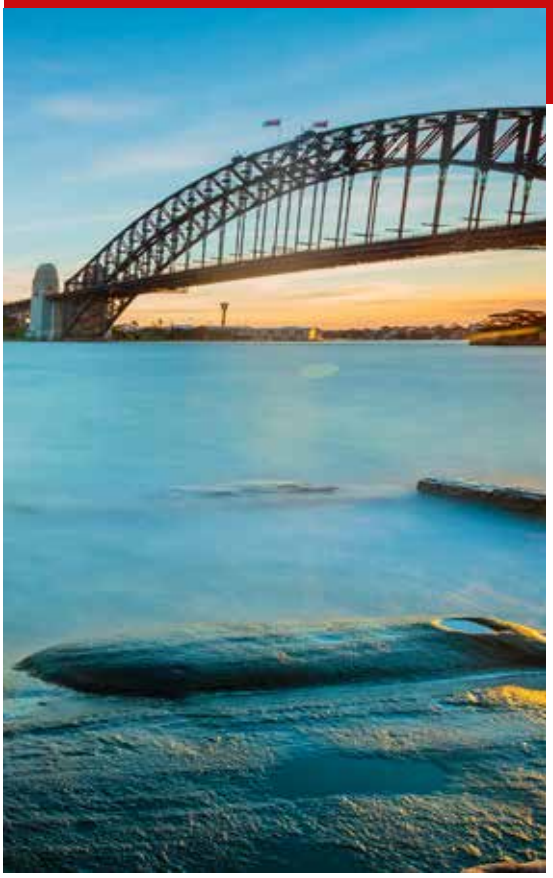

**Stephanie Wee**
Gilbert + Tobin

**Ghassan Kassisieh**
Gilbert + Tobin

# AUSTRALIA

Stephanie Wee and Ghassan Kassisieh of Gilbert + Tobin examine recent enforcement actions in Australia and proposals to introduce a deferred prosecution agreement scheme

**1.** What trends, in terms of activity or focus, have you seen in the prosecution of business crimes in your jurisdiction in the last 12 months?

On the back of mounting public and political pressure, there has been increasing scrutiny of the Australian financial services industry, and in particular, the 'Big Four' (the major Australian trading banks). Both major political parties went to the 2016 federal election promising to boost enforcement against financial institutions. The government (which was returned) promised to increase enforcement resources at the Australian Securities & Investments Commission (**ASIC**), whilst the opposition proposed a royal commission into the financial services industry. The current political landscape means that regulators will want to be seen to have taken action.

In March 2014, following large-scale investigations by financial services regulators in both the UK and the US, ASIC announced its own investigation into potential misconduct in the foreign exchange market. In a report released in July 2015, ASIC confirmed that it was investigating financial institutions in regards to conduct relating to financial benchmarks. Earlier this year, ASIC commenced court proceedings against three of the Big Four for unconscionable conduct and market manipulation of the Bank Bill Swap rate (**BBSW**).

Over the last 12 months, the Australian Federal Police (**AFP**) has made strong statements that

it is ramping up its investigations into foreign bribery by Australian businesses and multiple prosecutions are reportedly in the pipeline. As a result of OECD criticism of Australia's response to foreign bribery, Australia has introduced new false accounting offences into its Commonwealth Criminal Code and a Senate inquiry was launched to look into foreign bribery and the effectiveness of current enforcement measures. Following the recent federal election and return of the Coalition government, it is expected that these matters will continue to receive further attention.

In a recent Senate inquiry into corporate tax avoidance, the Australia Taxation Office (**ATO**) indicated that it was hardening its approach to tax minimisation arrangements by multinational and large companies operating in Australia. A Federal Court decision late last year, currently under appeal, sided with the ATO on a profit-shifting arrangement by a large US company. Further, in their dissenting Senate inquiry report, government senators indicated that the government had "identified 30 large multinational companies who may have deliberately shifted profits away from Australia to avoid paying their fair share of tax in Australia". The Australian parliament recently enacted new multinational tax anti-avoidance and profit shifting laws which came into effect on 11 December 2015.

In addition to the above, the ASIC and the Australian Competition and Consumer Commission (**ACCC**) maintain an active interest in consumer retail issues, anti-competitive conduct, insider trading, continuous disclosure obligations and other dishonest market practices, especially in the financial services industry.

**2.** Are enforcement agencies particularly focused on any specific industries or crimes?

Depending on the subject matter and industry, there are a number of agencies involved in regulating and supervising business conduct, including ASIC, ATO, AFP, ACCC and the Australian Prudential Regulatory Authority (**APRA**). Criminal prosecutions are generally referred to the Commonwealth Director of Public Prosecutions (**CDPP**), an independent agency which largely brings criminal prosecutions.

As at year end 2015, the ASIC had criminal prosecutions on foot for insider trading, market manipulation and misconduct by directors. The financial services industry has been a major and increasing target for ASIC in recent years. ASIC has large enforcement actions on foot against three of the Big Four in respect of alleged BBSW manipulation, in which it seeks declarations of contravention, pecuniary penalties, and orders for the implementation of compliance programmes.

Large multinationals are increasingly in the sights of the ATO, whilst the ACCC has pursued enforcement actions in a wide range of industries, including in tourism, consumer goods and construction. Mining and resources industries have been a focus for all regulators.

"The financial services industry has been a major and increasing target for ASIC in recent years"

**3.** Are enforcement agencies more or less focused on pursuing cases against corporations or individuals?

Australian enforcement agencies are increasingly focused on pursuing actions against corporations. Such actions have sometimes also been brought against key individuals, such as directors, who are significantly involved in contraventions, although ASIC's focus has very much been on corporate culture in recent times.

However, certain types of prohibited conduct, such as insider trading or dishonest conduct in financial services, have principally been brought against individuals.

The Australian regulatory environment provides most enforcement agencies with civil as well as criminal jurisdictions. Historically, agencies have tended to prefer civil and administrative actions over criminal prosecutions since these actions require a lower standard of proof but may still attract pecuniary penalties. However, high-profile insider trading cases against individuals have recently resulted in custodial sentences.

**4.** Does the legal framework concerning the prosecution of business crimes allow for extraterritorial enforcement? Are such matters being pursued?

Many Australian offences have been drafted to allow extraterritorial enforcement. For example, subject to the terms of particular provisions, the Corporations Act 2001 (Cth) generally applies to acts and omissions occurring outside Australia, to non-residents and non-citizens, and to incorporated and unincorporated foreign and Australian bodies. Many criminal offences, such as market manipulation and insider trading, have extraterritorial dimensions meaning persons or entities outside Australia may be exposed to criminal prosecution in Australia provided an Australian market has been affected by their conduct. Other offences, such as foreign bribery offences, are extraterritorial in nature.

However, as set out in the response to question 6 below, there is a well-established legal and practical framework facilitating international cooperation and extraterritorial enforcement. So, in practice, Australian regulators have tended to focus on conduct taking place in Australia or which has material implications for Australians or Australian markets, referring misconduct by non-nationals to appropriate foreign regulators. For example, the 2012 foreign bribery prosecutions brought against individuals and entities associated with the Reserve Bank of Australia involved cooperation between the AFP and its counterparts in Malaysia, Indonesia and Britain, with prosecutions in Britain and Malaysia also brought against persons there.

**5.** What judicial or legislative developments have impacted the prosecution of business crimes in your jurisdiction in the last 12 months? Are there any significant proposals for reform of the legal framework that governs business crimes in your jurisdiction?

There has been significant political and public pressure for stronger enforcement measures, particularly directed at alleged wrongdoing by large financial institutions and multinationals.

Recent legislative changes have included the introduction of false accounting offences in bribery legislation and multinational tax anti-avoidance provisions. There has been ongoing parliamentary scrutiny into the effectiveness of ASIC in regulating the financial services industry and inquiries into the strengthening or expansion of whistleblower protections. The Federal Government has recently introduced arrangements to provide greater protection for whistleblowers who disclose information to the ATO, which will take effect from July 2018.

In terms of judicial developments, in December 2015, the High Court of Australia confirmed the lawfulness of an established practice of regulators making agreed civil penalty submissions with defendants to a court, which will ordinarily accept the agreed penalty if it determines that the penalty is appropriate (*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46).

A key area of development is the proposed introduction of a Deferred Prosecution Agreement (DPA) scheme, similar to those in the UK and US (see question 9 on the opposite page).

**6.** How common is it for enforcement agencies in your jurisdiction to exchange information and cooperate internationally with other agencies? What are the consequences of cross-border cooperation on prosecutions of entities and individuals in your jurisdiction?

ASIC has cooperation agreements in place with most Australian regulators and market bodies, including ACCC, APRA and the ASX and Chi-X. ASIC also has cooperation agreements in place with many overseas regulators, including in Europe, the Americas, Asia, the Middle East and South Africa. Cooperation between ASIC and foreign regulators is common, with ASIC reporting 754 requests for assistance received and 706 finalised in 2014–15. The ACCC also has cooperation arrangements in force with a number of overseas competition and consumer regulators.

Under the *Mutual Assistance in Business Regulation Act 1992* (Cth), an Australian business regulator (such as ASIC) may obtain relevant information, documents and evidence and transmit it to a foreign regulator for its administration or enforcement of a foreign business law. Before considering a request, an Australian regulator must receive a written undertaking from the foreign regulator that the information or evidence will not be used against the person in criminal proceedings or proceedings for the imposition of a penalty. The Act preserves the right to claim legal professional privilege and, to a qualified extent, the privilege against self-incrimination (although in that case the information and evidence must be produced but cannot be admitted against the person in criminal proceedings or proceedings for the imposition of a penalty).

Australia also has in place mutual assistance and/or extradition arrangements with nearly 150 countries. The *Mutual Assistance in Criminal Matters Act 1987* (Cth) also regulates the provision of assistance by and requested of Australia, including when assistance must or may be refused. Extradition is dealt with under the *Extradition Act 1988* (Cth).

**7.** What unique challenges do entities or individuals face when enforcement agencies in your jurisdiction initiate an investigation?

These are some of the unique challenges facing entities and individuals under enforcement action in Australia:

- Apart from the ACCC immunity and cooperation policy for cartel conduct, the settlement of enforcement actions is not standardised or predictable. Liability may be admitted, penalties agreed or undertakings given, but on the whole, the process is largely discretionary and *ad hoc*. There is also less certainty around the advantages of self-reporting. For example, there are no clear or established penalty discounts for self-reporting, although courts are likely to apply *some* discount for early admissions of wrongdoing and cooperation with regulators in relation to the prosecution of other wrongdoers.
- Australia has a liberal class action regime which, when coupled with established litigation funders, means that regulatory enforcement action is frequently accompanied by class actions for compensation by affected parties.

“Apart from the ACCC immunity and cooperation policy for cartel conduct, the settlement of enforcement actions is not standardised or predictable. Liability may be admitted, penalties agreed or undertakings given, but on the whole, the process is largely discretionary and *ad hoc*”

Alongside standard disclosure and subpoena regimes, lawyers for persons contemplating or involved in relevant proceedings may request from ASIC a copy of the written record of an examination of a person taken by ASIC (ASIC Act, s 25). Damages in large class actions could well exceed regulatory fines and there remains a great deal of uncertainty in how a court will calculate damages in class actions as such actions have typically settled.

- Australia has general prohibitions against misleading and deceptive conduct, and unconscionable conduct, and an active and well-established consumer protection regime. These general prohibitions can give rise to significant allegations of unfair dealing and have founded a number of regulatory and third party class actions against large corporations. Even when class actions have not ultimately succeeded (as was the case in the recently decided action against one of the Big Four for its credit card late payment fees), they have put significant pressure on their targets who are braced for a possibly adverse result. In that case, the bank voluntarily reduced its fees by nearly 50% although it was ultimately successful in the High Court.

**8.** Do enforcement agencies in your jurisdiction provide incentives for individuals or entities to self-report a business crime or otherwise provide assistance to the government? If so, what factors should individuals or entities consider when assessing whether to self-report a business crime or cooperate with a government investigation?

Various self-reporting obligations exist under Australian law for both individuals and entities. For example, under section 912D of the Corporations Act, financial services licensees are required to report significant breaches or likely breaches of certain laws to ASIC. Failure to comply with this obligation is itself an offence.

ASIC does not have any formal policy of granting immunity for self-reporting entities. ASIC has, however, published enforcement guidelines in which it states that early notification of a breach or a cooperative approach to an investigation will often be relevant to ASIC's consideration of which remedy or remedies should be pursued. As the CDPP conducts most criminal prosecutions investigated by ASIC, it is the CDPP that ultimately determines, after consultation with ASIC, whether or not charges should be laid for most criminal matters. In deciding whether to prosecute an offence, the CDPP considers whether prosecution is in the public interest, having regard to factors including whether the alleged offender is willing to, or has, cooperated in the investigation or prosecution of others.

Similarly, the ATO has stated that taxpayers who make voluntary disclosures regarding false or misleading statements can generally expect a reduction in the administrative penalties and interest charges that would normally apply. Any such reduction will depend on when the correction is disclosed, and in particular whether the disclosure is made before the taxpayer is notified of an examination by the ATO.

By contrast, the ACCC has a formal immunity policy designed to encourage self-reporting of cartel involvement. The policy confers immunity from ACCC action to the first participant who reports involvement in a cartel. Immunity is granted subject to certain conditions including full disclosure and ongoing cooperation with any resulting investigation and legal proceedings against other cartel participants. Following a recommendation from the ACCC, the CDPP will decide whether to grant immunity from prosecution by applying the same criteria as are contained in the ACCC policy.

**9.** Do enforcement agencies in your jurisdiction use non-prosecution agreements ("NPA") or deferred prosecution agreements ("DPA")? If so, how do such agreements work in practice and what can entities or individuals do to reach an NPA or a DPA with enforcement agencies? If not, do you believe it is likely that such agreements will become part of the legal framework in the next five years?

In March 2016, the Australian Minister for Justice announced a public consultation into whether Australia should introduce a DPA scheme for serious corporate crime (including fraud, bribery and money laundering). Submissions to the consultation, which included submissions from ASIC and the ATO, were generally in favour of a scheme, with a leaning towards a UK-style scheme. It is not yet clear whether DPAs will be introduced or their proposed scope, but the general trend in Australia has been towards a broadening of the regulator armoury.

In the absence of a formal DPA/NPA scheme, entities and individuals accused of wrongdoing have been able to negotiate a regulatory settlement in a mixture of formal and informal ways, including:

- ASIC may accept an enforceable undertaking as an alternative to civil or administrative (but not criminal) action. For example, in 2013–14 ASIC accepted enforceable undertakings and voluntary contributions totalling $3.6 million from three multinational banks in connection with alleged BBSW misconduct. ASIC does not accept undertakings in cases of deliberate misconduct, fraud or conduct involving a high level of recklessness, except in certain circumstances. Enforceable undertakings may include

- compensatory arrangements but ASIC does not use them to impose penalties. The ACCC has similar powers.
- Admitting wrongdoing in a criminal prosecution or pecuniary penalty proceeding to get a discount on penalty.
- Agreeing with the regulator on a civil penalty to propose to the court, which a court will likely accept if the penalty is appropriate (see *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46).

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**Stephanie Wee** swee@gtlaw.com.au

Stephanie has extensive experience in advising clients in Australia and overseas, particularly in relation to regulatory, bribery and corruption investigations. That experience includes structuring and leading complex investigations and reporting to boards on regulatory, bribery and corruption risks, whether in the context of an internal investigation, a regulatory investigation or a proposed corporate acquisition. She also has experience as a war crimes prosecutor.

**Ghassan Kassisieh** gkassisieh@gtlaw.com.au

Returning to Gilbert + Tobin after two years at a magic circle firm in London, Ghassan's practice includes commercial and regulatory disputes resolution and investigations. He returns with an international awareness of the increasing and extraterritorial regulatory enforcement environment in which multinationals and large corporates find themselves, including in the area of consumer law, financial services and white-collar crime.

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