that the corporation failed to create and maintain a corporate culture that required compliance with the relevant provision.

If a fault element is negligence in relation to a physical element of an offence and no individual employee, agent or officer of the corporation has that fault element, that fault element may nonetheless exist if the body corporate's conduct is negligent when viewed as a whole (ie, by aggregating the conduct of any number of its employees, agents or officers). Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate management, control or supervision of the conduct of one or more of its employees, agents or officers, or failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

### Prosecuting Legal and Natural Entities for the Same Offence

It is possible for an individual and a corporation to be found directly liable in respect of the same offence. An individual may be personally liable as an accessory to a corporation's offence or as a principal offender, including where the individual is deemed to be a principal offender because of their role and status in the management of the corporation (including in the field of taxation, occupational health and safety and environmental regulation).

Generally, there is no formal policy preference at either Commonwealth level or state/territory level as to when to prosecute a legal entity or a natural person or both, and the prosecution of a legal entity will not prevent the prosecution of an individual for their involvement in the same or a related offence, nor vice versa. However, prosecutors at both the Commonwealth and state/territory levels are empowered to exercise their discretion to grant concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others, provided that certain conditions are met. There also exists, in respect of market misconduct offences and cartel offences, immunity regimes designed to encourage early reporting and co-operation with regulatory and prosecutorial authorities.

### Successor Liability

There is no concept of liability for successor corporations under Australian law. A successor entity will not be held liable for offences committed by the target entity that occurred prior to the merger or acquisition. But a corporation acquired by new owners after committing an offence remains liable for that offence. That is to say, any criminal liability travels with the

corporation but cannot be transferred to a new corporation.

### 1.5 Damages and Compensation

Each state and territory has established processes which enable a criminal court to direct an offender to compensate an aggrieved person(s) for injury or loss occasioned by the offending conduct. Similarly, under the Commonwealth Crimes Act, a court may order an offender to make reparation to a person in respect of loss suffered or expense incurred by reason of a Commonwealth offence.

Additionally, a number of Commonwealth, state and territory laws that impose white-collar criminal liability contain parallel provisions which grant civil rights of action by or on behalf of victims and/or other persons who have suffered loss as a consequence of contravening conduct, including in some jurisdictions as a class action.

For example, the Corporations Act imposes duties on company directors and officers which, if breached, can give rise to criminal liability, as well as liability to compensate the corporation for any losses suffered as a consequence of the breach. Several Commonwealth, state and territory statutes impose criminal liability for conduct in a variety of contexts in trade or commerce relating to unfair practices, false or misleading representations and pricing, as well as liability to compensate persons who have suffered losses as a consequence.

Generally, persons who claim to have suffered a loss as a consequence of the contravening conduct and bring civil proceedings bear the onus of proving, on the balance of probabilities, that the conduct in question occurred and that there was a causal nexus between the conduct in question and the loss suffered. Evidence of a criminal conviction or of a finding of fact in a criminal proceeding will not be admissible in civil proceedings to prove the existence of a fact that was in issue in the criminal proceeding.

### 1.6 Recent Case Law and Latest Developments

In April 2020, the ALRC provided a report to the Australian government following a review of the Commonwealth Corporate Criminal Responsibility Regime (the "CCR Report"). The CCR Report examined the regime for establishing corporate criminal responsibility in Part 2.5 of the Commonwealth Criminal Code, including mechanisms that could be used to hold senior corporate office holders and other individuals liable for corporate misconduct. In broad terms, the ALRC's recommendations to improve and reform the regime seek to:

- simplify and clarify laws that reduce the regulatory compliance burdens on companies;
- criminalise corporate systems of conduct or patterns of behaviour that lead to breaches of civil penalty provisions;
- standardise legal tests for attribution of criminal responsibility to companies to provide greater certainty, consistency and clarity; and
- implement a new model of "failure to prevent" offences of misconduct overseas by Australian corporations.

The ALRC's recommendations are not binding on the Australian government. However, the Australian government has indicated it is carefully considering each of the recommendations with a view to future legislative reforms.

The Australian government is also presently considering specific reforms in respect of a variety of white-collar offences.

## 2. Enforcement

### 2.1 Enforcement Authorities

The main authorities with powers of investigation and/or powers to institute and/or prosecute criminal proceedings in respect of white-collar offences include the following.

#### Commonwealth Director of Public Prosecutions (CDPP)

The CDPP is the independent prosecutor for Commonwealth offences. The CDPP has the power to institute and carry on prosecutions on indictment for Commonwealth offences and to take over prosecutions for Commonwealth offences instituted by other persons and agencies.

#### Australian Securities and Investments Commission (ASIC)

ASIC is an independent Commonwealth authority which regulates corporations, managed investment schemes, participants in the financial services industry and people engaged in credit activities under various Commonwealth laws, including the Corporations Act, the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) and the National Consumer Credit Protection Act 2009 (Cth). ASIC has information-gathering and investigatory powers and the power to initiate criminal prosecutions for offences under the Corporations Act 2001 (Cth) and certain other Commonwealth statutes. ASIC is also authorised to prosecute some minor offences. ASIC will refer more serious offences to the CDPP for assessment and prosecution. ASIC may also bring proceedings seeking civil penalties.

#### Australian Competition and Consumer Commission (ACCC)

The ACCC is an independent Commonwealth authority, whose role is to enforce the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act) and a range of additional legislation, promoting competition, consumer protection, and fair trading. The ACCC has information-gathering and investigatory powers as well as the power to initiate criminal prosecutions for offences under the Competition and Consumer Act. The ACCC has signed a memorandum of understanding to refer serious cartel conduct to the CDPP for prosecution. The ACCC may also bring proceedings seeking civil penalties.

#### Commissioner of Taxation

Through the Australian Taxation Office (ATO), the Commissioner is responsible for administering Commonwealth taxation laws. The ATO has information-gathering and investigatory powers and may initiate prosecutions in the name of the Commissioner in respect of a taxation offence. The ATO prosecutes summary taxation offences. Generally, the ATO will refer more serious taxation offences to the CDPP.

#### Australian Federal Police (AFP)

The AFP is the primary agency responsible for the provision of police services in respect of the laws of the Commonwealth, and will often be responsible for or will assist other Commonwealth agencies in the investigation of suspected Commonwealth offences. In addition to the regulatory agencies noted above, the AFP will also receive referrals from the Australian Transaction Reports and Analysis Centre (AUSTRAC) (Australia's money laundering and terrorism financing regulator) with respect to suspected crimes identified as part of its monitoring and investigatory processes.

### National Anti-Corruption Commission (NACC)

The NACC is a new independent Commonwealth agency tasked with detecting, investigating and reporting on serious or systemic corrupt conduct involving Commonwealth public officials. The Commissioner of the NACC has a wide range of information-gathering and investigatory powers, including the holding of private and public hearings. The Commissioner also has some limited enforcement powers, including the issuing of "stop action" directions, but cannot commence prosecutions. At the conclusion of an investigation, the Commissioner of the NACC must make a report setting out their findings and recommendations. The Commissioner may also make referrals of evidence of criminal conduct to appropriate agencies for prosecution. There are also various similar anti-corruption bodies at state and territory level.

### State and Territory Authorities

The relevant state and territory police services and crown prosecutors investigate and prosecute state and territory offences.

## 2.2 Initiating an Investigation

The police and the key regulators (ASIC, the ACCC and the ATO) are empowered to initiate and carry out investigations into suspected criminal conduct. Such investigations typically result in the regulator receiving information about misconduct or potential misconduct, which may occur in a number of ways. For example:

- a report of misconduct may be received from the public or an industry body;
- information may be obtained by the regulator through monitoring or surveillance work;
- information may be disclosed by another regulator or statutory body;
- information may be disclosed in a statutory report made by an auditor, liquidator, Australian Financial Services Licensee or Australian Credit Licensee; or
- the regulator may receive a tip-off from a whistle-blower.

### Investigations by Regulators (ASIC, ACCC, ATO)

ASIC, the ACCC and the ATO have the discretion to determine which suspected criminal matters they will investigate and will consider a range of factors when deciding whether to investigate or take enforcement action. Factors relevant to the exercise of discretion are largely driven by their respective regulatory objectives.

For example, the specific factors that ASIC may consider broadly include:

- strategic significance, including the seriousness of the misconduct and its impact on the market, market integrity and investor or consumer confidence;
- regulatory benefits of pursuing misconduct, including whether the misconduct is widespread or part of a growing trend and whether enforcement action will send an effective message to the market;
- issues specific to the case, such as the time since the misconduct occurred, whether it was an isolated instance, and the availability of evidence; and
- alternatives to formal investigation, such as engagement with stakeholders, surveillance, guidance or policy advice.

### AFP Investigations

The AFP's Case Categorisation and Prioritisation Model (CCPM) sets out guidance to assist the AFP in determining whether to investigate, including by categorising matters by incident type, impact on Australian society, the importance of the matter to the AFP and the resources

required to investigate. Economic crime (including money laundering) and bribery of Commonwealth or foreign public officials are categorised as having a high impact on Australian society.

Additionally, the Minister for Home Affairs may give written directions to the Commissioner of the AFP, with respect to general policy in relation to the performance of the AFP's functions. The most recent direction, issued in December 2020, included cyber-crime, fraud and anti-corruption as expected focus areas for the AFP.

## 2.3 Powers of Investigation

Australia's key regulators have information-gathering and investigative powers, including powers to require documents to be produced, require individuals or companies to provide information or be examined in relation to particular conduct, and search powers (subject to the issue of a warrant).

### Regulatory Information-Gathering and Investigative Powers (ASIC/ACCC/ATO)

ASIC, the ACCC and the ATO each have a range of compulsory information-gathering and surveillance powers at their disposal.

ASIC has general surveillance powers and the power to inspect any book (including, among other things, financial records) that a person is required by law to keep, and is also empowered to issue written notices to:

- compel the production of other books in a person's possession relating to the affairs of a body corporate or registered scheme; or
- require a person who ASIC suspects or believes, on reasonable grounds, is able to give information relevant to a matter that it is investigating, to give to ASIC all reasonable assistance in connection with the investigation, and to appear before a specified member or staff member for examination on oath.

The ACCC is empowered to issue written notices to persons requiring them to:

- furnish, in writing signed by that person, any information which the ACCC has reason to believe the person can give in relation to a suspected contravention of the legislation it administers;
- produce any documents which the ACCC has reason to believe the person can produce in relation to such a contravention; or
- appear before the Commission or a specified member or staff member for examination on oath.

Additionally, ASIC and the ACCC each have powers to search premises in Australia and seize materials either with the informed consent of the occupier of the premises or with a warrant issued by a magistrate. A magistrate may issue such a warrant if the magistrate is satisfied, by information on oath, that there are reasonable grounds for suspecting that there is evidentiary material on the premises or there may be evidentiary material on the premises within the next 72 hours. The AFP may be authorised to execute or to assist in executing such a warrant.

For the purpose of the administration or operation of a Commonwealth taxation law, the ATO is empowered to:

- issue notices in writing to compel the giving of any information which the Commissioner requires, or the production of any documents in the person's custody or under the person's control;
- issue notices in writing to compel an individual to attend an interview and give evidence

before the Commissioner, or an individual authorised by the Commissioner; or
- access any premises to examine, inspect or make copies of any documents.

### AFP Powers

The AFP has a range of investigative powers, including powers:

- to apply to the Federal Circuit Court of Australia for a written notice requiring a person to produce documents which are relevant to, and will assist in the investigation of, a serious offence (provided the AFP officer holds a reasonable belief that the person has such documents);
- to apply to a magistrate for the issue of a warrant to search premises (provided there are reasonable grounds for suspecting that there is, or will be within the next 72 hours, evidentiary material at the premises); and
- in serious and urgent circumstances to stop, detain and search a conveyance without a warrant if a constable suspects, on reasonable grounds, that a thing relevant to an indictable offence is in or on the conveyance and that it is necessary to exercise the power in order to prevent the thing from being concealed, lost or destroyed.

### State and Territory Police Powers

State and territory police forces have similar investigative powers to the AFP.

## 2.4 Internal Investigations

In Australia, internal investigations are generally conducted on a voluntary basis, usually in response to the discovery of a regulatory or compliance issue, or an investigation by a regulator, such as ASIC. By proactively conducting an internal investigation, a corporation or firm will be better prepared to deal with, and minimise the negative impact of, any regulatory investigation or enforcement action. Additionally, if an entity seeks to apply to ASIC or the ACCC for immunity pursuant to each regulator's respective immunity regimes (referred to in **4.3 Co-operation, Self-Disclosure and Leniency**), the grant of immunity will depend (among other things) on the entity's full co-operation, which may require a full internal investigation of the facts.

## 2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Australia is a party to various bilateral and multilateral treaties designed to facilitate mutual assistance in criminal matters. Where Australia does not have a treaty with a country from which it requests, or receives a request for, mutual assistance, this does not preclude the request from being made. However, in the absence of any such treaty, the request for mutual assistance and whether it is accepted will depend (in respect of outbound requests) on the domestic laws of the country whose assistance is sought and (in respect of inbound requests) on whether any mandatory or discretionary grounds for refusal apply under the Mutual Assistance in Criminal Matters Act 1987 (Cth).

All inbound and outbound extradition requests are handled in accordance with the Extradition Act 1988 (Cth). Australia will only accept an extradition request from a country that has been declared an extradition country under domestic regulations.

In addition, Australian regulators have entered into memoranda of understanding with their international equivalents (eg, the UK FSA; and the US SEC and FINRA). These agreements facilitate the exchange of information between regulators in relation to offences.

## 2.6 Prosecution

ASIC, the ACCC and the ATO each have powers to initiate criminal proceedings in relation to suspected offences against legislation within their respective areas of responsibility. In respect of serious and indictable offences, where a regulator considers it appropriate, they will refer the matter to the CDPP for consideration as to whether to prosecute.

The Prosecution Policy of the Commonwealth (Prosecution Policy) underpins and guides all decisions about whether to prosecute. When deciding whether to prosecute, the CDPP must first be satisfied that there is sufficient evidence on a prima facie basis to prosecute the case; and that the prosecution will be in the public interest, taking into account the facts of the case and all surrounding circumstances.

The public interest factors considered by the CDPP vary from case to case, but relevantly include:

- whether the offence was serious or trivial;
- any mitigating or aggravating circumstances;
- the passage of time since the alleged offence;
- attitudes of the victims;
- the prevalence of the alleged offence and the need for general and personal deterrence;
- the need to give effect to regulatory or punitive imperatives; and
- the likely outcome in the event of a finding of guilt.

## 2.7 Deferred Prosecution

Deferred prosecution agreements (DPAs) are not currently available, although are recommended in current law reform proposals.

## 2.8 Plea Agreements

Plea negotiations are common in criminal proceedings in Australia.

The Commonwealth Prosecution Policy includes provisions governing plea negotiations in relation to Commonwealth offences. It provides that negotiations between the defence and the prosecution as to charges and a plea can be consistent with the requirements of justice, subject to:

- the charges to be proceeded with bearing a reasonable relation to the nature of the criminal conduct of the defendant;
- those charges providing an adequate basis for an appropriate sentence in all the circumstances of the case; and
- there being evidence to support the charges.

Any decision to agree to a plea agreement proposal must take into account all the circumstances of the case and other relevant considerations including:

- the defendant's willingness to co-operate and the extent to which they have already done so;
- whether the sentence that is likely to be imposed if the charges are varied as proposed would be appropriate for the criminal conduct involved;
- the desirability of prompt and certain dispatch of the case;
- the defendant's antecedents;
- the time and expense involved in a trial and any appeal proceedings; and
- the likelihood of adverse consequences to witnesses.

The prosecution will not agree to a charge negotiation proposal initiated by the defence if the defendant continues to assert their innocence

with respect to a charge or charges to which the defendant has offered to plead guilty.

For information on sentencing, please see **5.2 Assessment of Penalties**.

## 3. White-Collar Offences

### 3.1 Criminal Company Law and Corporate Fraud

#### Corporate Criminal Offences

Although corporate criminal prosecutions are predominantly heard in state courts, the majority concern contraventions of Commonwealth legislation. In theory, corporations are capable of being convicted of any Commonwealth offence, including ones for which the prescribed punishment is imprisonment. In practice, however, most prosecuted corporate crime relates to the contravention of financial, economic, environmental and workplace regulations.

Although the Commonwealth Criminal Code contains various offences that may be committed by corporations (and their officers, agents and employees), it is not the sole source of Commonwealth criminal offences. Nor does it codify or harmonise the principles relating to white-collar offences. Outside the Commonwealth Criminal Code, the richest sources of offences commonly applying to corporations (and their officers, agents and employees) are found in the Corporations Act and various statutes concerning financial services law, competition law, tax, and environmental protection. Examples of corporate criminal offences include insider trading, market manipulation, serious cartel conduct and money laundering offences.

#### Constituent Elements of Offences

The prosecution of most offences requires the prosecutor to prove, beyond a reasonable doubt, one or more physical elements coinciding with applicable fault elements (see **1.4 Corporate Liability and Personal Liability**). The Commonwealth Criminal Code provides a framework for the majority of offences applying to corporations, including attribution (although some offences are governed by separate statutory regimes which dictate different principles).

#### Corporate Fraud

The Commonwealth Criminal Code proscribes the following.

- fraud against Commonwealth entities including:
  - (a) obtaining a financial advantage by deception; and
  - (b) dishonestly obtaining a gain or causing a loss to a Commonwealth entity;
- dishonestly causing a loss or a risk of loss; and
- knowingly making false or misleading statements to a Commonwealth entity in connection with an application for a licence, permit, registration or benefit.

Similar fraud offences to those detailed above, but which relate to fraud directed at persons other than Commonwealth entities, are provided for in state and territory legislation.

The Corporations Act includes offences relating to the concealment, destruction, alteration or falsification of accounting records or company books, and misleading or deceptive conduct in trade or commerce in relation to financial services or financial products.

## 3.2 Bribery, Influence Peddling and Related Offences

Bribery, being the provision of a benefit that is not due to a person with the intention of influencing that person, is generally unlawful in Australia. Commonwealth law proscribes bribing a Commonwealth or foreign public official. Bribery between private parties is not criminalised at a national level, however each state and territory has its own laws proscribing private bribery.

### Bribery of a Foreign Public Official

It is a Commonwealth offence for a person to provide a benefit to another person, in circumstances where the benefit is not legitimately due to the recipient and the benefit is provided with the intention of influencing a foreign public official (who need not be the recipient of the benefit) in the exercise of their official duties. In order to commit an offence, the person offering the benefit must do so in order to obtain or retain business or a business advantage that is not legitimately due. Importantly, the advantage does not actually need to be obtained to establish the offence. A bill is currently before the Australian Parliament to create a new and additional offence of failure to prevent bribery of a foreign public official.

### Bribery of a Commonwealth Public Official

Similarly, persons are prohibited from dishonestly providing a benefit to a person with the intention of influencing a Commonwealth public official in the exercise of their duties. It is not necessary that the person giving the bribe knew that the official was a Commonwealth public official, or that the duties were duties in their capacity as a Commonwealth public official. Corresponding offences apply to public officials that solicit or accept bribes.

### Penalties

The penalties for bribing a Commonwealth public official or a foreign public official are as follows.

- Individual – imprisonment for not more than ten years, a fine of not more than 10,000 penalty units, or both.
- Body corporate – not more than the greatest of the following:
  - (a) a fine of 100,000 penalty units;
  - (b) three times the value of the benefit obtained (if the value can be determined); or
  - (c) 10% of annual turnover during the preceding 12 months.

Note: For offences committed on or after 1 July 2020, a penalty unit is AUD222.

### False Accounting Offence

It is also an offence intentionally to make, alter or destroy an accounting document, or to fail to make or alter an accounting document required to be made under a law of the Commonwealth, a state or territory or common law, with the intention of concealing or disguising the giving or receiving of a bribe, or while being reckless as to whether it will conceal or disguise the giving or receiving of a bribe. Where a person is found guilty of intentional false dealing with accounting documents, the maximum penalty is the same as the maximum penalty for bribing a Commonwealth public official or foreign public official. However, where a person is found guilty of reckless false dealing with accounting documents, the maximum penalty is half the maximum penalty for bribing a Commonwealth public official or foreign public official, reflecting a lower culpability.

## 3.3 Anti-bribery Regulation

Australian authorities strongly encourage Australian companies, particularly companies conducting business offshore and/or with foreign governments, to implement robust and effective anti-bribery and corruption compliance programmes. Despite this, there are currently no laws in Australia that create a specific obligation to prevent bribery and influence peddling, including by requiring the institution of a compliance programme.

## 3.4 Insider Dealing, Market Abuse and Criminal Banking Law

### Insider Trading

Under the Corporations Act, persons are prohibited from transacting, tipping or procuring other persons to transact in financial products (including securities) while in "possession" of information that they know, or ought reasonably to know, is "inside information". There is no requirement that the person relied upon the inside information while trading, or that they intended to obtain an advantage.

"Inside information" is information that is:

- not "generally available"; and
- price sensitive (determined by reference to whether a reasonable person would expect it to have a material effect on the financial product's price or value).

The Corporations Act defines "information" broadly and there is no requirement that the information be specific or precise. "Possession" of inside information is not defined in the Corporations Act, although the language of the statute suggests that a person may be in possession of inside information even if they do not appreciate its significance. The concept of "possession" is extended in relation to corporations and partnerships, such that a corporation is taken to know, and possess, information if an officer of the corporation knows or possesses it in their capacity as an officer of the corporation, and a member of a partnership is taken to know, and possess, inside information if another member of the partnership or an employee of the partnership has come to know or possess it in their capacity as a member of the partnership or in the course of the performance of their duties.

### Market Manipulation

In Australia, market manipulation is addressed through a general proscription and a series of specific prohibitions contained in Division 2 of Part 7.10 of the Corporations Act. Broadly, it is an offence to take part in or carry out one or more transactions that have, or are likely to have, the effect of creating or maintaining an artificial price for trading in financial products on a financial market operating in Australia. It is also an offence to:

- engage in conduct that would have the effect of creating a false appearance of active trading of financial products, or artificially maintaining, inflating or depressing the prices of financial products;
- enter into a fictitious or artificial transaction that results in the trading price for a financial product being maintained, inflated, depressed or rendered volatile;
- disseminate information about an illegal transaction or conduct constituting market manipulation where the person either engaged in the illegal transaction/conduct, or may receive a direct or indirect benefit from disseminating information about it;
- make a false or materially misleading statement, knowing or being recklessly indifferent to the veracity of the statement, that is likely

either to induce persons to trade or to induce a price effect; and
- trade for the purpose of influencing a financial benchmark.

### Penalties

The maximum penalties for insider trading or market manipulation are as follows.

- Individual – 15 years' imprisonment and/or the greater of 4,500 penalty units or three times the profit gained, or loss avoided.
- Body corporate – the greater of 45,000 penalty units, three times the profit gained, or loss avoided or 10% of the body corporate's annual turnover.

Insider trading and market manipulation are also civil penalty provisions.

## 3.5 Tax Fraud

In Australia, the Commonwealth government levies all major income taxes on Australian individuals and companies. Serious tax fraud (or evasion) is generally prosecuted under the fraudulent conduct offences in Part 7.3 of the Commonwealth Criminal Code. The main offences are:

- by a deception, dishonestly obtaining Commonwealth property with the intention of permanently depriving the other of the property;
- by a deception, dishonestly obtaining a financial advantage from the Commonwealth;
- conspiring with another person with the intention of dishonestly obtaining a gain from (or causing a loss to) the Commonwealth; and
- obtaining a financial advantage from the Commonwealth while knowing or believing that there was no eligibility to receive that advantage.

### Penalties

For the first three offences above, the maximum penalty is ten years' imprisonment.

The fourth offence above is punishable by up to 12 months' imprisonment.

Failure to prevent tax evasion is not presently a criminal offence in Australia.

## 3.6 Financial Record-Keeping

The main offences relating to financial record-keeping are contained in the Corporations Act and the Commonwealth Criminal Code.

### Corporations Act Offences

Under the Corporations Act, it is an offence for a corporation, registered scheme or disclosing entity to fail to keep financial records:

- that correctly record and explain its transactions and financial position and performance, and that would enable true and fair financial statements to be read and audited; or
- for seven years after the transaction covered by the records was completed.

The Corporations Act also contains offences relating to the concealment, destruction, mutilation or alteration of books and accounting records, and the falsification of books and accounting records. It is also an offence under the Corporations Act to fail (i) to take all reasonable precautions to guard against the falsification of books or records and (ii) to facilitate the discovery of any falsification.

The penalties for each of these offences can include a significant fine or a penalty of up to two years' imprisonment, depending on whether the offence is committed by an individual (who may be prosecuted as a primary offender or for

aiding, abetting, counselling or procuring an offence) or a corporation, registered scheme or disclosing entity, and whether, in the case of the offence of failure to keep financial records, the offence is prosecuted as a fault-based offence or a strict liability offence.

### Commonwealth Criminal Code Offences

The Commonwealth Criminal Code Offences relating to the concealment, destruction, alteration or falsification of accounting records, or the failure to keep accounting records, with the intention of concealing a bribe, or while being reckless as to whether it would conceal a bribe, are discussed in **3.2 Bribery, Influence Peddling and Related Offences**.

## 3.7 Cartels and Criminal Competition Law

The principal criminal offences under the Competition and Consumer Act relate to "serious cartel conduct". A corporation (or individual) will be guilty of an offence where it:

- makes and/or gives effect to a contract, arrangement or understanding that contains a "cartel provision"; and
- does so with the knowledge or belief that the contract, arrangement or understanding contains a "cartel provision".

A "cartel provision" is one which has:

- the purpose or effect of fixing, controlling or maintaining price;
- the purpose of preventing, restricting or limiting production or supply;
- the purpose of allocating customers or territories between the parties; or
- the purpose of rigging bids for the supply or acquisition of goods or services,

and at least two of the parties to the contract, arrangement or understanding are, or would be but for the cartel provision, "in competition" with each other.

An individual who aids, abets, counsels or procures a person to contravene a cartel provision, or who is in any way, directly or indirectly, knowingly concerned in, or party to the contravention of a cartel provision may be guilty of an offence.

### Penalties

The maximum penalties for cartel offences are as follows.

- Individual – ten years' imprisonment and/or a fine of 2,000 penalty units;
- Body corporate – a fine not exceeding the greater of:
  - (a) AUD10 million;
  - (b) three times the total value of the benefits obtained by one or more persons which are attributable to the commission of the offence (if that can be determined); or
  - (c) if the total value of the benefits cannot be determined, 10% of the corporation's Australian annual turnover for the 12-month period immediately preceding the offence.

## 3.8 Consumer Criminal Law

The Australian Consumer Law (ACL) provides for offences relating to unfair practices, unsolicited consumer agreements, and breaches of safety standards. Specific offences include making false or misleading representations about goods or services, engaging in certain negotiations of unsolicited consumer agreements, propagating pyramid selling schemes and supplying goods while failing to comply with information standards.

Many of the offences in the ACL are strict liability offences, punishable by fines.

## 3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

In Australia, the main offences in relation to cybercrimes, computer fraud and breach of company secrets are set out in the Commonwealth Criminal Code and legislation of the Commonwealth, states and territories.

Relevantly, the Commonwealth Criminal Code criminalises various cyber-offences, including:

- unauthorised access to, or modification of, "restricted data" held in a computer, access to which is restricted by an access control system;
- unauthorised impairment of data/electronic communications; and
- possession or control of data with intent to commit an offence.

The penalties for cybercrimes under the Commonwealth Criminal Code depend on the severity of the crime, with the maximum penalties ranging from two to ten years' imprisonment.

The states and territories have also enacted legislation which criminalise similar cyber-offences.

## 3.10 Financial/Trade/Customs Sanctions

### Types of Sanctions

Australia implements two types of sanctions:

- United Nations Security Council (UNSC) sanctions, which Australia must impose as a member of the United Nations; and
- Australian autonomous sanctions, which are imposed as a matter of Australian foreign policy.

Pursuant to the Charter of the United Nations Act 1945 (Cth) and the Autonomous Sanctions Act 2011 (Cth), it is an offence for a body corporate or an individual to engage in conduct that contravenes a sanction law or condition of a sanction law. Australian sanctions laws include general prohibitions on providing a sanctioned service, engaging in a sanctioned commercial activity, and dealing with a designated person or entity. Sanctions are generally imposed in relation to specific countries and activities (eg, providing financial assistance for military activity in Iran).

These offences are strict liability offences for bodies corporate.

### Penalties

The maximum penalties for an offence are the same under both Acts.

- Individual – ten years' imprisonment and/or a fine the greater of 2,500 penalty units, or three times the value of the transaction (if the value can be determined).
- Body corporate – a fine the greater of:
  (a) 10,000 penalty units; or
  (b) three times the value of the transaction (if the value can be determined).

### Misleading a Government Agency

It is also an offence to give false or misleading information to a Commonwealth entity in connection with the administration of a sanction law.

Contravention by an individual is punishable by up to ten years' imprisonment, a fine of 2,500 penalty units, or both.

As set out in **1.4 Corporate Liability and Personal Liability**, criminal liability for Commonwealth offences extends to body corporates,

with the maximum penalty being five times the amount of the maximum pecuniary penalty that could be imposed on an individual.

### 3.11 Concealment

Various statutes render the concealment of a criminal offence, including through the destruction of records, a crime. For example, the Commonwealth Crimes Act makes it an offence for a person to ask for, receive or obtain any benefit upon the agreement or understanding that they will:

- compound or conceal;
- abstain from, discontinue or delay a prosecution of; or
- withhold evidence of,

an indictable Commonwealth offence. The maximum penalty is three years' imprisonment.

Each of the states and territories have similar offences in relation to concealment of serious indictable offences.

Similarly, there are statutory offences for concealment in relation to specific regulatory regimes. For example, it is an offence under the ASIC Act to conceal, destroy, alter or remove from the jurisdiction, "books" (broadly defined) which relate to a matter that ASIC is investigating, or about to investigate. The maximum penalty for an individual is five years' imprisonment.

Under the Corporations Act, it is an offence for officers of companies to fraudulently conceal the removal of any part of the property of the corporation or conceal any debt owed to or by the corporation (among other things). The maximum penalty for an individual is two years' imprisonment.

As set out in **1.4 Corporate Liability and Personal Liability**, the penalty for a body corporate for each of the Commonwealth offences of concealment is not greater than five times the amount of the maximum pecuniary penalty that could be imposed on an individual.

### 3.12 Aiding and Abetting

Generally, at both Commonwealth and state and territory levels, a person who aids, abets, counsels or procures the commission of an offence will be taken to have committed the primary offence and punished accordingly.

A person may be found guilty of aiding and abetting even if the person who committed the primary offence has not been prosecuted or found guilty of that primary offence.

### 3.13 Money Laundering

#### Offence of Money Laundering

It is an offence under Part 10.2 of the Commonwealth Criminal Code to launder money in Australia. Money laundering offences encompass a wide range of criminal activity, falling into the following categories:

- dealing with the proceeds of crime;
- dealing with money or property which is intended to become an instrument of crime; or
- dealing with property reasonably suspected of being proceeds of crime.

The first two categories encompass offences with maximum penalties tied to the defendant's state of mind (belief/intention, recklessness, indifference) in relation to their dealing with, and the nature of, the money or property.

To be found guilty of the third category above, no proof as to the defendant's state of mind is required.

The maximum penalty in relation to the first two categories above depends on the offender's state of mind and the value of the money or property involved, and varies from fines to 25 years' imprisonment.

The maximum penalty for the third category above is two or three years' imprisonment depending on the value of the property involved.

### Obligations to Prevent Money Laundering

The Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth) (AML/CTF Act) places a positive obligation on reporting entities (broadly, financial institutions or providers of designated services) to have a programme in place to identify, mitigate and manage the risks posed to their business by money laundering and terrorism financing, and to notify authorities of suspicious matters. AUSTRAC administers and has the power to enforce the AML/CTF Act. A failure to have or comply with an adequate programme can result in AUSTRAC applying to the court for a civil pecuniary penalty, payable to the Commonwealth. The maximum penalty is as follows.

- Individual – 20,000 penalty units per contravention.
- Body corporate – 100,000 penalty units per contravention.

## 4. Defences/Exceptions

### 4.1 Defences

In Australia, general criminal law defences apply to white-collar crimes (innocence, duress, honest and reasonable mistake, etc).

The Commonwealth Criminal Code establishes some defences of general application for body corporates, including the following.

### Mistake of Fact

In relation to strict liability offences (ie, those with a physical element but no fault element) a person will not be criminally responsible for an offence if at or before the time of the relevant conduct, the person, having considered whether or not facts existed, is under a mistaken but reasonable belief about those facts, and, had those facts existed, the conduct would not have constituted an offence. A corporation can only rely on this defence if the employee, agent or officer who carried out the conduct was under such a mistaken but reasonable belief about the facts.

### No Authorisation

In offences where intention, knowledge or recklessness is a fault element, the offence can be attributed to a corporation that expressly, tacitly, or impliedly authorised or permitted the commission of the offence. However, attribution will not be established where the corporation proves that it exercised due diligence to prevent the conduct, or the authorisation or permission of the offence.

### Intervening Conduct

A body corporate may plead the defence of intervening conduct against the physical element of a strict or absolute liability offence where it can demonstrate that the physical element of the offence was brought about by a person (who

is not an employee, agent or officer of the body corporate) who the body corporate has no control over and could not reasonably be expected to guard against the occurrence of the intervening conduct or event.

The defences outlined above are not an exhaustive list and certain white-collar offences may be countered with specific defences.

## 4.2 Exceptions

There are no blanket exceptions to white-collar offences for any particular types of transactions, sectors or persons. However, statutory regimes may provide for specific exceptions to certain offences (eg, the "exception" to insider trading prohibitions protecting underwriters that acquire securities pursuant to an underwriting agreement obligation).

Furthermore, Commonwealth, state and territory prosecutors each have policies that govern the exercise of their prosecutorial discretion which guide determinations as to which matters are prosecuted (in light of their scarce resources and overall considerations of justice). Prosecution decisions are made on a case-by-case basis. Matters such as the merits of a case, its prospects, and the alleged magnitude and type of harm may be considered.

## 4.3 Co-operation, Self-Disclosure and Leniency

Australian regulators, investigators and prosecuting authorities may take account of self-disclosure and co-operation in making decisions concerning whether to proceed with an investigation or prosecution. However, except to the extent noted below, there is no requirement for them to do so with respect to white-collar offences, and it is by no means certain that self-disclosure and/or co-operation would assist a party considering such a step. Self-disclosure and co-operation with investigators or prosecuting authorities may also be considered by a court in sentencing.

### ACCC Immunity Policy

The ACCC has an immunity and co-operation policy for cartel conduct which applies to both individuals and corporations. Where an individual or corporation intends to make an application for immunity, they can request that the ACCC place a marker. The marker allows the applicant a limited amount of time to gather the information necessary to demonstrate that they satisfy the requirements for conditional immunity. Once a marker has been requested, the individual or corporation must co-operate fully with the ACCC in order to obtain conditional immunity including by providing full disclosure of information to the ACCC.

The ACCC is not able to grant immunity from criminal prosecution for cartel conduct although the ACCC will make recommendations to the CDPP where it considers such immunity is appropriate. The CDPP will make its own assessment according to the Prosecution Policy of the Commonwealth.

### ASIC Immunity Policy

In February 2021, ASIC published an immunity policy for contraventions of Part 7.10 of the Corporations Act, including offences of insider trading and market manipulation. Under this policy, immunity may be available for individuals who think they may have contravened (with at least one other person) a provision of Part 7.10 and intend to co-operate with ASIC in relation to its investigation and any court proceedings regarding the contravention. Immunity is not available to corporations under the policy.

In order to qualify for immunity under the policy:

- the individual seeking immunity must be the first individual who satisfies the immunity criteria and reports the misconduct to ASIC; and
- the individual must do so prior to ASIC commencing an investigation into the conduct.

The process for obtaining immunity from ASIC is similar to that of the ACCC, including the marker process. ASIC is not able to grant immunity from prosecution. However, ASIC can make recommendations to the CDPP that immunity be granted to individuals. The CDPP will then make its own assessment according to the Prosecution Policy of the Commonwealth.

### 4.4 Whistle-Blower Protection

The Corporations Act provides whistle-blower protection to individuals who meet the following criteria:

- the individual is an "eligible whistle-blower", which includes current or former employees, officers and contractors of a corporation (and relatives, spouses or dependants of those individuals);
- the disclosure is made to an "eligible recipient", which includes directors, company secretaries, senior management, auditors, actuaries of the corporation, ASIC or Australian Prudential Regulation Authority (APRA), or the individual's legal representatives;
- the disclosure relates to a regulated entity, which includes companies, banks, insurers, and superannuation entities and trustees; and
- the individual has reasonable grounds to suspect that the information that they are disclosing indicates that the entity has committed an offence or a contravention of Australian law, including of the Corporations Act, Banking Act, Criminal Code, or that the conduct represents a danger to the public or financial system.

In general terms, whistle-blowers who make qualifying disclosures cannot be subject to any civil or criminal liability for making the disclosure. No contractual or other remedy may be enforced or exercised against the whistle-blower on the basis of the disclosure.

The Corporations Act also prohibits the victimisation of the whistle-blower and creates a right entitling any victimised whistle-blower to seek damages. Additionally, a whistle-blower whose employment is terminated as a result of their disclosure may commence court proceedings seeking that their employment be reinstated.

Public companies, large proprietary companies, and corporate trustees of superannuation entities regulated by APRA must have a whistle-blower policy. Among other things, the whistle-blower policy must include information about the legal protections available to whistle-blowers, how a corporation will investigate a disclosure made by a whistle-blower and how they will protect whistle-blowers from detriment.

## 5. Burden of Proof and Assessment of Penalties

### 5.1 Burden of Proof

The prosecution bears the burden of proving every element relevant to the guilt of the person charged, as well as disproving any matter in relation to which the defendant has discharged an evidential burden of proof. The standard of proof is beyond reasonable doubt: see Section 141 of the Evidence Act 1995 (Cth) (and see also Division 13 of the Commonwealth Criminal Code), and Section 141 of the Uniform Evidence Acts

of the States of New South Wales, Tasmania and Victoria, and the Australian Capital Territory and the Northern Territory. Similar legislative provisions exist in respect of the States of Queensland, South Australia and Western Australia.

A defendant who wishes to raise a positive defence must generally discharge an evidential burden only, this being a burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (the applicable standard of proof in respect of any burden of proof by the defendant being the balance of probabilities). Once that burden has been discharged, the prosecution bears a legal burden of negating the defence as part of the discharge of the prosecution's burden of proof beyond a reasonable doubt.

### 5.2 Assessment of Penalties

Part IB of the Commonwealth Crimes Act contains provisions which establish general sentencing principles in relation to Commonwealth offences, including the matters to which the court must have regard when passing a sentence, and any reductions for co-operation with law enforcement agencies.

Each of the states and territories has its own legislation dealing with sentencing procedure, rules and guidelines.

Unlike state and territory legislation, Commonwealth statutes do not include specific provisions governing the procedures for fact-finding by a court sentencing a Commonwealth offender. As such, procedures and evidentiary rules in the relevant state or territory in which the sentencing hearing is held will apply, by virtue of Sections 68 and 79 of the Judiciary Act 1903 (Cth), to sentencing hearings in respect of Commonwealth offences, except to the extent that a Commonwealth law has expressly or by necessary implication excluded the operation of such state or territory laws.

Sentencing is strictly a matter for the sentencing court, and although prosecutorial authorities may make a submission that a custodial or non-custodial sentence is appropriate in a particular case, a prosecutor will not be permitted to make a submission as to the bounds of the available sentencing range or to proffer some statement as to the specific result.

Commonwealth and state/territory sentencing legislation permits the court to take into account various factors when determining a sentence, including whether the accused has pleaded guilty to the charge, the timing of the plea and any benefit to the community, victim or witness derived from the plea, as well as the following, to the extent relevant and known to the court as a consequence of its fact finding on sentencing:

- the nature and circumstances of the offence, any injury, loss or damage resulting from the offence and any victim impact statement from the victim;
- the degree to which the person has shown contrition for the offence;
- the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
- the deterrent effect that any sentence or order under consideration may have on the person or on other persons;
- the need to ensure that the person is adequately punished for the offence;
- any abuse by the person of their position or standing in the community to aid in the commission of the offence; and

- the probable effect that any sentence or order under consideration would have on any of the person's family or dependents.

# Trends and Developments

**Contributed by:**
Richard Harris, Peter Munro, Catherine Kelso and Jason Oliver
**Gilbert + Tobin**

**Gilbert + Tobin** is a leading Australian law firm, with a disputes and investigations practice comprising 26 partners and special counsel, supported by over 150 lawyers across the firm's offices in Sydney, Melbourne and Perth. The team has experience working with some of Australia's leading companies, executives and directors on complex regulatory enforcement and compliance matters, including investigations, civil proceedings, criminal prosecutions and public inquiries. The firm's lawyers have a commercial focus and possess a comprehensive understanding of legal requirements, as well as the best practices for investigating, defending proceedings, advocating for clients, negotiating with investigators and prosecutors, and managing risk.

## Authors

**Richard Harris** leads the disputes and investigations practice at Gilbert + Tobin, where he specialises in major disputes and contentious regulatory issues, assisting large corporates through significant litigation, class actions, investigations and regulatory enforcement proceedings. He regularly advises banks, large corporations and their boards on major dispute, regulatory and governance issues. Richard regularly acts for directors and senior management in investigations or allegations of misconduct. He continues to have a very substantial disputes practice including a number of the most significant and reputational sensitive conflicts and investigations in the Australian market.

**Peter Munro** is a partner in Gilbert + Tobin's disputes and investigations group, specialising in commercial and corporate disputes and contentious matters. He has extensive experience advising significant clients in relation to high-stakes litigation in state and federal courts, regulatory investigations and enforcement, as well as government inquiries and Royal Commissions. Peter provides advice that is pragmatic, commercial and strategic. He assists clients to navigate significant investigations and multi-party litigation, including class actions and regulatory proceedings, and has represented both plaintiffs and defendants in multi-billion dollar complex commercial disputes in both Australia and the US across highly regulated industries such as financial services and health care.

**Catherine Kelso** is a partner in Gilbert + Tobin's disputes and investigations team. She has deep experience in navigating financial services participants through regulatory investigation and enforcement activity. She also advises in relation to compliance and governance issues. Prior to joining Gilbert + Tobin, Catherine worked for the Australian Government Solicitor and was seconded as part of the team managing the Financial Services Royal Commission. As such, Catherine brings a deep understanding of the unique challenges and environment in which government and public bodies operate. She is also skilled at navigating the complex and significant demands of responding to and participating in Royal Commissions and public inquiries.

**Jason Oliver** is a special counsel in Gilbert + Tobin's disputes and investigations group. Jason has over 16 years' experience in significant commercial disputes, Royal Commissions and inquiries, investigations and enforcement, administrative law matters, white-collar crime and minimising financial and reputational risk. Jason has practised in multiple jurisdictions in Australia and internationally, and has acted for the Australian government and its departments and agencies, as well as several major multinationals, banks, financial services firms and professional services firms in some of their most highly complex, high-profile and high-value disputes and regulatory matters.

## Gilbert + Tobin

Level 35, Tower Two, International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4000
Email: info@gtlaw.com.au
Web: www.gtlaw.com.au

## Reform of White-Collar Criminal Regulation

Over the past decade or so, Australian regulators and prosecutors have faced sustained criticism over the approach they have taken to the investigation, enforcement and prosecution of white-collar offences. In particular, it has often been suggested that they are too slow to act, and too reluctant to prosecute or commence proceedings for white-collar offences, especially against large, institutional companies (such as banks).

In 2018, a wide-scale investigation of these issues in the context of the financial services sector was undertaken by a former judge of the High Court of Australia, Kenneth Hayne, known as the Royal Commission into the Banking, Superannuation and Financial Services Industry (the "Financial Services Royal Commission").

Arising from the Financial Services Royal Commission and broader criticisms, there has been an increased interrogation of the adequacy with which corporations and their officers are held accountable for serious corporate misconduct (including criminal conduct) and a growing sense that penalties must be set at a level sufficient to deter corporate misconduct and so as not to be capable of being regarded as an "acceptable cost of doing business".

This backdrop has given rise to various recommended and proposed legislative reforms and higher levels of enforcement activities against individuals and corporations, including in the financial services and consulting sectors. However, not all of the proposals from the Financial Services Royal Commission have been implemented, with several of the reforms failing to pass through the Australian Parliament before the change from the Liberal/National coalition government (which had been in power for a decade) to a Labor government in the May 2022 Federal Election. Some, but not all, of the reforms have been picked up by the Labor government in bills it has introduced to parliament.

In 2023, the government has also signalled additional reforms arising from a new focus on accounting, audit and consulting firms. This follows a Senate Committee Inquiry that commenced in March 2023 into the management and assurance of integrity by consulting services, which was the result of an investigation by the Tax Practitioner's Board into a Big Four accounting firm for sharing confidential government information in relation to Australia's forthcoming anti-avoidance tax laws. The final report is due on 30 November 2023. The proposals for reform are in their early stages, and it remains to be seen which, if any, make their way into the statute books, and if so, what form they take.

This paper describes some of the key matters of note arising from shifts in the strategic focus of key Australian regulators and notable outcomes in white-collar crime prosecutions over the past 12 months.

## Recent and Proposed Legislative Reforms

### *Financial Accountability Regime (FAR)*

A suite of bills was introduced by the former coalition government in October 2021 in response to the recommendations of the Financial Services Royal Commission that the existing Banking Executive Accountability Regime (BEAR) be repealed and replaced with a new FAR. The suite of bills sought to strengthen the accountability, key personnel, deferred remuneration and notification obligations measures in place under the BEAR and to extend them beyond the banking sector to the insurance and superannuation sectors. The bills were passed by Parliament on 5

September 2023 and are expected to receive Royal Assent in late September.

The FAR has a variety of mechanisms for enforcement once a contravention or likely contravention has been established, which align with those in place under the BEAR to ensure continuity and consistency of approach. Enforcement mechanisms under the FAR include directions powers, disqualification, enforceable undertakings, injunctions, civil penalties, and some limited criminal offences relating to non-compliance with an investigation or request for information from the Australian Prudential Regulation Authority (APRA) or Australian Securities and Investments Commission (ASIC).

The FAR will apply to the banking industry from approximately late March 2024 (six months after Royal Assent), and to the insurance and superannuation sectors from approximately late March 2025 (18 months after Royal Assent).

### *Deferred Prosecution Agreement (DPA) scheme*

The former coalition government, while it was in power, made two unsuccessful attempts to introduce a DPA scheme. There has been no indication since the 2022 Federal Election as to whether the new Labor government will make a third attempt to introduce a DPA scheme. It is notable that, when the Senate Legal and Constitutional Affairs Legislation Committee (the "LCAL Committee") reviewed the first unsuccessful coalition government DPA bill (introduced in 2019), two Labor Senators on the LCAL Committee, in their report on the bill, contended that whilst there may be a place for a DPA scheme in Australia, the particular DPA scheme proposed in the bill was "too weak" and could not supported in its proposed form.

### *New offence of failure to prevent foreign bribery and reform to existing foreign bribery offence*

The 2019 bill referred to above also sought to amend Australia's foreign bribery offence provisions, including to introduce a corporate offence of failure to prevent foreign bribery, although the opposition to the proposed DPA scheme in the bill meant that those amendments also failed to pass through Parliament.

Since then, in June 2023, the Labor government has introduced new proposed legislation pursuing the amendments to the foreign bribery offence provisions. The new bill, the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, includes some key changes to the amendments that had been proposed in the 2019 bill. Most significantly, the proposed crime of failure to prevent foreign bribery in the 2023 bill has been changed to an "absolute liability" offence, meaning there is no requirement to prove fault nor any available defence of honest and reasonable mistake of fact. However, an "adequate procedures" defence has been introduced, whereby corporations can avoid liability by demonstrating they had adequate procedures in place to combat bribery (reflecting similar provisions in the UK and elsewhere). Like the 2019 bill, the 2023 bill also includes amendments to the existing foreign bribery offence provisions designed to improve their effectiveness, responding to criticisms that the existing provisions are overly prescriptive and difficult to use. The bill is currently before the House of Representatives and had its second reading on 8 August 2023.

### *National Anti-Corruption Commission*

A key election campaign policy of the Labour government was the introduction of a National Anti-Corruption Commission. It commenced

operations on 1 July 2023 under the National Anti-Corruption Commission Act 2022. Its aim is to prevent, investigate and publicly report on serious or systemic corrupt conduct involving Commonwealth public officials. The inclusion of private contractors providing goods and services to the Commonwealth under Commonwealth contracts within the definition of "public official" has the implication of including companies, their directors, officers, and employees within the NACC's investigative purview.

Between its commencement on 1 July 2023, and close of business on 4 September 2023, the NACC received 813 referrals of potential serious or systemic conduct, of which 323 have been assessed by the NACC as outside its jurisdiction, either because they did not involve a Commonwealth public official or did not raise a corruption issue. The NACC has indicated that approximately 11% of the referrals it has received relate to matters well publicised in the media.

### *Amendments to AML/CTF Act*

Included in an "omnibus" amendment bill on criminal law and law enforcement are various technical amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth). The amendments are intended to strengthen and modernise various aspects of the regime and to assist the Australian Transaction Reports and Analysis Centre (AUSTRAC) in fulfilling its functions efficiently. The amendments: (i) clarify the application of civil penalties for failing to enrol with AUSTRAC within 28 days of commencing to provide a designated service; (ii) clarify the existing secrecy and access framework for certain sensitive AUSTRAC information to make clear that the information cannot be inappropriately disclosed for the purposes of, or in connection with, court or tribunal proceedings; and (iii) introduce new provisions authorising the AUSTRAC CEO to use computer programs for certain decision-making and the exercise of certain powers. The bill was introduced to Parliament on 29 March 2023 and was passed by both houses on 4 September 2023. It received Royal Assent on 13 September 2023.

### *Potential regulatory reforms for the consulting industry*

The wider investigation into the consulting industry is in its early stages and the end shape of any legislative reform is far from certain. However, on 6 August 2023 the government announced a package of reforms focused on three "priority areas for action" in "tax adviser misconduct": (i) strengthening the integrity of the tax system; (ii) increasing the powers of regulators; and (iii) strengthening regulatory arrangements so that they are fit for purpose. Significant proposed reforms include increasing maximum penalties for advisers and firms who promote tax exploitation schemes from AUD7.8 million to over AUD780 million and various improvements to the regulatory frameworks of both the Australian Tax Office and the Tax Practitioners Board aimed at increasing their respective powers. There may well be further significant legislative reforms in this space in the future.

## Recent Regulatory and Enforcement Activity

### *Australian Securities and Investments Commission (ASIC)*

ASIC has adjusted its enforcement approach in recent years, shifting away from the "why not litigate" strategy that it had adopted following the Financial Services Royal Commission, towards a more nuanced approach that employs other enforcement tools and places greater emphasis on protecting consumers in the uncertain post-COVID-19 economic environment.

In August 2023, ASIC published its Corporate Plan 2023–27, in which it revealed that its strategic priorities for the next four years include the following.

- Product design and distribution – reducing the risk of harm to consumers of financial, investment and credit products caused by poor product design, distribution and marketing, especially by driving compliance with design and distribution requirements.
- Sustainable finance – supporting market integrity and efficiency through supervision and enforcement of governance, transparency and disclosure standards to reduce harm from greenwashing, while engaging closely on climate-related financial disclosure requirements.
- Retirement decision-making – protecting consumers as they plan and make decisions for retirement, with a focus on superannuation products, managed investments and financial advice.
- Technology risk – focusing on the impacts of technology in financial markets and services, driving good cyber-risk and operational resilience practices within companies and financial markets infrastructure, and acting to address digitally enabled misconduct.

These priority areas are aligned with a number of ASIC's recent regulatory, investigation and enforcement activities. ASIC's enduring enforcement priorities are the following.

- Misconduct that damages market integrity, including insider trading, continuous disclosure breaches or failures, market manipulation and governance failures.
- Misconduct that impacts First Nations peoples.
- Misconduct involving a high risk of significant consumer harm, particularly conduct targeting financially vulnerable consumers.
- Systemic compliance failures by large financial institutions that result in widespread consumer harm.

ASIC has outlined its 2023-specific priorities including greenwashing, poor design and distribution of financial products, pricing promises in insurance and protecting vulnerable consumers from predatory lending practices or high-cost credit.

Reflecting those priorities, some of ASIC's key regulatory actions for the period 1 July 2022 to 30 June 2023 have included the following.

- In February 2023, ASIC launched its first court action in relation to alleged greenwashing conduct, in the form of civil penalty proceedings in the Federal Court of Australia against a superannuation provider for allegedly making misleading statements about the sustainable nature and characteristics of some of its superannuation investment options.
- In March 2023 ASIC published Report 758 Good practices for handling whistleblower disclosures (REP 758). The report aims to help entities improve their arrangements for handling whistle-blower disclosures, and ensure the arrangements are effective and encourage people to speak up. Report 758 sets out the good practices ASIC observed in a review of seven entities' whistle-blower programmes from a cross-section of industries.
- Also in March 2023, ASIC took action for the first time over alleged breaches of the whistle-blower provisions, in the form of civil penalty proceedings in the Federal Court against an ASX-listed company, its manag-

ing director, chief commercial officer, former chair, and former director and deputy chair for engaging in conduct alleged to have harmed a whistle-blower.
- ASIC will be working closely with APRA to implement the FAR by providing guidance, engaging with industry and developing effective registration and other processes subject to the passage of legislation.
- ASIC also intends to monitor financial reporting and audits by using data and natural language processing to enhance its ability to identify risks. It will also continue to focus on disclosures by directors in their operating and financial reviews, particularly in relation to their risk management strategies and future prospects.

In the period between 1 January 2023 to 30 June 2023, as a result of ASIC's enforcement activities, 18 individuals were charged with criminal offences and 124 individuals were charged with strict liability offences. Compared with the reporting periods in the preceding 18 months, this is a notable increase in the number of individuals charged with strict liability offences and a modest decrease in the number of individuals charged with criminal offences. However, the overall number of individuals charged in both categories of offence has remained broadly consistent over the past 24 months.

### *Australian Competition and Consumer Commission (ACCC)*

In August 2023, the ACCC published its Corporate Plan 2023–24. The Corporate Plan confirmed that, alongside its enduring priorities of cartel conduct, anti-competitive conduct, product safety, consumers experiencing vulnerability or disadvantage, and conduct impacting First Nations people, the ACCC's competition compliance and enforcement priorities for 2023–24 include:

- consumer, product safety, fair trading and competition concerns regarding environmental claims and sustainability;
- scam detection and disruption;
- consumer and fair trading issues related to manipulative or deceptive advertising and market practices in the digital economy;
- unfair contract terms in consumer and small business contracts;
- competition and consumer issues arising from the pricing and selling of essential services, with a focus on energy and telecommunications;
- competition issues relating to digital platforms;
- promoting competition and investigating allegations of anti-competitive conduct in the financial services sector, with a focus on payment services; and
- exclusive arrangements by firms with market power that impact competition.

These priority areas are aligned with a number of the ACCC's recent regulatory, investigation and enforcement activities, including the following.

- In July 2023, the ACCC published draft guidance to improve the integrity of environmental and sustainability claims made by businesses and protect consumers from greenwashing. The draft guidance aims to address conduct identified by the ACCC's recent greenwashing internet sweep, which found 57% of businesses reviewed were making potentially misleading environmental claims.
- In August 2023, following the ACCC instituting civil cartel proceedings against an ASX-listed company and its former general manager, the Federal Court ordered the

company to pay a AUD57.5 million penalty for attempting to fix prices for products supplied in Australia. The next highest cartel penalty imposed by the Federal Court was a AUD46 million penalty against Yazaki Corporation, ordered in May 2018.
- On 10 November 2023, legislation will come into effect establishing a civil penalty regime for unfair contract terms in certain standard form contracts and expanding the class of contracts covered.

### *AUSTRAC*

AUSTRAC continues to increase its presence and prominence in the white-collar regulatory landscape, following funding boosts from the Australian government in 2020–21.

AUSTRAC enhanced its regulatory powers in February 2023 by signing Memoranda of Understanding (MOU) with two British regulators, the Financial Conduct Authority and HMRC. The MOUs will enhance engagement with the agencies on regulatory issues, allowing the exchange of regulatory information and could result in joint anti-money laundering and counter-terrorism financing supervision with the latter agency.

The following significant AUSTRAC enforcement activities can be noted.

- In November 2022, AUSTRAC commenced civil penalty proceedings in the Federal Court against The Star Pty Limited and The Star Entertainment QLD Limited for alleged non-compliance with Australia's anti-money laundering and counter-terrorism financing laws. The action followed an industry-wide AUSTRAC compliance campaign that began in September 2019 and led to an enforcement investigation into The Star Pty Limited being opened in June 2021.
- In July 2023, Crown Melbourne and Crown Perth were ordered by the Federal Court to pay a AUD450 million penalty over two years, as well as AUSTRAC's costs, after AUSTRAC launched civil penalty proceedings against them for breaching of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. The parties filed joint submissions in May 2023 for the payment of this penalty, and as part of the settlement, Crown admitted that it operated in contravention of the AML/CTF Act, including that Crown Melbourne and Crown Perth's AML/CTF programmes were not based on appropriate risk assessments, did not have appropriate systems and controls to manage their risks, and were not subject to appropriate oversight by their boards and senior management.

### *Criminal prosecutions*

A recent judgment of significance on foreign bribery offending is the High Court of Australia's decision in The King v Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz [2023] HCA 23. Sinclair Knight Merz pleaded guilty to three counts of the offence of conspiracy as a body corporate to bribe foreign officials.

The appeal considered the correct approach to setting the maximum available penalty for the offending, and the High Court held that the maximum penalty must be set with reference to the "gross" value of the benefit obtained from the offending as opposed to the "net" value. This is consistent with established authority holding that, where commercial profit is the motivating factor in corporate offending, penalties must be fixed with a view to ensuring they are not regarded as an "acceptable cost of doing business". As a consequence of the decision, corporate foreign bribery offenders are more likely to pay higher penalties. The decision may also

have relevance to other criminal and civil penalty provisions regulating corporate conduct given that similar statutory language is used.

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