

CORPORATE CRIME AND INVESTIGATIONS: LOOKING BACK AT 2018 AND THE OUTLOOK FOR 2019

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Legal Briefings – By **Grant Marjoribanks, Jacqueline Wootton, Tania Gray and Christine Wong**

The conclusion of public hearings at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) marks the end of a significant year in the focus on corporate conduct. We look back at key developments in 2018 and look forward to the outlook in 2019.

WHAT DID WE SEE IN 2018?

1. INCREASED APPETITE TO CRIMINALLY PROSECUTE CORPORATE OFFENCES

This year has seen the commencement of two criminal prosecutions for cartel conduct against multiple companies, in addition to criminal charges laid against the CFMMEU. This continues the trend in recent years of the ACCC seeking criminal prosecution of cartel conduct since it became a criminal offence in Australia in 2009. It follows the first cartel list being criminally convicted, sentenced and fined in 2017.

ASIC's criminal prosecution of a former CFO of a major contracting company was successful, with the former executive convicted of false accounting offences in December 2018. ASIC has signalled its intention in respect of further criminal prosecutions with the appointment of Daniel Crennan QC as Deputy Chair:

- At his appearance before the Parliamentary Joint Committee in August 2018, he stated that *“any suggestion that ASIC has a limited appetite for criminal prosecutions is plainly*

incorrect.”

- That position was bolstered in his evidence given in October 2018 (in the Review of the Four Major Banks) that ASIC expects the volume of criminal briefs to the CDPP to accelerate by about 82% over the next two years. In 2018, ASIC gave 32 criminal briefs to the CDPP. It expects the 2018 figure to increase by an additional 10 criminal briefs in 2019, and by an additional 14 to 15 criminal briefs in 2020.

2. ADDITIONAL FUNDING FOR REGULATORS AND THE CDPP

A raft of additional funding measures to support regulatory enforcement action has been announced this year:

- **ASIC.** An additional \$70.1 million in funding has been committed to ASIC over the next four years, with \$26.2 million of that committed to ASIC’s litigation budget.
- **APRA.** An additional \$58.7 million in funding has been committed to APRA over the next four years.
- **CDPP and Federal Court of Australia.** an additional \$41.6 million (over eight years) and \$9.9 million (over four years) has been committed to these bodies respectively to accommodate the expected increase in prosecutions arising from ASIC investigations.
- **ACCC.** An additional \$35.6 million in funding was announced by the Government as part of the mid-year budget update in December 2018. The initial funding will support 16 additional investigators, who will enhance the ACCC’s ability to investigate cartel and competition issues.

This follows the additional \$321.4 million in funding confirmed in last year’s budget for the AFP over the next four years, the largest single investment in the AFP in the past decade. The funding is directed towards building the AFP’s expertise across a broad range of criminal activity.

3. INCREASED PUBLIC SCRUTINY OF REGULATORY ENFORCEMENT FOR CORPORATE MISCONDUCT

2018 has seen a strong focus on the enforcement records of ASIC and APRA. The public hearings of the Royal Commission examined these issues and the Interim Report posed a number of questions as to whether their regulatory and enforcement practices were satisfactory. We anticipate that the final report (due by 1 February 2019) will make recommendations in respect of these matters.

The recent lifting of suppression orders in respect of Australia's first successful foreign bribery prosecution also gave rise to questions about ASIC's role in that matter.

WHAT DO WE EXPECT IN 2019?

We expect to see:

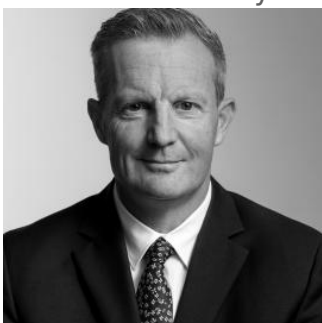
1. **Heightened public scrutiny of corporate misconduct**, including corporate crime, and compliance in the short and medium term.
2. **Continuing uplift in enforcement by corporate regulators and a tougher enforcement landscape** for companies, including more decisions to prosecute potential criminal breaches. This is particularly in view of the additional funding and public scrutiny outlined above.
3. **Companies investing to strengthen compliance with legal and regulatory requirements and improve corporate governance**. The draft 4th edition of the ASX Corporate Governance Principles was released in May 2018 for public consultation, with the final version expected to be released in early 2019 and to take effect on 1 July 2019. Key changes include additional focus on meeting community expectations of responsible governance, with recommendations that listed entities disclose whistle-blower policies and anti-bribery & corruption policies.
4. **Implementation of previously announced law reform which is expected to bring about increased investigation and enforcement activity, as well as tougher penalties**. We have previously reported on the implications of currently proposed law reforms. While the upcoming Federal election may delay introduction of some of these reforms in the nearer term, we anticipate that many of these reform areas will remain high on the agenda for both parties:
 - **Increasing civil penalties for white collar crime**. In October 2018, the Government introduced *the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* which seeks to increase penalties for certain corporate criminal offences in ASIC-administered legislation and expand the infringement notice and civil penalty regime. The Bill was approved by the House of Representatives in November 2018 and is currently in the Senate for approval.

- **Deferred prosecution agreements and reforms to the foreign bribery offence.** Our previous updates outline the implications of the proposed reforms under the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, which include the introduction of a Deferred Prosecution Agreement (**DPA**) scheme. Most recently, the Attorney-General's Department released a DPA Code of Practice for public consultation (**Draft Code**) (see our update on that [here](#)). Public submissions were received on the Draft Code this year. A number of those raised issues of whether a formal admission was necessary for a DPA to be offered; the need for the Code to clearly identify a reduction in penalties as part of the scheme; and consideration of amending or removing references to waiving privilege or making witnesses available to interview.
- **Strengthened Whistleblower Legislation.** On the final sitting day of 2018, the Senate approved the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018*, following amendments which strengthened the protections and rights of whistleblowers (our earlier update on the form of the Bill is [here](#)). The amendments included giving whistleblowers the ability to claim compensation when a company breaches a duty to prevent (or fails to take reasonable steps to prevent) a third party from engaging in detrimental conduct towards the whistleblower. The Bill received bipartisan support in the upper house and now goes to the House of Representatives. The earliest possible commencement time for the reforms is 1 July 2019.
- **Federal anti-corruption body.** In December 2018, the federal government bowed to growing public pressure and announced the establishment of a Commonwealth Integrity Commission to monitor the federal public sector. Its proposed jurisdiction includes parliamentarians and staff, as well as ACCC, APRA, ASIC and the ATO. The public consultation period on the proposed model closes in early 2019.

Thank you to our vacation clerks, Theodora von Arnim and Tim Porter, for their assistance with this update.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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