What's on the regulatory agenda for 2018?

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In brief

This year will witness key changes to the following areas of Australian regulation:

- Whistleblower protection,
- Serious corporate crime, including foreign bribery offences, and
- Anti-money laundering and counter-terrorism financing law.

Whistleblower protections regime

The Federal Government has introduced the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (the Whistleblower Protections Bill) to consolidate existing legislation and improve the protection regime for whistleblowers. The consolidated regime will cover corporate, financial, and tax misconduct.

Serious corporate crime

The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (the Combatting Corporate Crime Bill) will present three substantial changes to Australia's arsenal against serious corporate crime:

- The offence against bribing a foreign public official is to be broadened,
- Corporations will be liable for failing to prevent bribery of a foreign public official by an associate, and
- A new Commonwealth Deferred Prosecution Agreement (DPA) scheme is to be introduced, to encourage corporations to report serious corporate crime and reduce exposure to criminal prosecution.

Anti-money laundering and counter-terrorism financing law

The *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (the AML/CTF Amendment Act) received Royal Assent on 13 December 2017 and is expected to commence in April 2018. The amendments will expand the AUSTRAC CEO's powers and functions, provide regulatory relief to certain low-risk industries, and regulate digital currency exchange providers.

Checklist: our organisation...

Whistleblower policy	✓ **has or is developing a whistleblower policy that provides information about the protections available to whistleblowers, how individuals can make a disclosure, and ensures whistleblowers are not victimised;**
Anti-corporate crime policies	✓ **is updating our anti-corporate crime policies, particularly in relation to preventing foreign bribery;**
DPA scheme	✓ **if facing risk exposure to serious corporate crime, is considering the impact of the DPA scheme;**
AML/CTF	✓ **implements and maintains an up-to-date AML/CTF program.**

In detail

1. Whistleblower protection regime

Detecting corporate and financial misconduct often relies on individuals who are willing to report, usually at their own personal risk. However, Australia's existing whistleblower protection regime is piecemeal in structure, leading to gaps and complexity. Further, the regime does not presently extend to tax misconduct.

To reduce these personal risks and encourage reporting, the Federal Government plans to consolidate Australia's existing whistleblowing protection regime in the *Corporations Act 2001* (Cth) (Corporations Act). Similar amendments will be made to the *Taxation Administration Act 1953* (Cth) (Tax Act) to protect whistleblowers who disclose misconduct in the tax sector.

If passed, the reforms are extensive, and are intended to apply to disclosures made on or after 1 July 2018 (including disclosures about events occurring before this date). Below, we set out a summary of the intended key features of the consolidated whistleblower protection regime.

1.1 Qualifying disclosures

The whistleblower protection regime protects *eligible whistleblowers* who make disclosures about *regulated entities* with respect to certain *disclosable matters*. Such a disclosure is known as a 'qualifying disclosure'.

Regulated entity

Regulated entities will include all corporations captured by the *Corporations Act*. Banks, life insurers, general insurers, superannuation entities and trustees of superannuation entities will also be covered by the consolidated whistleblower protection regime.

Disclosable matter

Conduct that may fall within the parameters of a qualifying disclosure includes actual or suspected misconduct or an improper state of affairs or circumstances with regards to a regulated entity, a contravention of any law overseen by ASIC and/or APRA and the Australian Federal Police (AFP),

conduct that places the public or financial system in danger, and an offence against any law of the Commonwealth that is punishable by imprisonment for 12 months or more.

Eligible whistleblower

A qualifying disclosure can be made by an individual who is, or has been, in a relationship with the regulated entity about which the disclosure is made and will include former employees. Additionally, this could include family members of employees.

An individual is eligible as a whistleblower if their relationship to a regulated entity falls into any of the prescribed categories. The following could be eligible:

1.2 Eligible recipients

An eligible recipient is any person to whom a qualifying disclosure may be made. The range of eligible recipients will be expanded to include a manager or supervisor of the whistleblower. In some situations (e.g. where there is danger to public health and safety), a Member of Parliament or journalist may be considered eligible recipients following any emergency disclosure made to them. Additionally, disclosures to lawyers for the purposes of obtaining legal advice is included.

Under the *Taxation Administration Act*, eligible recipients are generally internal to the entity about which the disclosure is made, or have a relationship with that entity that is relevant to its tax affairs.

1.3 Emergency disclosure

The amendments to the *Corporations Act* establish a new concept of 'emergency disclosure'. This permits disclosure to a third party when:

- the whistleblower has previously made a qualifying disclosure to ASIC and APRA,
- he or she has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety or to the financial system if the information is not acted on immediately, and
- after a reasonable time has lapsed since the disclosure was made, the whistleblower provides the eligible recipient with a written notification that includes sufficient information to identify the previous qualifying disclosure and states that he or she aims to make an emergency disclosure.

Emergency disclosures will not be available with respect to tax misconduct.

1.4 Protections and remedies for whistleblowers

If passed, the level of protection for whistleblowers will be increased in a number of ways:

- Requirement to have a whistleblower policy: public companies, large proprietary companies and registrable superannuation entities must have whistleblower policies. These must be made accessible to officers and employees,
- No requirement to reveal identity: whistleblowers no longer need to reveal their identities when making a disclosure, unless it is made to the Australian Taxation Office (ATO) or the AFP, or a legal practitioner for the purposes of obtaining legal advice in relation to the tax whistleblower protections regime. Further, a whistleblower's identity cannot be disclosed to a court or tribunal without a court order, or the individual's consent,
- Reasonable grounds to suspect: disclosures will be protected where there have been 'reasonable grounds to suspect' a breach of law, as opposed to disclosures needing to be in 'good faith',
- Inadmissibility of evidence against whistleblower: the regime ensures that information disclosed is not admissible in evidence against the whistleblower in any prosecution,
- Anti-victimisation measures: the prohibition against victimisation of whistleblowers is expanded by adding a civil penalty option for prosecution for victimisation, including liability for employers who contribute to victimisation through any act or omission. A broad definition of 'detriment' is introduced, which includes dismissal of an employee, alteration of an employee's position to his or her disadvantage, and harassment or intimidation of a person.

1.5 Requirement to have a whistleblower policy

The existing whistleblower provisions in the *Corporations Act* do not require companies to have internal systems to deal with whistleblower disclosures.

If the Bill is passed, it will require public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have an internal whistleblower policy with information about:

- the protections available to whistleblowers,
- how and to whom an individual can make a disclosure,
- how the company will support and protect whistleblowers,
- how investigations into a disclosure will proceed,
- how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures,
- how the policy will be made available, and
- any other matters prescribed by regulation.

Whistleblower policies must include information about protections that are available to whistleblowers, as well as protections provided in the tax whistleblower regime. Failure to comply with this requirement is an offence of strict liability, with the current penalty proposed being 60 penalty units ($12,600).

1.6 Penalties against company or entity for contravention of whistleblower protections

Contraventions of the whistleblower protection regime carry a maximum penalty of $200,000 for an individual, and $1 million for a corporation. Compensation will also be payable for victimisation of whistleblowers.

Under the current law in the *Corporations Act*, the prosecution must prove the elements of the offence of disclosing the identity of a whistleblower on the criminal standard, beyond a reasonable doubt. The amendments will render it a civil penalty contravention to reveal a whistleblower's identity, thereby allowing the prosecution to make out the elements of the contravention to the lower civil standard of proof.

2. Serious Corporate Crime

Corporate crime costs Australia an estimated $8.5 billion each year, yet successful prosecution has been rare. Proposed new rules will strengthen Australia's approach to serious corporate crime.

The Combatting Corporate Crime Bill was introduced into the Senate in December 2017 and referred to Senate Legal and Constitutional Affairs Legislation Committee, with a report due in April 2018. We review the following three expected developments:

- The offence of bribery of a foreign public official is to be broadened,
- New offence of failure of a body corporate to prevent bribery of a foreign public official by an associate, and
- A new Commonwealth Deferred Prosecutions Agreement regime, in relation to certain serious corporate crimes.

Consequential amendments are also proposed to the *Income Tax Assessment Act 1997* (Cth), to ensure deductions cannot be claimed for a loss or outgoing incurred in making a bribe.

2.1 Bribery of a foreign public official

It is an offence under the *Criminal Code Act 1995* (Cth) to bribe a foreign public official. The proposed amendments (detailed in the below table) will broaden the offence, with the aim of removing undue impediments to successful prosecution.

Key concepts and details

Concept	Details of the amended offence	Details of the existing offence
Business or Personal Advantage	The offence applies to bribery to obtain or retain an advantage. Advantage is broadly defined as an advantage of any kind (business or personal) and is not limited to property.	The existing offence applies only to bribery to obtain or retain business or business advantages. The change broadens this to include non-business advantages.
Improper influence	Based on the concept of improper influence of a foreign public official. This is a broader notion than "not legitimately due". It is not an excuse that a benefit to a foreign public official is perceived to be customary in the situation. It is a defence where local law permits that benefit.	The existing offence requires that the bribe and the business advantage were "not legitimately due". This has enabled bribes to be disguised as, for example, agent fees.
Candidate	Bribery of foreign public officials includes candidates running for public office.	Currently, the offence extends to foreign officials influenced in the exercise of their public duties. Candidates running for office fall outside this scope.
Exercise of official duty	N/A	The existing offence applies only where the foreign public official is influenced in the exercise of official duties. This element is removed in the amended offence.

2.2 Failure of a body corporate to prevent bribery of a foreign public official by an associate

The Combatting Corporate Crime Bill also proposes to introduce a new strict liability offence of failure by a body corporate to prevent foreign bribery by an associate.

This offence can only be committed by a corporation, and corporations can be convicted even if the relevant associate is not successfully convicted (for instance, where conduct of the associate occurred outside Australia and, if engaged in Australia, would have constituted an offence).

A new definition of associate is intended to provide clarify by reference to the associate's role or position relative to the body corporate. A person is an associate of another person (including a corporation) if the first-mentioned person is any of the following:

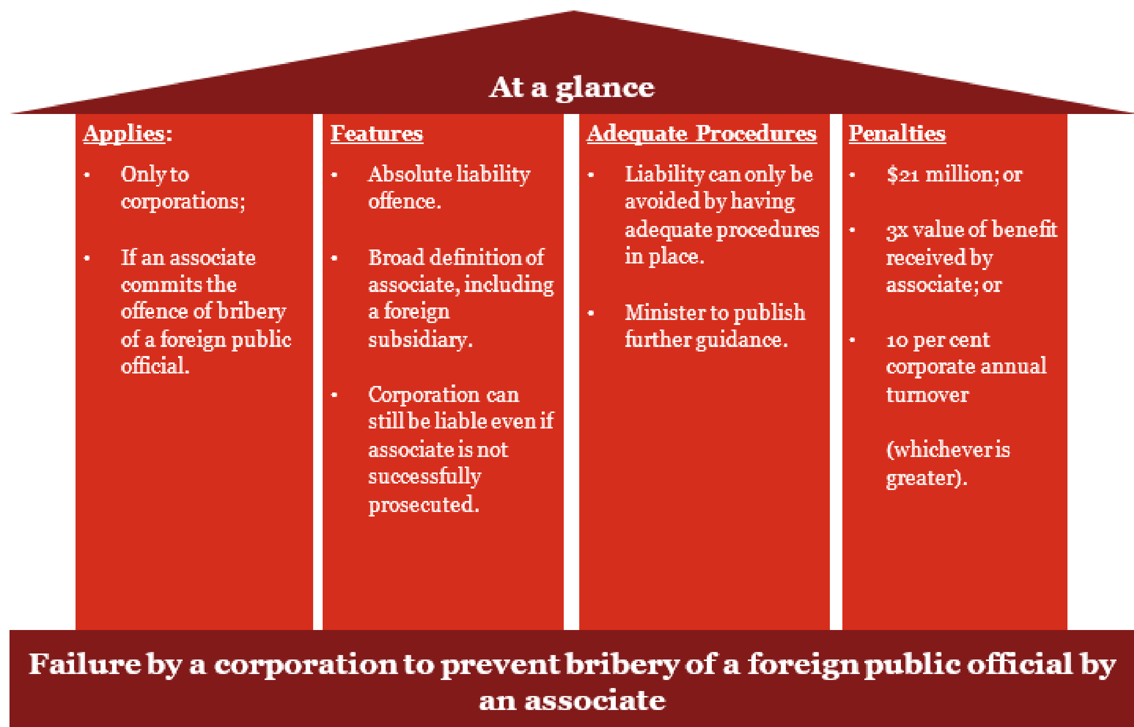
- an officer,
- an employee,
- an agent,
- a contractor,
- a subsidiary (as defined within Division 6 of the *Corporations Act 2001* (Cth), and includes a corporation incorporated outside Australia), or
- controlled by the other person or performs services for or on behalf of the other person.

> *"The only way for a corporation to avoid liability is to have in place adequate procedures and policies to prevent the commission of the offence by an associate."*

Strict liability applies to most elements of the offence. This would mean that corporations cannot avoid liability through wilful blindness or a defence of mistaken fact. The only way for a corporation to avoid liability is to have in place adequate procedures and policies to prevent the commission of the offence by an associate. The AFP and the Commonwealth Director of Public Prosecutions (CDPP) have published a joint guideline (available here), outlining the framework corporations can follow when self-reporting suspected instances of foreign bribery and related offences.

The maximum penalty for breach will be the greatest of the following:

- $21 million,
- 3 times the value of the benefit obtained by the associate, if that benefit can be calculated, or
- 10 per cent of the annual turnover of the body corporate for the 12 months commencing the month after the associate committed first bribed.



2.3 Commonwealth Deferred Prosecution Agreements (DPAs)

The new DPA scheme will enable the CDPP to negotiate a form of cooperation agreement with corporations allegedly involved in serious corporate crime. In exchange, the CDPP would not institute criminal proceedings against the corporation for those specified alleged offences.

A DPA will only be available with respect to 'primary offences', as well as lesser 'secondary offences' arising out of the same course of conduct. The primary offences, which are contained in various federal legislation, include:

> ***The DPA scheme is only available to corporations***
>
> It is designed to address serious corporate crime and encourage self-reporting.

- money laundering and terrorism financing,
- contravention of sanctions,
- market misconduct offences, and
- bribery of public officials.

There are mandatory and optional content DPA requirements. The Government's adoption of a semi-prescriptive approach to DPAs is to ensure consistency in administering the scheme.

A non-exhaustive list of conditions that a corporation entering a DPA may have to comply with include:

DPA Condition	Mandatory?
Preparation of an agreed statement of facts regarding each offence identified in the DPA	✓
Financial penalty	✓* *may be excluded if the CDPP is satisfied that there are exceptional circumstances and a penalty would not be in the interests of justice
Last day for which the DPA will be in force	✓
Requirements to be fulfilled by the person under the DPA	✓
Circumstances that constitute material contravention of the DPA	✓
Consequences of failure to comply with the DPA	-
Compensation for victims, forfeiture of likely benefits, and donation to charity or other third party	-
Implementation of compliance program	-
Cooperation in any investigation or prosecution relating to a matter specified in the DPA	-

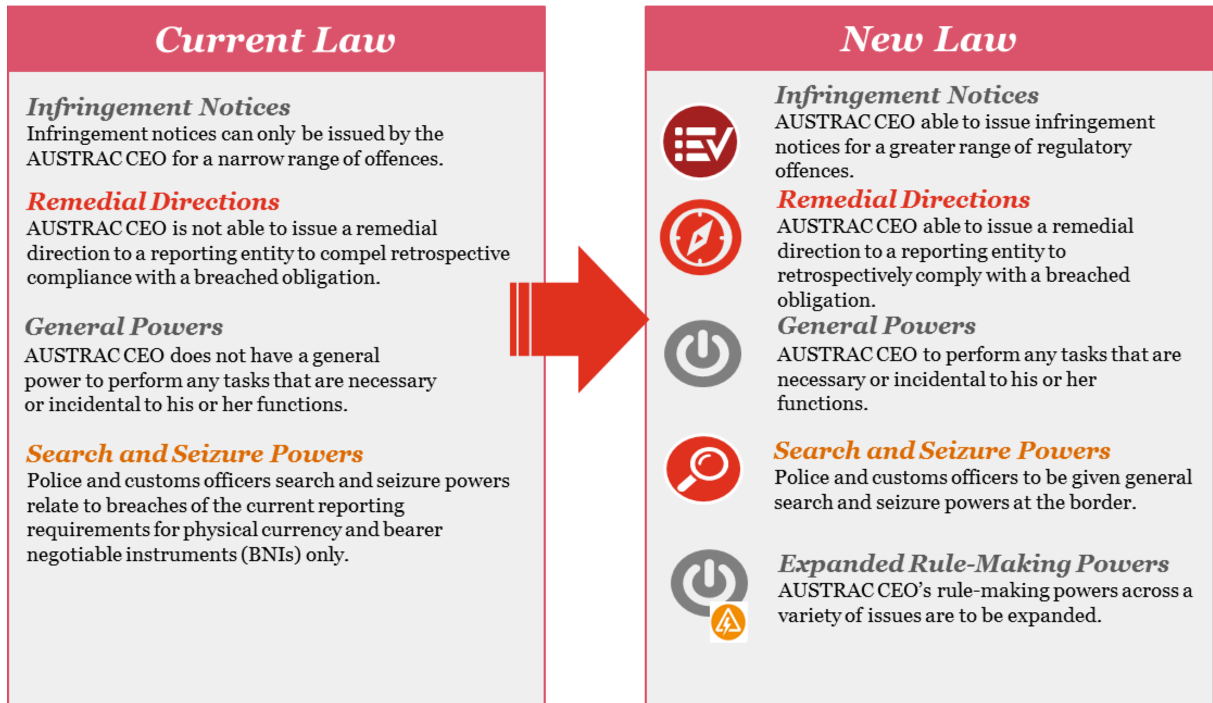
The DPA scheme will only be available to corporations, as it is designed to address serious corporate crime and encourage self-reporting. However, there will be a high threshold for approval of a DPA, and all DPAs must be reviewed by a former judicial officer. The high threshold ensures that DPAs do not become 'get out of gaol free' cards.

Approved DPAs will be published within 10 business days on the CDPP website. In certain cases, such as where publication would pose a threat to public safety or prejudice an ongoing trial or investigation, the CDPP may choose to partially publish a DPA (for instance, by omitting names), or not to publish the DPA at all.

3. Anti-Money Laundering and Counter-Terrorism Financing

The *AML/CTF Amendment Act amends the Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and is expected to take effect from 1 April 2018. Companies should take this opportunity to review and update their AML/CTF programs as the amendments apply to them. A more detailed summary of these new amendments can be found in our Legal Talk – Insights here.

3.1 Expanding the AUSTRAC CEO's powers and functions



The AUSTRAC CEO will have powers to issue infringement notices for a wider variety of regulatory offences and cancel the registrations of remitters under the Remittance Sector Register who are no longer conducting remittance activities, in a bid to ensure that registration certificates are not given to third parties who may wish to avoid scrutiny.

The amendments will broaden the AUSTRAC CEO's power to issue remedial directions, including directions requiring reporting entities to rectify past breaches of civil penalty provisions (for example, a reporting requirement). However, the AUSTRAC CEO can only issue a remedial direction relating to a past breach occurring up to two years from the date of that breach, and if it is an appropriate and proportionate response to that breach. It is anticipated that this power will allow AUSTRAC to more effectively ensure reporting entity compliance and diminish financial intelligence gaps.

Overall, the scope of the AUSTRAC CEO's functions will be significantly expanded, with the inclusion of a power for the CEO to do all things necessary or convenient for the fulfilment of his or her duties.

3.2 Providing regulatory relief to industry

The AML/CTF Amendment Act introduces the notion of a 'corporate group' (alongside the "designated business group"), enabling multi-business corporate groups to share AML/CTF resources and achieve regulatory efficiency.

Further, the amendments will bring about regulatory relief to those in the cash-in-transit sector, insurance intermediaries and general insurance providers, on the basis that such sectors had been assessed to pose only a low money laundering and terrorism financing risk (save for motor vehicle dealers who act as insurers or insurance intermediaries).

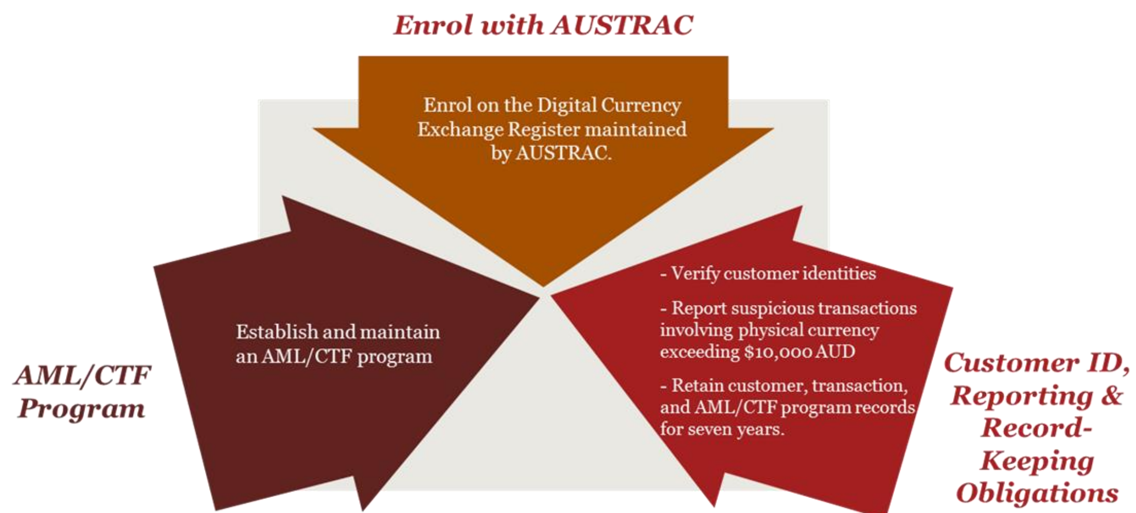
3.3 Regulating digital currency exchange providers

Digital currencies have grown in popularity in recent times. Often, they lie outside the scope of regulatory oversight, which can present opportunities for money laundering or terrorism financing. The new regime

will apply AML/CTF regulation to businesses which exchange digital currencies for money (e.g. Bitcoin exchanges). Specifically, digital currency exchange providers will be required to:

- enrol on the new Digital Currency Exchange,
- establish and maintain an AML/CTF program to identify and manage associated risks,
- verify customer identities,
- report suspicious activities and transactions involving physical currency that exceeds $10,000 or more (or foreign equivalent) to AUSTRAC, and
- keep particular records relating to transactions, customer identification, and their AML/CTF program for seven years.

Under the amendments, if a person provides digital currency exchange services without first being registered on the Digital Currency Exchange Register, he or she will face a penalty of imprisonment for two years or $105,000, or both.



These amendments will fill regulatory gap with respect to businesses involved in providing digital currency exchange services, in the hopes of mitigating the money laundering and terrorism financing risks often associated with the digital currency sector.

3.4 Important to maintain an up-to-date AML/CTF program

A decision handed down by the Federal Court[1] late last year highlights the importance of maintaining an up-to-date AML/CTF program. The Court found that an AML/CTF program which does not conform to the AML/CTF Act and Rules is effectively the same as not having a program in operation at all when it comes to establishing liability for a breach of s 81 of the AML/CTF Act – this section provides that a reporting entity must create and maintain an AML/CTF program.

In light of above legislative changes, particularly the AUSTRAC CEO's expanded powers and functions, companies should review and update their AML/CTF programs to ensure compliance with the AML/CTF Act and Rules.

[1] *Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited (No 3)* [2017] FCA 1296.

The takeaway

Whistleblower protections regime

The Whistleblower Protections Bill will consolidate and strengthen the protections and remedies accessible to eligible whistleblowers in the corporate, financial and tax sectors.

Alongside companies developing or updating their whistleblower protection policies, these legislative changes will are intended encourage employees to actively report any transgressions occurring in the workplace. The policy should also be implemented properly to ensure protections are provided and companies are not at risk of breaching these new laws.

Serious Corporate Crime

There are substantial proposed amendments to foreign bribery offences, and the only way for corporations to avoid liability under a new offence of failure to prevent foreign bribery by an associate is to have in place adequate procedures. All corporations, particularly those operating internationally, should take this as an opportunity to review and update anti-corporate crime policies.

In addition, a new Commonwealth Deferred Prosecution Agreement scheme will change the way in which businesses investigate and respond to serious corporate crime.

Anti-money laundering and counter-terrorism financing law

Upon commencement, the AML/CTF Amendment Act will significantly expand the AUSTRAC CEO's powers and functions, deregulate low-risk industries such as the cash-in-transit sector, and regulate digital currency exchange providers, such as Bitcoin exchanges.

Digital currency exchange providers should ensure that they are compliant with AML/CTF, particularly the requirement to enrol on the Digital Currency Exchange Register, as well as the requirement to create and maintain an AML/CTF compliance program.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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