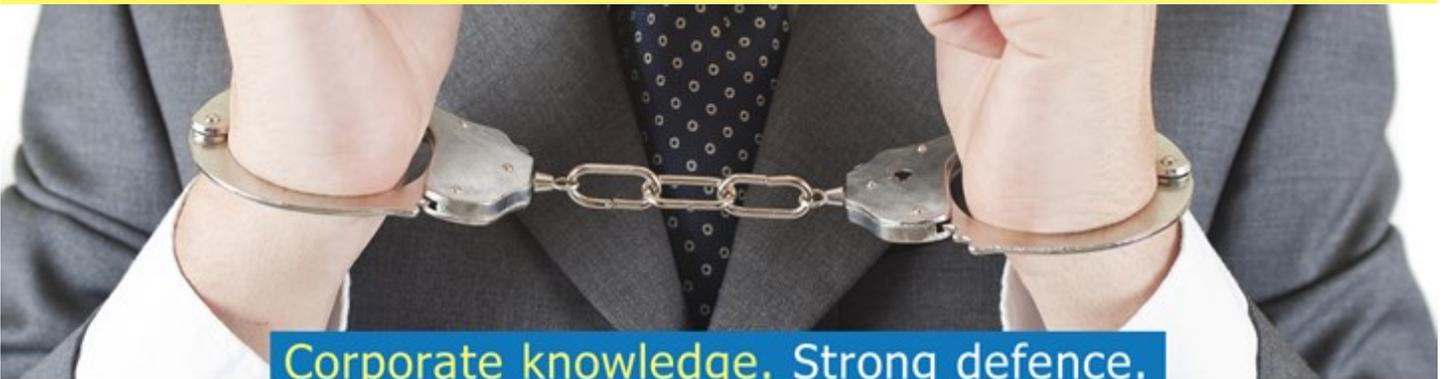


Corporate & White Collar Crime



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Summary

Individuals and businesses involved in transactions, advisory, professional services, leadership and positions of trust have various legal obligations. If breached or seen to be breached they can find themselves entangled in costly civil and potential criminal law proceedings.

Often it can be one particular act or a course of conduct over a lengthy period of time which can raise the suspicions of authorities, resulting in a decision by them to commence investigation and subsequent prosecutions.

At the very outset of an investigation, if questions or enquiries, which may otherwise seem innocuous, are put forward and not properly responded to, this can lead to adverse ramifications in a looming prosecution.

Individuals might not always knowingly be aware that they are committing a serious offence. However, with a large amount of complex legislation and regulatory instruments involving businesses and management, the actions that they have taken might be in breach.

At Quinn & Scattini we are skilled at representing individuals and companies in –

- Money Laundering
- Insider Trading
- Breach of Directors' Duties
- Disciplinary Proceedings
- Cartel Offences
- Bribery

Quinn & Scattini have the advantage of having both corporate and commercial lawyers, who work in collaboration with our expert criminal lawyers. It is this synergy of expertise, which allows us to not only advise on commercial transactions and disputes, but also to assist with the management of investigations by regulating authorities such as ASIC, the ACCC and the ATO, amongst others.

Our team can negotiate the management of risk, enforcement or prosecutions and provide expert advice on dealing with issues that arise and pre-empt potential issues when conducting day-to-day commercial dealings.



Money Laundering

Background

Money Laundering, generally speaking, is the conduct of attempting to legitimise money from criminal proceeds, as well as financing the furtherance of criminal conduct.

It is widely accepted that massive amounts of funds are generated through illegal activity. However, once these funds are generated, attempts are made to implement them in the legitimate financial system. Consequently, there are a number of government authorities, which have been specially tasked with trying to detect this conduct and prosecute these alleged offences. Investigations can be complex and cover a lengthy period of time, but where people have been convicted of these offences, custodial sentences often follow.

Therefore, many people and companies are regularly under the spotlight of the authorities who are trying to detect money laundering crimes. These people and companies can be innocent but since certain types of conduct are targeted, they can find themselves in the middle of a large scale investigation. Importantly, if dealing with the authorities during the investigation is not properly handled with a considered legal approach; the person being investigated will invariably not only be charged but could also significantly take away from their future defence.

Legislation

Australia has a complex approach to the criminalisation of money laundering. The starting point is that Division 400 of the *Criminal Code Act 1995 (Cth)* (the “*Criminal Code*”) contains the principal money laundering offences. Whilst there are a number of offences under this division there are two classified types of offences, which are:

1. Offences linked to proceeds of crime, which are funds generated by illegal activity; and
2. Offences linked to the instruments of crime, which are funds used to conduct illegal activity.

These are then further classified according to the value of the funds involved in the following bands:

1. \$1,000,000 or more;
2. \$100,000 to \$999,999;
3. \$50,000 to \$99,999;
4. \$10,000 to \$49,999; and
5. \$1,000 to \$9,999.

Continued

Penalties

Penalties range from maximum custodial sentences of 2 - 25 years. In addition to imprisonment, fines can also be imposed with the maximum being \$255,000 where the property or money related to the dealing on the proceeds of crime is or exceeds \$1,000,000.

Within each band there are then 3 offences based on the offender's knowledge of the source of the funds or what the funds were intended to be used for. This in essence determines the culpability of the offender, which then designates the applicable penalty range.

Offender classifications are as follows:

1. **Knowledge:**
The offender 'believes that the money or property is the proceeds of crime or intends that the money or property will become an instrument of crime';
2. **Recklessness:**
The offender is 'reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires)'; and
3. **Negligence:**
The offender is 'negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires)'.

Often these cases involve complex commercial dealings relating to real estate, currencies and personal property such as jewellery and art work. In these types of cases there is a lot of scrutiny on the valuations or quantification of the property and the transactions involved.

This also then raises a potential defence of mistake of fact, which is available for some of the relevant offences.



Insider Trading

What is Insider Trading

Insider trading is criminal conduct where information that is not generally available, which is likely to have an effect on the value of a financial product, is used to trade a financial product, or communicate inside information to others who will, or are likely to, trade on the inside information.

The insider trading provisions are found in Part 7.10, Division 3 of the *Corporations Act 2001* (the Corporations Act). Contravention of these provisions can result in both criminal and civil penalties.

Criminal prosecutions are headed by the Commonwealth Director of Public Prosecutions (CDPP). However, civil action can also be taken by ASIC and other private litigants. Therefore, a person or company who is alleged to have breached the insider trading provisions will often need to defend multiple court proceedings in both the criminal and civil jurisdictions. This requires an immediate and decisive civil and criminal defence.

At Quinn & Scattini, we have an expert Commercial Litigation Team as well as a Criminal Team, which work collaboratively on these matters. Decisions must not be made alone and without proper consideration to the multiple actions, as there is invariably a flow-on effect to subsequent and concurrent proceedings.

When dealing with these cases, the relevant authorities have often conducted lengthy and complex investigations. Therefore, it is necessary that your legal team have a detailed understanding of the financial markets and the realities of what is involved with the day-to-day comings and goings of those involved in the industry.

The Australian Financial Markets Association (AFMA) has released its best practice guidelines for "Handling Confidential & Price-Sensitive Information & Soundings". It is important that those involved with the financial markets industry, such as officers and senior employees of public companies, bankers, stockbrokers, and others who advise and have dealings in the industry, familiarise themselves with this guideline. It provides helpful insight and steps that should be taken to assist in protection from the risks of insider trading.

We have the expertise if you find yourself or your business is in need of:

1. Dealing with and responding to an investigation by the regulator; or
2. Defending a prosecution by the CDPP, civil action by ASIC and other potential plaintiffs.

Breach of Directors' Duties

Directors of companies, whether private, publicly listed or public but unlisted, have duties at:

1. Common Law;
2. Statute Law; and
3. Under the company's constitution.

Directors have a number of duties they must comply with. Broadly speaking, they must ultimately act in the best interest of the company as a whole at all times. They must not act in their own self-interest or the interest of a related party at the expense of the company.

The *Corporations Act 2001 (Cth)* (Corporations Act) provides for a number of civil and criminal penalties for breaches of directors' duties as well as failure to comply with certain reporting requirements imposed in the conduct of certain transactions and day-to-day management of the company.

Schedule 3 of the Corporations Act provides the penalties applicable for breaches of particular provisions. These involve lengthy periods of imprisonment and significant fines. In addition to these penalties, a person is automatically disqualified from managing a corporation if convicted of certain criminal provisions. The length of the disqualification depends on the offence they are convicted of and length of imprisonment imposed.

Criminal proceedings are instituted by the Commonwealth Director of Public Prosecutions (CDPP). The CDPP have specialist commercial prosecutors who take carriage of these matters, which are referred to them by ASIC. ASIC have usually conducted a detailed investigation and may have even commenced civil action. Therefore, it is necessary that a defendant has a legal team who are ready, willing and able to take carriage of these matters.

We also understand the need to work in collaboration with crisis management and public relations providers on these matters. This is because there is often media interest and steps need to be taken to mitigate public opinions, while preserving the integrity of the case.

If you find yourself before the courts for criminal charges this can be a very stressful time, as the consequences can have significant impacts on a person's future livelihood.



Disciplinary Proceedings

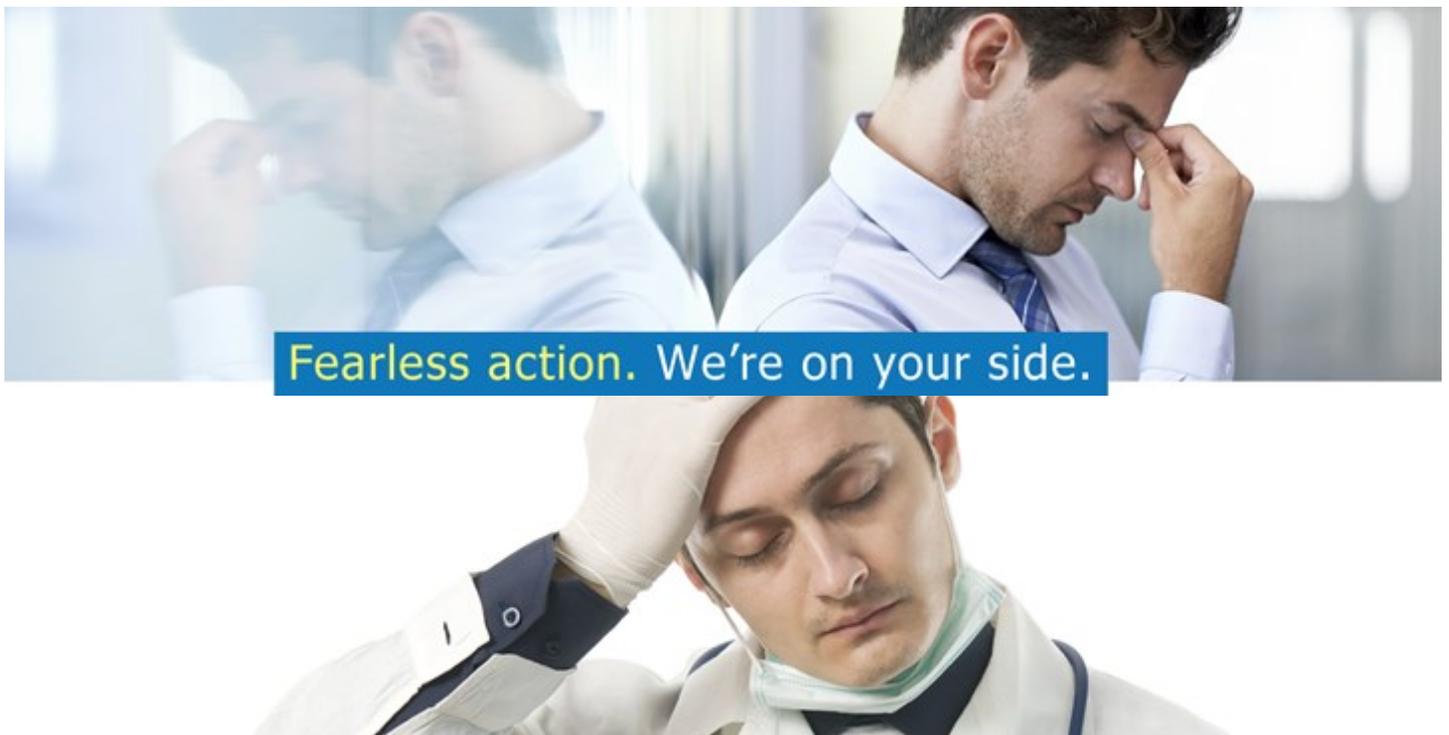
Those working in professional services, such as health practitioners, lawyers, accountants, teachers and public servants, among other areas, can face the stressful and unfortunate experience of having to deal with a complaint made to their disciplinary body. This can then lead to initial investigations and proceedings before the respective body's tribunal.

Often where a person finds themselves before the courts in relation to criminal offences, even if acquitted or where the crown have not proceeded with the charge/s, this does not prevent further action or concurrent action being taken by the person's disciplinary body.

We have the expertise and legal team, who represent clients in both criminal and civil matters as well as dealing with the relevant disciplinary body who may be conducting their own investigation.

Investigations and proceedings can be concurrent and a measured and considered approach must be taken to ensure that a person's interests are properly preserved when dealing with multiple matters and proceedings.

It is important to address these matters straight away and respond as is appropriate to your case.



Cartel Offences

Under the *Competition and Consumer Act 2010 (Cth)* (“CCA”) there are parallel criminal offences and civil prohibitions relating to cartel conduct.

Cartel conduct

Cartel conduct is where a corporation or individual makes or gives effect to a contract, arrangement or understanding that contains a cartel provision.

A cartel provision is defined by the CCA as a provision relating to:

1. price-fixing;
2. restricting outputs in the production and supply chain;
3. allocating customers, suppliers, or territories; or
4. bid-rigging;

by parties that are, or would otherwise be, in competition with each other.

Penalties for those involved in a cartel include:

For individuals:

1. Maximum of 10 years imprisonment and/or fines of up to \$340,000 per criminal cartel offence.
2. A pecuniary penalty of up to \$500,000 per civil contravention.

For corporations:

The maximum fine or pecuniary penalty for each criminal cartel offence or civil contravention is the greater of:

1. \$10,000,000;
2. 3 times the total value of the benefits obtained by one or more persons and that are reasonably attributable to the offence or contravention; or
3. Where benefits cannot be fully determined, 10 per cent of the annual turnover of the company (including related corporate bodies) in the preceding 12 months.

Other penalties for cartel civil contraventions or criminal offences include:

1. Injunctions;
2. Orders disqualifying a person from managing corporations; and/or
3. Community service orders.

Continued

Cartel offences or contraventions are very serious. It is likely that when the CDPP starts commencing prosecutions and there are convictions, the Courts will start imposing penalties of imprisonment and significant fines on individuals.

In an effort to promote whistle blowing and cooperation, the ACCC has an immunity policy, which applies to both civil and criminal actions. However, with respect to criminal immunity, the CDPP will have the final say, but will consider the recommendation put forward by the ACCC.

Where a person or company applies for immunity, they must fulfil a number of conditions before being considered. These include that the applicant:

1. must be 'first in';
2. must not have been a leader of the cartel or have coerced others to partake in the cartel;
3. can offer information or evidence where the ACCC does not already have enough evidence to prosecute; and
4. must provide full disclosure of its conduct and cooperate fully throughout the investigation.

However, there is always the risk that immunity is not provided. Although, when immunity is not provided, not all is lost. Cooperation can be used in mitigation at sentence, or judgement, as the case may be with civil actions. The level of mitigation depends on the value and importance of the evidence provided and the level of cooperation. This is in addition to whether the person took prompt action to retreat from their involvement in the cartel.

Another important consideration is that even when immunity is provided, this does not limit action instituted by a private litigant who has suffered loss and damage as a result of the cartel. A plaintiff in this action can seek to recover its loss and damage and seek declarative and injunctive relief.

If you or your company are concerned about potential involvement in cartel conduct it is important that you seek legal advice immediately. There are a number of considerations that need to be observed. The consequences for a company or an individual can be devastating and have long term effects. An understanding of the laws, dealing with regulators and management of the various legal actions is a must.

Bribery

Generally speaking bribery is where a benefit is given, received or attempted to be received or obtained in return for an improper advantage.

“Benefit” includes property, advantage, service, entertainment, the use of or access to property or facilities, and anything of benefit to a person whether or not it has any inherent or tangible value, purpose or attribute.

In Australia this conduct is prohibited by Commonwealth and State legislation.

Commonwealth

The Commonwealth legislation is targeted at bribery offences relating to Commonwealth Public Officials and Foreign Public Officials.

With respect to the Commonwealth legislation, prosecution under the bribery laws can be instituted against any Australian citizen, resident, or entity established in Australia that is alleged to have committed the bribery offence, regardless of whether the offence was alleged to have been committed in Australia.

Penalties – Criminal Code (Cth)

The offence of bribing a Commonwealth or Foreign public official holds the following penalties:

Individual

Maximum penalty of up to 10 years imprisonment and/or a fine of up to \$1,700,000.

Company

A fine not more than the greatest of the following

1. \$17,000,000;
2. 3 times the value of the benefit; or
3. 10% of the company's turnover from the 12 months before the offence was committed.

Continued

Defences

There are essentially two defences to charges under the Commonwealth legislation. They are:

1. The local law defence – this defence requires the defendant to show that the act that is the subject of the contravention is actually permitted by the written law of the place where the act occurred.
2. Facilitation payments - this is where it can be shown that payments of a minor nature were made with the intention of facilitating the performance of a minor, routine government action, and that benefit was recorded in accordance with the Criminal Code Act 1995.

Queensland

In Queensland, the *Criminal Code (Qld)* prohibits the following conduct:

1. Member of Parliament Receiving Bribes;
2. Bribery of a Member of Parliament;
3. Bribery with respect to elections.

Penalties – Criminal Code (Qld)

The penalties in relation to (1) and (2) are imprisonment for 7 years, the member of parliament who is convicted of receiving the bribe is also disqualified from sitting or voting as a member of the Legislative Assembly for 7 years.

Further, where a person has been convicted of an offence under (2), all property which has been tendered or produced in evidence at the trial of the offender, as being the property or part of the property which the offender in the course of the commission of such offence gave, conferred or procured, or promised or offered to give, or confer or to procure, or attempt to procure, to, upon, or for a member of the Legislative Assembly, or to, upon, or for any other person, shall become and be deemed to have become forthwith upon such conviction and without any further judgment or order the absolute property of the Crown, whether such property is the property of the offender or of any other person.

With respect to (3) the penalty is imprisonment up to 7 years or alternatively up to 1 year depending on if the offender is charged under section 98C or section 101.



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This is general advice only. You should seek specific advice for your particular circumstances.**