

## SENATE ECONOMICS REFERENCES COMMITTEE

### RESPONSES TO QUESTIONS ON NOTICE

#### **Inquiry into the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime**

Assistant Commissioner Ian McCartney took a range of questions on notice during the hearing before the Committee on 6 December 2016.

The responses to those questions (extracted from Hansard) are set out below.

#### **Question**

**CHAIR:** Thank you. I note that the AFP has 114 fraud related matters on hand at the present time, according to the AGD submission. Sorry, that was as at 30 June last year. You may want to take this on notice. Because of the complexity of these matters, the difficulty in detection, to what extent have you relied on whistle-blowers to get to the stage where you can take these matters to court?

**Mr McCartney:** These are complex matters. I think any assistance we can receive is greatly appreciated. On the issue of whistle-blowers, we have noted in our submission the support for deferred prosecutions. Again, that is that engagement with the private sector to encourage them to come forward at an early juncture to work with agencies such as the AFP to disclose more of the criminality that is actually out there.

**CHAIR:** Are you able to give me a sense as to what extent whistle-blowers have played a part in those 114 matters as at 30 of June? Have you been able to detect them because of the difficulties getting evidence and the complexity of the matters?

**Mr McCartney:** In terms of the referrals that have come into the fact centre, there are various avenues: they may be referred from the Commonwealth department; they may be referred directly to the AFP from whistle-blowers or from the companies themselves in self disclosure. The breakdown is something we could take on notice and provide to you.

#### **Answer**

The AFP is unable to provide a breakdown of whistle-blowers connected to the 114 fraud matters on hand as at 30 June 2015 for the following reasons.

- The AFP does not routinely record where a complainant in a matter is a whistle-blower.
- A referral may also be received from another agency where the evidence has been provided by a whistle-blower.
- In these instances, the AFP applies appropriate protections for the whistle-blower, which may include protecting their identity.

#### **Question**

**Senator WHISH-WILSON:** An example that has been mentioned in a number of submissions, and we have talked about it today, is the insider-trading case that ASIC took against John Gay in Tasmania. I understand they were unhappy with the result. Then they asked the AFP to institute a proceeds of crime, but you chose not to.

**Mr McCartney:** Correct.

**Senator WHISH-WILSON:** Then, I think, it was referred to the DPP who did eventually do that. When you look at taking on a case like that how do you guys think that through? Is there a reason you did not take that case on?

**Mr McCartney:** There were significant complexities in relation to that case. We made the decision, at the time, that if we could have taken it on we would have taken it on. Based on the complexities of the case we decided not to. I understand it was since reviewed by the DPP. There have been a number of cases since. I can take that on notice but I think every referral on insider trading since, provided to the AFP, we have taken proceeds action, in relation to these matters.

## Answer

All referrals received by the AFP's Criminal Assets Confiscation Taskforce case forum consider a number of factors, including the:

- nature of the alleged crime;
- gravity or the sensitivity of the matter;
- effect of the criminality involved; and
- resources available to apply an agreed effective treatment action and the likelihood of a successful outcome.

Each case is assessed on its merits and, where the matter is accepted, a determination is made on treatment options.

Since the decision was made not to proceed with the John Gay case, the Commissioner – in his capacity as a proceeds of crime authority – has commenced action under the *Proceeds of Crime 2002* in all insider trading matters referred by ASIC, other than one matter which is still under consideration.

## Question

**CHAIR:** Another one you might want to take on notice relates to the corporate culture provisions of the Criminal Code. Section 12.3 provides that a company may be found to have committed an offence under certain provisions of the code if it is proved that a 'corporate culture' existed within the company that 'directed, encouraged, tolerated or led to noncompliance with the relevant provision' or which did not require compliance with the provision. The question is: how many investigations, prosecutions and convictions have there been using the corporate culture provisions?

**Mr McCartney:** The Criminal Code provides a clear intention by criminal responsibility to bodies corporate. It does allow for a criminal liability to be attributed to a corporation without finding fault in relation to an individual. What we find is that proving of a non-compliant corporate culture is often difficult, because people take great care to avoid incrimination. What it really boils down to is that intentional knowledge and ulterior intention. It is difficult to prove, especially where third parties are involved, so we have had some real difficulties in these cases. I would stand to be corrected by my colleagues from DPP but I believe Operation Rune, which was Note Printing Australia—the company was criminally charged in relation to that matter. But I will take that on notice.

## Answer

### Investigations

The AFP routinely considers all available offences and provisions, including Part 2.5 of the Criminal Code – Corporate criminal responsibility, when conducting foreign bribery investigations.

## Prosecutions/convictions

In July 2011, eight former senior officers Note Printing Australia (NPA) (wholly owned by the Reserve Bank of Australia) and Securrency International (Securrency) were arrested and charged with foreign bribery offences relating to activity in Indonesia, Vietnam and Malaysia. NPA and Securrency were also charged at this time as corporate entities.

On 5 December 2011, NPA and Securrency pleaded guilty to foreign bribery charges and were subsequently fined.

## **Question**

**Senator WHISH-WILSON:** Are you aware there are consulting companies or specialist companies—private commercial companies—out there that actually go and fix this kind of thing up for the corporate sector?

**Mr McCartney:** There are a number of ex-AFP working for those companies, particularly for some of the big four. They have investigation areas, so before calling in law enforcement they may refer it to those agencies to have a look at the fraud first to perhaps (a) clean it up or (b) prepare a referral to a state or Commonwealth agency.

**Senator WHISH-WILSON:** I did not want to put too much pressure on our first witness, because he did not really want to go into details about his discussions with these kinds of entities, but do you have dealings with them in terms of what they do and do not refer to you? He said they have commercial-in-confidence arrangements with their clients, so they will not disclose details of wrongdoings if they have managed to fix it up at a company level. But do you have any input with these agencies or these people?

**Mr McCartney:** We do have a relationship where the decision is made for the referral to come into us and these consultancy agencies have done the work up. Getting back to the point you made: the company would have to agree to any referral to a law enforcement agency, so it is not as if these consultancy companies could self-disclose in relation to criminality. That is my understanding.

**Senator WHISH-WILSON:** I can see why these companies would do what they are doing, but to anyone on the outside it looks like a corporate cover-up really. There have been laws broken due to unethical or illegal behaviour in the companies. The companies are not reporting it; it is going unreported. It makes it difficult for us to understand how widespread this problem is; therefore, what kinds of recommendations do we make about what is necessary for punitive measures to stop this thing happening in the first place? It seems very odd—it is a chicken and egg thing, I know.

**Mr McCartney:** In terms of the cases you are talking about, the majority would be state offences. Senator, it is something we could take on notice to engage with our state police partners to see if they are looking at recommendations in this area in terms of enhancing and increasing reporting from some of these corporations.

## **Answer**

The AFP has consulted with State police partners and confirmed there are no positive reporting obligations on consultants to report suspected fraud to law enforcement.

Where consultants are engaged by corporate entities to audit, review or interrogate the corporation's business, commercial-in-confidence caveats or legal professional privilege generally applies. This acts as an inhibitor for the consultancy firm to refer allegations of criminality to law enforcement.

The onus on reporting alleged criminal conduct thereby currently rests with the corporate entity.

The AFP is aware of proposed changes to the *Code of Conduct for Professional Accountants* providing a pathway to disclosure of non-compliance with laws and regulations (NOCLAR) to public authorities – allowing accountants to set aside the duty of confidentiality in certain circumstances.

## Question

**CHAIR:** I want to go back to the issue of investigations. In your submission, the AFP talks about some of the difficulties in gathering evidence. In paragraph 32 you say:

... current processes for obtaining such information from financial institutions still largely reflect the historical approach of the criminal law

Could you just elaborate as to what needs to change here in order to facilitate your investigation?

**Mr McCartney:** We have not kept pace with technology. Some of the records we get from financial institutions are still paper based. Our proposal in this space is that the ability to request and receive the information should happen electronically. So, there is a working group, and AGD is a part of that working group at the minute, in terms of potentially putting in place a process. And that is not something that just the AFP wants; the financial institutions would support that, too. So I just do not think there is a requirement for legislative reform; I think we just need to build the framework with some of these financial institutions such that this can occur. It occurs in the UK; it occurs in the States. We are lagging behind in relation to this issue.

**CHAIR:** Just help me to understand this, because I would have thought that just electronic documents on a USB stick—you are saying you cannot ask for that?

**Mr McCartney:** You can from some financial institutions, but it is ad hoc, and it is not optimal in terms of how we engage with these institutions.

**CHAIR:** Which financial institutions?

**Mr McCartney:** I would have to take that on notice.

## Answer

In his evidence to the Committee, Assistant Commissioner McCartney indicated that some financial institutions could be engaged with electronically. To clarify, Assistant Commissioner McCartney was indicating that depending on the legislative framework in place, financial institutions could be engaged electronically in the execution and provision of material required under warrant. Commonwealth legislation (upon which the AFP relies) currently does not facilitate electronic provision of documents in response to a section 3E search warrant. However, some State jurisdictions, such as NSW, have legislation which does facilitate electronic provision of documents requested by police.