

# Proposed Changes to Australia's Foreign Bribery Laws

## Successful prosecution and enforcement more likely of foreign bribery by Australian companies

## What steps should Australian companies be taking to ensure compliance?

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On 6 December 2017, the Australian Government announced significant reforms to Australia's foreign bribery laws with the introduction of the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017* (the **Bill**). Not only will companies be required to take steps actively to protect against foreign bribery, companies will also be held responsible for bribery committed by their "associates", which includes their officers, employees, contractors, agents and subsidiaries.

The changes were considered necessary because, to date, there have been significant barriers to investigations and prosecutions. Foreign bribery has been very difficult to identify and to target with effective enforcement. Conduct often occurs offshore and evidence can be difficult to obtain. Further, bribery can be concealed, for example, as agent expenses or other expenses which appear legitimate. The proposed changes will lower the threshold significantly for prosecutions.

### What is foreign bribery?

Currently, under section 70.2 of the *Criminal Code Act 1995 (Cth)*, it is an offence to bribe a foreign official. The offence of foreign bribery will be committed when all of the following three essential components are present:

1. The alleged offender (**Person A**) **must** do one of the following:
  - a. provide a benefit to another person (**Person B**);

- b. promise or offer to provide a benefit to Person B;
  - c. cause a benefit to be provided, promised or offered to Person B.
2. The benefit is not legitimately due to Person B.
3. Person A has made the offer, promise etc in item 1 above with the intention of influencing a foreign public official in the course of the foreign public official's duties in order to obtain or retain business or a business advantage, to which the recipient (or intended recipient) of the advantage is not legitimately due.

It is not necessary that Person B referred to item 1 is the foreign public official referred to in item 3.

The conduct referred to above:

- must occur in Australia or on-board an Australia aircraft or ship; or alternatively
- if it occurs outside Australia, it must be committed by an Australian citizen, an Australian resident or a body corporate incorporated in Australia.

If the three essential components are present, the offence will occur regardless of:

- the outcome of the bribe; and
- whether or not the alleged offender sought to bribe a specific foreign public official.

### What are the penalties?

If convicted, the maximum penalty for an individual is 10 years imprisonment and/or a fine of 10,000 penalty units (which is currently \$2.1 million). Corporations, on the other hand, can be fined or be required to pay a proportional penalty. Where it is possible to determine the value of any benefit obtained from bribery, then the penalty will be the greater of either:

- (i) three times the value of the benefits obtained; or
- (ii) 100,000 penalty units (currently \$21 million).

If the value of the benefit cannot be ascertained, then the penalty will be the greater of:

- (i) 100,000 penalty units (currently \$21 million); or
- (ii) 10% of the corporation's (and its related bodies corporate) annual turnover.

Further, benefits obtained by the conduct may be forfeited to the Australian Government in accordance with the *Proceeds of Crime Act 2002 (Cth)*.

Companies *may* be liable for their employees' actions and agents under both Australian laws and foreign law. If acting as an agent, the agent may also be liable personally under both Australian and foreign laws.

### Challenges with the Offence

Enforcement has been difficult. Over the last few years, steps have been taken to strengthen the enforcement of foreign bribery laws. The Fraud and Anti-Corruption Centre, for example, was launched in 2014 and is a multi-agency initiative hosted by the Australian Federal Police.

The Attorney-General's Department has noted that there are **four** areas of the offence which present particular challenges and make enforcement difficult:

1. establishing the alleged offender's intention.
2. the prosecution must establish that both:
  - a. the bribe; and
  - b. the business advantage which was sought,

are not legitimately due. For example, a bribe can be disguised as an agent payment to appear legitimate.

3. obtaining detailed information from foreign jurisdictions, for example, details about a foreign official's duties. Obtaining information of this nature may take time and may be reliant on assistance from the foreign jurisdiction.
4. interpreting the offence in a manner which is not consistent with policy objectives.

### Proposed Amendments to the Offence

The Bill contains a number of proposed reforms which follow on from the consultation conducted by the Australian Government earlier this year.<sup>1</sup> Proposed reforms contained in the Bill include the following:

- replacement of the existing foreign bribery offence by an offence which will be committed by a person if they:
  - provide, offer or promise a benefit to another person, or cause the benefit to be provided, offered or promised to another person; and
  - do so with the intent of **improperly influencing** a foreign public official in order to obtain or retain business or an advantage.

Accordingly, the offence will be extended to include an advantage of **any** kind (not just business related) and may include personal advantage, such as visa processing;

- the creation of a new corporate offence of failing to prevent foreign bribery whereby the company is automatically liable if an "associate" commits an offence for the **profit or gain** of the company, unless the company has an "adequate system" of procedures in place to prevent such conduct. "Profit" and "gain" are not defined. An "associate" of a company includes:
  - an officer, employee, contractor or agent of the company;
  - a subsidiary of the company;
  - a company controlled by the company; or
  - more broadly, a person who otherwise performs services for or on behalf of the company.

What is an "adequate system" will be determined by the Courts on a case-by-case basis. The Minister will also publish guidance on steps that a company can take to prevent an associate from bribing a foreign public official. Clearly, this new offence will be an impetus for companies to ensure they have in place adequate systems to prevent bribery;

- the establishment of a Deferred Prosecution Agreement Scheme (**DPA Scheme**). Prosecutors may negotiate a voluntary agreement requiring the company to comply with particular conditions, for example, cooperate with an investigation, pay a penalty and implement a compliance program. By entering into a Deferred Prosecution Agreement, the need for a trial which can be lengthy, is avoided. Provided the company complies with the terms of the agreement, it will not be prosecuted in respect of the agreement's subject matter. The DPA Scheme is **not** available to individuals. Similar schemes exist in the USA and the UK;
- the extension of the definition of "foreign public official" to include candidates for public office. Candidates are not currently captured by the definition of "foreign public official".<sup>2</sup> However, candidates may be bribed with the intention of obtaining advantages etc from them once they are appointed;
- the removal of the requirement that the influencing of a foreign public official must be in the exercise of their official capacity, which would recognise that public

officials may be bribed outside their official duties;  
and

- making it clearer that the alleged offender need not have a particular business or advantage in mind. This would cover situations where a person is “buttering up” an official with the intention that the official will assist in providing an undue advantage at some stage in the future.

### What should companies be doing?

Regardless of when the proposed amendments take effect (which may be during 2018), companies should have in place a specific compliance regime which addresses the risk of bribery. Companies should take reasonable steps to ensure that they have an “adequate system” of procedures to prevent foreign bribery, not only by employees, but also contractors, agents, and companies within their group. Companies should conduct a risk assessment of their activities and arrangements in overseas markets where they are active.

Companies should ensure that they have appropriate mechanisms for reporting suspected offences (such as a whistleblower policy and/or procedure and training) and that whistleblowers are protected.

We will be monitoring closely the progress of the Bill.

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<sup>1</sup> Attorney-General's Department public consultation: “Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995” at <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx>.

<sup>2</sup> “Foreign public official” currently includes, for example, employees or officials of a foreign government body; an individual performing work for a foreign government body under a contract; an individual holding or performing the duties of an appointment, office or position under a law, custom or convention of a foreign country; a member of the executive, judiciary or magistracy of a foreign country; an employee or officeholder of a public international organisation (or an individual performing work under a contract for such an organisation) or anyone holding themselves out as an authorised intermediary of a foreign public official.