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The International Comparative Legal Guide to:

Business Crime 2019

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A practical cross-border insight into business crime

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Australia

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Australia has a federal system of government. The Commonwealth Director of Public Prosecutions (CDPP) is the primary prosecution authority responsible for prosecuting both indictable and summary criminal offences of a business crime nature (which are usually offences under Commonwealth laws). Several federal law enforcement authorities including, but not limited to, the Australian Federal Police (AFP), the Australian Securities and Investments Commission (ASIC), the Australian Taxation Office (ATO), the Australian Competition and Consumer Commission (ACCC) and the Australian Criminal Intelligence Commission (ACIC) investigate and refer matters to the CDPP for criminal prosecution. Each State and Territory also has its own prosecution authority and investigative agencies. They sometimes have overlapping roles with federal authorities as they also have the capacity to investigate and prosecute fraud, corruption, false accounting, and similar offences under the relevant State/Territory law.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As a general rule, the CDPP is responsible for prosecuting offences under Commonwealth laws, and State/Territory prosecution authorities are responsible for prosecuting offences under State/Territory laws.

As far as investigations are concerned, the law enforcement authority responsible for administering the legislation that creates the business crime will generally be responsible for investigating it. For example, the ASIC, as the corporate regulator, is responsible for investigating criminal breaches of directors' duties or insider trading under the *Corporations Act 2001* (Cth).

At the Commonwealth level, where an authority administers legislation that creates an offence but it does not have investigative powers, the matter is generally referred to the AFP for investigation. Furthermore, the AFP generally takes a role in investigations where it is necessary to utilise police powers such as the power of arrest and execution of search warrants.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

There are several statutes that provide for both civil and criminal enforcement of business crime. This is particularly relevant to matters investigated by the ASIC, the ACCC and the ATO. For example:

- the ASIC can investigate an alleged failure by a listed company to disclose price-sensitive information to the market as a possible crime, contravention of a civil penalty provision or as a matter in respect of which the ASIC may issue an infringement notice; and
- the ACCC, as the competition regulator, can investigate suspected cartel conduct as a possible crime or as a contravention of a civil penalty provision.

A civil penalty provision is one which imposes a standard of behaviour typically imposed by the criminal law, but allows enforcement by civil process (and with a civil standard of proof). They are commonly found in statutes which create business crime offences. Contraventions of such provisions are pursued by the relevant law enforcement authority itself (and not the CDPP). Civil remedies include monetary penalties, injunctive relief and compensation orders to provide reparations to victims.

Proceeds of crime legislation also enable both conviction- and non-conviction-based forfeiture of the proceeds, or instruments, of crime. There are also a range of administrative orders that can be made, such as orders disqualifying a person from managing a corporation, obtaining an enforceable undertaking or issuing an infringement notice.

The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) provides for a suite of standard regulatory powers that certain federal agencies may invoke in respect of legislation which they administer. This regulatory regime is intended to bolster the relevant agency's monitoring and investigating powers, as well as enforcement powers through the use of civil penalties, infringement notices, enforceable undertakings and injunctions.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In June 2018, the CDPP charged Citigroup, Deutsche Bank, Australia and New Zealand Banking Group (ANZ) and six senior executives with criminal cartel offences. The charges involve alleged cartel arrangements between the Joint Lead Managers relating to trading in ANZ shares following an ANZ institutional share placement in

August 2015. These charges follow the first successful criminal cartel prosecution in 2017, which resulted in a fine of AUS$25 million for Japanese shipping company Nippon Yusen Kabushiki Kaisha: see *CDPP v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876.

In September 2017, the NSW Supreme Court sentenced the first individual offenders under Australia's foreign bribery offence. Mr. John Jousif, Mr. Ibrahim Elomar and Mr. Mamdouh Elomar pleaded guilty to the offence of conspiracy to bribe an Iraqi public official and were sentenced to four years' gaol (with a two-year non-parole period). Fines were also imposed. This was only the second foreign bribery prosecution in Australia: see *R v Jousif* [2017] NSWSC 1299.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

Virtually all federal criminal offences are prosecuted in the courts of the State or Territory where the alleged crime occurred, and the criminal procedures applicable in that State/Territory apply. Generally speaking, and with some minor exceptions, the States/Territories have three levels of courts, namely, Local/Magistrates' Courts, District/County Courts, and Supreme Courts. The Federal Court of Australia has specifically been vested with jurisdiction to deal with a narrow category of crimes, including offences under the *Competition and Consumer Act 2010* (Cth). The High Court is the highest court in Australia and has jurisdiction to hear appeals in criminal matters. There are no specialised criminal courts for particular crimes.

2.2 Is there a right to a jury in business crime trials?

Often, there will be a right to a jury, but not in every case. All Federal offences which are tried on indictment must be tried by jury under the Constitution. However, there are statutory mechanisms, at both the Federal and State/Territory level, which enable some indictable offences to be heard summarily before a Magistrate alone where the maximum penalty is significantly moderated.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Securities fraud

The *Corporations Act 2001* (Cth) criminalises market misconduct, including, but not limited to, intentionally making false or misleading statements in relation to financial products (including securities). The statement maker must know or ought reasonably to have known that the statement is false or materially misleading, or not care whether the statement is true or false.

o Accounting fraud

The *Corporations Act 2001* (Cth) places a positive obligation on companies to keep financial records which correctly record its transactions and would enable true and fair financial statements to be prepared and audited. This is a strict liability offence and it is unnecessary to establish any particular mental state. The *Corporations Act 2001* (Cth) and other State/Territory laws also criminalise conduct where a person dishonestly destroys or conceals accounting records or dishonestly makes or publishes any statement that is false or misleading. In March 2016, Australia introduced two new false accounting offences in the *Criminal Code Act 1995* (Cth). These offences criminalise conduct where a corporation or an individual engages in either intentional or reckless false dealings with accounting documents which, in effect, are dealings that cover up the receipt or payment of illegitimate benefits.

o Insider trading

The *Corporations Act 2001* (Cth) criminalises conduct in which a person knows, or ought reasonably to know, that they have confidential, price-sensitive information about a financial product and intentionally deals with the financial product, procures another person to deal with the financial product or discloses the information to another person likely to trade in the financial product.

o Embezzlement

New South Wales (NSW) is the only Australian jurisdiction that retains a specific offence of embezzlement under its *Crimes Act 1900* (NSW). It criminalises conduct in which an employee intentionally misappropriates property entrusted to him or her by their employer. In other Australian jurisdictions, embezzlement conduct is dealt with under provisions relating to fraud, theft or other property offences.

o Bribery of government officials

The *Criminal Code Act 1995* (Cth) creates an offence of bribing a foreign public official. It prohibits a person from offering or providing a benefit to a person which is not legitimately due and is intended to influence a foreign public official in order to obtain or retain business or a business advantage. The Act also creates a similar offence for bribing Australian Commonwealth public officials. Various State and Territory laws similarly prohibit bribery, including of State/Territory government officials.

o Criminal anti-competition

See below under the sub-heading "Cartels and other competition offences".

o Cartels and other competition offences

It is an offence under the *Competition and Consumer Act 2010* (Cth) for a corporation to intentionally enter into, or give effect to, a contract, arrangement or understanding which the corporation knows or believes contains a "cartel provision" relating to price-fixing, market-sharing, bid-rigging or restricting supply chain outputs.

o Tax crimes

Tax crimes and frauds against revenue are primarily prosecuted under the *Criminal Code Act 1995* (Cth) and the *Taxation Administration Act 1953* (Cth). The most serious tax crimes are generally pursued through various offence provisions under the *Criminal Code Act 1995* (Cth), which criminalises dishonest intentional conduct which is fraudulent and results in the loss (or risk of loss) of Australia's taxation revenue.

o Government-contracting fraud

Government-contracting fraud is generally prosecuted under general fraud and corruption offences under the *Criminal Code Act 1995* (Cth) or the relevant State/Territory criminal statute. For example, under the *Criminal Code*, it is an offence for a person to do anything with the intention of dishonestly obtaining a gain from a Commonwealth entity.

o Environmental crimes

Australia has an extensive array of environmental laws. The principal federal statute is the *Environment Protection and*

Biodiversity Conservation Act 1999 (Cth). It contains, in addition to civil penalty provisions, criminal offence provisions for non-compliance. However, most environmental laws are State/Territory-based, and vary from one State/Territory to another. Many State/Territory environmental laws impose strict liability criminal offence provisions for non-compliance.

- **Campaign-finance/election law**

The *Commonwealth Electoral Act 1918* (Cth) creates several federal offences relating to elections, including offences which prohibit bribery, the undue influencing of votes, and interference with political liberty. The Act also makes it an offence to fail to disclose details of donations to political parties over a certain amount. The States/Territories have similar statutes, some of which make it an offence for certain persons (e.g. property developers in NSW) to make political donations.

- **Market manipulation in connection with the sale of derivatives**

The *Corporations Act 2001* (Cth) prohibits a person from intentionally taking part in a transaction that has, or is likely to have, the effect of creating or maintaining an artificial price for trading in financial products on a financial market.

- **Money laundering or wire fraud**

The *Criminal Code Act 1995* (Cth) provides for several money laundering offences which are being used to combat business crime. Money laundering offences will apply to persons who are dealing with money or property which constitutes the proceeds, or may become an instrument, of crime and have the requisite state of awareness. There are similar offences under the equivalent State/Territory laws.

- **Cybersecurity and data protection law**

Australia has implemented the Council of Europe Convention on Cybercrime via amendments to several statutes: the *Mutual Assistance in Criminal Matters Act 1987* (Cth); the *Criminal Code Act 1995* (Cth); the *Telecommunications (Interception and Access) Act 1979* (Cth); and the *Telecommunications Act 1997* (Cth). Computer offences cover illegal access, modification or impairment of either data or electronic communication. These offences are generally prosecuted under the *Criminal Code Act 1995* (Cth) or the relevant State/Territory statute.

Personal information or data in Australia is protected principally through the *Privacy Act 1988* (Cth). It applies to the handling of such data by, *inter alia*, Australian federal government agencies and certain private sector organisations. In February 2018, the Notifiable Data Breaches scheme introduced an obligation on all agencies and organisations regulated under the *Privacy Act* to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm.

- **Trade sanctions and export control violations**

Trade sanctions are implemented in Australia by the following legislation and accompanying regulations:

- *Charter of the United Nations Act 1945* (Cth): international sanctions imposed by the United Nations Security Council; and
- *Autonomous Sanctions Act 2011* (Cth): sanctions imposed autonomously by Australia.

Australian export controls (and violations for breach) are regulated through a variety of statutes and administered by numerous government departments and agencies. Relevant legislation includes the *Customs Act 1901* (Cth) and the *Defence Trade Controls Act 2012* (Cth). The Defence and Strategic Goods List specifies goods, software or technology that is subject to those controls.

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Under the *Criminal Code Act* 1995 (Cth), attempts are punishable as if the offence attempted had been committed. In order to be held criminally liable for an attempt, the person's conduct must be more than merely preparatory to the commission of the offence. It is not necessary that the attempted crime is completed. Further, a person may be found guilty even if the commission of the offence was impossible or the actual offence was committed. The State/Territory laws also provide for criminal liability for attempts.

For other inchoate crimes, see the response to question 10.1 below.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

It is commonly accepted that a corporation, as a separate legal entity, can be convicted of a criminal offence and have a criminal penalty imposed upon it. There are also numerous offences created under the statute which specifically apply to corporations, particularly in the area of occupational health and safety.

Under federal criminal law, the criminal law applies to body corporates in the same way as it applies to individuals subject to any statutory modification. If intention, knowledge or recklessness is an element of a particular offence, it will be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence by an employee. The means by which such an authorisation or permission may be established include, amongst other things, proving that a "corporate culture" existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision. In other Australian jurisdictions, generally speaking, a corporation may be found guilty of a criminal offence either on the grounds of vicarious responsibility or on the basis that the person who committed the acts and had the requisite mental state was the directing mind and embodiment of the company.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

In order for personal criminal liability to ensue against a person, the prosecution authority needs to charge the individual as well as the company. Accessorial criminal liability of company officers is often provided for in a specific statutory provision. For example, a statute may provide that an officer will be liable if they were knowingly involved in the corporate offence, or alternatively if the corporate offence was committed with the consent, or connivance of, or was attributable to the neglect of, the officer. An officer may also be liable for a crime committed by the company if the officer aided, abetted, counselled or procured the commission of the offence. Alternatively, depending on the circumstances, directors or senior managers may be civilly liable under the *Corporations Act 2001* (Cth) for failing to exercise due care and diligence, for example, by failing to ensure that appropriate risk management systems and processes were in place.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

Prosecution authorities and law enforcement authorities generally do not have a policy or stated preference; however, they are more accustomed to charging individuals and are aware that this will often have a greater general deterrent effect. A determination of who is charged will ultimately be governed by whether there is a *prima facie* case, reasonable prospects of conviction and whether it is in the public interest (see the response to question 8.2 below).

4.4. In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Australian law does not specifically recognise the concept of successor liability. Consequently, domestic mergers and acquisitions can be structured so that the successor entity avoids exposure to liability in Australia. However, where the court has approved a scheme for the reconstruction of a body or the amalgamation of two or more bodies, the court can make an order under s 413 of the *Corporations Act 2001* (Cth) transferring the liabilities of the transferor body to the transferee company.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

At general law, there is no limitations period for the commencement of a prosecution for criminal offences unless a statute provides otherwise. However, criminal proceedings may be stayed to prevent injustice to the defendant caused by unreasonable delay. In some States/Territories, there are limitations periods for the prosecution of summary offences. Under the *Crimes Act 1914* (Cth), there is no limitations period for the prosecution of offences by individuals against a law of the Commonwealth where the maximum penalty exceeds six months' imprisonment or for the prosecution of offences by companies where the maximum penalty exceeds AUS$31,500. If the maximum penalty is less than those thresholds, a prosecution must be commenced within 12 months of the commission of the offence unless a statute provides for a longer period.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

A charge of conspiracy to commit a serious offence is not subject to a limitations period. In matters involving a pattern or practice where there is no conspiracy, it is possible that any applicable limitations period may have expired for the older offences.

5.3 Can the limitations period be tolled? If so, how?

No, they cannot.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Most federal business crimes have some level of extraterritorial reach, and it is not uncommon for enforcement agencies to rely on extraterritorial jurisdiction. In making such laws, Parliament is able to rely on the external affairs power in the Constitution, which has been interpreted broadly by the High Court. However, in many cases, if the conduct constituting the alleged offence occurs wholly in a foreign country and the alleged offender is neither an Australian citizen nor an Australian body corporate, criminal proceedings must not be commenced without the Attorney-General's consent: *Criminal Code Act 1995* (Cth).

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

An investigation is generally commenced when a complaint is made or information comes to the attention of the relevant authority that gives rise to a suspicion that an offence may have been committed. Some authorities, however, have their own guidelines as to when an investigation will be initiated (see, for example, the AFP's Case Categorisation and Prioritisation Model).

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Australian authorities both assist, and seek assistance from, foreign prosecution and investigation authorities under mutual assistance and extradition legislation. The federal Attorney-General's Department is the central processing centre that facilitates formal cooperation between Australian and foreign authorities. The AFP also engages informally in what is termed Police to Police Assistance. In addition, regulatory authorities such as the ACCC and ASIC often work closely with their international counterparts in the course of their investigations, in some cases pursuant to international co-operation agreements. See the response to question 7.5 below.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

Law enforcement authorities have a range of investigative tools which enable them to gather information and evidence when investigating business crimes. For example, authorities such as the ASIC, ACCC, ATO, and ACIC may issue notices compelling a person to produce documents, provide information and/or attend

a compulsory hearing or examination to answer questions. Law enforcement authorities also have the power to access premises to conduct searches and seize materials, although usually it will be necessary to first obtain a search warrant. For some serious offences, law enforcement authorities will also have access to more intrusive covert powers.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Certain authorities, such as those mentioned in the response to question 7.1 above, may issue notices which compel a company or individual to produce documents or provide information to the authority. The failure to comply with such a notice is an offence. Search warrant powers are also available to the AFP, and most authorities, upon application to a Magistrate. It is generally sufficient for the applicant to establish under oath or affirmation that s/he has "reasonable grounds for suspecting" that there is or shortly will be relevant evidential material at the premises.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Statutes that require the production of documents by a person or company in response to a law enforcement authority's notice are subject to any valid claims for legal professional privilege (LPP), unless the right to LPP is expressly abrogated by the statute in question. LPP is a substantive rule of law which protects confidential communications between a client and a lawyer, or with third parties, made for the dominant purpose of giving or obtaining legal advice or for use in actual or reasonably anticipated litigation. LPP may also be claimed over material caught by the terms of a search warrant. Investigative powers to obtain documents are not impacted by labour laws.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Data privacy laws in Australia do not provide an excuse for failing to produce employees' personal data in the circumstances set out in response to question 7.2 above. There are also no blocking statutes in Australia which may impede cross-border disclosure by law enforcement authorities to their overseas counterparts. Such disclosure is governed by Australian Privacy Principle 8 contained in Schedule 1 to the *Privacy Act 1988* (Cth).

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The government can demand that a company employee produce documents, or conduct a raid and seize documents, under the same circumstances set out in the response to question 7.2 above.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

The government can make such a demand or conduct such a raid under the same circumstances set out in response to question 7.2 above. In addition, the *Telecommunications (Interception and Access) Act 1979* (Cth) empowers prescribed Australian enforcement agencies to apply for a warrant to covertly access communications stored by carriers and carriage service providers to assist in the investigation of domestic offences. Only the federal Attorney-General may authorise the AFP or State/Territory police to apply for a stored communications warrant on behalf of a foreign law enforcement agency. The disclosure to a foreign country of any information obtained will be subject to certain conditions.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

There are now several authorities which have compulsory examination powers, such as those authorities referred to in the response to question 7.1 above. Those statutory powers enable the authority to compel an individual to attend a private examination or hearing to be questioned, under oath or affirmation, about matters relevant to an investigation. The relevant statute generally provides that the privilege against self-incrimination does not apply; however, certain protections are usually offered to the examinee if their answers may incriminate them, in particular that any incriminating responses will not be admissible against them in subsequent criminal proceedings. Nevertheless, there are criminal consequences for refusing to answer questions. The individual has the right to legal representation.

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

The response to question 7.6 above applies equally to a third person. Furthermore, once criminal proceedings are instituted, courts may issue subpoenas or summonses at the request of the prosecution authority compelling the attendance at court of a person to give evidence prior to or at the trial.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

See the response to question 7.6 above in relation to authorities with compulsory examination powers. In addition, law enforcement authorities who suspect a person has committed an offence will generally invite the suspect to voluntarily participate in a recorded cautioned interview towards the end of the investigation phase. When this occurs, the investigator must caution the suspect about their right to remain silent and have several other rights explained to them, including the right to contact a lawyer and to have them attend any questioning.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

A criminal case is initiated in accordance with the procedural rules applicable in the State/Territory where the crime is prosecuted. Each jurisdiction has its peculiar procedural nuances. Generally speaking, criminal cases are initiated through the issuing and service of a document which sets out the written charge which alleges the commission of an offence(s). The defendant will either be compelled to attend court to answer the charge through a summons, or arrested and brought before the court as soon as practicable to face the charge.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Australian prosecution authorities have publicly available prosecution policies which guide their decision-making. In general, a prosecutor must assess whether there is a *prima facie* case, reasonable prospects of conviction and then determine whether it is in the public interest to prosecute. Matters which are relevant to a prosecutor's assessment of each matter are set out within the policy.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

There are currently no legal mechanisms for a pre-trial diversion process or a deferred prosecution in Australia. However, a defendant can make a 'No bill' submission to the Director of the CDPP (and similar processes apply in the States/Territories). This is, in effect, an application to the Director to discontinue the prosecution. The Director, in extraordinary cases, will accede to a 'No bill' submission where it would not be in the public interest to pursue the prosecution or it has become apparent that there is insufficient admissible evidence to prove the case. Such process does not allow the prosecution to be re-enlivened at a later date if the defendant fails to meet certain conditions.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

This is not applicable. Deferred prosecution and non-prosecution agreements are not currently available in Australia. However, the federal government has introduced the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) into Parliament which, when passed, will make deferred prosecution agreements available for specific serious corporate crimes.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

Further to the matters set out in response to question 1.3 above, a law enforcement authority will consider all relevant facts and circumstances in determining the appropriate regulatory response, including the nature and seriousness of the alleged contravention and the strength of the available evidence. Further, if successful criminal action is taken, under various statutory regimes, a victim may be able to make a claim for a victim's compensation order from the sentencing judge for losses caused by the relevant criminal offence. Irrespective of whether criminal action is taken, the company may also, of course, be exposed to civil claims by third parties such as consumers, investors or shareholders.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The prosecution bears the legal burden of proof for each relevant element of an offence. The standard of proof on the prosecution is beyond reasonable doubt.

A legal burden can be placed on a defendant in certain circumstances; however, it must be express and need only be discharged to the standard of the balance of probabilities. An example is where the statute requires the defendant to prove a matter.

A defendant who relies on an exception, exemption, excuse or justification provided by the law creating the offence (i.e. as part of the definition of the ground of criminal liability) bears an evidential burden to point to evidence that suggests a reasonable possibility that the matter exists or does not exist (this can include evidence which is led by or tendered through the prosecution). Once that burden has been discharged, the prosecution bears the legal burden of disproving the matter.

9.2 What is the standard of proof that the party with the burden must satisfy?

See the response to question 9.1 above.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

In a prosecution for a federal indictable offence in a superior court, the jury is the arbiter of fact and determines whether a legal burden has been discharged. If a federal indictable offence proceeds summarily in a Magistrates' Court, then the presiding Magistrate is the arbiter of fact. The same situation applies for State/Territory offences unless there is provision for a superior court trial by a judge alone, in which case the superior court trial judge is the arbiter of fact.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Under the *Criminal Code Act 1995* (Cth), a person who conspires with another person to commit a Commonwealth offence is guilty of the offence of conspiracy to commit that offence, and faces the same punishment as if they committed the substantive offence. To be found guilty: they must have entered into an agreement with one or more other persons; the parties to the agreement must have intended that an offence would be committed; and at least one party to the agreement must have committed an overt act pursuant to the agreement. Conspiracy is also an offence under the various State/Territory laws.

A person is also taken to have committed a substantive offence if they aided, abetted, counselled or procured the commission of that offence by another person, and is punishable accordingly. Importantly, that person may be found guilty even if the other person has not been prosecuted or has not been found guilty.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

The prosecution must prove that the defendant had the requisite state of mind to commit an offence. Without proof of this requisite state of mind, the person will be acquitted. Whilst for the most serious business crimes this will typically be intent, there are a growing number of offences where the requisite state of mind is not intent but knowledge, recklessness or negligence. For some offences, which impose strict or absolute liability, the prosecution does not need to prove intent or any other state of mind. In regards to these offences, the prosecution must merely prove that the conduct occurred, the circumstance arose or the result happened, as the case may be.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

A mistake or ignorance of the law is not a defence to a criminal charge in most circumstances. However, some offence definitions specifically provide for a mistake of law to constitute an excuse. In such cases, the defence bears the evidential burden of proof, while the prosecution bears the legal burden of disproving the defence.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

An honest and reasonable mistake of fact may render the defendant's conduct innocent and be a defence to criminal responsibility, unless this defence is excluded by the statutory offence. The defence bears the evidential burden of proof, while the prosecution bears the legal burden of disproving the defence (unless the legislation specifically provides for a reasonable mistake of fact defence, in which case the defence bears the legal burden).

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

As a general rule, there is no obligation to report a crime in Australia. However, there are certain exceptions. For example, in NSW, it is an offence for a person (including a company) who knows or believes that another person has committed a serious indictable offence to fail without reasonable excuse to report that matter to the NSW Police. Furthermore, certain industries may be subject to specific legislative or regulatory requirements which require reporting in certain circumstances, such as the breach reporting obligations imposed on Australian financial services licensees or the suspicious matter reporting obligations imposed on reporting entities by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

See the response to question 13.1 below regarding the consequences of voluntary disclosure.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

As a general rule, an offender who discloses that they have engaged in criminal conduct will still be prosecuted subject to there being a *prima facie* case, reasonable prospects of conviction and that it is in the public interest to prosecute (but see the response to question 8.4 above). Nevertheless, the defendant can expect to receive a significantly moderated sentence because pleading guilty, cooperating with authorities and showing contrition (including by making reparation for any injury, loss or damage caused by the defendant's conduct) are all mitigating factors which a court must take into account in the sentencing process.

Published prosecution policies, guidelines and conventions, as well as statutes, provide for various legal mechanisms which can apply to persons who voluntarily disclosed their criminal conduct. This includes the granting of immunity from prosecution in extraordinary circumstances, or the investigating authority accepting an induced witness statement which cannot be used against the deponent.

The CDPP and the ACCC also have a publicly available policy which recognises that it is in the public interest to offer immunity from prosecution to a party who is willing to be the first to break ranks with cartel participants by exposing the illegal conduct and fully cooperating with both the ACCC and the CDPP.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

There are some regulatory authorities, like the ACCC and ASIC, that issue public statements about the advantages of cooperating with them in both civil and criminal matters. Notwithstanding that, the CDPP will take the views and recommendations of the relevant authority into account; it is ultimately for the CDPP (or its State/Territory counterparts where relevant) to make an independent determination about whether or not charges should be laid and the appropriate charges for most criminal matters.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

Prosecution policies and guidelines provide a foundation for the prosecution and the defendant to negotiate what charges should be proceeded with. Charge negotiations are encouraged and may result in the defendant agreeing to plead guilty to fewer than all of the charges they are facing, or to a less serious charge(s), with the remaining charges either not being proceeded with or taken into account without proceeding to conviction. The prosecution and defendant may also agree upon the facts on which the defendant will be sentenced.

Agreements on sentence are not enforceable or binding upon a sentencing court. Determining the appropriate sentence is entirely a matter for the court. The High Court has made it clear that the prosecution is not required, and should not be permitted, to proffer even a sentencing range to a sentencing judge (*Barbaro v the Queen* (2014) 253 CLR 58) and this decision will make it extremely difficult for prosecutor and defendant to ever agree on a sentence in exchange for a plea bargain. The High Court has also held that these restrictions do not apply to civil penalty proceedings (*Commonwealth v Director, Fair Work Building Industry Inspectorate and Others* (2015) 90 ALJR 113).

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

The ability to plea bargain is constrained by prosecution policies and guidelines of the CDPP and its State/Territory counterparts which provide that:

- the charges to be proceeded with should bear a reasonable relationship to the nature of the criminal conduct of the defendant;
- the charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
- there is evidence to support the charges.

The prosecution policies set out that agreements with respect to charge negotiation proposals must take into account all the circumstances of the case. The approval of the court is not required, although, as noted in the response to question 14.1 above, it is for the sentencing judge alone to decide the sentence to be imposed.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

Australia has complex legislated sentencing regimes which require each judge to impose a sentence of a severity appropriate to all the circumstances of the offence. The starting point for any sentence is the maximum penalty prescribed by law which indicates the seriousness of the offending. The sentencing court must take into account certain relevant matters, identified in legislation, which are known to it and, in effect, relate to both aggravating and mitigating issues. In respect to business crimes, general deterrence is a particularly important consideration.

A sentence of imprisonment generally requires the court to specify a minimum period of time in actual custody (a non-parole period). There is an array of options for sentencing and orders that sentencing courts are empowered to make, so that offenders are adequately punished.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The same sentencing principles which apply to individuals will apply to a corporation which is convicted unless it is not capable of application. Statutes prescribe statutory formulas which convert terms of imprisonment into significant financial penalties which can be imposed on corporations where the only penalty expressly provided for is imprisonment. Furthermore, some offence provisions will expressly provide for a specific maximum financial penalty and/or formula to calculate such a penalty.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Appeal rights are a creature of statute. The defendant has a right of appeal in respect of a conviction which has arisen from a guilty verdict. Some, but not all, Australian jurisdictions enable the relevant prosecution authority to appeal (or otherwise seek leave to appeal) an acquittal which has arisen from a not guilty verdict in constrained circumstances. Where an appeal statute permits an appeal against an acquittal, it only does so on a constrained basis.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Both the defendant and the prosecution have certain statutory appeal rights in relation to a sentence imposed by a judge. In some jurisdictions, the party appealing a sentence must first be granted leave to appeal. Generally speaking, courts will allow appeals against sentence where the sentence is found to be 'manifestly inadequate' or 'manifestly excessive' or where some other error of fact or law is demonstrated, warranting appellate intervention.

In general, where an appeal against a sentence is allowed, the re-sentencing can be done by the appeal court or remitted back to the original sentencing court to be dealt with further according to law.

16.3 What is the appellate court's standard of review?

The standard of review will be determined by the relevant statutory provisions in each jurisdiction. However, generally speaking, an appeal court may allow an appeal against a conviction if: the verdict is unreasonable or cannot be supported having regard to the evidence; there was a wrong decision on a question of law by the trial judge; or there was a miscarriage of justice on any other ground. Nonetheless, in most jurisdictions, if any of these grounds are established, an appeal may still be dismissed if the appellate court considers that no substantial miscarriage of justice has actually occurred.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Appellate courts generally have broad appeal powers to remedy an injustice at the trial. These include the power to: order a re-trial; set aside a conviction; or to enter a judgment of acquittal or of conviction for another offence.

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