

InfoPAKSM

Corporate Crime, Fraud and Investigations in Australia: Overview

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Corporate Crime, Fraud and Investigations in Australia: Overview

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This InfoPAKSM provides a Q&A guide to corporate crime, fraud and investigations in Australia.

The Q&A gives a high level overview of matters relating to corporate fraud, bribery and corruption, insider dealing and market abuse, money laundering and terrorist financing, financial record keeping, due diligence, corporate liability, immunity and leniency, and whistleblowing.

To compare answers across multiple jurisdictions, visit the Corporate Crime, Fraud and Investigations Country Q&A tool at <http://uk.practicallaw.com/3-520-1761>.

This Q&A is part of the global guide to corporate crime, fraud and investigations law. For a full list of jurisdictional Q&As visit www.practicallaw.com/corporatecrime-mjg.

Contents

I.	Fraud	6
A.	Regulatory Provisions and Authorities	6
B.	Offences	7
C.	Enforcement.....	7
D.	Penalties	9
II.	Bribery and Corruption	11
A.	Regulatory Provisions and Authorities	11
B.	Offences	13
C.	Defences	14
D.	Enforcement.....	15
E.	Penalties	16
F.	Tax Treatment.....	17
III.	Insider Dealing and Market Abuse.....	18
A.	Regulatory Provisions and Authorities	18
B.	Offences	18
C.	Defences	19
D.	Enforcement.....	20
E.	Penalties	20
IV.	Money Laundering, Terrorist Financing and Financial/Trade Sanctions.....	22
A.	Regulatory Provisions and Authorities	22
B.	Offences	23
C.	Defences	24
D.	Enforcement.....	25
E.	Penalties	26
V.	Financial Record Keeping	27
A.	What Are the General Requirements for Financial Record Keeping and Disclosure?.....	27
B.	What Are the Penalties for Failure to Keep or Disclose Accurate Financial Records?	28
C.	Are the Financial Record Keeping Rules Used to Prosecute White-Collar Crimes?	28

VI.	Due Diligence	29
A.	What Are the General Due Diligence Requirements and Procedures in Relation to Corruption, Fraud or Money Laundering When Contracting with External Parties?	29
VII.	Corporate Liability	30
A.	Under What Circumstances Can a Corporate Body Itself Be Subject to Criminal Liability?	30
VIII.	Cartels	31
A.	Are Cartels Prohibited in Your Jurisdiction? How Are Cartel Offences Defined? Under What Circumstances Can a Corporate Body Be Subject to Criminal Liability for Cartel Offences?	31
IX.	Immunity and Leniency	32
A.	In What Circumstances Is It Possible to Obtain Immunity/Leniency for Co-operation with the Authorities?	32
X.	Cross-Border Co-operation	33
A.	What International Agreements and Legal Instruments Are Available for Local Authorities?	33
B.	In What Circumstance Will Domestic Criminal Courts Assert Extra-Territorial Jurisdiction?	34
C.	Does Your Jurisdiction Have Any Statutes Aimed at Blocking the Assertion of Foreign Jurisdictions Within Your Territory?	34
XI.	Whistleblowing	35
A.	Are Whistleblowers Given Statutory Protection?	35
XII.	Reform, Trends and Developments	36
A.	Are There Any Impending Developments or Proposals for Reform?	36
XIII.	Market Practice	37
A.	What Are the Main Steps Foreign and Local Companies Are Taking to Manage Their Exposure to Corruption/Corporate Crime?	37
XIV.	The Regulatory Authorities	38
A.	Australian Federal Police (AFP)	38
B.	Commonwealth Director of Public Prosecutions (CDPP)	38
C.	Australian Crime Commission (ACC)	38
D.	Australian Competition and Consumer Commission (ACCC)	38
E.	Australian Transaction Reports and Analysis Centre (AUSTRAC)	39
F.	Australian Securities and Investments Commission (ASIC)	39
G.	Australian Taxation Office (ATO)	39
H.	Australian Crime Commission	39

I.	Independent Commission Against Corruption	39
XV.	Online Resources	40
A.	ComLaw	40
B.	NSW Legislation.....	40
C.	Victorian Legislation and Parliamentary Documents	40
D.	Queensland Legislation	40
E.	South Australian Legislation	40
F.	Western Australian Legislation.....	41
G.	Tasmanian Legislation.....	41
H.	ACT Legislation Register.....	41
I.	Current Northern Territory Legislation Database.....	41
XVI.	About the Authors	42
A.	Stephanie Wee, Special Counsel	42
B.	Andris Gauja, Lawyer	42

I. Fraud

A. Regulatory Provisions and Authorities

I. What Are the Main Regulatory Provisions and Authorities Responsible for Investigating Corporate or Business Fraud?

The main regulatory provisions dealing with corporate and business fraud are:

The various federal, state and territory criminal laws. In Australia, each state and territory (of which there are nine) has its own criminal legislation, in addition to federal criminal legislation. The Commonwealth Director of Public Prosecutions (Commonwealth DPP) and the equivalent state and territory prosecution offices are responsible, along with local law enforcement authorities, for enforcing the laws.

Corporations Act 2001 (Cth) (Corporations Act). This contains civil and criminal provisions in relation to corporations and financial services providers. The Australian Securities and Investments Commission (ASIC) is responsible for enforcing the Corporations Act.

Competition and Consumer Act 2010 (Cth) (Australian Consumer Law). This contains civil and criminal provisions in relation to fair trading, consumer protection and competition (outside of the financial services industry). The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the Australian Consumer Law.

Federal taxation legislation. This includes the Income Tax Assessment Act 1936 (Cth) and the Taxation Administration Act 1953 (Cth). These contain civil and criminal provisions in relation to tax avoidance. Taxation legislation is administered by the Australian Taxation Office (ATO).

Each regulatory authority has also issued regulatory guidelines and policy statements outlining their approach to both substantive and procedural matters relevant to their role as a regulator.

For more information on the regulatory authorities see Section XIV.

B. Offences

I. What Are the Specific Offences Relevant to Corporate or Business Fraud?

Federal, state and territory criminal legislation contain various offences relevant to financial crimes in a corporate business context. These include:

- Standard fraud offences, which include obtaining property, financial advantage or causing financial disadvantage by deception or dishonesty.
- The destruction or concealment of accounting records.
- The publishing or making of misleading statements.

These are not strict liability offences and require evidence of intent by way of deception or dishonesty.

Attempts to commit these offences may attract the same liability.

C. Enforcement

I. What Are the Regulator's Powers of Investigation, Enforcement and Prosecution in Cases of Corporate or Business Fraud and What Are the Consequences of Non-Compliance?

a. Powers of Investigation

The main regulators (that is, the Australian Securities and Investments Commission (ASIC), the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO)) have broad powers of investigation to support their enforcement responsibilities. Their powers include:

- The power to require the production of "books" (a term which is broadly defined).
- The power to require a person to provide information, including by way of a formal interview or an examination on oath.
- The power to access premises (including without prior notice) to conduct searches and to seize material.

Failure to comply and co-operate with a regulator that is exercising its power is a contravention of the law.

There are some limited protections available to a corporation or person responding to regulatory investigations. These include the ability to make claims for privilege over documents and information.

In relation to formal examinations of persons conducted by the ASIC and ACCC, an examinee does not have a right to silence. However, a subsequent "use immunity" is available, which prohibits the regulator from using answers in subsequent criminal proceedings. To benefit from this protection, in formal examinations before the ASIC and ACCC, a person must say "privilege" before each answer.

b. Powers of Enforcement

After investigation, the regulators may pursue enforcement in the form of civil or criminal prosecutions (in relation to the latter, generally with the Commonwealth Director of Public Prosecutions (DPP) and state/territory equivalents). Other enforcement measures may also be taken as an alternative to prosecution, which are discussed in Section I.D.1.

Enforcement proceedings can also include injunctions or interim orders in relation to corporate assets. For example, the ASIC may seek urgent injunctive relief from the court in order to freeze funds to protect investors. These matters are normally at the discretion of the court and injunctive relief can be applied for and obtained within 24 hours.

Some provisions of the Corporations Act and other legislation have application outside Australia. In certain circumstances, Australian courts may make orders or determinations which have extraterritorial application. However, these orders are only enforceable in the jurisdiction of the Court making the order.

All of the regulators work closely with other international enforcement agencies. In some cases, the regulators have signed formal co-operative documents, including memoranda of understanding (MOUs) in relation to international regulation, information sharing and enforcement (for example, there is a specific unit within ASIC responsible for liaising with international regulators).

The regulators are also signatories to domestic co-operative documents between Australian agencies relating to the conduct of investigations, sharing of information and referral of matters between regulators and agencies.

For more information on extraterritoriality, see Section X.A.

D. Penalties

I. What Are the Potential Penalties or Liabilities for Participating in Corporate or Business Fraud?

a. Civil/Administrative Proceedings or Penalties

A regulator can pursue a variety of civil/administrative enforcement remedies, including pursuing punitive actions such as compensation orders or pecuniary penalties.

Depending on the nature of the offence, a regulator can take administrative action without the need to involve the courts. For example, the ASIC can take the following action:

- Disqualification of an individual from managing a corporation, or a ban on providing financial services or engaging in credit activities.
- Revocation, suspension or variation of conditions of a financial services licence.
- Public warning notices.

The ASIC and ACCC also have the power to issue enforceable undertakings (which are public) to a person or body corporate following an investigation. These can include undertakings to:

- Remedy the harm caused by the conduct.
- Accept responsibility for their actions.
- Make improvements to their corporate practices.

b. Criminal Proceedings or Penalties

A regulator will usually pursue criminal remedies for more serious cases of misconduct and breaches of the law. Depending on the nature of the offence, criminal penalties can include prison sentences (for example, the state of New South Wales legislation provides for maximum prison sentences for serious fraud ranging from five to ten years). Criminal penalties can also include criminal fines or non-punitive court orders such as community service orders.

In criminal proceedings, a higher standard of proof is required to secure a conviction than in civil proceedings.

c. Civil Suits

Regulators can also pursue representative civil action against offenders on behalf of persons who have suffered loss, and can seek compensation or pecuniary penalties and orders of disqualification in relation to individuals.

Corporate and business fraud may also expose an offender to civil liability in respect of third parties such as consumers, investors or shareholders, including class actions. In the last ten years, Australia has seen a very marked rise in shareholder and consumer class actions arising from misleading and deceptive conduct on the part of corporations.

II. Bribery and Corruption

A. Regulatory Provisions and Authorities

I. What Are the Main Regulatory Provisions and Authorities Responsible for Investigating Bribery and Corruption?

The main provisions in relation to bribery and corruption are contained in federal, state and territory criminal legislation. Domestic law enforcement agencies and public prosecution offices are responsible for the investigation and prosecution of bribery and corruption.

The applicable regulatory authorities are as follows:

- The Australian Federal Police (AFP) has primary law enforcement responsibility for investigating bribery and corrupt conduct in respect of foreign or domestic public officials. In addition, other bodies have been established by the Australian government to investigate bribery and corruption.
- In the context of organised crime, the Australian Crime Commission (ACC) is a national criminal agency with investigative powers and responsibilities relating to corruption capabilities.
- State bodies have been established to investigate allegations of corrupt activities within the relevant State public sector (among other things). For example:
 - the Independent Commission Against Corruption (ICAC) in New South Wales;
 - the Independent Broad-based Anti-Corruption Commission (IBAC) in the State of Victoria;
 - the Corruption and Crime Commission (CCC) in the State of Western Australia;
 - the Corruption and Crime Commission (CCC) in the State of Queensland;
 - the Independent Commissioner Against Corruption (ICAC) in the State of South Australia; and
 - the Integrity Commission Tasmania (ICT) in the State of Tasmania.

The penalties for bribery and corruption offences include significant prison terms and fines (see Section II.E.1).

The Organisation for Economic Co-operation and Development (OECD) has noted that Australia is behind other jurisdictions in relation to anti-bribery enforcement, with the first prosecution only starting in July 2011. The investigation of foreign bribery is a currently a key strategic priority of the AFP and there is significant public pressure on the

Australian regulators to demonstrate its willingness to initiate prosecutions against wrongdoers. A number of government bodies have released guidelines in relation to corruption and bribery, for example:

- The Australian Taxation Office (ATO) has provided guidelines for understanding and dealing with the bribery of Australian and foreign public officials (see www.ato.gov.au/About-ATO/About-us/In-detail/How-we-do-things/ATO-guidelines-for-understanding-and-dealing-with-the-bribery-of-Australian-and-foreign-public-officials/).
- The ICAC provides detailed guidelines in relation to responding to corrupt conduct (see www.icac.nsw.gov.au/preventing-corruption/responding-to-corrupt-conduct).
- The Attorney General's Department (Crime Prevention) has released a Foreign Bribery Information and Awareness Pack (see www.crimeprevention.gov.au/Financialcrime/Pages/InformationandAwarenesspack.aspx).
- For more information on the AFP, the ACC and ICAC see Section XIV.

2. What International Anti-Corruption Conventions Apply in Your Jurisdiction?

Australia is party to the following anti-corruption conventions:

- UN Convention Against Corruption 2003 (Corruption Convention) (ratified 7 December 2005).
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Anti-bribery Convention) (ratified 18 October 1999).
- UN Convention against Transnational Organised Crime 2000 (ratified 27 May 2004).
- Australia is also a member of the:
- G20 Anti-Corruption Workup Group.
- APEC Anti-Corruption and Transparency Working Group.
- UN Convention against Corruption Working Group.

B. Offences

I. What Are the Specific Bribery and Corruption Offences in Your Jurisdiction?

a. Foreign Public Officials

The offence of bribing a foreign public official is set out in section 70.2 of the Criminal Code Act 1995 (Cth) (Commonwealth Criminal Code). This provision has a number of elements which are divided into "steps". All steps must be present for the offence to apply (it is not a strict liability offence).

A person is guilty of an offence if:

- **Step one.** The person does any of the following:
 - provides a benefit to another person;
 - offers or promises to provide a benefit to another person; or
 - causes a benefit to be provided, offered or promised to another person.
- **Step two.** The benefit is not legitimately due to the other person.
- **Step three.** Step one was carried out with the intention of influencing a foreign public official (who may or may not be that other person) in the exercise of the official's duties as a foreign public official, in order to obtain or retain business or obtain or retain a business advantage which is not legitimately due.

The offence applies regardless of either:

- The outcome of the bribe (for example, the business advantage was not actually obtained or was not retained).
- The alleged necessity of the payment (for example, the benefit is customary, necessary or required).

A person who attempts to commit this offence is also guilty of that offence.

b. Domestic Public Officials

The offence of bribing a Commonwealth public official is set out in section 141.1 of the Commonwealth Criminal Code. This offence is similar to the foreign bribery offence in that a number of steps must be present for the offence to apply (it is not a strict liability offence).

A person is guilty of the offence if:

- **Step one.** The person does any of the following:
 - provides a benefit to another person;

- offers or promises to provide a benefit to another person; or
- causes a benefit to be provided, offered or promised to another person
- **Step two.** The person carries out step one with the intention of influencing a Commonwealth public official (who may be the other person) in the exercise of the official's duties as a Commonwealth public official.

Sections 142.1 and 142.2 of the Criminal Code Act 1995 (Cth) also sets out offences for giving corrupting benefits to Commonwealth public officials, or for Commonwealth public officials receiving such benefits.

There are also equivalent bribery offences under state and territory legislation.

c. Private Commercial Bribery

Each state and territory has offences for bribery. For example, in New South Wales, Part 4A of the Crimes Act 1900 (NSW) prohibits the corrupt giving, receipt, or solicitation of a benefit as an inducement or reward for an act or omission in relation to a business.

C. Defences

I. What Defences, Safe Harbours or Exemptions Are Available and Who Can Qualify?

Two statutory defences available in relation to foreign public official bribery offences, as follows:

- Where a written law governing the foreign public official expressly permits or requires the benefit to be given.
- Where the benefit is a "facilitation payment". For this defence to apply:
 - the benefit must be of a minor value; and
 - the benefit must be offered for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature.

A "routine government action" does not include any decision to award or continue business, or any decision related to the terms of new or existing business. Detailed records must be kept in relation to the transaction. The facilitation payments defence has been the subject of a formal review by the Attorney General of Australia and may be prohibited in future.

There are no specific statutory defences in relation to domestic public official bribery or private commercial bribery offences. Other defences such as duress (for example, payment of money under threat) may apply to these offences.

2. Can Associated Persons (Such as Spouses) and Agents Be Liable for These Offences and in What Circumstances?

In certain circumstances, corporations can be found responsible for the illegal acts of employees and agents, including in relation to bribery offences. For example, a company can be held liable where an agent of the company offered a bribe to a foreign official and it is shown that a corporate culture existed within the company that directed or tolerated the commission of the offence. Implementing an appropriate anti-bribery regime within a corporation is an important step in demonstrating a culture of compliance.

An associated person, such a spouse or other relative, can be held liable if he or she induces a third person to do something that results in another person obtaining a benefit.

D. Enforcement

I. What Are the Regulator's Powers of Investigation, Enforcement and Prosecution in Cases of Bribery and Corruption and What Are the Consequences of Non-Compliance?

The Australian Federal Police (AFP) has primary law enforcement responsibility for investigating allegations involving bribery and the corruption of public officials. In relation to state and territory bribery offences, local law enforcement has primary responsibility.

The AFP and state and territory law enforcement agencies have a broad range of investigative powers, which include detention, search and seizure powers. In certain circumstances, warrants must be obtained prior to exercising those powers.

Specific anti-corruption agencies, such as the Independent Commission Against Corruption (ICAC) in New South Wales have been established to investigate bribery and corruption in the public sector for that particular state (for the various state agencies, see Section II.A.1). In addition to conducting investigations, the ICAC also has the power to:

- Compel the production of documents.
- Require persons to attend compulsory examinations or public inquiries.

The Australian Crime Commission (ACC) has similar coercive powers, which are used in special operations or investigations relating to organised crime.

Failure to comply with any such action is a contravention of the law.

The AFP has stated that it works closely with its international and domestic counterparts to investigate and prosecute foreign bribery cases. The first prosecution, which commenced in 2011, involved a co-operative investigation with a number of overseas regulators. The AFP is a member of the International Foreign Bribery Taskforce, which includes US, UK and Canadian law enforcement agencies.

E. Penalties

I. What Are the Potential Penalties for Participating in Bribery and Corruption?

a. Civil/Administrative Proceedings or Penalties

Where a corporation is found to have engaged in bribery or corrupt conduct a director of that corporation may be liable for breaching his or her directors duties under the Corporations Act 2001 (Cth). These breaches are investigated and prosecuted by ASIC and can attract the following penalties, in relation to both companies and individuals:

- pecuniary or compensation orders, which can attract significant monetary sums;
or
- disqualification from managing a corporation (for individuals).

Civil sanctions can also be imposed on public service employees who engage in bribery and corruption. These can include termination of employment and other disciplinary matters.

b. Criminal Proceedings or Penalties

There are significant criminal penalties for bribery offences under federal and state legislation, which generally include both monetary fines and prison sentences. For example, individuals contravening Commonwealth foreign bribery offences can attract:

- Prison sentences of up to ten years.
- Fines of up to 10,000 penalty units (about A\$1.7 million as at January 2015).

For corporations, significant monetary fines can apply and were increased significantly in 2010. A corporation may be exposed to a potential fine amounting to the greater of any of the following:

- 100,000 penalty units (about A\$17 million as at January 2015).
- Three times the "benefit" obtained by the corporation.
- 10% of the corporation's annual turnover in the 12 months preceding the offence.

F. Tax Treatment

I. Are There Any Circumstances under Which Payments Such as Bribes, Ransoms or Other Payments Arising from Blackmail or Extortion Are Tax-Deductible as a Business Expense?

Bribes are not tax deductible under Australian law, with the current exception of "facilitation payments" (see Section II.C.1).

Although the Australian Tax Office has not specifically ruled on whether other payments arising out of blackmail or extortion are tax-deductible, Australian law generally allows for deductions for losses incurred for the purpose of gaining or producing assessable income.

III. Insider Dealing and Market Abuse

A. Regulatory Provisions and Authorities

I. What Are the Main Regulatory Provisions and Authorities Responsible for Investigating Insider Dealing and Market Abuse?

The main regulatory provisions relating to investigating insider dealing and market abuse are set out in Part 7.10 of the Corporations Act. The Australian Securities and Investments Commission (ASIC) is the regulatory body responsible for investigating breaches of the provisions relating to insider dealing and market abuse.

The ASIC has released regulatory guidelines which:

- Explains how the ASIC uses its powers.
- Explains how the ASIC interprets the law and its approach.
- Provides practical guidance.

For example, in relation to insider dealing and market abuse, Regulatory Guide 238 (in relation to suspicious activity reporting) gives guidance on the obligations for market participants in Australia in a number of financial markets, including the Australian Securities Exchange (ASX), to notify the ASIC of any suspicious activity ([see www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-238-suspicious-activity-reporting/](http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-238-suspicious-activity-reporting/))

For more information on the ASIC, see Section XIV.

B. Offences

I. What Are the Specific Insider Dealing and Market Abuse Offences?

a. Insider Dealing

The insider trading offences are set out in Division 3 of Part 7.10 of the Corporations Act. Broadly speaking, these offences prohibit a person from:

- Trading while in the possession of inside information.
- Communicating inside information to another person for the purpose of trading.

"Inside information" is information which is both:

- Not generally available.

- Information which, if generally available, a reasonable person would expect would have a material effect on the price or value of a financial product.

This is not a strict liability offence.

b. Market Abuse

The market abuse offences are set out in Division 2 of Part 7.10 of the Corporations Act. These offences relate to the trading of financial products in a recognised market (such as the Australian Securities Exchange). Broadly speaking, these offences prohibit conduct which either:

- Creates or maintains an artificial trading price.
- Creates a false or misleading appearance of trading.

This is not a strict liability offence.

c. Other Prohibitions

There are also other prohibitions contained set out in Division 2 of the Corporations Act which deal with misleading and deceptive conduct in relation to financial products. For example, a person must not make false or misleading statements that would either:

- Induce persons to trade in financial products.
- Have an effect on the trading price of financial products.

Strict liability applies to certain aspects of this offence.

C. Defences

I. What Defences, Safe Harbours or Exemptions Are Available and Who Can Qualify?

The Corporations Act provides a general defence to civil penalty proceedings, including in relation to proceedings in section 1317S.

This defence is only available in relation to civil proceedings, and empowers the Court to relieve a person wholly or partially from liability. The court must be satisfied that both:

- The person has acted honestly.
- Having regard to all the circumstances of the case, the person ought fairly to be excused.

The Corporations Act also provides for specific exceptions in relation to insider trading, which include exceptions for:

- Withdrawals from managed investment schemes.

- Underwriters.
- Acquisitions pursuant to legal requirements.
- The communication of information following a requirement imposed by a government or regulatory authority.
- Chinese wall arrangements.
- Knowledge of a person or body corporate's own intentions or activities.

D. Enforcement

I. What Are the Regulator's Powers of Investigation, Enforcement and Prosecution and What Are the Consequences of Non-Compliance?

The Australian Securities and Investments Commission's (ASIC) powers of investigation and the consequences of non-compliance are the same as for corporate and business fraud (see Section I.C.1). Similarly, the ASIC or the Commonwealth Director of Public Prosecutions may also apply to court for restraint orders, freezing or travel restriction orders.

The market abuse provisions and insider trading provisions apply whether or not the person or corporation is inside or outside of Australia, but the offence must relate to financial products or to a financial market operated in Australia.

For more information on extraterritoriality, see Section X.B.

E. Penalties

I. What Are the Potential Penalties for Participating in Insider Dealing and Market Abuse?

a. Civil/Administrative Proceedings or Penalties

Insider dealing and market abuse offences carry civil penalty consequences. If an offence has been made out, a court will make a declaration of a contravention under section 1317E of the Corporations Act.

Once a declaration has been made, the Australian Securities and Investments Commission (ASIC) can then seek a pecuniary penalty order of up to (*section 1317G, Corporations Act*):

- A\$200,000 for an individual.
- A\$1 million for a corporation.

Orders for the payment of compensation in relation to damage caused by the offence can also be obtained, as well as orders disqualifying individuals from managing corporations.

b. Criminal Proceedings or Penalties

Insider dealing and market abuse offences are also criminal offences under Part 9.4 Division 2 and Schedule 3 of the Corporations Act.

An individual may be liable for any of the following:

- Ten years' imprisonment.
- A fine of up to 4,500 penalty units (about A\$765,000).
- Three times the value of the profit gained or the loss avoided (whichever is greater).

A corporation may be liable for either:

- A fine of up to 45,000 penalty units (about A\$7.65 million).
- Three times the value of the profit gained or the loss avoided (or, if this value cannot be determined, up to 10% of the corporation's annual turnover in the relevant period).

c. Civil Suits

Compensation orders can be sought by parties who have suffered damages (see Section III.E.1.a).

In relation to the offences of making misleading statements for encouraging market abuse (*sections 1041E to 1041H, Corporations Act*), an affected party can recover the amount of the loss or damage by action against any person involved in the contravention, whether or not that other person has been convicted of that offence (*section 1041I, Corporation Act*).

However, the amount recoverable can be limited if either:

- The affected party failed to take reasonable care.
- The defendant did not intend to, or did not fraudulently, cause that loss or damage.

Civil actions may also be brought by parties on the basis of misleading or deceptive conduct generally.

IV. Money Laundering, Terrorist Financing and Financial/Trade Sanctions

A. Regulatory Provisions and Authorities

I. What Are the Main Regulatory Provisions and Authorities Responsible for Investigating Money Laundering, Terrorist Financing and/or Breach of Financial/Trade Sanctions?

a. Money Laundering

The main regulatory provisions for money laundering and terrorist financing are provided in the following legislation:

- Criminal offences are set out in the Criminal Code and the equivalent state and territory criminal laws.
- The reporting obligations on financial institutions and other financial intermediaries are set out in the:
 - Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AMTFL Act);
 - Financial Transaction Reports Act 1988 (Cth) (FTR Act).

In relation to reporting obligations, the legislation imposes obligations, including:

- Customer due diligence.
- Reporting.
- Record keeping.
- Adopting and maintaining their own anti-money laundering and counter-terrorism financing programmes.

The authority responsible for compliance with this legislation is the Australian Transaction Reports and Analysis Centre (AUSTRAC).

b. Terrorist Financing

See Section IV.A.1.a.

c. Financial/Trade Sanctions

Australia has implemented the following financial/trade sanctions:

- **UN Security Council sanctions regime.** This regime is primarily implemented under the Charter of the United Nations Act 1945 and separate sets of regulations in relation to specific countries.
- **Australian autonomous sanctions regime.** This regime is primarily implemented under the:
 - Autonomous Sanctions Act 2011 (Cth);
 - Australian Autonomous Sanctions Regulations 2011 (Cth).

The Australian Department of Foreign Affairs and Trade (DFAT) administers the above laws.

B. Offences

I. What Are the Specific Offences Relating to Money Laundering, Terrorist Financing and Breach of Financial/Trade Sanctions?

a. Money Laundering

The offence of money laundering is set out in Division 400 of the Commonwealth Criminal Code. The offence of money laundering involves dealing with "proceeds of crime", money or other property that is intended to become, or is at risk of becoming, an instrument of crime.

There are similar offences in the equivalent state and territory criminal laws. For example, in New South Wales, the offence of money laundering is provided in Part 4AC of the Crimes Act 1900 (NSW). These are not strict liability offences.

The AMLCTF Act contains civil penalty and criminal offences in relation to breaches of that Act (which relate to breaches of obligations relating to customer due diligence, reporting, record keeping, and maintaining a compliance programme).

b. Terrorist Financing

The offence of terrorist financing is provided in Chapter 5 of the Commonwealth Criminal Code. This offence requires the collection or provision of funds for a terrorist organisation, or the provision of support to a terrorist organisation. It is not necessary for a terrorist act to have occurred. This is not a strict liability offence.

c. Financial/Trade Sanctions

For corporations, the sanctions offences (see Section IV.A.1.c) are strict liability offences. In such cases, it is not necessary to prove intent or knowledge.

C. Defences

I. What Defences, Safe Harbours or Exemptions Are Available and Who Can Qualify?

a. Money Laundering

The various offences of money laundering range in severity depending on the level of knowledge of the person or corporation engaging in money laundering (that is, whether the crime is the result of intention, recklessness or negligence). If it can be shown that the offender did not know that money was an instrument of crime, then a defence may be available, or a lesser penalty may apply.

It is also a defence if the defendant dealt with the proceeds of crime to assist the enforcement of a law of the Commonwealth, or a state or territory (for example, see section 193(B)(4) of the Crimes Act 1900 (NSW)).

In relation to criminal and civil proceedings brought under the Anti-Money Laundering and Counter-Terrorism Financing Act (AMLCTF Act), it is also a defence if the defendant proves that the defendant took reasonable precautions, and exercised due diligence, to avoid the contravention in respect of which the proceedings were instituted (*section 236*).

In relation to civil proceedings brought under the AMLCTF Act, a defence of relying on information supplied by another person (who is not an agent, officer or employee) is available (*section 68*).

b. Terrorist Financing

The various offences of terrorist financing range in severity depending on the level of knowledge of the person or corporation engaging in the terrorist financing (for example, whether the accused had actual knowledge that the organisation was a terrorist organisation, or was he was recklessness as to the fact). If it can be shown that the offender did not know that the organisation was a terrorist organisation, then a defence may be available, or a lesser penalty may apply.

It is also a defence to receiving funds from a terrorist organisation if those funds were received solely for the purpose of the provision of representation in legal proceedings, or assistance to the organisation for it to comply with a law of the Commonwealth, or a state or territory.

c. Financial/Trade Sanctions

The Minister for Foreign Affairs (or his or her delegate) may be able to grant a permit authorising an activity that would otherwise contravene sanction laws.

The offence provisions will also not apply if a person or body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening the sanction laws.

D. Enforcement

I. What Are the Regulator's Powers of Investigation, Enforcement and Prosecution and What Are the Consequences of Non-Compliance?

a. Powers of Investigation

The Australian Transaction Reports and Analysis Centre (AUSTRAC) oversees the compliance of Australian corporations with the Anti-Money Laundering and Counter-Terrorism Financing Act (AMLCTF Act) and Financial Transaction Reports Act (FTR Act).

AUSTRAC also provides financial information to state, territory and Australian national law enforcement, security, social justice and revenue agencies, and certain international counterparts.

To this end, AUSTRAC has broad investigative powers, which include:

- Issuing notices to require the provision of information and documents.
- Executing monitoring warrants to access reporting entities' premises.
- Seeking injunctions from the Federal Court on short notice, to require a person to do something, or refrain from doing something, in relation to the breach of a civil penalty provision of the AMLCTF Act.

Legal professional privilege may be claimed over documents and information the subject of an investigation.

b. Powers of Enforcement

In terms of enforcement, the AUSTRAC can:

- Accept enforceable undertakings.
- Issue remedial directions.
- Issue infringement notices.
- Seek civil penalty orders in the Federal Court.
- Refer criminal matters to the AFP or Commonwealth Director of Public Prosecutions.

The Australian Federal Police (AFP), along with other domestic counterparts and intelligence organisations (such as the Australian Security and Intelligence Organisation) is responsible for investigating terrorism-related offences.

For more information on the AUSTRAC and the AFP see Section XIV.

E. Penalties

I. What Are the Penalties for Participating in Money Laundering, Terrorist Financing Offences and/or for Breaches of Financial/Trade Sanctions?

a. Money Laundering

The maximum civil penalties for breaches of the Anti-Money Laundering and Counter-Terrorism Financing Act (AMLCTF Act) are:

- For corporations, up to 100,000 penalty units (about A\$17 million).
- For individuals, up to 20,000 penalty units (about A\$3.4 million).

The maximum criminal penalties for breaches of the AMLCTF Act are either or both:

- Ten years' imprisonment.
- 10,000 penalty units (about A\$1.7 million).

Civil and criminal penalties apply to all reporting entities and include their employees and agents.

In relation to money laundering, the Commonwealth penalties imposed depend on the level of knowledge of the offender and the amount of money involved. For example, under Commonwealth legislation:

- For individuals, the maximum penalties are a fine of A\$255,000 and/or 25 years imprisonment.
- For corporations, a court can impose a fine of an amount not greater than five times the maximum fine for individuals (up to about A\$1,275,000).

b. Terrorist Financing

There are significant criminal penalties in relation to terrorist financing. The maximum penalty is life imprisonment, with lesser prison sentences (ranging from 15 to 25 years) depending on the level of knowledge of the offender in relation to whether the organisation was a terrorist organisation.

c. Financial/Trade sanctions

Contravening financial/trade sanction laws is a serious punishable offence with penalties of up to ten years imprisonment and substantial fines for individuals and corporations. The maximum penalty for each offence by corporations is the greater of three times the value of the transaction (or transactions), provided the court can determine such value, or 10,000 penalty units (about A\$1.7 million).

V. Financial Record Keeping

A. What Are the General Requirements for Financial Record Keeping and Disclosure?

I. Financial Record Keeping

Section 286 of the Corporations Act provides a general duty to keep financial records.

Financial records must:

- Correctly record and explain a company's transactions, financial position and performance.
- Enable true and fair financial statements to be prepared and audited.

The financial records must be retained for seven years after the transactions covered by the records are completed.

The Australian Securities and Investments Commission has provided guidance on the requirements for financial record keeping (see www.asic.gov.au/for-business/running-a-company/company-officeholder-duties/what-books-and-records-should-my-company-keep/).

2. Disclosure

In relation to disclosure, directors of a company have a general right of access to a company's financial records. Other entities, such as shareholders, auditors, controllers of a company's property (such as a receiver), and regulatory authorities are granted limited rights of access in certain circumstances.

Public companies, large proprietary companies and some small proprietary companies are also required to prepare and distribute to shareholders an annual report, which comprises a:

- Financial report.
- Directors' report.
- Auditor's report.

Public companies listed on the Australian Securities Exchange must also comply with continuous disclosure requirements to the market.

B. What Are the Penalties for Failure to Keep or Disclose Accurate Financial Records?

The penalty for a failure to keep financial records is a fine of 25 penalty units (about A\$4,250). This is a strict liability offence.

A director may also be liable if they fail to take all reasonable steps to comply with, or to secure compliance with, the obligation to keep financial records (*section 344, Corporations Act*). Penalties may include disqualification or pecuniary penalties. If the contravention is dishonest, the director may also be subject to criminal fines or imprisonment of up to five years.

State and territory criminal legislation also contains offences for creating false or misleading records.

C. Are the Financial Record Keeping Rules Used to Prosecute White-Collar Crimes?

Financial record keeping rules can be and are often used by prosecutors to target white collar crime, in conjunction with breaches of other provisions.

VI. Due Diligence

A. What Are the General Due Diligence Requirements and Procedures in Relation to Corruption, Fraud or Money Laundering When Contracting with External Parties?

It is standard market practice for Australian companies to conduct due diligence on other companies prior to entering into any association or agreement. Areas of inquiry for due diligence generally include:

- Details of the company's anti-corruption policy (including reporting mechanisms), and the implementation, review and audit of that policy.
- Whether the company has appointed any agents or other third parties, and procedures to monitor their activities.
- Whether there has been any actual or potential violation of any anti-corruption laws or internal policies.

It is also standard market practice for the agreements between parties to contain the following warranties:

- A warranty that the contracting company has not engaged in corruption or bribery.
- A warranty in relation to compliance with anti-corruption laws and internal policies.

VII. Corporate Liability

A. Under What Circumstances Can a Corporate Body Itself Be Subject to Criminal Liability?

A corporate body can be liable for most statutory or common law criminal offences. This liability will be either vicarious or personal in nature, depending on the circumstances of the case.

1. Vicarious Liability

A corporate body is vicariously liable for the criminal acts of employees if the offence was performed within the scope of employment. Vicarious liability will not extend to criminal offences with a *mens rea* element (*Tesco case*; *Presidential Security Services v Brilley* (2008) 67 ACSR 692). Accordingly, this liability only arises in circumstances where there has been the commission of a statutory offence of strict or absolute liability.

Further, a corporate body will have personal criminal liability if it fails to perform duties or obligations imposed on it by statute that are strict liability offences.

2. Personal Liability

Personal liability may also arise where the offence was committed by a person whose acts are treated at law as the acts of the company. These persons include directors, a managing director, and other superior officers of the company. The applicable test is the "directing mind and will" principle from *Tesco Supermarkets Ltd v Nattr* [1972] 2 All ER 127, adopted by the High Court in *Hamilton v Whitehead* (1988) 166 CLR 121. The critical question is whether the person who commissioned the offence was the directing mind and embodiment of the company. If this test is satisfied, the *mens rea* formed by that individual will be attributed to the corporate body.

VIII. Cartels

A. Are Cartels Prohibited in Your Jurisdiction? How Are Cartel Offences Defined? Under What Circumstances Can a Corporate Body Be Subject to Criminal Liability for Cartel Offences?

This question was added in the 2015/16 edition of the guide.

IX. Immunity and Leniency

A. In What Circumstances Is It Possible to Obtain Immunity/Leniency for Co-operation with the Authorities?

A number of regulatory authorities have issued guidelines or policies relating to co-operation. For example, the Australian Securities and Investments Commission (ASIC) has stated the following:

- Early notification of misconduct and/or a co-operative approach during an investigation will often be relevant to the ASIC's consideration of which type of action to pursue and what remedy or combination of remedies to seek.
- In any proceedings commenced by the ASIC, the ASIC will give due credit for any co-operation received from the person or company against whom the proceedings are brought.
- See www.asic.gov.au/about-asic/asic-investigations-and-enforcement/cooperating-with-asic.
- The Australian Competition and Consumer Commission also has:
- A policy in relation to co-operation in enforcement matters (see www.accc.gov.au/system/files/ACCC%20cooperation%20policy%20July%202002.pdf).
- A specific immunity and co-operation policy for cartel conduct (see www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_FA.pdf).

Each state, territory and Commonwealth prosecutions office publish prosecution policies. For example, the Commonwealth Director of Public Prosecutions prosecution policy recognises that "whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so" is a factor which may arise for consideration in determining whether the public interest requires a prosecution.

See www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf

X. Cross-Border Co-operation

A. What International Agreements and Legal Instruments Are Available for Local Authorities?

1. Obtaining Evidence

In relation to transnational crime, mutual assistance to and from Australia is governed by the Mutual Assistance in Criminal Matters Act 1987 (Cth) (Mutual Assistance in Criminal Matters Act). Mutual assistance requests can be made on behalf of enforcement and prosecuting agencies. These requests can include:

- Executing search warrants to obtain evidence such as bank records from financial institutions.
- Taking evidence from a witness in Australia for foreign criminal proceedings.
- Arranging for witnesses to travel with their consent to a foreign country to give evidence in foreign criminal proceedings.

All requests under the Mutual Assistance in Criminal Matters Act require ministerial authorisation.

2. Seizing Assets

Under the Mutual Assistance in Criminal Matters Act, mutual assistance requests can also include registering and enforcing orders, to restrain and forfeit the proceeds of crime.

3. Sharing Information

The various regulators and authorities (such as the Australian Securities and Investments Commission, Australian Competition and Consumer Commission, Australian Transaction Reports and Analysis Centre and the Australian Federal Police) work closely with their international counterparts in relation to information sharing during the course of an investigation. In some cases, these bodies have signed formal co-operative documents, including memoranda of understanding.

B. In What Circumstance Will Domestic Criminal Courts Assert Extra-Territorial Jurisdiction?

Where express provision is made in legislation applying extra-territorial jurisdiction for specific offences, a court will assert extra-territorial jurisdiction. For example, section 70.2 of the Criminal Code extends liability for bribery related offences to conduct which occurs outside of Australia, if the person who engaged in such conduct is an Australian citizen or resident or a body corporate incorporated in Australia.

In addition, there are also additional bases recognised in public international law which would enable an Australian court to assert extra-territorial jurisdiction for:

- Crimes committed in its own territory.
- Crimes which have an effect in Australia.
- Crimes committed by an Australian national or corporation or against an Australian national.
- Crimes which are prejudicial to Australian national security or which is an offence against the international community.

C. Does Your Jurisdiction Have Any Statutes Aimed at Blocking the Assertion of Foreign Jurisdictions Within Your Territory?

Under the Mutual Assistance in Criminal Matters Act, any requests from overseas authorities for assistance must have ministerial authorisation.

In deciding whether to authorise assistance under the Mutual Assistance Act, the Minister must consider whether certain statutory criteria are met, including:

- The grounds of refusal set out in section 8 of the Mutual Assistance Act.
- Any grounds of refusal in the relevant treaty.

XI. Whistleblowing

A. Are Whistleblowers Given Statutory Protection?

The Corporations Act (and other state and territory legislation) contains protections for certain whistleblowers, including making it unlawful to persecute a whistleblower for making a protected disclosure of information. These protections apply to:

- Officers and employees of a company.
- A person who has a contract for the supply of services or goods to a company.
- An employee of a person who has a contract for the supply of services or goods to a company.

A disclosure must be made to any of the following:

- The Australian Securities and Investments Commission (ASIC).
- A company's auditor.
- A director, secretary or senior manager of the company.
- A person authorised to receive such disclosures.

The Corporations Act provides protections in relation to the confidentiality of the information the whistleblower provides.

The Corporations Act also provides two protections for whistleblowers themselves:

- The Act contains a provision protecting a whistleblower against civil or criminal litigation (including a case for breach of contract, or termination of employment) for disclosing protected information.
- The Act makes it a criminal offence to victimise a whistleblower because the whistleblower has made a protected disclosure. If a whistleblower suffers damage because of such victimisation, the offender may be liable to compensate the whistleblower for that damage.

The ASIC has released an information sheet assisting whistleblowers who may wish to provide information directly to them (see www.asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/whistleblowers-and-whistleblower-protection).

XII.Reform, Trends and Developments

A. Are There Any Impending Developments or Proposals for Reform?

As to bribery and corruption issues, the Transparency International annual Corruption Perceptions Index issued in 2014 lowered Australia's ranking from ninth "cleanest" country in 2013 to eleventh in 2014. This is largely due to Australia's relatively poor prosecution record and a number of high-profile inquiries involving alleged corrupt conduct of state public officials. This has resulted in calls for:

The release of a comprehensive national anti-corruption plan.

- The removal of the "facilitation payments" defence.
- Other changes to the Criminal Code, which would make it easier for the Australian Federal Police to launch prosecutions.

In the interim, it appears that no outcomes have resulted from a consultation paper released by the Attorney General's department in November 2011, which proposed a number of changes to the Criminal Code.

The pressure on the Federal Government to increase and improve regulatory action on corruption and bribery was reinforced by the release in April 2015 of the report of the OECD Working Group on Bribery. The Federal Government has recently released a bill which would have the effect of clarifying that the person or corporation promising, offering or providing a benefit to a person does not need to have intended to bribe a "particular" foreign public official.

Recent ICAC hearings into corrupt conduct involving state ministers have also resulted in increasing pressure for:

- Prosecutions to be brought against individuals alleged to have been involved in corrupt behaviour.
- The establishment of a federal independent commission against corruption of domestic public officials.

A recent challenge to the powers of the ICAC in the High Court resulted in a narrowing of the power of ICAC to investigate allegedly corrupt conduct. The NSW government legislated to effectively restore the power of ICAC retrospectively, but has not altered ICAC's power prospectively. This is currently being reviewed by a panel of experts and the powers of ICAC may be broadened in the future. One of the actions arising from the G20 Anti-Corruption Working Group is that each member country must review its domestic whistleblower protections, to ensure that whistleblowers are encouraged to inform a regulator if he or she becomes aware of potentially corrupt conduct.

XIII. Market Practice

A. What Are the Main Steps Foreign and Local Companies Are Taking to Manage Their Exposure to Corruption/Corporate Crime?

Increased penalties for contravening the law and increasing the regulators' focus on investigating and prosecuting corruption and corporate crime have resulted in both local and foreign corporations making more efforts to ensure that they have the appropriate policies and procedures in place to prevent such conduct from occurring.

From a corporation's perspective, the necessity of having rigorous compliance systems and checks and due diligence systems is essential to ensure that the company, and its directors, are not exposed to corporate criminal responsibility for unlawful acts committed by its employees or agents. In many instances, this has resulted in:

- An increase in compliance staff.
- The allocation of responsibility for managing corporate risk at the highest levels of a corporation.

XIV. The Regulatory Authorities

A. Australian Federal Police (AFP)

W www.afp.gov.au

Status. Governmental organisation.

Principal responsibilities. The AFP is responsible for preventing, detecting and investigating criminal offences; identifying the proceeds of crime; investigating fraud against Commonwealth revenue and expenditure; and preventing, countering and investigating terrorism.

B. Commonwealth Director of Public Prosecutions (CDPP)

W www.cdpp.gov.au

Status. Governmental organisation.

Principal responsibilities. The CDPP is responsible for the conduct of prosecutions for offences against the laws of the Commonwealth and criminal confiscation actions in relation to such offences.

C. Australian Crime Commission (ACC)

W www.crimecommission.gov.au

Status. Governmental organisation.

Principal responsibilities. The ACC is responsible for providing a co-ordinated national criminal intelligence framework to combat serious and organised criminal activity.

D. Australian Competition and Consumer Commission (ACCC)

W www.accc.gov.au

Status. Governmental organisation.

Principal responsibilities. The ACCC is responsible for ensuring compliance with the Commonwealth's competition, fair trading and consumer protection laws.

E. Australian Transaction Reports and Analysis Centre (AUSTRAC)

W www.austrac.gov.au

Status. Governmental organisation.

Principal responsibilities. The AUSTRAC is responsible for ensuring compliance with the AMLCTF Act and Financial Transaction Reports Act 1988 (Cth), and for collecting, analysing and disseminating financial intelligence.

F. Australian Securities and Investments Commission (ASIC)

W www.asic.gov.au

Status. Governmental organisation.

Principal responsibilities. The ASIC is responsible for monitoring, regulating and enforcing corporation laws and financial services laws and promoting market integrity and consumer protection across the financial services and the payments system.

G. Australian Taxation Office (ATO)

W www.ato.gov.au

Status. Governmental organisation.

Principal responsibilities. The ATO is the government's principal revenue collection agency, and is responsible for administering Australia's taxation laws.

H. Australian Crime Commission

W www.crimecommission.gov.au/

Status. Governmental organisation.

Principal responsibilities. The ACC works to reduce the threat and impact of serious and organised crime on Australia and the Australian economy.

I. Independent Commission Against Corruption

W www.icac.nsw.gov.au

Status. Governmental organisation.

Principal responsibilities. ICAC was established by the NSW Government to investigate and expose corrupt conduct in the NSW public sector.

XV. Online Resources

A. ComLaw

W www.comlaw.gov.au

Description. Official Australian Government website setting out all Commonwealth Acts, legislative instruments, gazettes and bills.

B. NSW Legislation

W www.legislation.nsw.gov.au

Description. Official New South Wales Government website setting out all New South Wales Acts, legislative instruments and bills.

C. Victorian Legislation and Parliamentary Documents

W www.legislation.vic.gov.au

Description. Official Victorian Government website setting out all Victorian Acts, legislative instruments, and parliamentary documents.

D. Queensland Legislation

W www.legislation.qld.gov.au

Description. Official Queensland Government website setting out all Queensland Acts, legislative instruments, and bills.

E. South Australian Legislation

W www.legislation.sa.gov.au

Description. Official South Australian Government website setting out all South Australian Acts, regulations and rules, policies, proclamations and notices and bills.

F. Western Australian Legislation

W www.slp.wa.gov.au/legislation/statutes.nsf/default.html

Description. Official Western Australian Government website setting out Western Australian Acts, subsidiary legislation, legislation information and parliamentary bills.

G. Tasmanian Legislation

W www.thelaw.tas.gov.au/index.w3p

Description. Official Tasmanian Government website setting out all Tasmanian legislation.

H. ACT Legislation Register

W www.legislation.act.gov.au

Description. Official Australian Capital Territory Government website setting out the Australian Capital Territory Act, legislative instruments and bills.

I. Current Northern Territory Legislation Database

W http://dcm.nt.gov.au/strong_service_delivery/supporting_government/current_northern_territory_legislation_database

Description. Official Northern Territory Government website setting out all Northern Territory legislation

XVI. About the Authors

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Areas of practice. Commercial litigation; dispute resolution; regulatory investigations.

Non-professional qualifications. Bachelor of Laws, University of Technology, Sydney, 1998; Graduate Certificate of Legal Practice, University of Technology, Sydney, 1998; Bachelor of Business, University of Technology, Sydney, 1998

Recent transactions

- Significant commissions of inquiry (for example, Royal Commission into Institutional Responses to Child Sexual Abuse, Special Commissions of Inquiry into the Glenbrook Rail Accident, the Waterfall Rail Accident, the Establishment of the Medical Research and Compensation Foundation, Sydney Ferries Corporation, Electricity Transactions and the United Nations Oil-for-Food Program).
- Prominent investigations conducted by regulators such as the AFP, the ASIC, the ASX and APRA and civil and criminal proceedings arising from the investigations or other inquiries such as ICAC inquiries and NSW parliamentary inquiries.
- A complex and significant contractual dispute arising from a share sale acquisition in the defence industry.
- A large contractual dispute between a multinational foreign banking institution and one of Australia's largest financial institutions in relation to a A\$1.25 billion finance facility.

Professional associations/memberships. Law Society of New South Wales.

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Areas of practice. Commercial litigation; regulatory investigations; commissions of inquiry.

Recent transactions

- Acting for the Truth Justice and Healing Council and the Catholic Church in relation to the Royal Commission into Institutional Responses to Child Sexual Abuse.
- Extensive involvement in the Centro Properties Group class action litigation in the Federal Court.
- Advising regarding notices served by ASIC and assisting with responses.
- Advising clients on other regulatory matters.
- Acting for commercial clients summoned for examinations under section 597 of the Corporations Act in the Federal Court.

Professional associations/memberships. Law Society of New South Wales.