



Internal Investigations in the Asia-Pacific Region

December 8, 2021

Moderator & Speakers



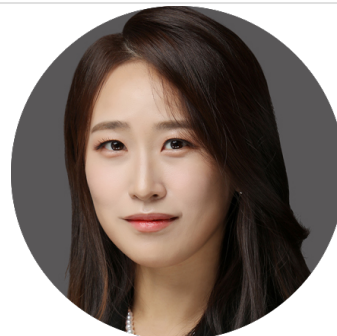
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Singapore

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Singapore: Setting Up and Scoping an Internal Investigation



Key Considerations





- Legal Professional Privilege
 - Legal Advice Privilege: *Who is a client?*
 - Litigation Privilege: *Is litigation privilege available at the outset of investigations?*

- In-House Counsel
 - Section 131 of the Evidence Act (Cap. 97)

- Waiver of Privilege
 - Limited Waiver of Privilege
 - Co-operation



- Suspicious Transaction Report:
 - Section 39 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A)
- Financial Institutions misconduct reporting:
 - MAS Notice SFA04-N11
- Timely disclosure of any information that is either ‘*necessary to avoid the establishment of a false market in [its] securities*’ or ‘*that would be likely to materially affect the price or value of its securities*’:
 - Rule 703 of the SGX (Mainboard) Listing Rules
- Obligation to file a police report in respect of specified offences under the Penal Code:
 - Section 424 of the Criminal Procedure Code (Cap. 68)

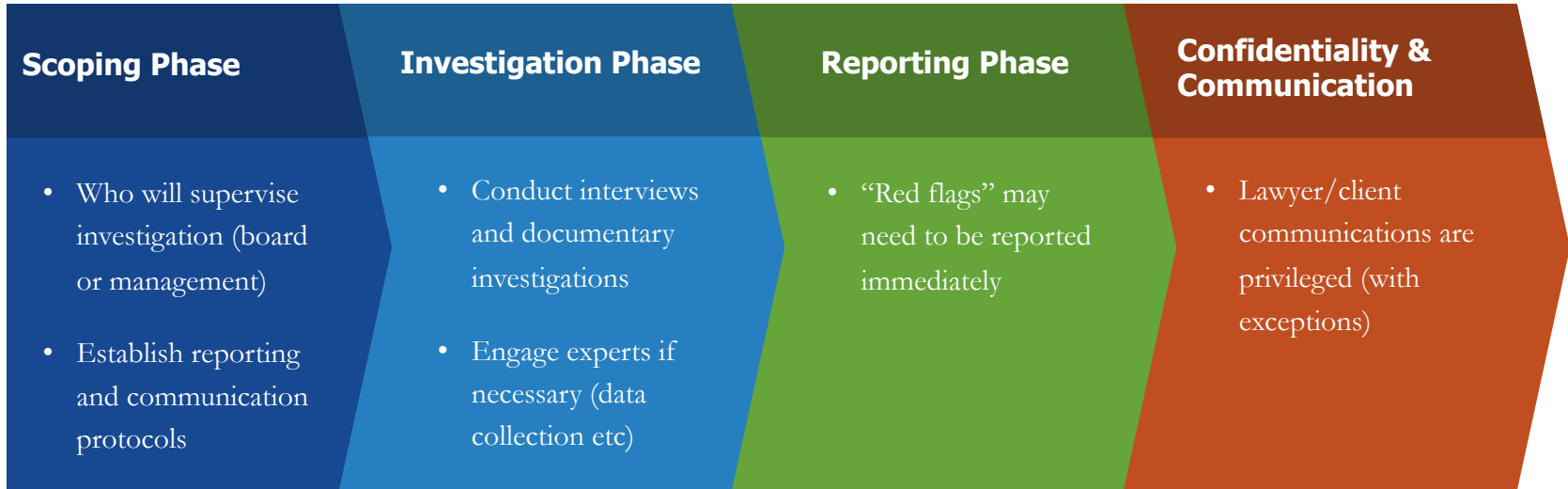


Australia

Philip Stefanovski, MinterEllison

MinterEllison.

Australia: Setting Up and Scoping an Internal Investigation





- Documents are protected by legal professional privilege if they are created for the dominant purpose of obtaining legal advice, or created for the purpose of litigation (actual or reasonably contemplated).
- Privilege can extend to draft and final versions of investigation reports, lawyer's working papers and interview notes or transcripts conducted by or at the request of the company's lawyers, and external expert reports obtained by internal or external lawyers for a privileged purpose.
- Privilege cannot be used to “mask” an investigation that has a non-privileged purpose.
- Legal advice provided to a company remains privileged even where it is disseminated beyond the lawyer's direct instructors. It is still prudent to limit the circulation of legal advice within the company to avoid its unauthorised or inadvertent disclosure.



- Companies listed on ASX have continuous disclosure and financial reporting obligations
- Strict reporting obligations under Australia's anti-money laundering legislation
 - Westpac fine of AUD\$1.3billion (approx. USD\$925million)
- Industry-specific reporting obligations
 - Financial services licensees must report any "serious breach" of relevant financial services laws
- Self-reporting can have advantages (eg submitting a “market” for cartel conduct)



China

Kent Woo, Zhong Lun Law Firm



China: Setting Up and Scoping an Internal Investigation



Key Considerations





- Legal Professional Privilege – Article 38 of the Lawyers Law of the PRC
- Litigation Privilege - Article 48 of the Criminal Procedure Law
- In-House Counsel – Article 84 of the Criminal Procedure Law



- Legal Professional Privilege exception - A client or any other person is preparing for or is committing a crime.
- Listing Rules



Japan

Akira Nagasaki & Naoyuki Kishimi

City-Yuwa Partners



Japan: Key Considerations



Terms of Reference

Clarify the scope of investigation (Analyze the cause in detail, examination of recurrence prevention measures), existence of similar cases, organize investigation team.

Investigation Team

Depends on the scale of fraud, background, and management responsibility. In case of company-wide fraud, the team is often organized by an independent panel of experts (“Third Party Committee”). In case of smaller violations, the investigation team is often recruited only internally.

Evidentiary Material

Interviews, digital forensics (sometimes), questionnaire, documents, whistle-blowing system



- In Japan, there is no statute that recognizes attorney-client privilege (with one exception).
 - For civil procedures – we have no discovery, so no big issue.
 - For criminal procedures – we have statute that allows certain professionals to refuse seizure of materials by law enforcement:
 - Article 105 of the Code of Criminal Procedure
 - A physician, dentist, midwife, nurse, **attorney (including a foreign lawyer registered in Japan)**, patent attorney, notary public or a person engaged in a religious occupation, or any other person who was formerly engaged in any of these professions may refuse the seizure of articles containing the confidential information **of others** with which said person has been entrusted, and retains or possesses in the course of said person's duties; **provided however, that this does not apply** when the person in question has given consent, **when the refusal is deemed to be an abuse of rights exclusively for the interests of the accused (unless said person is the accused)**, or where there exist other circumstances provided for by the Rules of Court.
 - **But this does not apply if law enforcement seizes material not held by attorneys!**



- The ONLY exception
 - “**Distinction Procedure**” (判別手続)
 - From Dec 25, 2020, certain communication will be subject to “distinction” for investigation by the JFTC
 - For violations subject to leniency – typically cartels and bid rigging.
 - Protected communication must be:
 - Between the client and a lawyer admitted in Japan (cannot be foreign-admitted lawyers)
 - Confidential
 - An opinion given by the lawyer to the client regarding the issue subject to investigation
 - Will only apply to investigation made by the JFTC to impose administrative fines – the JFTC will not use the “distinguished” materials for their evaluation.
 - **Will not apply to criminal investigations by law enforcement!**



- Certain self-reporting obligations (such as product recall, pharmacies)
 - For JFTC, there is leniency
 - For Criminal Procedure, we have a limited plea-bargaining system during investigation.
- Investigative reports are not required to be disclosed by the government, meaning these will be for internal purposes.
 - However:
 - Listed companies
 - The stock exchange may require disclosure of internal investigative reports for incidents that effect the stock market (insider trading, false reporting, etc.)
 - Others
 - Companies may still choose to disclose internal investigative reports to regain public (=customer/consumer) trust



South Korea

Hangil Lee, Bae Kim & Lee LLP

bkl

South Korea: Internal Investigation Scheme



Key Features and Considerations





- American Concept of Privilege NOT Recognized
 - Attorney-client privilege / Attorney work-product privilege.
 - NOT recognized for communications PRIOR to commencement of a criminal investigation or criminal proceedings
 - NOT clear whether such privilege is recognized AFTER commencement of the criminal proceedings
 - Confidentiality Obligation (O)
 - An attorney bears confidentiality obligation and has the right to refuse seizure and to testify confidential information in civil/criminal proceedings a
 - Court precedents are NOT conclusive.
 - Trend in Internal Investigations

- Case Example and Recent Trends
 - Raids frequently used by the government/enforcement authorities
 - Case Example and Recent Trend as to Privilege
 - Raids against Kim & Chang (2018)
 - Legislation Efforts as to Formal Introduction of Privilege



- No Obligation to Self-report
 - Generally, no obligation to share the results of an internal investigation with the government.
 - Exception: Article 12 of the Act on the Aggravated Punishment, etc. of Specific Economic Crimes (e.g. certain financial institutions providing for public functions)
 - No benefits written in the laws or policies for self-reporting the misconduct
- Incentives Recognized
 - Mitigating Factor in Sentencing Guidelines
 - Leniency Policy for Self-reporting in Cartel Investigations
 - Written leniency policy for self-reporting in cartel investigations (KFTC: Article 22.2 of the Monopoly Regulation and Fair Trade Act;/ Prosecutors' Office: Guidelines for Reduction of Penalty in Cartel Cases and Investigation Procedures)
 - Eligible for exemption or mitigation from administrative sanctions



Vietnam

Doan Nhat Minh, VILAF



Vietnam: Setting Up and Scoping an Internal Investigation





- There is no concept of “legal privilege” fully developed under the laws of Vietnam
- Vietnamese laws only stipulate about the duty of confidentiality of lawyers/law firms:
 - Articles 9.1(c) and 25 of the 2006 Law on Lawyers
 - Article 73.2(g) of the 2015 Criminal Procedure Code
 - The Code of Conduct for Vietnamese Lawyers
- In-house counsels



- Article 19.1 of the of the 2015 Penal Code: A person who **clearly knows** that **a crime under Article 389** of the 2015 Penal Code is being prepared, is committed or has been committed shall be subject to criminal liability if he/she does not denounce such crime.
- Article 19.3 of the 2015 Penal Code has considerably undermined the confidential obligation of lawyers in regard of criminal offense since the defense lawyer (who is engaged by a prosecuted person) is still obliged to denounce **crimes of infringing national security or other extremely serious offenses** which have been committed or participated in by his/her client(s).



Questions?