

# PROPOSED CHANGES TO AUSTRALIA'S FOREIGN BRIBERY OFFENCE: GOVERNMENT RELEASES PAPER

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Legal Briefings - By **Jacqui Wootton, Tania Gray** and **Priscilla Bourne**

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On 4 April 2017, the Australian Government released a public consultation paper on ['\*Combatting bribery of foreign public officials: Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995\*](#) (**Consultation Paper**).

In consultation with the Australian Federal Police and the Office of the Commonwealth Director of Public Prosecutions (**CDPP**), the Attorney-General's Department is exploring reform options to improve the effectiveness of Australia's current foreign bribery regime under the *Criminal Code Act 1995* (Cth) (**Criminal Code**) in addressing foreign bribery and removing barriers to prosecution. The Government's overarching objective is to create an incentive for companies to implement more effective measures to prevent bribery and promote a culture of integrity. The Consultation Paper sets out proposed reforms to the Criminal Code.

The amendments will significantly lower the bar for corporate prosecutions for foreign bribery in Australia.

The key changes proposed include:

1. creating a new offence of recklessly bribing a foreign public official; and
2. creating a new corporate offence for failing to prevent foreign bribery, akin to the offence under the UK Bribery Act.

Submissions on the proposed amendments close on **Monday 1 May 2017**.

In parallel, the Government is also calling for submissions on its proposed deferred prosecution scheme for Australia. Further information is available in our briefing [here](#).

## WHAT IS FOREIGN BRIBERY?

Australia has been a party to the [OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions \(Anti-Bribery Convention\)](#) since 1999. The Anti-Bribery Convention obliges State parties to criminalise the bribery of foreign public officials and implement a range of related measures to effect this criminalisation.

Australia has given effect to these obligations through the foreign bribery offence in s 70.2 of the Criminal Code. In brief, this provides that it is an offence to provide or offer a benefit to another person that is not legitimately due, with the intention of influencing a foreign public official in order to gain or retain business or a business advantage that is not legitimately due.

Foreign bribery is a serious offence, which carries significant penalties for both individuals and companies, but is one that is inherently difficult to detect and enforce. The Australian experience to date has shown the difficulties the Australian authorities have had with investigation and enforcement, with only 2 matters proceeding to prosecution since the offence was introduced almost 20 years ago.

## WHAT ARE THE CHALLENGES POSED BY THE CURRENT OFFENCE?

The Consultation Paper identifies the following challenges posed by the foreign bribery offence in its current form:

- it is difficult to establish the relevant intention by the accused, particularly where there is a lack of written evidence;
- the prosecution must show that both the benefit offered or provided and the business advantage sought were 'not legitimately due'. This can be difficult to show beyond reasonable doubt when bribes are often concealed by describing them as legitimate payments (eg as agent fees);
- elements of the offence cannot be established without obtaining information from foreign jurisdictions, meaning investigators are reliant on international legal assistance processes;
- the drafting of the offence can be interpreted inconsistently with the intended policy

objectives; and

- the offence can be difficult to apply to typical cases of foreign bribery, which may involve the use of third party agents or intermediaries, or instances of wilful blindness by senior management to activities within their companies.

## **WHAT ARE THE PROPOSED AMENDMENTS?**

To overcome these challenges, the Government proposes to amend the foreign bribery offence as described below.

### ***NEW OFFENCE OF FAILING TO PREVENT BRIBERY***

Under the current regime, a corporation may be found guilty of the offence of foreign bribery if an employee, agent or officer engages in the relevant conduct (the offering of an illegitimate benefit) with a guilty intention. Under the Criminal Code provisions relating to corporate attribution, the corporation will be responsible if the Board or a “high managerial agent” engages or authorises the conduct, or if its corporate culture encouraged, tolerated or led to the conduct.

One of the most significant changes proposed is to introduce a new corporate offence of failing to prevent foreign bribery, similar to the corporate offence that exists in the UK. This would mean a company would automatically be liable for bribery by employees, contractors and agents, except where it can show that the company had a proper system of internal controls and compliance in place to prevent the bribery from occurring – known as 'adequate procedures'.

When a similar offence was introduced in the UK, it led to significant activity from companies looking to enhance their compliance regimes. The Consultation Paper indicates that the Government will publish guidelines on steps that companies could take to do this.

### ***NEW OFFENCE OF RECKLESSLY BRIBING A FOREIGN PUBLIC OFFICIAL***

The Government is also considering whether it would be appropriate to create a new foreign bribery offence based on recklessness. Unlike the current offence requiring intention, this new offence would apply where a person is aware of a substantial (and unjustifiable) risk that the conduct of providing or offering a benefit would improperly influence a foreign public official in relation to obtaining business or an advantage.

The maximum penalty would be half of the corresponding intention offence, reflecting the differing degree of culpability.

This will significantly lower the hurdle prosecutors face in pursuing alleged offenders, and is another development which is intended to prompt companies to revisit and where necessary bolster their compliance frameworks.

## **REMOVING THE REQUIREMENTS THAT THE BENEFIT OR BUSINESS ADVANTAGE MUST BE 'NOT LEGITIMATELY DUE'**

The abovementioned challenges highlight the difficulty proving that a benefit or business advantage was 'not legitimately due'. The Government proposes to amend the offence to replace these elements with the concept of 'improperly influencing' a foreign public official to obtain or retain business or an advantage.

The revised offence would not outline an exclusive list of factors to be considered in determining whether there has been 'improper influence', as it would remain open to the court to consider all relevant factors. However, factors the legislation could expressly list as relevant may include:

- who was the recipient or intended recipient of the benefit;
- the nature of the benefit and how it was provided;
- whether the value of the benefit was disproportionate to the value of any goods or services provided, or consideration given, for the benefit;
- whether the benefit was provided in the absence of any legal obligation to do so;
- whether the benefit was recorded or documented and, if so, the accuracy of that record or documentation and its consistency with the ordinary recording practices of the person who made it;
- whether there is evidence that due diligence was exercised;
- whether the provision or acceptance of the benefit, or any conduct directly connected with the provision or acceptance of the benefit, is contrary to a written law in the place where the conduct occurs;
- whether the business or advantage was awarded on a competitive or non-commercial basis; and
- whether there is any demonstrable conflict in the provision of the business or advantage.

In determining whether the influence is improper, a court would be required to disregard the fact the benefit or advantage may be customary, insignificant or officially tolerated.

Potential alternatives to introducing the concept of 'improper influence' that are also under consideration include:

- replacing the threshold of 'not legitimately due' with the concept of 'dishonesty'; or
- providing that the benefit must be 'improper', which would increase the number of factors the court could consider and focus the attention on the nature of the benefit rather than the relevant circumstances surrounding an attempt to influence the foreign public official.

### ***EXTENDING THE DEFINITION OF FOREIGN PUBLIC OFFICIAL***

The Government also proposes to extend the current definition of 'foreign public official' in s 70.1 of the Criminal Code to include candidates for office. This amendment would not prevent individuals or companies from making legitimate donations to candidates, as the prosecution would still need to show the benefit provided or offered sought to improperly influence the candidate to obtain or retain an advantage.

### ***EXTENDING THE OFFENCE TO COVER BRIBERY TO OBTAIN A PERSONAL ADVANTAGE***

The offence currently applies to bribery of foreign public officials to obtain or retain business or business advantages. However, foreign bribery can occur where the advantage sought is personal (eg the bestowal of personal titles or honours). The Government proposes to extend the offence to cover this.

### ***REMOVING THE REQUIREMENT OF INFLUENCING A FOREIGN PUBLIC OFFICIAL IN THEIR OFFICIAL CAPACITY***

A further proposed amendment to the foreign bribery offence is removing the requirement that the foreign public official be influenced 'in the exercise of their duties as foreign public official'. According to the Consultation Paper, investigations have indicated that foreign public officials can be bribed to act outside their official duties to secure business or an advantage. It is seemingly more relevant that the foreign officials hold a particular position of power within the foreign country, rather than whether they were in fact influenced to act specifically within their official capacity.

### ***CLARIFYING THE SCOPE OF THE OFFENCE***

Finally, the Government proposes to amend the drafting of the offence to clarify its intended scope in two ways. First, to make it clear that the business or advantage can be obtained for another person, not only the person who provided or offered the benefit. Second, to clarify that the accused does not need to have a specific business or advantage in mind when providing or offering the bribe.

### ***FACILITATION PAYMENTS DEFENCE TO REMAIN***

Notably, the Government does not propose to amend or remove the existing facilitation payment defence, despite almost all submissions lodged in relation to the [inquiry into foreign bribery by the Senate Economic References Committee](#) calling for its abolition.

## WHAT NEXT

As mentioned above, feedback has been invited on the proposed reforms. Responses to the Consultation Paper close on **Monday 1 May 2017**.

The proposed reforms coincide with the [Senate Economic References Committee's inquiry](#) into Australia's arrangements in relation to foreign bribery, which commenced in July 2015. While this inquiry lapsed at the end of the 44<sup>th</sup> Parliament, the Senate agreed to re-adopt the inquiry in October 2016. A report is due by 30 June 2017.

Further, the Consultation Paper's release closely follows the Government's release of another [consultation paper](#) that sets out the Government's proposed model for implementing a deferred prosecution agreement scheme in Australia. For further information on that, please see our update [here](#).

Reform is also currently under separate consideration in relation to whistle-blowers and [white collar crime penalties](#). We anticipate that these proposed reforms will provide further impetus and continue to drive political focus on corporate crime reform.

For further information, see our recent updates and predictions for 2017 developments in the anti-corruption space [here](#) and [here](#).

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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