JONES DAY | One Firm Worldwide®

WHITE PAPER

June 2021

Australia-U.S. Cooperation in Criminal Cases

U.S. criminal law has a long reach outside the borders of the United States. Australian companies and individuals whose activities touch on the United States—even without having offices or any physical presence in the United States—have the potential to appear on the radar of U.S. enforcement authorities. As some recent U.S. cases show, U.S. and Australian authorities are both increasingly willing to utilise their shared ability to co-operate in investigations of white collar and corporate crime.

This *White Paper* examines the treaty framework between Australia and the United States, by which one country can request and obtain evidence for use in a criminal proceeding or seek to extradite a person to stand trial or serve a criminal sentence. The applicable procedures for mutual legal assistance are then examined, including by way of comparison with procedures available to U.S. regulators seeking civil penalties. This is followed by an overview of relevant legal privileges and protections which apply to mutual assistance requests, together with some concluding observations and practical considerations for Australian corporations and their directors and officers.

TABLE OF CONTENTS

INTRODUCTION

As detailed in a prior article, U.S. criminal law has a long reach outside the borders of the United States—a result of several factors, including laws that allow for the exercise of criminal jurisdiction based on minimal contacts with the United States, such as use of the U.S. banking system; federal prosecutors who are motivated to use those laws to reach beyond U.S. borders and who are increasingly working in conjunction with authorities in other countries; and federal law enforcement agencies that have the resources to conduct and support international investigations.

Australian companies and individuals whose activities touch on the United States—even without having offices or any physical presence in the United States—have the potential to appear on the radar of U.S. enforcement authorities. While this may be as a target in an investigation or even as a defendant in an active prosecution, it may also be as merely a witness. Through channels of international law enforcement cooperation, U.S. authorities can obtain evidence in Australia through their Australian counterparts by means of the compelled production of documents, compelled testimony or invasive search warrants. Further, U.S. authorities may seek the extradition of Australian nationals or residents to the United States to face prosecution there.

U.S. and Australian authorities are both increasingly willing to utilise their shared ability to cooperate in investigations of white collar and corporate crime. This cooperation has been highlighted in some recent U.S. cases:

- In December 2016, the U.S. Department of Justice ("DOJ") announced a resolution with Redflex Traffic Systems Inc. ("Redflex"), a U.S. automated safety company owned by Redflex Holdings Group of Melbourne, which owns a network of digital speed and red-light cameras worldwide, to record and ticket drivers who run red lights.[1] The former CEO of Redflex was convicted, along with a Chicago city official and a lobbyist from Columbus, Ohio, in connection with a probe into bribes paid to elected officials to procure or expand government contracts with Chicago and Columbus. Based on the company's cooperation in these prosecutions, as well as its payment of restitution, the DOJ entered into a nonprosecution agreement with Redflex as part of which "Redflex agreed to cooperate fully with DOJ and any other law enforcement agency designated by DOJ, *including the Australian Federal Police and other Australian law enforcement authorities*".[2]

- In January 2020, Australian derivatives trading firm Propex Derivatives Pty Ltd ("Propex") entered into a deferred prosecution agreement with the DOJ to resolve allegations relating to "spoofing", the practice of placing large orders to buy and sell futures contracts with the intent to cancel them before execution, in order to inject misleading liquidity and pricing information into the futures market.[3] Propex agreed to pay USD $1 million in criminal penalties, criminal disgorgement and victim compensation, and reached a separate settlement with the U.S. Commodities Futures Trading Commission ("CFTC") in a related proceeding. The DOJ publicly acknowledged assistance from the Australian Attorney-General's Department, the Australian Federal Police ("AFP") and the Australian Securities and Investments Commission ("ASIC").

- In January 2021, the DOJ announced the extradition from Australia of two individuals, an Australian national and a Chinese national, on criminal charges including fraud and identity theft.[4] U.S. prosecutors allege that the two individuals conspired with others to generate more than USD $50 million through a scheme to charge hundreds of thousands of mobile phone customers in monthly fees for unsolicited text messages on topics such as horoscopes, celebrity gossip and fun facts. The DOJ publicly acknowledged the assistance of law enforcement partners in Australia, including the International Crime Cooperation Central Authority, the AFP and the New South Wales Police Force.

This increased cooperation should be viewed in the context of an enhanced focus on white collar crime and corporate wrongdoing in Australia in recent years which may increase the frequency of prosecutions. A recent *White Paper* addressed the Australian Law Reform Commission's Final Report on Corporate Criminal Responsibility which, among other things, recommended an expansion of the scope of corporate criminal responsibility. Similarly, ASIC recently published a new policy which provides immunity to individuals who report involvement in market misconduct, such as insider trading, market manipulation, false trading and market rigging. If such developments lead to an uptick in white collar prosecutions in Australia, we expect that the scope of cooperation between U.S. and Australian authorities will broaden correspondingly.

In this environment, it is important that Australian corporations and their directors and officers are aware of the avenues for cooperation between U.S. and Australian authorities and the significant reach that U.S. authorities have in Australia.

This *White Paper* examines the treaty framework between Australia and the United States, by which one country can request and obtain evidence for use in a criminal proceeding or seek to extradite a person to stand trial or serve a criminal sentence. The applicable procedures for mutual legal assistance are then examined, including by way of comparison with procedures available to U.S. regulators seeking civil penalties. This is followed by an overview of relevant legal privileges and protections which apply to mutual assistance requests, together with some concluding observations and practical considerations for Australian corporations and their directors and officers.

TREATY FRAMEWORK

Two bilateral treaties principally govern law enforcement cooperation between Australia and the United States: a mutual legal assistance treaty ("MLAT") and an extradition treaty.

Mutual Legal Assistance Treaty

The MLAT between Australia and the United States—or more formally, the Treaty Between the Government of the United States of American and the Government of Australia on Mutual Assistance in Criminal Matters—was signed in 1997.[5]

The Australia-U.S. MLAT defines the respective "central authorities"—the government agencies charged with carrying out the parties' responsibilities under the agreement—as the Attorney-General for Australia and the U.S. Attorney General. Within those respective agencies, work is done by the International Crime Cooperation Central Authority within the Australian Attorney-General Department, and by the DOJ's Office of International Affairs. As explored further below, the MLAT provides for certain types of assistance, such as taking testimony, producing records, serving documents, locating persons, transferring inmates, and seizing and forfeiting criminal proceeds.

The treaty does not require "dual criminality"—that is, the requesting country may ask for assistance in connection with a criminal investigation without having to establish that the conduct at issue would also be a crime in the requested country. Where there is a lack of dual criminality, however, a country has discretion to deny the foreign assistance request.

In Australia, the Mutual Assistance in Criminal Matters Act 1987 (Cth) ("Mutual Assistance Act") regulates the provision by Australia of international assistance in criminal matters when a request is made by a foreign country. After the MLAT came into effect, the Australian Government implemented regulations providing that the Mutual Assistance Act applies, subject to the terms of the treaty, to requests between Australia and the United States.[6]

Extradition Treaty

The Treaty on Extradition Between Australia and the United States of America ("Extradition Treaty") has been in force since 1976.[7]

The Extradition Treaty contains a list of offenses that can be the basis for extradition, provided that those offenses are punishable under the laws of both countries by a term of imprisonment exceeding one year. The Extradition Treaty provides that, in addition to the listed offenses, extradition shall also be granted for any other offenses that are made extraditable under Australian law and that are felonies under U.S. law. Thus, unlike the MLAT, the Extradition Treaty does require "dual criminality".[8]

In general, extradition is sought either to bring a person to trial or to require a person who has already been convicted to serve a sentence. The Extradition Treaty recites that extradition for the purposes of trial shall be granted only if the evidence is found to be sufficient, according to the laws of the country where the person is found, to justify that person's committal for trial (if the equivalent offense had been committed in the country where the person is found). Extradition for the purposes of serving a sentence shall be granted only if the evidence establishes that the person found is identical to the person convicted by the courts of the requesting state.

Foreign extradition proceedings in Australia are governed by the Extradition Act 1988 (Cth) ("Extradition Act").

CLOUD Act Agreement Negotiations

Currently, Australia and the United States are in the process of negotiating an agreement pursuant to U.S. legislation, passed in March 2018, known as the Clarifying Lawful Overseas Use

of Data Act ("CLOUD Act"). The bilateral agreement, if signed, would facilitate reciprocal production of electronic information held by Australian and U.S. internet service providers in connection with criminal matters.

In October 2019, the Australian Department of Home Affairs issued a statement announcing that the United States and Australia had entered into formal negotiations for a CLOUD Act agreement.[9] According to the Department of Home Affairs, once signed and enacted via domestic legislation, the bilateral agreement would "enable Australian law enforcement to serve domestic orders for communications data needed to combat serious crime directly on U.S.-based companies, and vice versa". This means that law enforcement in both Australia and the United States investigating white collar crimes could obtain communications data held in the other country more quickly and efficiently, and without having to rely on the more onerous process under the MLAT described below. However, to date, an agreement has not yet been signed, and domestic legislation in Australia is yet to be passed.

THE REACH OF U.S. COURTS TO AUSTRALIAN NATIONALS AND CORPORATIONS

Within the framework of the relevant treaties, individuals and corporations in Australia may be the subject of foreign assistance requests made to Australian authorities by U.S. law enforcement. In such cases, there is no requirement that the person from whom information is sought be a putative defendant—such person could be a mere witness. Nor is it a requirement that the person has any connection to the United States. Likewise, individuals in Australia may be the subject of U.S. extradition requests to stand trial on criminal charges in U.S. courts.

Taking Evidence in Australia for Use in U.S. Prosecutions

The MLAT contemplates a range of assistance that each country is required to render the other for obtaining evidence in criminal matters. Some of these measures are more obtrusive than others. Article 5 provides, for example, that the courts in each country are empowered to issue subpoenas and search warrants as necessary to execute the foreign request. For all persons or corporations subject to a foreign request, responding to a subpoena is far less disruptive than being raided by law enforcement. The form of assistance to be sought is left to the discretion of the requesting party.

Beyond issuing subpoenas or seizing documents, the MLAT also provides for the taking of statements or even compelled testimony. Under Article 8 of the MLAT, a person can only be compelled to give testimony or produce records subject to the law of the requested State on immunity, capacity or privilege. That is, in executing an assistance request from U.S. authorities, an Australian court would apply the Australian law of privilege.

Article 8 further provides that if the person from whom evidence is sought asserts a claim of immunity, incapacity or privilege under the law of the requesting State, the evidence shall nonetheless be taken, leaving it to the authorities of the requesting State to later determine the validity of that claim. In other words, in the example of an Australian court executing a U.S. assistance request, the person from whom evidence is sought might successfully invoke an Australian privilege to refuse to produce evidence—but could not, at that stage of the proceedings, invoke a U.S. privilege to refuse to produce evidence. The question of privilege under U.S. law would instead be a matter for determination by the U.S. courts, for example, at the time the U.S. authorities sought to use it in a U.S. court proceeding.

Resisting the Taking of Evidence Under the MLAT

The MLAT is an agreement between two governments, and explicitly states that it "shall not give rise to a right on the part of any private person to obtain, suppress or exclude any evidence, or to impede the execution of a request".[10] For example, in *United States v. Davis*, 767 F.2d 1025, 1029-30 (2d Cir. 1985), the U.S. Court of Appeals for the Second Circuit held that the defendant did not have standing to claim that the U.S. government violated the MLAT between the United States and Switzerland when obtaining his Swiss bank account records, citing a provision similar to that in the Australia-U.S. MLAT.

Under the Mutual Assistance Act, the Australian Attorney-General may refuse a request for assistance from a foreign country if, among other things, the request relates to a political offence; the request relates to an investigation or prosecution of someone based on their race, sex, sexual orientation, religion, nationality or political opinions; there are reasonable grounds for believing that the person is in danger of being subjected to

torture; the granting of the request would prejudice the sovereignty, security or national interest of Australia; or the offence is one in which the death penalty would be imposed.[11]

Further, there are two Australian statutes that may prevent the production of evidence in certain circumstances:

- Sections 41 and 42 of the Foreign Evidence Act 1994 (Cth) allow the Attorney-General to make a written order prohibiting the production or giving of evidence if it is desirable to do so for the purpose of preventing prejudice to Australia's security.

- Sections 6 and 7 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth) allow the Attorney-General to make an order prohibiting the production of a document in a foreign court or the giving of evidence by an Australian citizen or resident in cases in which: (1) such an order is desirable to protect the national interest; (2) the jurisdiction of the foreign court is contrary to international law, comity or practice; or (3) the action taken by the foreign authority is contrary to international law, comity or practice. However, the use of these provisions usually relate to foreign proceedings which may affect the Australian national interest, such as proceedings relating to trade with other countries or amongst the Australian States.[12]

Taking Evidence in Proceedings Issued by U.S. Regulators Seeking Civil Penalties

The processes available to U.S. law enforcement authorities in respect of criminal matters as set out in the MLAT can be contrasted with the processes available to U.S. regulators that issue proceedings against individuals seeking civil penalties, such as the CFTC or the Securities and Exchange Commission ("SEC").

A U.S. regulator may request assistance from Australian regulators in obtaining evidence from individuals or entities located in Australia with both the CFTC[13] and the SEC[14] having entered into a memorandum of understanding ("MoU") with ASIC which allow them to make requests for assistance. Each of the MoUs allow the CFTC or SEC to request that ASIC take testimony from Australian individuals or provide documents located in Australia.

Such testimony or evidence can be taken by ASIC or any other Australian regulator pursuant to the *Mutual Assistance in Business Regulation Act 1992* (Cth) ("MABR Act") which enables Australian regulators "to render assistance to foreign regulators in their administration or enforcement of foreign business laws by obtaining from persons relevant information, documents and evidence and transmitting such information and evidence and copies of such documents to foreign regulators".[15] However, before an Australian regulator provides assistance, it must seek an undertaking from the foreign regulator that the information or evidence it obtains from a person "will not be used for the purposes of criminal proceedings against the person or of proceedings against the person for the imposition of a penalty".[16] As a result, U.S. regulators cannot use the request for assistance procedures under MoUs with ASIC to obtain information and evidence in Australia from defendants or prospective defendants to civil penalty proceedings (although the provision of the required undertaking does not prevent a U.S. regulator from using the evidence obtained under these procedures against persons not subject to the request).

U.S. regulators seeking civil penalties can also follow procedures set out in Australian legislation in Australian states and territories[17] that enact provisions of the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ("Hague Convention"). The Hague Convention allows parties to foreign civil disputes to apply to Australian courts for orders for the taking of evidence in Australia, and generally does not involve any restriction on using the evidence obtained pursuant to the procedures for the purposes of civil proceedings for the imposition of a penalty (including against the person subject to the request).

In the recent case of *Re Application of the Securities and Exchange Commission of United States of America under the Evidence on Commission Act 1995 (NSW) (No 2)* [2020] NSWSC 1500, the SEC applied under s 32 of the *Evidence on Commission Act 1995* (NSW) ("EOC Act") (which is the Hague Convention legislation in NSW) for the examination of a number of Australian-based witnesses. The SEC sought this evidence in support of a proceeding it issued against a U.S. individual for, among other things, securities fraud, and in which the SEC sought relief in the form of an injunction, an asset freeze, disgorgement of ill-gotten gains and civil penalties. The Court rejected an argument made by one of the witnesses that the SEC's application for civil remedies fell within the specific carve out contained in the s 32(2) of the EOC Act for "proceedings relating to the commission of an offence or

an alleged offence" (and thus required the SEC to follow the procedures in the MLAT[18]), finding that the proceeding issued by the SEC in the United States was a civil proceeding in which civil remedies were sought and to which the civil standard of proof applied.[19]

Under Australian law, foreign parties seeking evidence under the Hague Convention must arrange for a court in the relevant foreign jurisdiction to prepare a "letter of request" to an Australian State Supreme Court which requests certain orders for the taking of evidence. However, the State court retains discretion as to whether to make the orders and, in exercising this discretion, may take into account the purpose of the request, the relevance of the evidence sought and the stage that the foreign proceeding has reached at the time of the request.[20]

However, even if the State court grants the orders sought, the Hague Convention process is often time-consuming and costly, particularly compared with the process set out in the MLAT which only requires cooperation between the respective Attorneys-General of the United States and Australia. Furthermore, unlike under the MLAT, a U.S. regulator seeking civil remedies must have issued an active proceeding before a request for the taking of evidence can be made to an Australian court under the Hague Convention process.

Extradition Procedures

All incoming and outgoing foreign extradition requests in Australia are processed pursuant to the Extradition Act. As explained by the Full Federal Court in *Matson v United States of America* (2018) 260 FCR 187, the Extradition Act contemplates four distinct stages:[21]

1. ***Application stage***: Either an application to a Magistrate or an eligible Federal Circuit Court judge ("the specified court") by the country seeking the extradition ("the extradition country")[22] or the receipt by the Australian Attorney-General of an extradition request from an extradition country.[23] In the latter case, once a request is received by the Australian Attorney-General, he or she must exercise their discretion as to whether to give written notice under s 16 of the Extradition Act to the specified court.[24] In exercise of this discretion, the Attorney-General must be satisfied that the person is an "extraditable person," being a person who has been convicted in a foreign country or who is the subject of an arrest warrant in the foreign country.[25] The decision of the Attorney-General to give notice may be challenged by way of judicial review pursuant to s 39B of the *Judiciary Act 1903* (Cth) or s 75(v) of the Australian Constitution.

2. ***Remand stage***: The arrest of the person and consideration by the specified court of whether the person should be remanded in custody or granted bail for such periods as may be necessary for proceedings under s 15A (waiver of extradition), s 18 (consent to surrender) or s 19 (proceedings before specified court to determine whether the person is eligible for surrender).[26]

3. ***Eligibility stage***: The determination by the specified court regarding whether the person is eligible for surrender.[27] This stage is not relevant in cases where the person decides to waive extradition or consent to surrender. When determining eligibility for surrender, the specified court must be satisfied of a number of matters, including that the alleged conduct would have constituted an "extradition offence" if it took place in Australia (i.e., dual criminality) and that there are no substantial grounds for believing that there is an "extradition objection" in relation to the offence—that is, one of the bases under the treaty for denying extradition, such as where the offence is a political offence, or where the person has already been acquitted or pardoned for the offence in the extradition country.[28] Where the specified court makes an order that the person is eligible for surrender, the person may apply to the Federal Court for a review of the order.[29]

4. ***Surrender stage***: The decision by the Australian Attorney-General to surrender the person to the extradition country.[30] Relevant circumstances to be taken into account by the Attorney-General at this stage of the process include satisfaction that there is no applicable extradition objection.

APPLICABLE PROTECTIONS AND PRIVILEGES UNDER THE MLAT

In Australia and the United States alike, the ability of law enforcement (or parties to civil litigation) to gather evidence is limited by certain legal protections and privileges. Of these, one of the most important—and most frequently invoked—is

legal professional privilege. Just as vital is the privilege against self-incrimination applicable in each country. The details of these protections, and the contexts in which they apply, add a level of complexity to foreign legal assistance requests under the MLAT.

Protections in Australian and U.S. Proceedings

For a corporation or individual in Australia who becomes implicated in U.S. criminal proceedings, there are two principal contexts in which questions of privilege may arise. The first is in Australia, where Australian authorities are executing a foreign assistance request or where Australian law enforcement may be gathering evidence for its own related investigation. The second is in the United States, where a corporation or individual may seek to persuade a U.S. court that certain evidence—whether obtained pursuant to the Australia-U.S. MLAT or by other means—is protected by a privilege under Australian or U.S. law.

As discussed above, Article 8 of the MLAT governs the first of these situations. A party may assert an Australian privilege before an Australian court, and may also assert a U.S. privilege, but the U.S. privilege will not shield the party from having to produce evidence at that stage.

U.S. courts do not take a uniform approach in applying foreign laws of privilege. In the recent decision of *Mangouras v. Squire Patton Boggs*, 980 F.3d 88 (2d Cir. 2020) ("*Mangouras*"), the U.S. Court of Appeals for the Second Circuit answered the choice-of-law question by applying a "touch base" test, which had previously been employed by some but not all trial courts. Under that test, a U.S. court applies the law of the country that has the "predominant" or "the most direct and compelling interest" in whether communications should remain confidential, unless the foreign law is contrary to U.S. public policy.[31] The Court explained that the country with the predominant interest is either the place where the allegedly privileged relationship was entered into, or the place in which that relationship was centered at the time of the communication. The Court determined that communications about U.S. legal proceedings, or that reflected the provision of advice about U.S. law, would "touch base" with the United States and would therefore be governed by U.S. law, even if they also involved foreign attorneys or a foreign proceeding.

The *Mangouras* case involved the compelled production of evidence in the United States for use in criminal proceedings in Spain as well as a proceeding before the European Court of Human Rights—the inverse of the situation where evidence from Australia is sought to be used in a U.S. proceeding. The rule in that case certainly suggests that U.S. courts would apply Australian law of privilege to, for example, an attorney-client communication in Australia regarding Australian law. But with any degree of factual complexity, the choice-of-law analysis becomes significantly less predictable.

The "Legal Professional Privilege" (Australia), the "Attorney-Client Privilege" (United States) and the "Work Product Protection" (United States)

In Australia, the common law doctrine of legal professional privilege applies to situations where compulsory disclosure of information is sought in investigations by State authorities.[32] Legal professional privilege is the common law right to maintain confidences and protect from disclosure oral or written communications that have passed between a person (including a corporation) and their legal advisers for the dominant purpose of either obtaining legal advice or assistance from a legal practitioner or for use in actual, pending or anticipated legal proceedings.[33] Under the second limb of the common law test, a legal proceeding is "anticipated" if there is a reasonable probability or likelihood that such proceedings will be commenced.[34] In limited circumstances, a claim for privilege may be rejected on public policy grounds.[35] This may include communications made to further the commission of a crime or fraud.[36]

In the United States, the counterpart to Australian "legal professional privilege" is "attorney-client privilege". Although each of the 50 states has its own doctrine of attorney-client privilege, in federal criminal cases the privilege is determined by application of federal law. The scope of attorney-client privilege under federal law is not codified by rule or statute, but is instead articulated by federal courts. In general, the privilege applies to communications between an attorney and a client for purposes of obtaining or providing legal advice that are intended to be, and in fact were, kept confidential.[37] The privilege applies where the client is a corporation, just as it does where a client is an individual.[38] Among other exceptions, the privilege does not apply to communications made for the purpose of getting advice to commit a fraud or crime.[39]

U.S. law also recognizes a "work product protection" that is distinct from the attorney-client privilege, but that resembles the second limb of the Australian legal professional privilege. In federal cases, the protection applies to "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative," including the other party's attorney.[40]

The Privilege Against Self-Incrimination

In Australia, the privilege against self-incrimination is the right of an individual to refuse to answer a question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal".[41] The privilege is deeply entrenched in Australia's criminal justice system as "a basic and substantive common law right".[42]

However, it remains unsettled whether the privilege against self-incrimination can be invoked in Australia in relation to a potential incrimination under the law of a foreign country, and there are conflicting authorities on the question.[43] In *X v Australian Crime Commission* (2004) 139 FCR 413, the Federal Court of Australia (without reaching a concluded view on the matter) suggested that the better view is that the privilege has no application in relation to foreign offences. As such, if a person subject to a U.S. foreign legal assistance request is only at risk of prosecution by U.S. authorities, there is a chance that they would be unable to claim the privilege in Australia under Australian law, and would be forced to rely on U.S. law and have their privilege claim considered by a U.S. court at a later stage.

The United States' protection against self-incrimination is contained in the Fifth Amendment to the U.S. Constitution. Ratified in 1791, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself". The privilege applies against compelled testimony, and therefore does not protect the contents of business records, which were voluntarily prepared.[44] Unlike the attorney-client privilege, the Fifth Amendment privilege against self-incrimination applies to individuals only, and not corporations.[45]

CONCLUSIONS

There is a well-established framework with broad reach by which U.S. law enforcement bodies can seek to have Australian citizens and noncitizens alike extradited to the United States, or compel individuals or corporations to produce documents or testify for the benefit of U.S. criminal proceedings. This framework is increasingly used in practice, including in white collar matters. There has been a trend of cooperation and support among corporate regulators and prosecuting bodies around the world. We expect this trend to continue, particularly as Australia looks to broaden the scope of corporate criminal responsibility with recent recommendations by the Australian Law Reform Commission and a new policy introduced by ASIC which suggest an increased focus on corporate wrongdoing and white collar crime in Australia. A shared focus on corporate crime by Australian and U.S. regulators and enforcement agencies is likely to result in an increased use of the tools of international cooperation to investigate such crime, as well as encouraging new forms of cooperation.

Company officers and directors in Australia should therefore be mindful not only of developments in Australian enforcement priorities but also of the reach of U.S. enforcement, and take steps to mitigate domestic and foreign prosecution risk through robust compliance, risk management, verification and assurance frameworks. Such individuals should also ensure that they are indemnified under applicable D&O liability insurance and/or deeds of indemnity for defense costs relating to any investigation or proceedings pertaining to potential personal liability under foreign laws.

Persons subject to investigations by U.S. authorities under the MLAT should ensure that they consider, claim and maintain relevant privileges under both Australian and U.S. law. Communications between targets of a U.S. investigation and their lawyers are subject to two layers of privilege under Article 8 of the MLAT: (1) in Australia under the common law doctrine of legal professional privilege; and (2) in the United States under the doctrines of attorney-client privilege and work product protection. However, the position is less clear for claims based on the privilege against self-incrimination, and individuals potentially subject to prosecution by U.S. authorities should seek legal advice in regards to criminal procedure in the United States.

LAWYER CONTACTS

Jennifer Chambers
Sydney
61.2.8272.0706
jchambers@jonesday.com

Theodore T. Chung
Chicago
1.312.269.4234
ttchung@jonesday.com

Steven Fleming
Sydney
61.2.8272.0538
sfleming@jonesday.com

Karen P. Hewitt
San Diego
1.858.314.1119
kphewitt@jonesday.com

Robert S. Huie
San Diego
1.858.314.1123
rhuie@jonesday.com

Tim L'Estrange
Melbourne/Sydney
61.3.9101.6820/61.2.8272.0561
tlestrange@jonesday.com

James P. Loonam
New York
1.212.326.3808
jloonam@jonesday.com

Daniel Moloney
Melbourne
61.3.9101.6828
dmoloney@jonesday.com

Corey Byrne, an associate in the Melbourne Office, and Ellen Kim, an associate in the Irvine Office, assisted in the preparation of this White Paper.

ENDNOTES

1 See U.S. DOJ Press Release, "Redflex Traffic Systems Enters into Non-Prosecution Agreement with United States" (Dec. 27, 2016), available at https://www.justice.gov/opa/pr/redflex-traffic-systems-enters-non-prosecution-agreement-united-states.

2 Ibid (emphasis added). Specifically, the company is required to provide the Australian Federal Police, and other Australian law enforcement authorities, upon request, all non-privileged information, documents, records, or other tangible evidence.

3 See U.S. DOJ Press Release, "Propex Derivatives Pty Ltd Agrees to Pay $1 Million in Connection with Spoofing Scheme" (Jan. 21, 2020), available at https://www.justice.gov/opa/pr/propex-derivatives-pty-ltd-agrees-pay-1-million-connection-spoofing-scheme.

4 See U.S. DOJ Press Release, "U.S. Attorney Announces Extradition Of Two Defendants In Multimillion-Dollar Text Messaging Consumer Fraud Scheme" (Jan. 26, 2021), available at https://www.justice.gov/usao-sdny/pr/us-attorney-announces-extradition-two-defendants-multimillion-dollar-text-messaging.

5 Treaty Between the Government of the United States of America and the Government of Australia on Mutual Assistance in Criminal Matters, Austl.-U.S., signed Apr. 30, 1997, S. Treaty Doc. No. 105-27, 1997 WL 597540.

6 Mutual Assistance in Criminal Matters (United States of America) Regulations 1999, reg. 3.

7 Treaty on Extradition Between Australia and the United States of America, Austl.-U.S., signed May 14, 1974, 27 U.S.T. 957 (entered into force May 8, 1976).

8 In *In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986), the U.S. Court of Appeals for the Ninth Circuit recognized that the Australia-U.S. extradition treaty expressly incorporates the concept of dual criminality. The Court of Appeals further held at 803 that "to satisfy the "dual criminality" requirement, each element of the offense purportedly committed in a foreign country need not be identical to the elements of a similar offense in the United States. It is enough that the conduct involved is criminal in both countries".

9 The Hon Peter Dutton MP, "Joint Statement Announcing United States and Australian Negotiation of a CLOUD Act Agreement by U.S. Attorney General William Barr and Minister for Home Affairs Peter Dutton" (Oct. 7, 2019), available at https://minister.homeaffairs.gov.au/peterdutton/Pages/australian-negotiation-cloud-act.aspx.

10 Treaty Between the Government of the United States of America and the Government of Australia on Mutual Assistance in Criminal Matters, Austl.-U.S., signed Apr. 30, 1997, S. Treaty Doc. No. 105-27, 1997 WL 597540, Art 1(3).

11 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8.

12 "Antitrust laws" are defined to mean "any law of a kind commonly known as an antitrust law and includes any law having as its purpose, or as its dominant purpose, the preservation of competition between manufacturing, commercial or other business enterprises or the prevention or repression of monopolies or restrictive practices in trade or commerce": Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth), s 3(1).

13 Memorandum of Understanding between the Australian Securities Commission and the United States Commodity Futures Trading Commission Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws (19 October 1993).

14 Memorandum of Understanding between the U.S. Securities and Exchange Commission and the Australian Securities and Investments Commission Concerning Consultation, Cooperation and the Exchange of Information related to the Enforcement of Securities Laws (25 August 2008).

15 *Mutual Assistance in Business Regulation Act 1992* (Cth), s 5.

16 *Mutual Assistance in Business Regulation Act 1992* (Cth), s 6(2)(a).

17 *Evidence Act 1971* (ACT), Pt 12B; *Evidence on Commission Act 1995* (NSW), Pt 4; *Evidence Act 1939* (NT), Pt 6, Div 2; *Evidence Act 1977* (Qld), Pt 3, Div 3; *Evidence Act 1929* (SA), s 59F; *Evidence on Commission Act 2001* (Tas), Pt 2; *Evidence (Miscellaneous Provisions) Act 1958* (Vic), Pt I, Div 1C; *Evidence Act 1906* (WA), s 115-118A.

18 The MLAT procedures were not applicable in this case given that the SEC is not a "Central Authority" as defined by the MLAT: *Re Application of the Securities and Exchange Commission of United States of America under the Evidence on Commission Act 1995 (NSW) (No 2)* [2020] NSWSC 1500 at [211].

19 Ibid at [202].

20 *British American Tobacco Australia Services Ltd v Sharon Y Eubanks for the United States of America* (2004) 60 NSWLR 483 at [42] citing *Gredd v Arpad Busson* [2003] EWHC 3001 at [27].

21 *Matson v United States of America* (2018) 260 FCR 187 at [9]-[22].

22 *Extradition Act 1988* (Cth), s 12.

23 *Extradition Act 1988* (Cth), s 16.

24 *Extradition Act 1988* (Cth), s 16(1).

25 *Extradition Act 1988* (Cth), ss 6, 16(2);

26 *Extradition Act 1988* (Cth), s 15.

27 *Extradition Act 1988* (Cth), s 19.

28 *Extradition Act 1988* (Cth), s 7.

29 *Extradition Act 1988* (Cth), s 21.

30 *Extradition Act 1988* (Cth), s 22.

31 *Mangouras*, 980 F.3d at 99.

32 *Baker v Campbell* (1983) 153 CLR 52.

33 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

34 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526.

35 *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 161.

36 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447 at 456 (Lockhart J), 461–463 (Beaumont and Gummow JJ); *Commissioner of Police (Cth) v Propend Finance Pty Ltd* (1997) 188 CLR 501.

37 *See, e.g.*, *United States v. Krug*, 868 F.3d 82, 86 (2d Cir. 2017).

38 *Upjohn v. United States*, 449 U.S. 383, 389-90 (1981).

39 *United States v. Zolin*, 491 U.S. 554, 562-63 (1989).

40 Fed. R. Civ. Pro. 26(b)(3)(A). The doctrine has its exceptions and can be overcome in certain circumstances.

41 *Sorby v Commonwealth* (1983) 152 CLR 281 at 288.

42 *Reid v Howard* (1995) 184 CLR 1 at 11.

43 *See Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4)* [1985] 1 Qd R 127; *FF Seeley Nominees Pty Ltd v El Ar Initiations* (UK) Ltd (1990) 96 ALR 468.

44 *United States v. Doe*, 465 U.S. 605, 611-12 (1984). In *Doe*, the U.S. Supreme Court held that even though the Fifth Amendment does not apply to business records in themselves, it may apply to the *act* of producing such records, in response to a subpoena for example. 465 U.S. at 617.

45 *Braswell v. United States*, 487 U.S. 99, 100 (1988). This is similar to the position under Australian law: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1992-1993) 178 CLR 477.