

Personal responsibility, corporate liability and criminality: an Australian perspective on the new UK failure to prevent fraud offence

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Due to commence in September 2025, the new failure to prevent fraud offence in the UK is likely to pose challenges in terms of both efforts to comply and in regard to defending corporations charged under the new legislation. Section 199 of the Economic Crime and Corporate Transparency Act 2023 (ECCTA) criminalises the conduct of large organisations where a person associated with the organisation commits fraud with intent to benefit the organisation or anyone the person provides services to on behalf of the organisation. It is a defence if the organisation can prove that there were reasonable procedures in place to prevent fraud or that it was not reasonable for such procedures to be in place. While Australian law does not contain an equivalent offence, presently, at least, the state of failure to prevent offences in Australia provides an interesting backdrop to a discussion on the broader issues surrounding such offences.

The Australian failure to prevent foreign bribery offence

In 2024, the failure to prevent foreign bribery offence commenced in Australia. This offence is similar to the prevention of foreign bribery offence contained in section 7 of the UK's Bribery Act 2010.

Section 70.5A of the Commonwealth Criminal Code provides that a corporation is guilty of an offence where an associate of the corporation engages in bribery of a foreign public official for the profit or gain of the corporation. Relevantly, pursuant to section 70.5A(5), if the corporation had adequate procedures in place to prevent the bribery of foreign public officials, it will not be guilty of the offence.

As part of the introduction of the offence, again similarly to the UK, the Australian government introduced guidance as to what constitutes 'adequate procedures' to prevent foreign bribery.^[1]

The Australian guidance closely reflects the equivalent guidance in the UK for the offences of both foreign and domestic bribery, which focuses on six guiding principles, namely:

✕ proportionate procedures;

f top-level commitment;

risk assessment;

due diligence;

communication and training; and

➤ monitoring and review.

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For Australian criminal defence lawyers, understanding the government's guidelines is central to advising clients both on the steps they can take to ensure compliance and in defending clients charged with the failure to prevent foreign bribery offence.

With guidelines around fraud prevention procedures required pursuant to the ECCTA, these considerations are likely to be equally central to advising clients in relation to the new UK legislation. The ECCTA guidance is also centred around the same six guiding principles. However, as the failure to prevent fraud offence only applies to large organisations, the expectations regarding the implementation of reasonable procedures will reflect the complexity of these organisations. Having both sets of UK guidance to hand will allow Australian practitioners to anticipate what challenges may lie ahead in regard to the implementation of its own domestic 'failure to prevent' laws. While the UK Bribery Act offences have been in force for over ten years, there remains some uncertainty about how companies will manage the additional compliance burdens related to the failure to prevent fraud obligations pursuant to the ECCTA.

Other failure to prevent offences

In 2013, the Victorian parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations recommended that a new offence be introduced to 'impose criminal responsibility on those individuals in positions of authority in organisations who act or fail to act understanding that their action or inaction may pose a substantial and unjustifiable risk of harm to children, but they disregarded that risk and acted or did not act accordingly.'^[2] The Victorian government accepted the recommendation and introduced a new offence, which commenced in 2015 and is found in section 49O of the Crimes Act 1958 (Vic).

While titled the 'failure to protect', this offence is, at its core, also a failure to prevent offence, concerning the failure to prevent the sexual abuse of children. In contrast to the failure to prevent foreign bribery offence, this offence is targeted at individuals who are involved in broader organisations. Section 49O recognises the relevance of organisations in allowing such criminal conduct to occur, but it maintains a more traditional approach to criminal liability by holding the natural person responsible for what may ultimately be organisational failures. Such offences carry many of the same difficulties as organisational failure to prevent offences.

In contrast, there is a tradition in the quasi-criminal area of occupational health and safety of corporate liability for failure to provide, for example, safe systems of work. The offence of workplace manslaughter, pursuant to the Occupational Health and Safety Act 2004 (Vic), allows both natural persons and organisations to be held criminally liable for breaches of the relevant duties, such as the duty to provide a safe working environment, that result in a person's death. In this context, corporate criminal liability is not unknown in Australia.

The future of failure to prevent offences in Australia

It remains unclear how the failure to prevent foreign bribery will develop in Australia. The prosecution must establish that the associate committed the predicate offence, often in circumstances where evidence may be limited or

to obtain. It is only then that the strict liability regime is triggered under the Criminal Code.

For more complex matters, the Australian government has declined to introduce a deferred prosecution scheme that might encourage companies to voluntarily report potential criminal conduct, namely foreign bribery, in instances where, in general, there is no positive legal obligation on a company to report such conduct.

As Robert Wyld has observed,^[3] the failure to prevent offence may not trigger any rush to report such conduct to the authorities.^[4] Rather, as Wyld noted, greater care will be taken by companies to investigate and

remediate such conduct and then a considered view will be formed as to whether a self-report is warranted.

At present, there does not appear to be much appetite to introduce an Australian equivalent to the UK's incoming failure to prevent fraud offence. Having said that, Australia does have a history of looking to overseas experience and legislation and, if such provisions are seen as effective in fighting criminal activity, they are often adopted in the Australian jurisdiction. For corporations looking to ensure compliance ahead of any legislative change, the Australian Standard 8001, also known as the Australian Standard for Fraud and Corruption Control, provides a starting point.

Before any expansion in regard to a broad failure to prevent fraud offence, one might expect some analysis of the effectiveness and impact of the Australian failure to prevent foreign bribery offence. Following that, it is not difficult to imagine that Australia may replicate the UK's failure to prevent fraud legislation some years in the future.

[1] See <https://www.ag.gov.au/sites/default/files/2024-08/guidance-adequate-procedures-prevent-the-commission-of-foreign-bribery.PDF> last accessed on 11 August 2025.

[2] See https://www.parliament.vic.gov.au/4962da/contentassets/966c1dbd76864228a2b7aa3fb362d0eb/inquiry-into-handling-of-abuse_volume-1_final_web.pdf, last accessed on 11 August 2025, page xlv.

[3] Robert R Wyld is the former co-chair of the IBA Anti-Corruption Committee and a current advisory board member.

[4] Robert R Wyld, 'Bribery, Corruption & Sanctions Laws in Australia', LexisNexis, July 2025, pp. 137-139.

