

ALLEGED MISUSE OF CONFIDENTIAL ATO INFORMATION

PwC AUSTRALIA

POSSIBLE ENFORCEMENT RESPONSES

OVERVIEW

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I SUMMARY

1. Three central possible kinds of enforcement response to the alleged misuse of confidential ATO information by PwC Australia are discussed in this overview:
 - (a) The potential criminal liability of individuals who are partners or employees of PwC Australia implicated in the alleged misuse of ATO confidential information and clients knowingly implicated in that misuse;
 - (b) The possibility of using a deferred ban agreement between the Commonwealth and PwC Australia with conditions designed to uphold accountability for past wrongful conduct and protect the Commonwealth against any possible future wrongful conduct; and
 - (c) The possibility of using a deferred ban agreement between the Commonwealth and PwC Australia with conditions designed to expedite the recovery of damages from PwC for loss suffered by the Commonwealth.

¹ Brent Fisse Lawyers, Sydney. Publications include: *Howard's Criminal Law* (Law Book Co, 5th ed 1989); B Fisse, D Fraser & G Coss (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book Co, 1992); B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (Cambridge Univ Press, 1993); C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (Cambridge Univ Press, 2011). The usual disclaimers apply. One is that this is a paper for the purpose of discussion, not legal advice.

(a) The potential criminal liability of individuals who are partners or employees of PWC Australia implicated in the alleged misuse of ATO confidential information and clients knowingly implicated in that misuse

2. Partners, employees and clients allegedly involved (the presumption of innocence applies unless and until alleged facts and offences are proven) in misuse of confidential ATO information may be exposed to prosecution for the offences of 'General dishonesty' and 'Conspiracy to defraud' the Commonwealth under the Criminal Code (Cth). These are serious offences, subject to a maximum term of imprisonment of 10 years. The presumption of innocence applies unless and until they are proven.
3. Such alleged facts and offences, if proven, and if they caused or were intended to cause a loss to the Commonwealth or another person of at least \$10,000, could attract the application of the pecuniary penalty regime under the Proceeds of Crime Act 2002 (Cth) and potential recovery of benefits derived from commission of the offences.
4. A full AFP investigation should be undertaken into the potential application of the Criminal Code and the Proceeds of Crime Act. Perhaps such an investigation has commenced or is under consideration.
5. Nothing in this overview suggests that alleged events have been established as facts or that any offences have in fact occurred. Investigation is merely a step in the possible enforcement process and does not imply criminal or civil liability.

(b) The possibility of using a deferred ban agreement between the Commonwealth and PWC Australia with conditions designed to uphold accountability for past conduct and protect the Commonwealth against future misconduct

6. The PWC Australia partnership would not be exposed to potential criminal liability for general dishonesty or conspiracy to defraud because, as a partnership, PWC Australia is not subject to corporate criminal liability. However, the Commonwealth has the power to impose remedies informally or contractually on PWC Australia. One possible remedy would be a ban on contracts by the Commonwealth with PWC Australia in relation to a specified range of contracts (all?) for a specified period (5 years?). If that approach is

considered by the Commonwealth to be too drastic or counterproductive to the interests of Australian citizens and public administration (noting utility of expertise of PwC for Government agencies), an alternative approach would be to have PwC Australia enter into a deferred ban agreement (akin to a deferred prosecution agreement, as below discussed).

7. The conditions imposed by a deferred ban agreement might be designed to assist investigation of the relevant partners, employees and clients for possible offences under the Criminal Code, and to provide strong incentives for PwC Australia to design and implement more effective governance controls and compliance precautions. The contractual conditions could address co-operation by PwC with the investigation of Criminal Code offences, PwC's internal accountability controls, compliance procedures, disgorgement of profits proven to have been wrongfully derived, certification and audit procedures for Commonwealth contracts, and other measures.
 8. The conditions of a deferred ban agreement might also require PwC to use a corporate entity under the Corporations Act when contracting with the Commonwealth. This requirement would mean that directors' duties and other safeguards under the Corporations Act would apply to PwC when PwC does contract work for the Commonwealth. The required directors of that entity might include members of the Executive Board of the PwC Australia partnership.
- (c) The possibility of using a deferred ban agreement between the Commonwealth and PwC Australia with conditions designed to expedite the recovery of damages from PwC for loss suffered by the Commonwealth**
9. Published allegations include that at least some relevant PwC partners entered into confidentiality (non-disclosure) agreements with the Commonwealth in relation to some relevant information. If PwC Australia is proven has breached a contractual confidentiality obligation, and/or a confidentiality obligation enforceable in a court's equitable jurisdiction, contractual and/or equitable claims for damages could be made by the Commonwealth. The Commonwealth might seek to recover financial damages including lost tax revenue.
 10. The pursuit of damages claims by litigation could be a long and costly process.

11. A more expeditious approach would be to make the compensation of loss suffered by the Commonwealth a condition of the deferred ban agreement outlined in (b) above, Compensation conditions are a feature of many deferred prosecution agreements used by the US Department of Justice and the Securities and Exchange Commission. A similar approach could readily be taken in a deferred ban agreement between the Commonwealth and PwC Australia.

II AERIAL VIEW OF THE POSSIBLE ENFORCEMENT RESPONSES OUTLINED ABOVE

A The potential criminal liability of individuals who are partners or employees of PWC Australia and clients implicated in the misuse of ATO confidential information

12. PWC Australia is a partnership in the ACT (under the Partnership Act 1963), with around 900 partners. (PWC Australia, Transparency Report FY22, 8, at: <https://www.pwc.com.au/about-us/firmwide-transparency-report-fy22.html>) Various PWC companies are incorporated under the Corporations Act. However, these appear to be service or holding companies that do not provide taxation advisory services.
13. The Corporations Act s 115(1) lays down the general rule that a partnership cannot have more than 20 partners. However, an exemption under s 115(2) by s 2A of the Corporations Regulations allows accounting partnerships to have a maximum of 1000 partners.
14. A partnership is not subject to corporate criminal liability. However, individuals who are partners and employees of a partnership are subject to criminal liability for offences they commit or in relation to which they are subject to ancillary liability (eg as an accomplice).
15. Directors' duties under the Corporations Act do not apply to the PWC Australia partnership. The Partnership Act 1963 (ACT) does not make partners liable for failures like breaches of directors' duties, such as the failure of a director or other officer to comply with the duty under s 180(1) of the Corporations Act to exercise reasonable care and diligence, and other duties including the duty under s 183(1) not to improperly use information to gain an advantage. The use of a partnership structure by large accounting firms with the practical effect of avoiding corporate governance requirements of the Corporations Act is unsatisfactory as a matter of good public policy and equity between regulated businesses.
16. The main potential offences raised by alleged misuse of confidential ATO information (the presumption of innocence applies unless and until alleged facts and offences are proven) are general dishonesty under s 135.1 and conspiracy to defraud under s 135.4 of the Criminal Code (Cth).
17. There are several kinds of general dishonesty under s 135.1 of the Criminal

Code. The most relevant potentially in this case is under s 135.1(5), dishonestly causing a loss or risk of a loss to the Commonwealth:

135.1 General dishonesty

Causing a loss

(5) A person commits an offence if:

- (a) the person dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and
- (b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and
- (c) the other person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

18. There are several kinds of conspiracy to defraud under s 135.4. The most relevant in the current alleged fact scenario is possible (if proven) conspiracy to dishonestly cause a loss or a risk of loss to the Commonwealth under s 135.4(5):

1 35.4 Conspiracy to defraud

Causing a loss

5 5) A person commits an offence if:

- (a) the person conspires with another person to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person; and
- (b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and
- (c) the third person is a Commonwealth entity.

Penalty: Imprisonment for 10 years.

14. The elements of the offences would need to be proven beyond a reasonable doubt. Those elements include dishonesty and intention (a fault element). "Dishonesty" is defined in s 130.3 of the Criminal Code to mean: (a) dishonest according to the standards of ordinary people; and (b) known by the defendant to be dishonest according to the standards of ordinary people. Determination of dishonesty is a matter for the trier of fact (s 130.4).
15. The relevant Criminal Code offences referred to above lead to the potential operation of the Proceeds of Crime Act 2002 (Cth). The offences would come within the definition of 'serious offences' under the Proceeds of Crime Act if

the unlawful conduct caused, or was intended to cause, a loss to the Commonwealth or another person of at least \$10,000.

16. Pecuniary penalty orders can be made under the Proceeds of Crime Act in relation to benefits derived from a 'serious offence' under the Act. Pecuniary penalty orders quantify and strip away the benefit that a person has derived from a 'serious offence'. They do not necessarily require conviction for the underlying crime. The standard of proof is the civil standard of proof of balance of probabilities, not the criminal standard of proof beyond a reasonable doubt. In the current alleged fact scenario and if offences were proven, potential exposure extends beyond PWC Australia partners and employees implicated in the misuse of ATO confidential information, and potentially includes PWC clients that benefitted from the knowing commission by them of a proven serious offence.
17. There are also possible issues of liability in other jurisdictions. Factual allegations include that especially the USA where PWC appears to have marketed taxation avoidance schemes in the USA in relation to which confidential ATO information allegedly was used. If these allegations were proven, there is possible application of the Racketeer Influenced and Corrupt Organizations Act (US) (RICO). Predicate conditions for the application of the severe sanctions and remedies under RICO include mail or wire fraud. Mail and wire fraud are offences of potentially wide application to the communication of fraudulent schemes to victims or clients.

B The possibility of using a deferred ban agreement between the Commonwealth and PWC Australia with conditions designed to uphold accountability for past conduct and protect the Commonwealth against future misconduct

18. The Commonwealth has substantial negotiation leverage over PWC Australia, given the possibility of a ban on contracts with PWC and having regard to the value of Government contracts to PWC Australia. The Commonwealth might use that leverage to impose conditions on future work for the Government by PWC. Those conditions would need to address the past by requiring PWC Australia to cooperate in the investigation and enforcement of possible offences under the Criminal Code in relation to partners, employees and clients implicated in the misuse of confidential ATO information. They would also need to address the future by requiring PWC

Australia to take a range of precautions to protect the Commonwealth against the risk of abuse of trust and unlawful conduct by PWC in the years ahead.

19. One possible mechanism would be a deferred ban agreement comparable to the deferred prosecution agreements often used in the USA by the Department of Justice and the Securities Exchange Commission. Under this mechanism PWC Australia would be required to undertake specified remedial action under the threat of being banned from specified kinds of contracts with the Commonwealth in the event of non-compliance with the conditions imposed by the deferred ban agreement. If PWC Australia were not prepared to enter into a deferred ban agreement, the consequence might be no further grant of Commonwealth contracts unless and until PWC Australia did enter into that agreement.
20. Deferred prosecution agreements are also used by the Serious Fraud Office in the UK. They have been proposed in Australia for use in some areas, but legislation for implementing the proposal has yet to be passed.
21. There are hundreds of examples of deferred prosecution agreements. One example is attached as Attachment A: United States of America v The Boeing Company, 4:21-CR-005-O, Deferred Prosecution Agreement, Jan 7, 2021 (click pdf object twice to open).
22. The conditions imposed by deferred prosecution agreements in the USA are wide-ranging. The requirements vary from case to case but include co-operation with law enforcement, compensation of victims, disgorgement of illicit profit, internal disciplinary action, improvement of compliance procedures, monitoring of compliance with the conditions by an independent monitor, obligations to disclose additional related conduct or evidence of illegal activity identified during the term of the agreement, and certification at the conclusion of the term that all relevant evidence has been disclosed.
23. There is no need here to re-invent the wheel. Precedents for the conditions outlined above and many more are readily available. The law enforcement co-operation obligations imposed in ACCC cartel immunity cooperation agreements are basic but also useful and readily adaptable (see Attachment B).
24. One important condition in a deferred ban agreement between the

Commonwealth and PwC Australia could be a condition requiring PwC to use a corporate entity under the Corporations Act when contracting with the Commonwealth. The aim would be to ensure that directors' duties and other safeguards under the Corporations Act apply to PwC when contracting with the Commonwealth.

C The possibility of using a deferred ban agreement between the Commonwealth and PwC Australia with conditions designed to expedite the recovery of damages from PwC for loss suffered by the Commonwealth

25. If PwC Australia has breached a contractual confidentiality obligation, and/or a confidentiality obligation in equity, then contractual and/or equitable claims for damages could be made by the Commonwealth. Relevant losses to be considered would include lost tax revenue if that loss resulted from the alleged misuse of confidential ATO information.
26. The pursuit of damages claims by litigation against PwC Australia doubtless would be a long and costly process.
27. A much more expeditious approach would be to make the compensation of loss suffered by the Commonwealth a condition of the deferred ban agreement outlined in B above.
28. Compensation conditions are a feature of many deferred prosecution agreements used by the US Department of Justice and the Securities and Exchange Commission. See for example the compensation conditions in *United States of America v The Boeing Company*, 4:21-CR-005-O, Deferred Prosecution Agreement, Jan 7, 2021 (Attachment A) (click pdf object twice to open).
29. Note Clause 12 of the Boeing deferred prosecution agreement. Clause 12 requires that Boeing pay a total Airline Compensation Amount of \$1,770,000,000 to its airline customers for the direct pecuniary harm that its airline customers incurred as a result of the grounding of Boeing's 737 MAX.
30. Note also Clause 13 of the Boeing deferred prosecution agreement. Clause 13 requires that Boeing pay a total Crash-Victim Beneficiaries Compensation Amount of \$500,000,000 to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302.

ATTACHMENT A

Example of US DOJ Deferred Prosecution Agreement

IN THE UNITED STATES DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF TEXAS
 Fort Worth Division

FILED
 January 7, 2021
 KAREN MITCHELL
 CLERK, U.S. DISTRICT
 COURT ^{SD}

UNITED STATES OF AMERICA)
 v.)
 THE BOEING COMPANY.)
 Defendant.)

4:21-CR-005-O

DEFERRED PROSECUTION AGREEMENT

Defendant The Boeing Company (the "Company"), pursuant to authority granted by the Company's Board of Directors reflected in Attachment B, the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section"), and the United States Attorney's Office for the Northern District of Texas (the "USAO-NDTX") enter into this deferred prosecution agreement (the "Agreement"). The terms and conditions of this Agreement are as follows:

Criminal Information and Acceptance of Responsibility

1. The Company acknowledges and agrees that the Fraud Section will file the attached one-count criminal information in the United States District Court for the Northern District of Texas charging the Company with Conspiracy to Defraud the United States, in violation of Title 18, United States Code, Section 371 (the "Information"). In so doing, the Company: (a) knowingly waives any right it may have to indictment on this charge, as well as all rights to a

ATTACHMENT B

ACCC cartel immunity policy

Template cooperation agreement



AUSTRALIAN COMPETITION & CONSUMER COMMISSION

COOPERATION AGREEMENT

Parties

1. This cooperation agreement is entered into by:
 - a. the Australian Competition and Consumer Commission (ACCC), an independent, Commonwealth statutory authority established under section 6A of the *Competition and Consumer Act 2010 (CCA)*; and
 - b. [Company name ACN XXX XXX XXX (Name), company description] of [company registered address],(together, **the parties**).

Recitals

2. [Name] hereby:
 - a. declares that it understands its obligations under the *ACCC immunity and cooperation policy for cartel conduct October 2019 (Immunity Policy)*;
 - b. understands that any grant of conditional immunity for cartel conduct under the Immunity Policy will be conditional upon and will depend upon it satisfying, and continuing to satisfy, its obligations under the Immunity Policy and in this agreement;
 - c. understands that nothing in this agreement derogates from the ACCC's right to revoke its conditional civil immunity under Section F of the Immunity Policy should it breach the terms of this agreement or the conditions outlined in the Immunity Policy.

Conditions of obtaining and maintaining immunity

3. [Name] agrees;
 - a. to comply with the specific initial requirements of cooperation on or before the dates specified in the timetable set out in **Schedule 1** to this agreement; and
 - b. to comply with additional requirements of cooperation set out in writing by the ACCC from time to time,

during the course of the ACCC's investigation and any ensuing court proceedings, unless otherwise agreed in writing by the ACCC.

4. The ACCC agrees that upon [Name] disclosing information sufficient to satisfy the ACCC that it meets the criteria for conditional immunity in paragraph 23 [for corporations] of the Immunity Policy it will be granted conditional immunity.

Cessation of this cooperation agreement

5. This cooperation agreement shall cease on the occurrence of the earlier of:
 - a. the ACCC informing [Name] that it will not be granted conditional immunity;
 - b. the withdrawal of the immunity application by [Name];
 - c. the revocation of any conditional immunity offered to [Name]; or
 - d. the grant of final immunity to [Name].

Execution

Executed by [Company name ACN XXX XXX XXX] pursuant to section 127(1) of the
Corporations Act 2001 by:

Signature of director

Signature of a director/company secretary
[Delete as appropriate, or entire column if sole
director company]

Name of director (print)

Name of director/company secretary (print)

Date

Date

Accepted by the Australian Competition and Consumer Commission on:

Date

Signed on behalf of the Australian Competition and Consumer Commission:

General Manager - Cartels Branch

Date

Schedule 1

Timetable for initial cooperation

[These are examples of the type and level of cooperation that may be required, but this is not an exhaustive list.]

Action	Due date
(a) [Name] to provide to the ACCC all evidence and information in its possession or available to it, wherever located, regarding the cartel conduct for the duration of the investigation and any subsequent court proceedings [or specified documents and/or information],	
(b) [Name] to preserve, and assist the ACCC to retrieve, all information related to the conduct and/or relevant to the ACCC's investigation, including preservation of, access to, and assistance with, all IT systems and equipment under [Name's] power or control	
(c) [Name] to procure the assistance and cooperation of [Individual X] to attend an interview at the ACCC's [insert] office.	
(d) [Name] to procure the assistance and cooperation of [Individual X] to attend an interview at the ACCC's [insert] office for the purpose of providing the ACCC with a statement in writing regarding their knowledge of, and participation in, the cartel conduct subject of [Name's] application for immunity.	
(e) [to be inserted on a case-by-case basis]	