

---

THE  
INTERNATIONAL  
INVESTIGATIONS  
REVIEW

---

EDITOR  
NICOLAS BOURTIN

LAW BUSINESS RESEARCH

# THE INTERNATIONAL INVESTIGATIONS REVIEW

---

---

Reproduced with permission from Law Business Research Ltd.

This article was first published in The International Investigations Review,  
1st edition (published in September 2011 – editor Nicolas Bourtin).

For further information please email [Adam.Sargent@lbresearch.com](mailto:Adam.Sargent@lbresearch.com)

THE  
INTERNATIONAL  
INVESTIGATIONS  
REVIEW

---

Editor  
NICOLAS BOURTIN

LAW BUSINESS RESEARCH LTD

PUBLISHER  
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER  
Adam Sargent

MARKETING MANAGERS  
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT  
Robin Andrews

EDITORIAL ASSISTANT  
Lydia Gerges

PRODUCTION MANAGER  
Adam Myers

PRODUCTION EDITOR  
Joanne Morley

SUBEDITORS  
Sarah Morgan, Caroline Rawson

EDITOR-IN-CHIEF  
Callum Campbell

MANAGING DIRECTOR  
Richard Davey

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2011 Law Business Research Ltd

© Copyright in individual chapters vests with the contributors  
No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2011, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-907606-19-9

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: +44 870 897 3239

# ACKNOWLEDGEMENTS

---

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BOFILL MIR & ÁLVAREZ JANA

BOWMAN GILFILLAN INC

CAVALCANTI & ARRUDA BOTELHO ADVOGADOS

CHAVES AWAD CONTRERAS SCHÜRMMANN

DLA PIPER UK LLP

DR KAI HART-HOENIG RECHTSANWÄLTE

GILBERT + TOBIN

LINKLATERS

SCHELLENBERG WITTMER

SJÖCRONA VAN STIGT

STUDIO LEGALE PULITANÒ ZANCHETTI

SULLIVAN & CROMWELL LLP

SZECSKAY ATTORNEYS AT LAW

URÍA MENÉNDEZ

VON WOBESER Y SIERRA SC

WONGPARTNERSHIP LLP

## CONTENTS

---

<b>Editor's Preface</b> .....	vii
<i>Nicolas Bourtin</i>	
<b>Chapter 1</b> AUSTRALIA .....	1
<i>Rani John, Elizabeth Avery, Peter Feros, Justine Cameron, Freya Smith, Peter Giurissevich and Kaushalya Mataraaratchi</i>	
<b>Chapter 2</b> BELGIUM .....	19
<i>Françoise Lefèvre and Johan Verbist</i>	
<b>Chapter 3</b> BRAZIL .....	33
<i>Dora Cavalcanti Cordani</i>	
<b>Chapter 4</b> CHILE .....	41
<i>Jorge Bofill and Miguel Chaves</i>	
<b>Chapter 5</b> ENGLAND & WALES .....	51
<i>Simon Airey and Debra Baynham</i>	
<b>Chapter 6</b> GERMANY .....	63
<i>Kai Hart-Hoenig</i>	
<b>Chapter 7</b> HUNGARY .....	71
<i>Zoltán Balázs Kovács, Anikó Keller and Miklós Boronkay</i>	
<b>Chapter 8</b> ITALY .....	83
<i>Mario Zanchetti</i>	
<b>Chapter 9</b> MEXICO .....	94
<i>Claus von Wobeser and Fernando Carreño</i>	
<b>Chapter 10</b> NETHERLANDS .....	106
<i>Alexander de Swart and Max Vermeij</i>	
<b>Chapter 11</b> SINGAPORE .....	115
<i>Joy Tan and Koh Swee Yen</i>	

<b>Chapter 12</b>	SOUTH AFRICA.....	135
	<i>Matthew Purchase</i>	
<b>Chapter 13</b>	SPAIN.....	148
	<i>Ismael Clemente and Belén Alonso de Castro</i>	
<b>Chapter 14</b>	SWITZERLAND .....	161
	<i>Benjamin Borsodi</i>	
<b>Chapter 15</b>	UNITED STATES .....	169
	<i>Nicolas Bourtin and Nathaniel Green</i>	
<b>Appendix 1</b>	ABOUT THE AUTHORS.....	180
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS .....	190

## EDITOR'S PREFACE

---

It's a rare day when US newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Environmental crimes. Export controls and other trade sanctions.

US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, has been punished severely by record-breaking fines and the prosecution of corporate employees. Already complex interlocking legal and regulatory regimes have become even more labyrinthine with the passage of new laws in the wake of the recent economic crisis, and the compliance burdens imposed on corporations have grown ever more onerous.

This trend has by no means been limited to the US; while the US government is at the forefront of the movement to globalise the prosecution of corporations, the scenes in Europe and Asia are similar, as non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations, and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. This trend shows no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can substitute for the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world is undoubtedly long overdue and will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions

and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is a trial a realistic option? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your client faces criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that in its first edition, this volume provides impressive coverage for 15 countries.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

**Nicolas Bourtin**

Sullivan & Cromwell LLP

New York

August 2011

## Chapter 12

---

# SOUTH AFRICA

*Matthew Purchase\**

### I INTRODUCTION

South Africa is a signatory to the most significant global conventions against corruption and cross-border crime<sup>1</sup> and has enacted a comprehensive domestic legislative framework<sup>2</sup> specifically to give effect to those conventions and generally to facilitate the investigation and prosecution of unlawful conduct.

The following significant Acts form part of the domestic criminal legislative framework:

- a* The Prevention and Combating of Corrupt Activities Act<sup>3</sup> ('PACCA') provides measures to combat corruption and corrupt activities in both the private and public sphere. The Act creates a general offence of corruption<sup>4</sup> as well as numerous specific corruption offences.<sup>5</sup> The Act also contains important

---

\* Matthew Purchase is a director at Bowman Gilfillan Inc.

1 The international conventions signed and ratified by South Africa include the Organisation for Economic Co-operation and Development Convention on Bribery of Foreign Public Officials in international Business Transactions; the United Nations Convention and Protocols Against Transnational Organized Crime; the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.

2 Copies of the legislation referenced in this chapter can be obtained at [www.gov.za](http://www.gov.za).

3 Act 12 of 2004.

4 Section 3.

5 Examples of specific corruption offences include corrupt activities relating to contracts (Section 12) and corrupt activities relating to the procuring and withdrawal of tenders (Section 13). The formulation of each specific offence of corruption is substantially similar to the general offence of corruption, with the addition in each case of provisions making the offence applicable to specific circumstances or persons.

provisions concerning reporting obligations, extraterritorial jurisdiction and applicable penalties.

- b* The Prevention of Organised Crime Act<sup>6</sup> ('POCA') introduces measures to combat organised crime, money laundering and criminal gang activities, and in addition provides mechanisms for the recovery of the proceeds of crime as well as assets used in the commission of crimes.
- c* The Financial Intelligence Centre Act<sup>7</sup> ('FICA') creates an important obligation on persons to report suspicious and unusual transactions,<sup>8</sup> and imposes extensive 'know your client' requirements<sup>9</sup> on 'accountable institutions' as defined in the Act and obliges those accountable institutions to keep records of, *inter alia*, (1) the identity of the client, (2) the nature of the transaction, (3) the parties to the transaction and (4) the amounts involved.

There are a number of agencies or institutions in South Africa whose mandate includes the investigation of unlawful corporate conduct. The South African police<sup>10</sup> have specialised units, most notably the Directorate of Priority Crime Investigation (known colloquially as 'the Hawks'), and the commercial crimes unit, which focuses on the investigation of more complicated white-collar crime offences. The police work closely with the National Prosecuting Authority,<sup>11</sup> which is the body empowered to institute and prosecute criminal proceedings on behalf of the state.

One of the significant units established within the National Prosecuting Authority is the Asset Forfeiture Unit, which is empowered by Chapters 5 and 6 of POCA to affect the seizure and forfeiture of the proceeds of crime and assets used in the commission of crimes.

Investigations into unlawful corporate conduct are also carried out by the Competition Commission. The Competition Commission is constituted in terms of the Competition Act<sup>12</sup> and is the statutory body empowered to investigate restrictive business practices, abuse of dominant positions and mergers. The Competition Commission has the power to raid premises<sup>13</sup> and search for and remove information ('dawn raids') where it has a reasonable belief that an enterprise or individual within an enterprise has contravened the Competition Act. Dawn raids may be conducted pursuant to a warrant or, in limited circumstances, without a warrant.<sup>14</sup>

Where public entities are involved or are a party to a transaction, a number of other agencies or institutions may also be involved in investigating unlawful conduct. The

---

6 Act 121 of 1998.

7 Act 38 of 2001.

8 Section 29.

9 Sections 21 and 22.

10 Governed by the South African Police Services Act 68 of 1995.

11 Governed by the National Prosecuting Authority Act 32 of 1998.

12 Act 89 of 1998.

13 Sections 46 to 49.

14 Section 46.

Special Investigations Unit<sup>15</sup> investigates, *inter alia*, (1) unlawful, irregular or unapproved acquisitive acts, transactions, measures or practices that have a bearing on state property, (2) the intentional or negligent loss of public money or property and (3) corruption in connection with the affairs of any state institution. The Public Protector<sup>16</sup> is a separate body that investigates any conduct in state affairs, or in the public administration in any sphere of government that is alleged or suspected to be improper or to have resulted in impropriety or prejudice.

In addition, FICA created the Financial Intelligence Centre with the primary objectives of assisting in the identification of the proceeds of unlawful activities and combating money-laundering activities and the financing of terrorist and related activities.<sup>17</sup> Among its further objectives are the provision of high-quality, timely financial intelligence for use in the fight against crime and the exchange of information with similar bodies in other countries.

Investigations into criminal corporate conduct are not normally dependent on the cooperation of the implicated enterprise and are most often conducted – at least initially – without the knowledge of the implicated enterprise. The collection of evidence is not normally cooperation-based and is almost invariably obtained by authorities through the issue of warrants under the Criminal Procedure Act.<sup>18</sup> Close cooperation with police investigations are more common where the enterprise is a victim of crime, or crimes have been committed by individual members, directors or employees within the enterprise.

While there is no general obligation on an enterprise to cooperate in a criminal investigation, there are the usual safeguards preventing the obstruction of an investigation, tampering with or destruction of evidence, and interference with witnesses.

The common law crime of fraud remains an important basis for the criminal prosecution of individuals and incorporated entities making themselves guilty of white-collar crime.

## II CONDUCT

### i Self-reporting

There are a number of circumstances in which businesses have a legal obligation to self-report contraventions and offences. The most significant of these is created under the Prevention and Combating of Corrupt Activities Act ('PACCA'). Section 34 of PACCA imposes a duty on persons in a position of authority to report corruption, fraud, theft, forgery and uttering to the police. A person who fails to make a report in terms of this section is guilty of an offence and liable on conviction to a fine or up to 10 years' imprisonment. The duty to report corrupt transactions arises when 'any

---

15 Constituted in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996.

16 Constituted in terms of sections 181 to 183 of the Constitution of South Africa Act 108 of 1996.

17 Section 3(1) of the Financial Intelligence Centre Act.

18 Act 51 of 1997.

person who holds a position of authority<sup>19</sup> knows<sup>20</sup> or ought reasonably to have known or suspected<sup>21</sup> that any other person has committed fraud, theft, corruption, forgery or uttering<sup>22</sup> involving an amount of 100,000 rand or more<sup>23</sup> must report that knowledge or suspicion to the police.<sup>24</sup>

The Financial Intelligence Centre Act also creates an obligation to self-report suspicious and unusual transactions to the Financial Intelligence Centre. In broad terms, the obligation to report under FICA is triggered when a person involved in a business either knows or ought reasonably to have known or suspected that a transaction:

- a* facilitates the transfer of the proceeds of crime or property connected to financing terrorists;
- b* has no apparent business or lawful purpose;
- c* is conducted to avoid having to make a report under the Act;
- d* may be relevant to a tax evasion investigation; or
- e* the business is being used for money laundering.

A person who fails to comply with the reporting obligation is guilty of an offence and liable on conviction to a fine of up to 10 million rand or of up to 15 years' imprisonment.

The reporting obligations under PACCA and FICA set out above contemplate reports made by natural persons pursuant to a legal obligation, but there is no provision for immunity from prosecution for either the individuals making the report (to the extent that they may be guilty or complicit in any offence) or the affected company; nor are specific provisions made for leniency in such cases where reports are made, although the circumstances of the report and the degree of cooperation with the investigation would be factors considered by the courts in mitigation.

Companies in South Africa do also sometimes elect to self-report to the Competition Commission where they have been involved in cartel activity in return for immunity. The

---

19 Section 34(4) of the Act sets out a number of classes of person who are considered to be persons in a 'position of authority' and that include, for example, managers, secretaries and directors of companies or any other person 'responsible for the overall management and control of the business of an employer'.

20 Whether a person has actual knowledge can be proved in a number of different ways, and may be inferred from the proven facts.

21 In broad terms, the Act imputes knowledge to a person if another person occupying his position and also having his particular knowledge, skills and experience, would have known or suspected that the offence had been committed. The test is essentially objective (by reference to the standards of a reasonable person in the same position) with a subjective element (the person's own particular attributes).

22 The obligation to report is not limited to the corruption offences created in the Act but includes the common law crimes of fraud, theft and forgery and uttering.

23 No obligation to report is triggered for offences involving less than this amount.

24 The report must be made to the police and the Act and its regulations prescribe how the police should deal with such reports.

Commission has implemented a corporate leniency policy,<sup>25</sup> which is applicable to such cartel activity.<sup>26</sup> Broadly speaking, cartel activity is defined in the Competition Act to include the fixing of prices or trading conditions, the division of markets and collusive tendering. The leniency policy offers a cartel firm member the opportunity to disclose information regarding a cartel in return for immunity from prosecution and fines. Immunity is only available to the first cartel member that approaches the Commission.

In addition, third-party reporting obligations may also be applicable in specific cases. For example, in terms of the Auditing Profession Act,<sup>27</sup> registered auditors have an obligation to report 'reportable irregularities' uncovered during their audits to the Independent Regulatory Board for Auditors. Reportable irregularities are unlawful acts or omissions by an individual responsible for the management of an entity that (1) has caused or is likely to cause material financial loss to the entity or its stakeholders, (2) amounts to fraud or theft or (3) represents a material breach of a fiduciary duty owed to the entity or its stakeholders.

## **ii Internal investigations**

Companies are entitled to conduct their own investigations and are not ordinarily obliged to share the findings of their investigations with authorities, although the findings of any such investigation may be compellable evidence in civil and criminal proceedings unless it is privileged. For that reason, investigations should be carried out by attorneys (or under their direction) to ensure that such investigations and their findings are subject to legal professional privilege wherever possible.<sup>28</sup>

Internal investigations may be carried out by internal forensic and audit departments, though external forensic firms are often appointed to undertake such investigations. Such investigations commonly encompass the collection and analyses of documents (including the imaging and review of electronic records), undertaking background checks, asset tracing, and conducting internal and external interviews. Some investigations may also encompass elements of specialised forensic accounting, surveillance and information technology.

Care should be taken to ensure that internal investigations are lawfully conducted and investigators should ensure that they comply with the following:

- a* The Electronic Communications and Transactions Act,<sup>29</sup> which creates five<sup>30</sup> separate offences relating to the unauthorised access to, interception or interference with data. Where a person intentionally accesses, intercepts or

---

25 Introduced in 2004 and amended in 2008. A copy of the Corporate Leniency Policy is available from the Competition Commission's website at [www.compcom.co.za/corporate-lenieny-policy/](http://www.compcom.co.za/corporate-lenieny-policy/).

26 Contraventions of Section 4(1)(b) of the Competition Act.

27 Section 45 of the Auditing Profession Act 26 of 2005.

28 Legal professional privilege is expressly preserved in section 37 of the Financial Intelligence Centre Act.

29 Act 25 of 2002.

30 Section 86.

interferes with data without permission, that person is liable on conviction to a fine or imprisonment for a period of up to 12 months.

- b* The Regulation of Interception of Communications and Provision of Communications-related Information Act,<sup>31</sup> which, *inter alia*, prohibits the interception of communications in the course of its occurrence or transmission. Such intentional and unlawful interception is a criminal offence<sup>32</sup> punishable by a fine of up to 2 million rand or up to 10 years' imprisonment.<sup>33</sup>

Although not a legal requirement, where investigators or attorneys employed by a company interview its employees, it is advisable to inform the employee at the start of the interview that the investigator is acting on behalf of the company and not the employee, and that any legal privilege attaching to the interview is a privilege that can only be asserted or waived by the company.

### iii Whistle-blowers

The Protected Disclosures Act<sup>34</sup> ('the PDA') was enacted to encourage, without fear of reprisal, disclosure of information relating to suspected criminal and other irregular conduct.<sup>35</sup>

The PDA sets out procedures that employees in the private and public sector must follow to make a 'protected disclosure' regarding unlawful or irregular conduct by their employers in order to enjoy protection under the Act.

To ensure that employees who make a protected disclosure are not victimised, employees are protected against any 'occupational detriment', which is defined in the Act to include:

- a* being subjected to any disciplinary action;
- b* being dismissed, suspended, demoted, harassed or intimidated;
- c* being transferred against the employees' will;
- d* being refused a transfer or promotion;
- e* being denied appointment to an employment, profession or office; or
- f* being threatened with any of the above actions.

The PDA protects disclosures made to a legal adviser,<sup>36</sup> employer,<sup>37</sup> members of the Cabinet or Executive Council<sup>38</sup> and persons like the Public Protector and the Auditor

---

31 Act 70 of 2002.

32 Section 49(1).

33 Section 5(1)(b)(i).

34 Act 26 of 2000.

35 Section 2.

36 Section 6.

37 Section 7.

38 Section 8.

General. There is, however, precedent that a disclosure made to another person, which otherwise complies with the requirements of the PDA, may still be protected.<sup>39</sup>

An aggrieved employee is entitled to approach any court having jurisdiction (including the Labour Court) for appropriate relief, or may pursue any other process allowed by any law.<sup>40</sup> The appropriate relief may include compensation or reinstatement where the employee was dismissed.

### III ENFORCEMENT

#### i Corporate liability

A company is a separate legal person apart from its members, directors and employees.<sup>41</sup> The consequences of such separate existence is that a company has its own assets and liabilities, its own rights and obligations and is liable to be prosecuted independently of its members, directors and employees for offences committed by the company. Members, directors and employees may of course, through their own conduct, make themselves guilty of separate, related offences.

Corporate liability in South Africa is governed generally by the 'old' Companies Act,<sup>42</sup> the 'new' Companies Act<sup>43</sup> and the Criminal Procedure Act. Section 332 of the Criminal Procedure Act contains express provisions deeming certain acts or omissions of the directors and servants of the company to be the acts and omissions of the company itself for purposes of imposing criminal liability for any statutory or common law offence. A company is a legal person without any physical existence and has no mind or will of its own. For this reason the acts, omissions, intentions, purposes and knowledge of certain individuals within the company are regarded as being the acts, omissions, intentions, purposes and knowledge of the company.

The doctrine of the directing mind that has developed in South Africa requires that the law treat the acts or states of mind of those who represent or control the company as the acts and states of mind of the company itself. There is no closed list of those who may be considered to be the directing mind of the company and the central concern is 'who is or who are in actual control of the operations of the company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties'.<sup>44</sup> The doctrine is equally applicable to both civil and criminal matters.

There is no specific prohibition on legal counsel representing both the company and individuals in matters, although in practice this should be done with great circumspection because of the possibility of a conflict of interest arising where the interests of the company and the individual are not identical.

---

39 *H and M Ltd* (2005) 26 ILJ 1737 (CCMA).

40 Section 4(1)(a) of the Protected Disclosures Act.

41 *Ochberg v. CIR* 1913 AD 215.

42 Companies Act 61 of 1973.

43 Companies Act 71 of 2008, which came into effect on 1 May 2011.

44 *Law of South Africa*, Volume 4(1) – Companies, MS Blackman, at paragraph 35.

## ii Penalties

Corporate entities convicted of offences are ordinarily sentenced to the payment of a fine. The limits to the fines that can be imposed are determined in each case by the wording of the particular statutory provision. There are, in addition to the payment of fines, different penalties that may be levied against convicted corporate entities.

Corporate entities convicted of a corruption offence under PACCA may be sentenced to the payment of an unlimited fine. In addition to the ordinary fine, the court may also impose a second fine of five times the value of the gratification involved in the offence.<sup>45</sup>

Chapter 6 of PACCA also provides for the establishment of a 'Register for Tender Defaulters' within the office of the National Treasury. The details of any individual or entity (including any manager, partner, director or other person who exercises control over the entity that committed the offence) convicted of corruption relating to contracts or tenders are endorsed in the register. The endorsement remains in the register for a period of between five and 10 years,<sup>46</sup> during which time the endorsed persons are effectively excluded from all state work. The National Treasury is entitled to terminate any agreement that the state has already entered into with such convicted person. The register is open and available for inspection by the public.<sup>47</sup>

Under POCA, a person convicted of racketeering is liable to a fine of up to 1 billion rand. A person convicted of money laundering or its associated offences under Sections 4, 5 and 6 of POCA are liable on conviction to a fine not exceeding 100 million rand. POCA also contains important provisions allowing for the confiscation and forfeiture of the proceeds of unlawful activity and property used to commit an offence.

The Competition Act provides that parties who contravene the cartel conduct provisions contained in Section 4(1)(b) are liable for an administrative penalty or fine of up to 10 per cent of the offending party's annual turnover in South Africa during the preceding financial year.<sup>48</sup> The Competition Tribunal must consider the following when determining an appropriate penalty:

- a* the nature, duration, gravity and extent of the contravention;
- b* loss or damage suffered;
- c* the behaviour of the affected entity;
- d* the market circumstances;
- e* the level of profit derived from the contravention;
- f* the degree of cooperation shown by the affected entity; and
- g* previous contraventions of the Competition Act.<sup>49</sup>

---

45 Section 26 (3) of the Prevention and Combating of Corrupt Activities Act.

46 The period is determined by the National Treasury in accordance with Section 28(3)(a)(ii) of PACCA.

47 The Register can be accessed at [www.treasury.gov.za/publications/other/Register for Tender Defaulters.pdf](http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf).

48 Section 59(2) of the Competition Act.

49 Section 59(3).

### **iii Compliance programmes**

Compliance programmes, fraud and corruption prevention plans and periodic internal training are increasingly seen as effective and cost-effective ways of limiting the compliance and criminal risks to which corporate entities are exposed.

There is no express statutory provision setting out that the existence of a compliance programme would be a defence to criminal charges. The existence of thorough compliance programmes, however, may assist a corporate entity distinguishing the conduct of rogue directors or employees from the standard of conduct required by the corporate entity. The existence of such compliance programmes would likely be considered in mitigation.

### **iv Prosecution of individuals**

Unlike in other jurisdictions, it is not common for companies to pay the legal fees incurred by individuals in defending criminal charges brought against them in their capacities as employees or office bearers of the company, and there is seldom any separate agreement (or provisions in the employment agreement) to that effect.

In most circumstances, employees who stand accused of serious irregularities or white-collar crime offences are placed on immediate suspension (usually on full pay) pending an investigation into the allegations against that individual. The internal forensic investigation or disciplinary enquiries are invariably concluded before the finalisation of the criminal investigation and prosecution, with the result that employees guilty of serious irregularities or white-collar crime offences are often dismissed or no longer in the employ of the company at the time of any criminal trial.

In principle there is nothing prohibiting the company's legal advisers from liaising or coordinating with the individual's legal representatives in order to best protect the company's interests.

## **IV INTERNATIONAL**

### **i Extraterritorial jurisdiction**

Section 35 of the Prevention and Combating of Corrupt Activities Act provides that even if the act of corruption occurred outside South Africa, a South African court will have jurisdiction to hear the matter if the person to be charged (1) is a South African citizen, (2) is ordinarily resident in South Africa, (3) was arrested in the territory, territorial waters or on board a ship or aircraft registered in South Africa or (4) is a company incorporated or registered in South Africa.

## ii International cooperation

South Africa has amended its existing legislation and enacted new legislation to facilitate international cooperation in criminal investigations. Examples include the Extradition Act<sup>50</sup> and the International Co-operation in Criminal Matters Act.<sup>51</sup>

South Africa has acceded to the Council of Europe's Convention on Extradition, and has also signed separate extradition agreements with a number of countries, including the United States, Australia, Canada, India and China, as well as with a number of its neighbouring states.<sup>52</sup> In addition, the Extradition Act allows the surrender in extradition of persons to foreign states that are not a party to an extradition agreement with South Africa if the President consents on an *ad hoc* basis.<sup>53</sup>

South Africa has also entered into treaties on mutual assistance in criminal matters with a number of countries including the United States, Canada, India, China and France. Examples of 'mutual assistance' include the sharing of information, the locating of persons, making available public documents and obtaining statements from witnesses who agree to be interviewed. South Africa has also in the past acceded to requests for such mutual assistance from countries with which it has no treaty.<sup>54</sup>

South Africa is also a Member State of the International Criminal Police Organisation ('Interpol'), and the South African police have a section called the Pretoria National Central Bureau of Interpol, which serves as the South African national nodal point for Interpol.

Furthermore, one of the main objectives of the Financial Intelligence Centre is to exchange information with similar bodies in other countries regarding money laundering activities and similar offences.<sup>55</sup>

## iii Local law considerations

Individuals and entities affected by multijurisdictional investigations should have regard to the following local law considerations, which could have a material impact on the manner of investigation and prosecution in South Africa.

The provisions of the Promotion of Access to Information Act<sup>56</sup> ('PAIA') allow for persons to access the records of both public<sup>57</sup> and private bodies.<sup>58</sup> PAIA was enacted

---

50 Act 67 of 1962.

51 Act 75 of 1996.

52 Extradition agreements have also been concluded with Botswana, Lesotho, Malawi and Swaziland.

53 Section 3(2) of the Extradition Act; *Harksen v. President of the RSA* 2000 (2) SA 825 (CC).

54 See, for example, the request made by Equatorial Guinea in 2004 for the South African government to obtain the evidence of Sir Mark Thatcher in connection with an alleged coup attempt in that country – *Thatcher v. Minister of Justice and Others*, unreported judgment of the Cape High Court dated 24 November 2004

55 Section 3(2)(b) of the Financial Intelligence Centre Act.

56 Act 2 of 2000.

57 Part 2 of Chapter 3.

58 Part 3 of Chapter 5.

in order to give effect to Section 32 of the South African Constitution,<sup>59</sup> which provides that any person has access to information held by the state or any other person in order to exercise or protect any of their rights. There are of course numerous limitations on the right to access information, but the most significant instances where access to information can be refused are where:<sup>60</sup>

- a* the record contains trade secrets or financial, commercial, scientific or technical information of the private body itself or a third party, the disclosure of which would be likely to cause harm to its commercial or financial interests;
- b* disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement;
- c* the document is privileged from production in legal proceedings; and
- d* it is necessary to protect research information of a third party or the private body itself.

Records may be requested by individuals and incorporated entities and PAIA sets out in detail the process and time frames that must be followed in accessing information. Failure to disclose information or to comply with the provisions of PAIA entitles the aggrieved party to apply to court for an appropriate order.

A person who intentionally destroys damages or alters, conceals or falsifies a record is guilty of an offence and liable to a fine or two years' imprisonment.

POCA provides for the recovery of the proceeds of unlawful activity. Chapter 5 of the Act provides for restraint and confiscation orders which have the effect of a civil judgment made against the perpetrator of a crime for the payment of an amount of money to the state. The purpose of a confiscation order is to ensure that criminals do not enjoy the fruits of their crimes.

POCA also provides for the confiscation and forfeiture of property used to commit an offence and property that results from unlawful activity or that is associated with terrorist activities. Chapter 6 of the Act provides for preservation and forfeiture orders, which allow for the forfeiture of property that is an instrumentality of the offence, the proceeds of crime or associated with terrorist activities; the Assets Forfeiture Unit gives effect to these provisions.

Black economic empowerment in South Africa can give rise to unique investigation scenarios. The Broad-Based Black Economic Empowerment Act<sup>61</sup> ('the BBBEE Act') is the central legislation through which black economic empowerment is managed in South Africa. In broad terms, its objective is to enable the advancement of black people within the economy through consideration of a broad range of factors including ownership, management, employment equity and skills development.

---

59 Formerly numbered as Act No. 108 of 1996, but since the passage of the Citation of Constitutional Laws Act 2005, it has had no associated Act number.

60 Sections 63 to 69 of PAIA.

61 Act 53 of 2003.

The BBBEE Act does not set out offences or penalties relating to BBBEE performance, but rather seeks to achieve its objectives through economic measures and a preferential procurement policy.

The Preferential Procurement Policy Framework Act<sup>62</sup> effectively requires state entities to reserve 10 or 20 per cent (depending on the contract value) of the evaluation points in a tender for consideration of the black ownership status of the tenderer. Tenderers with significant black ownership consequently enjoy an advantage in practice when tendering for state work. This has given rise to a situation where entities engage in ‘fronting’, which is a practice where tenderers misrepresent the enterprise’s true BBBEE status. Such fronting would almost certainly render the enterprise liable for prosecution for common law fraud.<sup>63</sup>

Fronting can take a number of forms including the opportunistic appointment of black persons to an enterprise, where those persons are inhibited from participating in the activities of the enterprise, or where the benefits that are received as a result of the entities BBBEE status are diverted away from those persons.

## V YEAR IN REVIEW

The awareness of the domestic economic crime legislative framework has greatly increased over the past year due to a number of high-profile investigations against senior government officials. In recent months, the Public Protector has conducted an investigation and delivered a report with findings that lease agreements for the police headquarters in Pretoria and Durban were invalid and were improperly entered into. The findings of the Public Protector’s report implicated the incumbent police chief and Public Works Minister in wrongdoing.

Law enforcement authorities are also beginning to take more of a proactive approach to enforcing the domestic white-collar crime legislation. As an example, the Directorate of Priority Crime Investigation conducted high-profile search-and-seizure raids at the premises of private mining companies in pursuance of an investigation into allegations of fraud, forgery and corruption in the issuance of mining rights.

The relevance and applicability of the reporting obligation under PACCA referred to earlier has also assumed greater prominence and publicity, with the result that there is increased compliance with that reporting obligation and greater attention by law enforcement agencies on enforcing those reporting requirements.

## VI CONCLUSIONS AND OUTLOOK

South Africa has a world-class domestic legislative framework for dealing with corporate criminal conduct and economic crime, but greater attention is required to ensure the effective application and implementation of that legislation. In that regard, the most

---

62 Act 5 of 2000.

63 *Van Rensburg v. National Directorate of Public Prosecution* [2007] JOL 19500 (SCA).

recent report of the Organisation for Economic Co-operation and Development concerning South Africa<sup>64</sup> reported that:

*As of the time of this report, there are no prosecutions for foreign bribery in South Africa, a matter that [...] could be addressed if South Africa adopted a more proactive approach to the investigation and prosecution of this type of crime.[...] The working group noted that, in spite of the longstanding existence of corporate liability legislation, convictions or prosecutions of companies [...] appear to be rare [...] the legislative framework for combating bribery is of a generally high standard [...].*

An example of an excellent mechanism that has been underused to date is the Register for Tender Defaulters provided for in PACCA. While this register has been in existence for a number of years, there are to date only two persons who have had their details endorsed in the register. In step with international trends, we anticipate that the effective implementation and enforcement of the available criminal framework will become more of a priority going forward. An illustration of this is the recent establishment of the Corruption Task Team, a newly formed unit established to coordinate established agencies such as the Hawks and the Assets Forfeiture Unit in economic crime matters involving more than 5 million rand.

The increased enforcement of the US Foreign Corrupt Practices Act in recent years, and the recent promulgation and coming into effect of the UK Bribery Act have also had a significant impact on South African companies doing business abroad and global companies doing business in South Africa. The need for enterprises to manage their increased compliance risks has seen a greater focus on the design and implementation of effective compliance programmes as well as periodic fraud and corruption prevention training. Enterprises are also increasingly aware of the need to manage these risks in their commercial dealings, and there is accordingly a greater emphasis on these aspects in due diligence investigations and contractual negotiations where, for example, contractual audit and investigation rights are becoming more commonplace.

---

64 Phase 2 report published by the Working Group on Bribery in International Business Transactions on 17 June 2010 and updated on 13 July 2010.

## Appendix 1

---

### ABOUT THE AUTHORS

#### **MATTHEW PURCHASE**

*Bowman Gilfillan Inc*

Matthew Purchase is a practising attorney and a director at Bowman Gilfillan Inc. He practises as a specialist in the firm's forensic and white-collar crime practice area and routinely advises clients on all aspects of white-collar crime including the prevention, detection and investigation thereof, as well as dealing with the civil and criminal consequences of such crime.

Mr Purchase obtained a bachelor of commerce degree and a postgraduate LLB law degree from Stellenbosch University, and has also completed an advanced certificate in fraud examination. He is a member of the Association of Certified Fraud Examiners ('the ACFE') in the United States, and was elected to the board of directors and executive committee of the South African Chapter of the ACFE in September 2010. He is a member of both the Ethics and Compliance Institutes in South Africa, and a member of the *Lex Mundi* Business Crimes and Compliance Work Group.

Mr Purchase is a regular speaker at conferences and seminars and has also been invited to speak on radio from time to time on commercial crime-related matters. He has written a number of articles that have been published in the local press and in business reports, and has also contributed to international periodicals.

#### **BOWMAN GILFILLAN INC**

165 West Street, Sandton

Johannesburg

South Africa

Tel: +27 11 669 9000

Fax: +27 11 669 9001

[m.purchase@bowman.co.za](mailto:m.purchase@bowman.co.za)

[www.bowman.co.za](http://www.bowman.co.za)