

# **Q&A IN RELATION TO BRIBERY OFFENCES IN AUSTRALIA**



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## 1 Q&A In Relation to bribery offences in Australia

# 1. Legal Framework

### 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 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?

### 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.

### What are the principal offences under this legal framework?

- At a federal level:
  - bribing a foreign public official (division 70.2 of the Criminal Code);
  - bribery of a Commonwealth public official (division 141.1 of the Criminal Code). There are also related offences 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);
  - offences connected with intentionally or recklessly concealing illegitimate payments by making, altering or destroying accounting records (division 490 of the Criminal Code). These offences dovetail with similar offences 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).
- At a state and territory level, practitioners should have regard to, among other things, the elements of bribery offences 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 offences relate to both receiving and

soliciting bribes (which are frequently referred to as secret commissions, corrupt commissions, inducements or rewards).

### 3. Jurisdictional Reach

#### 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 offence 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 offences, 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 offence 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.

### 4. Who may be liable?

#### 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 offences.
- 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 offence 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 offence. Whether the corporation had a corporate culture that encouraged or tolerated the relevant non-compliance is also relevant.

#### 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.

### 5. High Risk Areas

#### 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

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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..

#### 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 offence 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.

#### 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.

## 6. Legal Defences

#### Are there any defenses for bribery offences?

- 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; and
  - The facilitation defense mentioned at paragraph 7, above.

## 7. Regulatory and Enforcement Bodies

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

- At a federal level, the principal enforcement agency for foreign bribery offences 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 offences 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.

## 8. Legal Consequences

### What are the legal consequences of being found guilty of bribery offences?

- At a federal level, for the offences 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 offence occurred, whichever is greater.
- The consequences of being found guilty of bribery offences 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 offences.

## 9. Deferred Prosecution Agreements

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

- Not at the time of writing. Legislation which seeks to introduce DPAs among other proposed reforms had been introduced to Parliament, but lapsed with the calling of the 2019 Federal election. Its fate may depend on the legislative priorities of the party that gains power following that election.

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Content Correct as of June 2019.

Cover Image: Transparency International Corruptions Perception Index 2018