

# Australia

## Overview of anti-corruption legal framework

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### Introduction

Australia's domestic and foreign anti-bribery offences are split between Commonwealth and State (and Territory) criminal laws. The foreign bribery offence is contained in the [Criminal Code Act 1995](#) (Commonwealth) (the 'Code') together with domestic bribery offences concerning the Commonwealth. State bribery offences, including offences for commercial bribery, are contained in State (and Territory) criminal laws (for example, the [Crimes Act 1900](#) (New South Wales)) ('NSW Crimes Act'). This summary focuses on Commonwealth laws, with illustrative references to the laws of New South Wales (NSW) (as many state laws are similar).

The Code offences reflect, in Australian law, the objects of various international instruments including:

- the Organisation for Economic Co-operation and Development (OECD) [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) which was adopted on 21 November 1997 (signed on 7 December 1998 and ratified on 18 October 1999 by Australia);
- the [United Nations Convention against Corruption](#) which entered into force on 14 December 2005 (signed on 9 December 2003 and ratified 7 December 2005 by Australia); and
- the [UN Convention against Transnational Organized Crime](#) which entered into force on 29 September 2003 (signed on 13 December 2000 and ratified on 27 May 2004 by Australia).

### Australia's domestic anti-bribery and anti-corruption framework

At a domestic level, there are several different bribery offences. The Code prohibits the giving of a bribe or corrupting benefit, receiving a bribe or corrupting benefit, and abuse of public office.<sup>1</sup> The offence includes situations where the giving or receiving of a corrupting benefit is a reward. In NSW, the offences are expressed to prohibit a person from corruptly receiving or soliciting from another anything of benefit as an inducement for doing or not doing something.<sup>2</sup>

Australia's domestic bribery regime can be divided into laws prohibiting bribery of:

- commonwealth and foreign public officials;
- state and territory government public officials; and
- local government public officials.

'Public official' is widely defined to include either a Commonwealth public official, or a Commonwealth Government-owned or controlled company. The bribery prohibitions do not prevent the participation

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<sup>1</sup> Criminal Code Act 1995, sections 141-142.

<sup>2</sup> NSW Crimes Act, sections 249A to 249J.

of public officials in commercial activities; rather they regulate their conduct concerning the receipt of certain benefits or the existence of a corrupting influence.

Public officials can participate in commercial activities that do not adversely affect the honest and independent exercise of their official functions. Public officials, such as members of commonwealth and state parliaments, are required to disclose their own personal interests, as well as those of their spouses and dependents. When receiving gifts or donations, public officials must exercise discretion so as to avoid any perceived or actual conflict of interest. An improper gift or donation may give rise to a breach of the [Australian Public Service Code of Conduct](#). Members of commonwealth, state and territory parliaments must declare certain assets, liabilities, gifts and gratuities over a nominated value, although these regimes vary across the jurisdictions with a regrettable lack of consistency.<sup>3</sup>

Domestic, but not foreign, citizens and companies are entitled to make political contributions to a commonwealth political candidate or party. Only one State, NSW, has banned the giving of political donations to a party, elected member, group or candidate, or the receipt by third party campaigners of a political donation from any person not enrolled to vote in local government, state or commonwealth elections or indeed from a property developer.<sup>4</sup>

Political influence is also regulated by the [Foreign Influence Transparency Scheme Act 2018](#) (Commonwealth) that requires persons or entities to register if they have an arrangement (that is, a written or unwritten form of contract, agreement, understanding or other arrangement of any kind) or undertake certain acts on the behalf of foreign principals. Whilst foreign actors are free to express and promote their interests in Australia, the arrangement to promote or express the foreign actor's interests must be registered to ensure the transparency of the sources and forms of foreign influence in Australia. This registration scheme is reinforced by criminal offences in the Code that prohibit foreign interference in 'the political or governmental process' in Australia or that seeks to influence the exercise of 'an Australia democratic or political right or duty' which is not defined.<sup>5</sup>

The domestic bribery framework does not expressly prohibit the payment or receipt of bribes in private commercial arrangements since the Code only applies to the conduct of Commonwealth public officials or foreign public officials. However, it does not follow that such conduct is legally permissible in Australia. State criminal laws impose liability on entities and individuals involved in the giving or receiving of bribes, or other improper or corrupting conduct intended to secure a commercial benefit. For example, the NSW Crimes Act provides for offences of:

- bribery to an agent of a business to show or not show favour to a particular person (section 249B(1));
- bribery to a person to give secret advice to a third party to influence them to enter into a contract or appointing a person to an office (section 249D(1)); and
- giving of property as an inducement or reward for the appointment of any person to be entrusted with the property (without consent of all those who are beneficially entitled to the property and the Supreme Court of NSW) (section 249E).

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<sup>3</sup> *Commonwealth Electoral Act 1918*, Part XX: Election funding and financial disclosure.

<sup>4</sup> [Electoral Funding Act 2018 \(NSW\)](#)

<sup>5</sup> Code, section 92.

## Domestic penalties

The maximum penalty for the offence of giving or receiving a bribe involving a Commonwealth public official is five years' imprisonment. State based legislation can often impose higher penalties with, for example, section 249B NSW Crimes Act imposing seven years' imprisonment for payer and payee offences of corrupt commissions or rewards. Local government officials can be dismissed for corrupt conduct. In NSW, the Independent Commission against Corruption (ICAC) can make a finding of 'serious corrupt conduct' against a State or local government official and may refer their conduct to the NSW Director of Public Prosecutions (DPP) for consideration of a criminal prosecution.

## Domestic anti-bribery regulation

The domestic bribery framework is regulated at a state and commonwealth level. Each state has its own independent anti-corruption commission whose role it is to investigate corruption of state or local government officials and public assets or money relevant to the State. In NSW, for instance, ICAC has jurisdiction over all NSW public sector agencies (except for the NSW Police Force) and those performing public official functions.<sup>6</sup> ICAC can investigate public sector corruption, with its mandate focused on systemic corrupt conduct, and make findings of corruption and criminality. However, it does not have any prosecuting powers as that remains with the NSW DPP (for state offences) and the Commonwealth Director of Public Prosecutions (CDPP) (for Commonwealth offences). ICAC findings and investigations are established using evidence secured by compulsive powers and cannot be used in subsequent prosecutions. This often means that while ICAC may make findings of corruption against individuals, prosecutions have to start afresh with an investigation to secure admissible evidence for a criminal prosecution. Affected individuals can seek judicial review of ICAC hearings and challenging findings of corruption, which the NSW Supreme Court determines.<sup>7</sup>

The Commonwealth does not have its own independent anti-corruption commission for domestic bribery. Instead, the Commonwealth has a 'patchwork' of regulatory and supervisory agencies that regulate domestic bribery offences. A serious offence will be investigated by the Australian Federal Police (AFP), who may refer potential charges to the CDPP. At a broader level, the Commonwealth Integrity Commissioner and the Australian Commission for Law Enforcement Integrity (ACLEI) are responsible for preventing, detecting and investigating serious and systemic corruption issues in a limited number of Australian government law enforcement agencies. Their limited oversight of the Commonwealth Government and the rarity of prosecutions have increased calls for a Commonwealth ICAC body. A Commonwealth ICAC has been resisted for many years by Commonwealth politicians (of all political persuasion) who seem to believe that corruption does not exist in the capital or in the Commonwealth Government and an inquisitorial ICAC would be detrimental to the political process. After entreaties from independent Members of the Australian Parliament, the Commonwealth Government introduced a form of a National Integrity Commission in reforms put forward in early 2019 whilst the Commonwealth Government was a minority government. However, the reforms appear to be going nowhere and were subject to extensive media and public criticism that the proposed Commission was weak, toothless and had limited investigative powers. The lack of a robust Commonwealth ICAC is a significant weakness in the overall level of accountability and transparency at the Commonwealth government level.

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<sup>6</sup> [Independent Commission against Corruption Act 1988 \(NSW\)](#)

<sup>7</sup> Corruption offences can often be hard to prove. Some recent cases against former high profile politicians involved alleged misconduct in public office, *R v Obeid (No 12)* [2016] NSWSC 1815; on appeal at *Obeid v R* [2017] NSWCCA 221.

## Key domestic anti-bribery and anti-corruption laws

Key provisions of Australia's domestic anti-bribery and anti-corruption laws are as follows:

- [Criminal Code Act 1995](#) (Commonwealth)
- [Crimes Act 1900](#) (NSW)
- [Foreign Influence Transparency Scheme Act 2018](#) (Commonwealth)
- [Australian Public Service Code of Conduct](#)
- [Election Funding, Expenditure and Disclosures Act 1981](#) (NSW)
- [Independent Commission against Corruption Act 1988](#) (NSW)

## Australia's foreign anti-bribery and anti-corruption framework

The primary source of the foreign bribery legal framework is the Code. The Code contains primary and secondary grounds of liability for Commonwealth offences. The Code's jurisdiction extends over all Australian companies or legal entities, citizens and residents for conduct that occurs wholly or partly in Australia, or in limited circumstances, wholly outside Australia. For each criminal offence, the Code requires a prosecutor to establish a physical element (action or conduct) and a fault element (intention, knowledge, recklessness or negligence) for an offence, otherwise a default physical and fault element will apply depending upon the particular offence.

The following other statutes create potential secondary liability:

- dealing in proceeds or instruments of crime is an offence giving rise to proceedings under the [Proceeds of Crime Act 2002](#) (Commonwealth);
- obstruction of justice under the [Crimes Act 1914](#) (Commonwealth);
- where public funds are used for bribery or corruption, offences for improperly dealing with public money are covered by the [Financial Management and Accountability Act 1997 \(Cth\)](#) and the [Commonwealth Authorities and Companies Act 1997](#) (Commonwealth);
- liability for a breach of duty by a director or officer of a corporation is contained in the [Corporations Act 2001](#) (Commonwealth) (the 'Corporations Act'); and
- general Commonwealth and state criminal law for domestic criminal offences.

## Threshold prosecution test

In determining whether to pursue (or continue) a prosecution for a Commonwealth offence, the CDPP must satisfy a dual threshold test, set out in the [Prosecution Policy of the Commonwealth](#) ('Prosecution Policy'):

- that there is sufficient evidence to prosecute the case and there are reasonable prospects of securing a conviction; and
- it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

The Prosecution Policy provides guidelines to assist the CDPP to decide whether to prosecute a person for foreign bribery offences. The Prosecution Policy states that the prosecutor must not be influenced by considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal persons involved.

## Elements of the foreign bribery offence

The term ‘foreign public official’ is defined to capture a wide range of public officials, including those persons:

- officially employed by a foreign government; and
- who:
  - perform work for a foreign government body;
  - hold themselves out to be an authorised intermediary of an official; or
  - are part of a ‘foreign public enterprise’ that acts (formally or informally) in accordance with the directions, instructions or wishes of a foreign country’s government.

A person is guilty of the offence of bribing a foreign public official if the person:<sup>8</sup>

- provides, or causes to be provided, a benefit to another person;
- offers or promises to provide a benefit to another person; or
- causes an offer or a promise of the provision of a benefit to be made to another person and:
  - the benefit is not legitimately due to the other person; and
  - the person does so with the intention of influencing a foreign public official in the exercise of the official’s duties as a foreign public official to obtain or retain business or obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage.

‘Benefit’ is interpreted broadly to include any advantage, is not limited to property or money and includes non-tangible inducements. In recognition of the fact that bribery cases often involve payments through intermediaries and third parties, a prosecutor is not required to establish any intention (on the part of an accused person) to influence a ‘particular’ foreign official.

The Code extends criminal liability to persons who are involved in any attempted offences, are accessories to or who commit an offence on the basis of “joint commission”, who procure an offence by an innocent agent, who incite an offence and who conspire with another to commit an offence.<sup>9</sup> Those secondary offences will be liable for the same penalty as the primary offence.

## Penalties

For a foreign bribery offence committed after 1 July 2017, the maximum penalties, per offence, that may be imposed upon a conviction are:

- for an individual:
  - imprisonment of up to ten years;
  - a fine of up to 10,000 penalty units (the value of one penalty unit is currently AUD 210, therefore the maximum fine is currently AUD 2.1m); or
  - both imprisonment and a fine; and
- for a corporation, the greatest of the following:
  - a fine up to 100,000 penalty units (or AUD 21m);

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<sup>8</sup> Code, section 70.2.

<sup>9</sup> Code sections 11.1-11.5.

- if the court can determine the value of the benefit obtained directly or indirectly and that is reasonably attributable to the offending conduct, three times the value of the benefit; or
- if the court cannot determine the value of the benefit, then ten per cent of the corporation's annual turnover during the 12-month period ending at the end of the month in which the conduct constituting the offence occurred.

In addition to penalties, the profits and assets obtained as a result of illegal or criminal conduct can be restrained or forfeited under the [Proceeds of Crime Act 2002](#) (Commonwealth). The AFP Asset Confiscation Taskforce has responsibility for proceeds-of-crime proceedings independently of the CDPP.

## Defences

There are essentially three defences to a prosecution for foreign bribery:

- if the conduct occurs wholly in a foreign country, and the conduct is permitted by a written law of that foreign country;<sup>10</sup>
- if a payment is a facilitation payment (see below);<sup>11</sup>
- corporate criminal liability may not be imposed on a corporation if it can demonstrate that it exercised due diligence to prevent the conduct or the authorisation or permission given to a high managerial agent.<sup>12</sup>

There is no judicial authority in Australia that has considered the operation of these defences.

## Facilitation payments

Australian law permits facilitation payments to 'expedite or secure' the 'performance of a routine government action' (despite the OECD's view that Australia should actively discourage all facilitation payments).

A payment is a facilitation payment so long as it meets the following conditions:<sup>13</sup>

- the value of the benefit is of a minor nature;
- the person's conduct is undertaken for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
- as soon as practicable after the conduct, the person makes and signs a record of the conduct, and any of the following subparagraphs applies:
  - the person has retained that record at all relevant times;
  - that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction; or
  - a prosecution for the offence is instituted more than seven years after the conduct occurred.

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<sup>10</sup> Code, section 70.3.

<sup>11</sup> Code, section 70.4.

<sup>12</sup> Code, section 12.3 (3).

<sup>13</sup> Code, section 70.4.

## **Intermediaries**

Australia's foreign bribery offence captures both direct and indirect payments of bribes made through third parties, such as agents, consultants, joint venture partners and intermediaries. An intermediary or third party may be liable for the primary foreign bribery offence or incur secondary liability if their conduct amounts to a conspiracy or the third party or intermediary otherwise aids, abets, counsels or procures the commission of the offence. A person may be found guilty even if the principal offender has not been prosecuted or found guilty.

## **Gifts, donations, entertainment and hospitality**

The Code does not prohibit or regulate the provision of gifts, gratuities, travel, hospitality or entertainment. However, the definition of a benefit under section 70.1 of the Code includes any advantage, which may mean that the provision of excessive gifts, gratuities, travel, meals or entertainment could constitute a bribe. There is no guidance in Australian case law on what constitutes an acceptable gift or level of corporate hospitality.

The key considerations for assessing whether gifts, travel, entertainment or other forms of corporate hospitality are likely to constitute benefits and potentially amount to a bribe involves considering:

- whether a payment is reasonable in all the circumstances;
- whether a payment is proportionate to and for a clearly identified business purpose;
- the manner in which a payment is documented;
- the amount and frequency of the payment; and
- the motive in connection with the payment, gift or offer of hospitality.

## **Individual and corporate criminal liability**

The Code imposes liability to individuals and attributes liability to corporations for criminal offences, including bribery of a foreign public official. In Australia, the method for establishing corporate criminal liability depends on the conduct of the individuals and of the company (by its board of directors).

The Code sets out a statutory regime for the imposition of corporate criminal liability for Commonwealth offences. The Code creates a regime for the attribution and imputation of knowledge of individual officers to a corporation. The physical elements are attributed to a company in circumstances in which an employee, agent or officer of a company commits the physical element (action or conduct) when acting within the actual or apparent scope of their employment or authority<sup>14</sup>. Fault elements are attributed to a company that 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'.<sup>15</sup> The corporation may be found guilty of any offence, including one punishable by imprisonment.

For attribution of corporate criminal responsibility, the Code provides for the following:<sup>16</sup>

- it defines 'board of directors', 'corporate culture' and 'high managerial agent';
- it establishes and imposes criminal liability on a corporation by attributing the knowledge and conduct of a person to the corporation;
- it attributes liability to a corporation by reference to the corporation's conduct as a whole;

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<sup>14</sup> Code, section 12.2.

<sup>15</sup> Code, section 12.3.

<sup>16</sup> Code, sections 12.1-12.6.

- it provides a mistake-of-fact defence that is of limited application; and
- it makes a company potentially criminally liable by reason of a bad corporate culture (one that condones or tolerates breaches of the law).

A corporation can defend the claim it had the imputed knowledge or intention possessed by a high managerial agent (as opposed to the board of directors), if the corporation has exercised due diligence to prevent the conduct occurring that constituted the offence.

The regime for determining corporate criminal liability is currently under view in Australia, given the criticisms directed towards the lack of corporate criminal cases that have been undertaken by prosecutors. The Australian Law Reform Commission (ALRC) was directed to consider the matter.<sup>17</sup> The ALRC published a Consultation Paper and presented its Report to the Commonwealth Government on 29 April 2020. The Report has yet to be made public by the Australian Government.

### **Proposed reforms to the foreign bribery offences**

There are reforms proposed to Australia's foreign bribery laws include the following:<sup>18</sup>

- repeal the existing foreign bribery offence;
- create a new foreign bribery offence covering intentional conduct and reckless conduct that involved the bribing of a foreign public official;
- replace the concept of 'not legitimately due' with the concept of 'improperly influencing' a foreign public official;
- make it clear that the improper influence of a particular official did not have to be established or that the business or advantage sought from or by the bribe was in fact obtained or retained;
- create a new strict liability corporate offence of failing to prevent foreign bribery (similar to section seven of the [Bribery Act 2010](#) offence in the United Kingdom) with a proposed defence of adequate procedures; and
- establish a deferred prosecution agreement scheme for a limited number of Commonwealth offences (including foreign bribery) to be administered by the CDPP.

These reforms have broad bi-partisan political support. Yet they are still just that, reforms after nearly five years of draft bills, reports, consultation papers and amended legislation. It remains to be seen when they will be enacted.

### **Criminal enforcement of foreign bribery**

The foreign bribery offences were introduced into the Code in 1999. The first prosecution did not occur until 2011. Since 2011, the level of prosecutions can best be described as low. While the AFP have various investigations that are ongoing, some of which have lasted for many years, there have been only a limited number of prosecutions.

The prosecutions can be summarised as follows (as at July 2020).

The Securrency banknote printing cases which involved two subsidiaries of the Reserve Bank of Australia and their executives engaging in bribery to secure lucrative banknote printing contracts from various central banks around the world with the following results:

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<sup>17</sup> The ALRC Terms of Reference are available [here](#).

<sup>18</sup> The reforms are contained in the [Crimes Legislation Amendment \(Combating Corporate Crime\) Bill 2019](#). The reforms were supported by the Australian Senate Legal and Constitutional Affairs Legislation Committee in its Report published March 2020 (available [here](#)).

- two company convictions;
- two individuals convicted for conspiracy to bribe a foreign public official, with limited sentences and no imprisonment;
- three individuals convicted of false accounting offences with limited sentences and no imprisonment; and
- four individuals had their prosecutions permanently stayed by the High Court of Australia due to egregious illegal conduct by the AFP, the ACIC and to a lesser extent, the CDPP.

The Lifese prosecution, which involved bribes to Iraqi officials to secure construction contracts, resulting in three individuals convicted and fined, with four years' imprisonment reduced to three years on appeal.

The Leighton Holdings prosecution, which involved false documents to hide the structure of complex payments in relation to Middle East construction contracts, resulting in one individual convicted of false accounting offences under the Corporations Act 2001 (Cth) (Corporations Act) with intensive corrective conduct orders over two years and no imprisonment.

The SKM prosecution, which is ongoing and concerns allegations of bribes paid to foreign officials in Vietnam and the Philippines in order to secure aid-funded infrastructure project work.

### **Civil enforcement**

The Code does not provide for the civil enforcement of Australia's foreign bribery laws. There are a number of grounds for civil action to be taken by Australian regulators against companies or individuals if the facts suggest difficulties with proving a foreign bribery case.

Secondary grounds of liability that might arise include the following:

- a civil penalty prosecution commenced by the Australian Securities and Investments Commission (ASIC) under the Corporations Act for breaches of common law or statutory duties owed by a director or officer to the corporation, where a director or officer acted recklessly or intentionally dishonestly in failing to discharge their powers and duties; or failed to act in good faith in the best interests of the corporation; or acted for an improper purpose;
- a prosecution by ASIC against individuals and corporations for failing to comply with record-keeping rules;
- a prosecution by the CDPP or State DPP against individuals and corporations for having, creating or using false or misleading records or false or reckless use of an accounting document or for other false accounting offences; and
- a prosecution by the Australian Tax Office (ATO) for breaches of tax laws regarding the misstatement of income and non-statement of monies that have been paid or received illegally.

A company may also incur liability as a result of a shareholder-initiated class action, but whether there is any value to be gained for shareholders may depend upon a variety of factors (that do not necessarily include any alleged improper or illegal conduct). However, it is difficult to run a civil class action claim for foreign bribery because of the complexity of identifying the correct victim and giving standing for the 'victim' to seek to recover losses.

## Leniency and self-reporting

In Australia, there is no transparent regime for encourage self-reporting of potential foreign bribery or other criminal offences as there is no legal obligation in Australia to report a crime (except for NSW).<sup>19</sup> In addition, under Australia's criminal law, a prosecutor is not permitted to negotiate or make submissions to a court on any agreed sentence.<sup>20</sup> Sentencing is a matter to be determined by the sentencing court in accordance with relevant law for Commonwealth and/or State offences.<sup>21</sup>

There are certain factors to consider when deciding whether to self-report a case of foreign bribery to the Australian Federal Police (AFP), including:

- the AFP has the discretion to charge a potential offender;
- the CDPP may grant an undertaking (letters of comfort or, more rarely, an indemnity) to a person not to use voluntary evidence against them where it is:
  - to secure testimony from person A to convict person B; and
  - the grounds upon which an undertaking might be given are set out in the [Director of Public Prosecutions Act 1983](#) (Commonwealth) and the [Prosecution Policy](#);
- the AFP and CDPP may offer and accept an 'induced statement' from an individual if that individual:
  - is not a target but a witness of fact; and
  - what the witness says in the induced statement cannot be used against them in any subsequent proceedings;
- if a corporation voluntarily discloses potential offences, cooperates and can demonstrate the 'right culture', the AFP and CDPP may be persuaded to accept a plea of guilty to lower charges; and
- if an offender offers voluntary cooperation in the absence of an undertaking, the extent of the cooperation can act as a material discount on their sentence.

The AFP does encourage companies to self-report potential offences. The AFP will conduct the investigation and then refer the matter to the CDPP who will then determine whether to prosecute. If the AFP and CDPP decide an offence has been committed, any resolution is usually predicated upon a guilty plea and sentencing by the court. In December 2017, the CDPP published its Best Practice Guidelines, [Self-Reporting of Foreign Bribery and Related Offences by Corporations](#). These Guidelines were published to support the proposed Commonwealth deferred prosecution agreement scheme (but that scheme has yet to be enacted) referred to above.

Save for the long-standing proposed reforms, noted earlier, there are currently no procedures in Australia for:

- a formal self-reporting or plea regime;
- resolving investigations through court-approved settlement agreements (deferred or non-prosecution agreements); or
- authorities to pursue civil rather than criminal penalties against companies or individuals.

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<sup>19</sup> [Crimes Act 1900](#), section 316

<sup>20</sup> *Barbaro v The Queen; Zirilli v The Queen* (2014) CLR 58; [2014] HCA 2.

<sup>21</sup> [Crimes Act 1901 \(Cth\)](#) Part 1B which govern sentencing guidelines for Commonwealth offences and as a state example for State offences, [Crimes \(Sentencing Procedure\) Act 1999](#).

## Prosecution of foreign companies

The jurisdiction of all Australia's laws is territorial and any extraterritorial operation of legislation must be clearly stated. To establish jurisdiction over conduct constituting the offence of bribing or corrupting a foreign public official, the following must exist:

- the conduct giving rise to the alleged offence occurred wholly or partly in Australia, on board an Australian aircraft or an Australian ship;
- if the conduct occurred wholly outside Australia, the person (at the relevant time) was a citizen or resident of Australia, or was a corporation incorporated under Australian law; and
- if the conduct occurred wholly outside Australia and the relevant person is a resident, the Commonwealth Attorney General must provide written consent.

Australia's criminal law of conspiracy can extend to foreigners even if those foreigners have no apparent presence in or association with Australia. The crime of conspiracy is a continuing offence that lasts as long as it is being performed as against parties to the conspiracy wherever they may be located. It is enough that certain conspirators are present in Australia and the conduct was wholly or partly performed in Australia even though others are not present and engaged in no conduct in Australia. These types of offences can apply to companies as well as individuals. Australia has a range of extradition relationships with many countries.<sup>22</sup> To date, the only current prosecution against a company for conspiracy to bribe foreign public officials is the SKM prosecution (referred to above). SKM is now an Australian business owned by a United States parent that acquired the business after the relevant alleged conduct occurred. No such cases have been brought, to date, against a foreign, non-Australian, company.

## Regulators

Australia's foreign bribery legal framework is regulated by the joint efforts of various enforcement, administrative and prosecution agencies. The investigation of foreign bribery offences is carried out by the AFP and is prosecuted by the CDPP. ASIC focuses on civil (and to a lesser extent, criminal) investigations and prosecutions, working collaboratively with the AFP.

The Australian Criminal Intelligence Commission (ACIC) (formerly the Australian Crime Commission) has secret, inquisitorial and compulsive powers to combat serious and organised crime (including bribery or corrupting a foreign public official).<sup>23</sup> The AFP and the ACIC often work together in investigating bribery and corruption. The CDPP can also be involved in assessing the evidence to determine if a prosecution can or should be undertaken. ACIC's compulsive powers mean it can give limited information to police forces when it is gained through investigating and compulsorily examining a potential offender.

The Australian Transaction Reports and Analysis Centre (or AUSTRAC) is Australia's anti-money laundering regulator. It has extensive powers under Australia's anti-money laundering regime, the [Anti-Money Laundering and Counter Terrorism Financing Act 2006](#) (Commonwealth) ('AML/CTF Act') and associated Rules, to require 'reporting entities' that provide 'designated services' (particularly in the banking, finance, loan, credit and gambling sectors) to have robust proactive compliance programs to know their customers and to detect and report, potential money laundering conduct (suspicious

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<sup>22</sup> Any extradition to or from Australia is determined by the *Extradition Act 1988*, see [here](#), and numerous country specific regulations.

<sup>23</sup> See the *Australian Crime Commission Act 2002* (Commonwealth)

transactions). AUSTRAC can commence civil penalty proceedings against entities that are in breach of the AML/CTF Act. The penalties are significant, up to AUD 21m per offence and each breach under the AML/CTF Act can trigger that penalty. Over many years, AUSTRAC was an unobtrusive regulator, taking little action against reporting entities that contravened the AML/CTF Act or the Rules. That position has now changed with significant judgments against a large gambling entity (for penalties of AUD 49m) and past and ongoing litigation against two of Australia's four major trading banks (with penalties in one case of AUD 700m).<sup>24</sup>

The National Fraud and Anti-Corruption Centre (FAC), hosted by the AFP, reviews serious and complex fraud and corruption referrals to ensure they are directed to the relevant law enforcement agency for action and are investigated with all the resources available to the Commonwealth agencies. The AFP also is closely involved in the Serious Organised Crime TaskForce.<sup>25</sup>

The other principal government agencies that may be involved in investigating conduct giving rise to potential foreign bribery offences include:

- ASIC, which is an independent government body that regulates Australia's corporate markets and financial services to protect investors and consumers;
- The ATO, which ensures proper compliance with Australia's Commonwealth revenue laws;
- The Australian Competition and Consumer Commission, which regulates compliance with Australia's competition, fair trading and consumer protection legislation, including its criminal cartel laws; and
- AUSTRAC, which works with Australian industries and businesses to ensure compliance with anti-money laundering and counterterrorism financing laws.

## Key foreign anti-bribery and anti-corruption laws

Key provisions of the Commonwealth anti-bribery and anti-corruption laws are as follows:

- [Criminal Code Act 1995](#)
- [Proceeds of Crime Act 2002](#)
- [Director of Public Prosecutions Act 1983](#)
- [Prosecution Policy of the Commonwealth](#)
- [Crimes Act 1914](#)
- [Financial Management and Accountability Act 1997](#)
- [Commonwealth Authorities and Companies Act 1997](#)
- [Corporations Act 2001](#)
- [Anti-Money Laundering and Counter-Terrorism Financing Act 2006](#)

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<sup>24</sup> *Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited (No 3)* [2017] FCA 1296 (10 November 2017); *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Commonwealth Bank of Australia Limited* [2018] FCA 930 (28 June 2018); AUSTRAC litigation against Westpac Banking Corporation is ongoing where the bank admitted up to 23 million breaches of the Act and has provisioned up to AUD 900m for potential penalties.

<sup>25</sup> Details of the AFP activities are available [here](#).