



Australia - Global bribery offenses guide

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1. What is the legal framework governing bribery in Australia?

The legal framework governing bribery in Australia exists at both a federal (national) level, and at the level of each of Australia's six states and two territories.

Australia's federal bribery laws generally deal with bribery connected with public officials, whereas its state and territory laws apply to both bribery of public officials, and private or commercial bribery. These laws exist at statute and in common law.

At the federal level, the key piece of legislation is the Criminal Code Act 1995 (Cth) (Criminal Code). The Criminal Code contains provisions relating to, among other things, the bribery of foreign public officials and the bribery of Commonwealth public officials.

At the time of writing, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) (Combatting Corporate Crime Bill) is before the Commonwealth Senate. The Combatting Corporate Crime Bill proposes amendments to sections of the Criminal Code in order to strengthen the existing foreign bribery offense, as well as introduce a new offense for failing to prevent foreign bribery. It also proposes a deferred prosecution agreement (DPA) scheme for corporations. The Combatting Corporate Crime Bill was first introduced in 2017 but lapsed when the government was dissolved in advance of the 2019 federal election.

On 17 March 2020, the Legal and Constitutional Affairs Legislation Committee (the Committee) published its report recommending that the Combatting Corporate Crime Bill be passed by the Australian Senate. Although the Committee ultimately recommended passage through the Senate, three Labor members rejected the proposal to amend various 'dishonest' offenses in the Criminal Code and the introduction of a DPA scheme.

In these uncertain times, Federal Parliament has announced that it will not sit again until August 2020 as part of a revised sitting schedule. It is unclear whether the Combatting Corporate Crime Bill will next be considered by Parliament at this next sitting.

At a state and territory level, legislative provisions relating to bribery are generally located within each jurisdiction's criminal statutes. The relevant provisions of those statutes include: s 249B of the Crimes Act 1900 (NSW), s 176 of the Crimes Act 1958 (Vic), s 150 and s 249 of the Criminal Law Consolidation Act 1935 (SA), s 442B-442BA of the Criminal Code Act 1899 (QLD), s 529-530 of the Criminal Code (WA), s 266 of the Criminal Code Act 1924 (TAS), s 356-357 of the Criminal Code 2002 (ACT) and s 236 of the Criminal Code Act 1983 (NT).

In this chapter we focus primarily on the federal legal framework.

2. What constitutes a bribe?

Generally speaking, a bribe occurs where a person provides a benefit (meaning any form of advantage) to another person where that benefit is not legitimately due or is provided in dishonest circumstances, in order to influence that second person to do or not do something in respect of their official role or in respect of their business affairs.

The specific definition applicable varies by jurisdiction. Regard should be given to specific legislation mentioned above.

3. What are the principal offenses under this legal framework?

At a federal level:

- bribing a foreign public official (division 70.2 of the Criminal Code). The Combatting Corporate Crime Bill broadens this offense in several respects. First, the definition of foreign public individuals is extended to include candidates for office. Secondly, the requirement that a foreign public official must be influenced in the exercise of their duties is removed. Thirdly, the ordinary requirement that a benefit must be "not legitimately due" is replaced with the concept of "improperly influencing" a public individual. Finally, the offense is extended to cover bribery to obtain a 'personal' or non-business advantage;
- bribery of a Commonwealth public official (division 141.1 of the Criminal Code). There are also related offenses of corrupting benefits given to, or received by, a Commonwealth public official (division 142.1 of the Criminal Code) and abuse of public office (division 142.2 of the Criminal Code);
- offenses connected with intentionally or recklessly concealing illegitimate payments by making, altering or destroying accounting records (division 490 of the Criminal Code). These offenses dovetail with similar offenses in Australia's Corporations Act 2001 (Cth) relating to the need for companies to keep written financial records which correctly record and explain their transactions and financial position and performance (s 286) and the prohibition on officers or employees from engaging in conduct which results in the falsification of books relating to the affairs of the company (s 1307); and
- the Combatting Corporate Crime Bill introduces a new corporate offense for failing to prevent foreign bribery by an "associate" of a corporation. The new offense will hold a corporation strictly liable where an associate bribes a foreign public official for the profit or gain of the corporation. The only defense available to the corporation will be if it can demonstrate that it had "adequate procedures" in place to prevent the offense. An "associate" is defined as an officer, employee, agent, contractor, subsidiary or person within the control of a corporation or otherwise performing services on behalf of a corporation.

At a state and territory level, practitioners should have regard to, among other things, the elements of bribery offenses as referred to in the state and territory legislation mentioned at paragraph 1, above, together with any relevant case law.

Generally speaking, many of the state and territory offenses relate to both receiving and soliciting bribes (which are frequently referred to as secret commissions, corrupt commissions, inducements or rewards).

4. What is the jurisdictional reach of the legal framework?

In respect of bribery of a foreign public official, the Criminal Code applies where the conduct constituting the offense occurs wholly or partly in Australia, or where the person alleged to have committed it is an Australian citizen or resident, or a body corporate incorporated in Australia.

In respect of bribery of a Commonwealth public official and other related offenses, the Criminal Code applies regardless of whether or not the alleged conduct occurs inside or outside of Australia or whether or not a result of the conduct constituting the offense occurs in Australia. At a state and territory level, consideration should be given to particular legislation that may apply. Generally speaking, a degree of geographic connection to the relevant state or territory will be required.

5. Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

At a federal level, private individuals, public officials and the legal entity concerned can be prosecuted for bribery offenses.

When assessing whether a corporation is liable for breach of the foreign bribery provisions, the Criminal Code specifies the approach to be taken in testing whether the 'physical' and 'fault' elements of the offense have been made out. In

particular:

- actions taken by an employee or agent of the corporation, within the scope of their apparent authority, will be treated as actions of the corporation; and
- in assessing whether the corporation had the relevant "intention" (to influence a foreign public official or a Commonwealth public official), the factors considered include whether the board or a senior manager intentionally, knowingly or recklessly carried out the conduct, or expressly or impliedly authorized or permitted the commission of the offense. Whether the corporation had a corporate culture that encouraged or tolerated the relevant non-compliance is also relevant.

As set out above, the proposed Combatting Corporate Crime Bill makes bribery of a foreign public official by an associate an offense of strict liability for a corporation. This means that the prosecution is not required to prove that the "fault" element of the offense is attributable to the corporation. Another important difference with the proposed legislation is that, as explained at paragraph 3 above, "associate" is broadly defined to capture officers, employees, agents, contractors, subsidiaries or persons within the control of a corporation or otherwise performing services on behalf of a corporation. This is different to the ambit of a corporation's liability under the current regime which, as noted above, is limited only to officers, employees and agents.

6. Can a parent company be liable for its subsidiary's involvement in bribery?

At a Federal level, yes, if the subsidiary is considered to be acting as the agent of the parent company.

There are several "accessorial" provisions extending criminal responsibility, including in relation to complicity and common purpose, joint commission, commission by proxy, incitement and conspiracy. Those provisions may also be relevant in having a parent company be found liable for its subsidiary's involvement in bribery.

Under the Combatting Corporate Crime Bill, Australian parent companies can be liable for the acts of their overseas and local subsidiaries even where they are not wholly owned.

7. Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

In relation to bribing a foreign public official, no, if the facilitation defense at division 70.4 of the Criminal Code can be made out.

That facilitation defense will be made out where the benefit is of a minor value, offered for the sole or dominant purpose of securing or expediting routine government action of a minor nature, and is recorded as soon as practicable after the conduct occurred. Such record needs to be signed or confirmed by the person concerned, and must identify the value of the benefit, the date of the conduct, the identity of the foreign public official and the details of the government action sought to be expedited.

On March 28, 2018 a Senate Standing Committee on Economics recommended that the facilitation defense be abolished. Although that has yet to occur, any developments in this area should be closely monitored.

8. Does the legal framework restrict political and charitable contributions?

At a federal level, political and charitable contributions are not expressly restricted under the Criminal Code. However, depending on the circumstances, such contributions could constitute the offense of bribing a foreign official, so corporates should proceed with caution in this area.

There are separate laws which govern disclosure requirements around such contributions.

9. Does the legal framework place restrictions on corporate hospitality?

At a federal level no, but it is possible for corporate hospitality to be considered a benefit within the meaning of the foreign bribery prohibitions of the Criminal Code. Usually, however, to do so would require some level of excess such that the hospitality or entertainment could be said to have been offered with the intention of influencing those attending.

10. Are there any defenses for bribery offenses?

At a federal level, there are certain defenses available, including:

- where the benefit given or offered is expressly permitted or required by the written laws governing the foreign public official;
- the facilitation defense mentioned at paragraph 7, above; and
- in relation to the new offense proposed under the Combatting Corporate Crime Bill for failing to prevent foreign bribery, the corporation will have a complete defense if it can show that it had adequate procedures in place to prevent the commission of foreign bribery by its associates.

11. What are the key regulatory or enforcement bodies with regard to bribery?

At a federal level, the principal enforcement agency for foreign bribery offenses is the Australian Federal Police. However, investigations can also be carried out by the multi-agency Fraud and Anti-Corruption Centre (FAC) and the Australian Securities and Investment Commission (ASIC). Those entities refer alleged offenders to the Commonwealth Director of Public Prosecutions (CDPP) for prosecution. It is the CDPP that makes the decision about whether or not to prosecute.

At a state and territory level, state and territory police are often tasked with investigating bribery offenses before referring them to their relevant prosecutorial authority. There is also a range of state and territory based anti-corruption authorities who have broad-ranging powers to investigate corruption.

12. What are the legal consequences of being found guilty of bribery offenses?

At a federal level, for the offenses of bribing a foreign public official or the bribery of a Commonwealth public official, the penalties are:

- for an individual, imprisonment for up to ten years and a fine of AUD2.1 million or both; and
- for a company, a fine of up to AUD21 million or a fine of three times the value of the benefit or 10% of the annual turnover of the company during the 12 months ending at the end of the month when the offense occurred, whichever is greater.

These penalties will also apply to the new offense of failing to prevent foreign bribery by an associate.

The consequences of being found guilty of bribery offenses at a state and territory level vary between states and territories, but they can likewise involve substantial fines and imprisonment of individuals.

Australia also has legislation enabling the confiscation of proceeds of crime, separate from and additional to any fines or penalties that may be imposed if found guilty of bribery offenses.

13. Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

At the time of writing, no such schemes exist. However, under the Combatting Corporate Crime Bill's proposed reforms, a new regime is being introduced where the CDPP can invite a company that has engaged in serious corporate crime, including bribery, to negotiate a DPA which will require the corporation to comply with a range of specified conditions. If the corporation complies with the specified conditions set out in the DPA, it will not be prosecuted in relation to the offenses specified under the DPA. However, the corporation will likely be required to cooperate with related investigations and pay financial penalties, amongst other conditions. A DPA will only be offered if the CDPP is satisfied that it is in the public interest to do so. Under the current proposed legislation, the terms of the DPA must also be approved by a retired judicial officer appointed for that purpose.

Although the new DPA scheme has been broadly supported by the Committee, there were three dissenting Committee members on the DPA scheme proposal. The Committee's split position may affect the prospects of the DPA regime passing into law in its current form.

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