

EXPOSURE DRAFT

2016-2017

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT (31/03/2017)

Crimes Legislation Amendment Bill 2017

No. , 2017

(Justice)

A Bill for an Act to amend the *Criminal Code Act 1995*, and for related purposes

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1
2 **A Bill for an Act to amend the *Criminal Code Act***
3 ***1995, and for related purposes***

4 The Parliament of Australia enacts:

5 **1 Short title**

6 This Act is the *Crimes Legislation Amendment Act 2017*.

7 **2 Commencement**

- 8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent.	

13 Note: This table relates only to the provisions of this Act as originally
14 enacted. It will not be amended to deal with any later amendments of
15 this Act.

- 16 (2) Any information in column 3 of the table is not part of this Act.
17 Information may be inserted in this column, or information in it
18 may be edited, in any published version of this Act.

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1 **3 Schedules**

2 Legislation that is specified in a Schedule to this Act is amended or
3 repealed as set out in the applicable items in the Schedule
4 concerned, and any other item in a Schedule to this Act has effect
5 according to its terms.

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Amendments relating to foreign bribery Schedule 1

1 **Schedule 1—Amendments relating to foreign**
2 **bribery**
3

4 *Criminal Code Act 1995*

5 **1 Before section 70.1 of the *Criminal Code***

6 Insert:

7 **Subdivision A—Definitions**

8 **2 Section 70.1 of the *Criminal Code***

9 Insert:

10 *advantage* means an advantage of any kind and is not limited to
11 property.

12 *annual turnover* has the meaning given by section 70.5C.

13 *associate*: a person is an *associate* of another person if the
14 first-mentioned person:

- 15 (a) is an employee, agent or contractor of the other person; or
16 (b) is a subsidiary (within the meaning of the *Corporations Act*
17 *2001*) of the other person; or
18 (c) is controlled (within the meaning of the *Corporations Act*
19 *2001*) by the other person; or
20 (d) otherwise performs services for or on behalf of the other
21 person.

22 **3 Section 70.1 of the *Criminal Code* (definitions of *benefit* and**
23 ***business advantage*)**

24 Repeal the definitions.

25 **4 Section 70.1 of the *Criminal Code* (at the end of the**
26 **definition of *foreign public official*)**

27 Add:

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Schedule 1 Amendments relating to foreign bribery

1 ; or (m) an individual standing, or nominated, (whether formally or
2 informally) as a candidate to be a foreign public official
3 covered by any of paragraphs (a) to (k) of this definition.

4 **5 After section 70.1 of the *Criminal Code***

5 Insert:

6 **Subdivision B—Bribery of foreign public officials**

7 **6 Section 70.2 of the *Criminal Code***

8 Repeal the section, substitute:

9 **70.2 Intentionally bribing a foreign public official**

- 10 (1) A person commits an offence if:
11 (a) the person:
12 (i) provides a benefit to another person; or
13 (ii) causes a benefit to be provided to another person; or
14 (iii) offers to provide, or promises to provide, a benefit to
15 another person; or
16 (iv) causes an offer of the provision of a benefit, or a
17 promise of the provision of a benefit, to be made to
18 another person; and
19 (b) the first-mentioned person does so with the intention of
20 improperly influencing a foreign public official (who may be
21 the other person) in order to obtain or retain business or an
22 advantage (whether or not for the first-mentioned person).

23 Note: See also section 70.2B. For defences see sections 70.3 and 70.4.

- 24 (2) For the purposes of paragraph (1)(b):
25 (a) the first-mentioned person does not need to intend to
26 influence a particular foreign public official; and
27 (b) the first-mentioned person does not need to intend to obtain
28 or retain particular business or a particular advantage; and
29 (c) business, or an advantage, does not need to be actually
30 obtained or retained.

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Amendments relating to foreign bribery **Schedule 1**

1

Penalty for individual

2

- (3) An offence against subsection (1) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

3

4

5

Penalty for body corporate

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- (4) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:

7

8

9

(a) 100,000 penalty units;

10

(b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;

11

12

13

14

15

(c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

16

17

18

19

20

Alternative verdict

21

- (5) In a trial for an offence against subsection (1), the trier of fact may find the defendant not guilty of that offence, but guilty of an offence against subsection 70.2A(1), if:

22

23

24

(a) the trier of fact is not satisfied that the defendant is guilty of the offence against subsection (1) of this section; and

25

26

(b) the trier of fact is satisfied beyond reasonable doubt that the defendant is guilty of the offence against subsection 70.2A(1); and

27

28

29

(c) the defendant has been accorded procedural fairness in relation to that finding of guilt.

30

31

70.2A Recklessly bribing a foreign public official

32

- (1) A person commits an offence if:

33

(a) the person:

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Schedule 1 Amendments relating to foreign bribery

- 1 (i) provides a benefit to another person; or
2 (ii) causes a benefit to be provided to another person; or
3 (iii) offers to provide, or promises to provide, a benefit to
4 another person; or
5 (iv) causes an offer of the provision of a benefit, or a
6 promise of the provision of a benefit, to be made to
7 another person; and
8 (b) the first-mentioned person is reckless as to whether the
9 conduct will improperly influence a foreign public official
10 (who may be the other person) in relation to the obtaining or
11 retaining of business or an advantage.

12 Note: See also section 70.2B. For defences see sections 70.3 and 70.4.

- 13 (2) For the purposes of paragraph (1)(b):
14 (a) the first-mentioned person does not need to be reckless as to
15 whether the conduct will influence a particular foreign public
16 official; and
17 (b) the first-mentioned person does not need to be reckless as to
18 whether the conduct will influence a foreign public official in
19 relation to the obtaining or retaining of particular business or
20 of a particular advantage; and
21 (c) business, or an advantage, does not need to be actually
22 obtained or retained.

23 *Penalty for individual*

- 24 (3) An offence against subsection (1) committed by an individual is
25 punishable on conviction by imprisonment for not more than 5
26 years, a fine not more than 5,000 penalty units, or both.

27 *Penalty for body corporate*

- 28 (4) An offence against subsection (1) committed by a body corporate
29 is punishable on conviction by a fine not more than the greatest of
30 the following:
31 (a) 50,000 penalty units;
32 (b) if the court can determine the value of the benefit that the
33 body corporate, and any body corporate related to the body
34 corporate, have obtained directly or indirectly and that is

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Amendments relating to foreign bribery **Schedule 1**

- 1 reasonably attributable to the conduct constituting the
2 offence—1.5 times the value of that benefit;
3 (c) if the court cannot determine the value of that benefit—5% of
4 the annual turnover of the body corporate during the period
5 (the *turnover period*) of 12 months ending at the end of the
6 month in which the conduct constituting the offence
7 occurred.

8 **70.2B Improper influence**

9 *Determination to be a matter for the trier of fact*

- 10 (1) In a prosecution for an offence against section 70.2 or 70.2A, the
11 determination of whether influence is improper is a matter for the
12 trier of fact.

13 *Matters that must be disregarded*

- 14 (2) In determining whether influence is improper for the purposes of
15 paragraph 70.2(1)(b) or 70.2A(1)(b), a trier of fact must disregard
16 the following:
17 (a) the fact that the benefit, or the offer or promise to provide the
18 benefit, may be, or be perceived to be, customary, necessary
19 or required in the situation;
20 (b) any official tolerance of the benefit;
21 (c) if particular business or a particular advantage is relevant to
22 proving the matters referred to in that paragraph—the
23 following:
24 (i) if the value of the business or advantage is
25 insignificant—that fact;
26 (ii) in the case of an advantage—any official tolerance of
27 the advantage;
28 (iii) in the case of an advantage—the fact that the advantage
29 may be customary, or perceived to be customary, in the
30 situation.

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Schedule 1 Amendments relating to foreign bribery

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Matters to which regard may be had

- (3) In determining whether influence is improper for the purposes of paragraph 70.2(1)(b) or 70.2A(1)(b), a trier of fact may have regard to the following:
- (a) the recipient or intended recipient of the benefit;
 - (b) the nature of the benefit;
 - (c) the manner of the provision of the benefit (or, if applicable, the offered or promised manner of the provision of the benefit);
 - (d) whether the value of the benefit is disproportionate to the value of any consideration provided or purported to have been provided for the benefit;
 - (e) if the benefit was provided, or the offer or promise to provide the benefit was made, in the absence of any legal obligation to do so—that fact;
 - (f) whether, and to what extent, the provision of the benefit, or the offer or promise to provide the benefit, is recorded or documented;
 - (g) if the provision of the benefit, or the offer or promise to provide the benefit, is recorded or documented:
 - (i) the accuracy of the record or documentation; and
 - (ii) whether the record or documentation is consistent with the ordinary practices of the person who made the record or documentation;
 - (h) whether there is evidence that due diligence was exercised by the first-mentioned person in section 70.2 or 70.2A (as the case may be) in relation to the benefit, or the offer or promise to provide the benefit;
 - (i) whether any of the following conduct is contrary to a written law in force in the place where that conduct occurs:
 - (i) the provision of the benefit, or the offer or promise to provide the benefit;
 - (ii) the acceptance of the benefit;
 - (iii) any conduct directly connected with conduct referred to in subparagraph (i) or (ii);

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Amendments relating to foreign bribery **Schedule 1**

- 1 (j) if particular business or a particular advantage is relevant to
2 proving the matters referred to in that paragraph—the
3 following:
4 (i) whether the business or advantage was awarded on a
5 competitive or non-commercial basis;
6 (ii) whether there is any demonstrable conflict of interest in
7 the provision of the business or advantage.
- 8 (4) To avoid doubt, subsection (3) does not limit the matters to which
9 the trier of fact may have regard.

7 Subsections 70.3(1) and (2) of the *Criminal Code*

10 Omit “section 70.2”, substitute “this Subdivision”.

8 After subsection 70.3(2) of the *Criminal Code*

11 Insert:

- 12 (2A) A person does not commit an offence against this Subdivision if:
13
14 (a) the person’s conduct occurred in relation to a foreign public
15 official (the *relevant foreign public official*); and
16 (b) the relevant foreign public official is covered by
17 paragraph (m) of the definition of *foreign public official* in
18 section 70.1 because the relevant foreign public official is a
19 candidate to be a particular foreign public official (the
20 *substantive foreign public official*); and
21 (c) assuming that the first-mentioned person’s conduct had
22 occurred wholly in the place, the foreign country or the part
23 of the foreign country, as the case may be, (the *relevant*
24 *place*) referred to in the item of the table in subsection (1)
25 that would be applicable if the first-mentioned person’s
26 conduct had occurred in relation to the substantive foreign
27 public official, a written law in force in the relevant place
28 permits the provision of the benefit to the relevant foreign
29 public official.
30

31 Note: A defendant bears an evidential burden in relation to the matter in
32 subsection (2A). See subsection 13.3(3).

9 Subsection 70.4(1) of the *Criminal Code*

33 Omit “section 70.2”, substitute “this Subdivision”.

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Schedule 1 Amendments relating to foreign bribery

1 **10 Paragraph 70.4(3)(d) of the *Criminal Code***

2 After “70.2(1)(a)”, insert “or 70.2A(1)(a) (as the case may be)”.

3 **11 Subsection 70.5(1) of the *Criminal Code***

4 Omit “section 70.2”, substitute “this Subdivision”.

5 **12 Subsection 70.5(1) of the *Criminal Code* (note)**

6 Omit “*section 70.2*”, substitute “*this Subdivision*”.

7 **13 Subsections 70.5(2) and (3) of the *Criminal Code***

8 Omit “section 70.2”, substitute “this Subdivision”.

9 **14 After section 70.5 of the *Criminal Code***

10 Insert:

11 **Subdivision C—Failure to prevent bribery of foreign public**
12 **officials**

13 **70.5A Failing to prevent bribery of a foreign public official**

14 *Offence*

15 (1) A person (the *first person*) commits an offence if:

16 (a) the first person is a body corporate:

17 (i) that is a constitutional corporation; or

18 (ii) that is incorporated in a Territory; or

19 (iii) that is taken to be registered in a Territory under
20 section 119A of the *Corporations Act 2001*; and

21 (b) an associate of the first person:

22 (i) commits an offence against section 70.2 or 70.2A; or

23 (ii) engages in conduct outside Australia that, if engaged in
24 in Australia, would constitute an offence (the *notional*
25 *offence*) against section 70.2 or 70.2A; and

26 (c) the associate does so for the profit or gain of the first person.

27 (2) Absolute liability applies to:

28 (a) paragraphs (1)(a) and (c); and

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Amendments relating to foreign bribery **Schedule 1**

- 1 (b) the circumstance in subparagraph (1)(b)(i) that the associate
2 commits an offence against section 70.2 or 70.2A; and
3 (c) the circumstance in subparagraph (1)(b)(ii) that the associate
4 engages in conduct outside Australia that, if engaged in in
5 Australia, would constitute the notional offence.
- 6 (3) To avoid doubt, the first person may be convicted of an offence
7 against subsection (1) because of the commission by the associate
8 of an offence against section 70.2 or 70.2A even if the associate
9 has not been convicted of that offence.
- 10 (4) Section 12.6 applies in relation to an offence against subsection (1)
11 of this section as if the reference in section 12.6 to an employee,
12 agent or officer of a body corporate included any associate of the
13 body corporate.

14 *Exception*

- 15 (5) Subsection (1) does not apply if the first person proves that the first
16 person had in place adequate procedures designed to prevent:
17 (a) the commission of an offence against either section 70.2 or
18 70.2A by any associate of the first person; and
19 (b) any associate of the first person engaging in conduct outside
20 Australia that, if engaged in in Australia, would constitute an
21 offence against section 70.2 or 70.2A.

22 Note: A defendant bears a legal burden in relation to the matter in
23 subsection (5): see section 13.4.

24 *Penalty*

- 25 (6) An offence against subsection (1) relating to an offence or notional
26 offence against section 70.2 is punishable on conviction by a fine
27 not more than the greatest of the following:
28 (a) 100,000 penalty units;
29 (b) if the court can determine the value of the benefit that the
30 associate obtained directly or indirectly and that is reasonably
31 attributable to the conduct constituting the offence, or that
32 would have constituted the notional offence, against
33 section 70.2—3 times the value of that benefit;
34 (c) if the court cannot determine the value of that benefit—10%
35 of the annual turnover of the first person during the period
-

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Schedule 1 Amendments relating to foreign bribery

1 (the *turnover period*) of 12 months ending at the end of the
2 month in which the conduct referred to in paragraph (b)
3 occurred.

4 (7) An offence against subsection (1) relating to an offence or notional
5 offence against section 70.2A (but not also against section 70.2) is
6 punishable on conviction by a fine not more than the greatest of the
7 following:

8 (a) 50,000 penalty units;

9 (b) if the court can determine the value of the benefit that the
10 associate obtained directly or indirectly and that is reasonably
11 attributable to the conduct constituting the offence, or that
12 would have constituted the notional offence, against
13 section 70.2A—1.5 times the value of that benefit;

14 (c) if the court cannot determine the value of that benefit—5% of
15 the annual turnover of the first person during the period (the
16 *turnover period*) of 12 months ending at the end of the month
17 in which the conduct referred to in paragraph (b) occurred.

18 *Geographical jurisdiction*

19 (8) Section 15.1 of the *Criminal Code* (extended geographical
20 jurisdiction—category A) applies to an offence against
21 subsection (1).

22 **70.5B Guidance on preventing bribery of foreign public officials**

23 (1) The Minister must publish guidance on the steps that a body
24 corporate can take to prevent an associate from bribing foreign
25 public officials.

26 (2) Guidance under subsection (2) is not a legislative instrument.

27 **15 Before section 70.6 of the *Criminal Code***

28 Insert:

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Amendments relating to foreign bribery **Schedule 1**

1 **Subdivision D—Miscellaneous**

2 **70.5C Meaning of annual turnover**

- 3 (1) For the purposes of this Division, the *annual turnover* of a body
4 corporate, during the turnover period, is the sum of the values of all
5 the supplies that the body corporate, and any body corporate
6 related to the body corporate, have made, or are likely to make,
7 during that period, other than the following supplies:
8 (a) supplies made from any of those bodies corporate to any
9 other of those bodies corporate;
10 (b) supplies that are input taxed;
11 (c) supplies that are not for consideration (and are not taxable
12 supplies under section 72-5 of the *A New Tax System (Goods
13 and Services Tax) Act 1999*);
14 (d) supplies that are not made in connection with an enterprise
15 that the body corporate carries on.
- 16 (2) Expressions used in this section that are also used in the *A New Tax
17 System (Goods and Services Tax) Act 1999* have the same meaning
18 in this section as they have in that Act.

19 **70.5D Related bodies corporate**

20 The question whether 2 bodies corporate are related to each other
21 is to be determined for the purposes of this Division in the same
22 way as for the purposes of the *Corporations Act 2001*.

23 **16 Application of amendments**

24 The amendments made by this Schedule apply in relation to conduct
25 engaged in on or after the commencement of this Schedule.