



Australian Government  
Attorney-General's Department

APRIL 2017

# Combatting bribery of foreign public officials

*Proposed amendments to the foreign bribery  
offence in the Criminal Code Act 1995*



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# **Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995***

## **Public Consultation Paper**

### **April 2017**

# Contents

- Introduction..... 1
- Recent developments ..... 1
- Making a submission ..... 2
- The current foreign bribery offence ..... 3
  - Overview..... 3
  - Challenges..... 3
- What would the proposed amendments do?..... 4
  - Extend the definition of foreign public official to include candidates for office ..... 4
  - Clarify the offence is about ‘improperly influencing’ a foreign public official..... 5
  - Create a new separate foreign bribery offence based on recklessness ..... 7
  - Create a new corporate offence of failing to prevent foreign bribery ..... 8
  - Remove the requirement of influencing a foreign official ‘in their official capacity’ ..... 8
  - Clarify that business or advantage can be obtained for someone else ..... 9
  - Clarify that the accused does not need to have specific business or advantage in mind ..... 9
- Implementation of the OECD Anti-Bribery Convention..... 9
- Possible consequential amendments ..... 9
- Appendix 1 — Notes on exposure draft..... 11

# Introduction

Bribery of foreign public officials (foreign bribery) in the course of international business is a serious problem across the globe. It harms those who play by the rules, siphons money away from communities, and undermines the rule of law. Bribery by Australians and Australian businesses can damage our international standing and shrink the global market for our exports.

Australia has been a committed party to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Anti-Bribery Convention) since 1999. The Anti-Bribery Convention obliges States parties to criminalise the bribery of foreign public officials and implement a range of related measures to make this criminalisation effective. Australia has given effect to these obligations through the foreign bribery offence in section 70.2 of the *Criminal Code Act 1995* (the Criminal Code), which carries significant penalties for individuals and companies.

The Government is exploring possible amendments to this offence to improve its effectiveness in addressing foreign bribery, and to remove possible impediments to a successful prosecution. Due to its nature, foreign bribery is inherently difficult to detect and enforce. Offending is often offshore, with evidence hard to identify and obtain. It can be easily concealed – with bribes disguised as agent fees or other seemingly legitimate expenses.

The offence in its current form poses challenges for typical cases of foreign bribery, which may involve the use of third party agents or intermediaries, instances of wilful blindness by senior management to activities occurring within their companies and a lack of readily available written evidence.

The Attorney-General's Department (the department) is working with the Australian Federal Police (AFP) and the Office of the Commonwealth Director of Public Prosecutions (CDPP) to explore possible reform options. This consultation paper outlines proposed amendments to the foreign bribery offence for public comment. Work is also underway in relation to a possible Australian scheme on deferred prosecution agreements, which may assist with enforcement of the foreign bribery offence.

## Recent developments

Australia has taken steps to strengthen enforcement of foreign bribery laws in recent years.

In 2014, the Government launched the AFP-hosted Fraud and Anti-Corruption Centre (the FAC Centre). The FAC Centre is a multi-agency initiative which strengthens law enforcement capability to respond to serious and complex fraud, foreign bribery and corruption. In 2016, the Government invested an additional \$15 million to expand the FAC Centre's foreign bribery investigative capability.

The Government constantly reviews relevant laws to ensure they remain strong and effective. In 2015, the Government amended the foreign bribery offence to close a potential loophole which could allow perpetrators of bribery to escape punishment by claiming they did not know the identity of the recipient of the bribe, or did not successfully induce an official to provide a benefit to the intended recipient. In March 2016, new false accounting laws commenced which make it a criminal offence, punishable by significant penalties, to intentionally or recklessly falsify accounting documents.

The Government is also exploring new enforcement options and ways to encourage companies to self-report criminal behaviour, including a possible scheme for deferred prosecution agreements. In 2016, the Minister for Justice released a public consultation paper on a possible deferred prosecution agreement scheme.

On 31 March 2017, the Minister released a consultation paper outlining a proposed model for a deferred prosecution agreement scheme. Submissions on this paper close on 1 May 2017.<sup>1</sup>

Work is also underway to enhance private sector whistleblower protections. The Treasury recently consulted on introducing new tax whistleblower protections and strengthening existing whistleblower protections in the corporate sector. This consultation complements the ongoing Parliamentary Committee inquiry into whistleblower protections in the corporate, public and not-for-profit sectors, which is due to report by 30 June 2017.

Australia is an active member of the OECD Working Group on Bribery, which monitors implementation and enforcement of the Convention. In March 2016, the Minister for Justice attended the OECD Anti-Bribery Ministerial Meeting in Paris and reaffirmed Australia's commitment to the Anti-Bribery Convention.<sup>2</sup>

The Senate Economics Committee is currently inquiring into Australia's arrangements in relation to foreign bribery. The terms of reference for this inquiry include an examination of the effectiveness of Commonwealth legislation governing foreign bribery and related offences. The submissions made to that Committee have assisted in preparing this consultation paper.

The Government released its first National Action Plan under the Open Government Partnership in December 2016. As part of that Action Plan, the Government has committed to review laws applying to foreign bribery and consult on possible reform options.

## Making a submission

The proposed amendments to the foreign bribery offence are available as a separate document on the department's website at [www.ag.gov.au/consultations](http://www.ag.gov.au/consultations). Notes on the draft clauses are set out at **Appendix 1**.

Submissions on the proposed amendments can be emailed to [foreign.bribery@ag.gov.au](mailto:foreign.bribery@ag.gov.au).

Submissions may also be posted to:

Public consultation: Foreign bribery amendments  
Criminal Law Policy Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Submissions should be provided by close of business on **Monday 1 May 2017**. Submissions may be made public. Please indicate if you wish your submission to be confidential. Please note that submissions or comments will generally be subject to freedom of information legislation.

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<sup>1</sup> New tools to tackle white-collar crime, 31 March 2017

<https://www.ministerjustice.gov.au/MediaReleases/Pages/2017/FirstQuarter/New-tools-to-tackle-white-collar-crime.aspx>; Proposed model for a deferred prosecution agreement scheme in Australia  
<https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx>.

<sup>2</sup> Exploring new enforcement options for serious corporate crime, 17 March 2016

<https://www.ministerjustice.gov.au/MediaReleases/Pages/2016/FirstQuarter/Exploring-new-enforcement-options-for-serious-corporate-crime.aspx>.

# The current foreign bribery offence

## Overview

Under Article 1 of the Anti-Bribery Convention, each State party is required to make it a criminal offence under its domestic law for:

*any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*

Australia has given effect to this obligation in section 70.2 of the Criminal Code. Section 70.2 provides that a person commits an offence if:

- the person provides, offers, or promises a benefit to Person B (or causes the benefit to be given or offered to Person B)
- the benefit is not legitimately due to Person B, and
- the person intends to influence a foreign public official (who may be person B or someone else) in the exercise of their official duties, in order to obtain or retain business or a business advantage that is not legitimately due.

The offence applies both to individuals and companies, through the corporate criminal liability provisions in Division 12 of the Criminal Code.

It has been 18 years since the foreign bribery offence was introduced into the Criminal Code, and so it is appropriate to review it to ensure the law reflects community expectations and does not present unnecessary barriers to effective prosecution.

## Challenges

There are four key challenges authorities currently face in investigating and prosecuting the foreign bribery offence.

Firstly, the offence requires the prosecution to establish intention by the alleged offender – both in relation to the conduct of providing, offering or promising a benefit to Person B, and in relation to the influence of a foreign public official. These fault elements can be difficult to prove. This is particularly so where there is a lack of written evidence to demonstrate intent to influence a foreign public official and where the person who offers or provides the benefit is not the same person who stands to obtain or retain business or make a business advantage.

Secondly, the construction of the offence can create issues. The prosecution needs to show that both the benefit offered/provided/promised (the bribe) and the business advantage sought were ‘not legitimately due’ (paragraphs 70.2(1)(b) and 70.2(1)(c)). In some cases, the threshold of ‘not legitimately due’ presents challenges. Bribes can be concealed by describing them as legitimate payments (for instance, agent fees) making it difficult to show, beyond a reasonable doubt, that the payments are not legitimately due.

The current offence also provides that a court is to disregard the value of a benefit or business advantage when considering whether this benefit or advantage is legitimately due. This was intended to ensure that bribes of a minor value would be captured by the offence. However, it has created a situation where the court is not able to

have reference to the value of seemingly disproportionately large payments in determining whether a benefit or business advantage is not legitimately due.

Thirdly, particular elements of the offence cannot be proven without obtaining detailed information from foreign jurisdictions. For example, proving that a benefit or advantage was not legitimately due, or that a foreign official was working within their official duties, requires prosecutors to obtain evidence about foreign laws and the duties of the official in the country where bribery allegedly took place. This means that investigators are reliant on international legal assistance processes, which may take time or be unsuccessful.

Finally, it is possible that the offence may be interpreted in ways which are not consistent with the intended policy objectives. The Government seeks to clarify that the foreign bribery offence applies where a person provides a benefit to obtain business for another person, regardless of whether the person does have a specific business or business advantage in mind.

## What would the proposed amendments do?

To help overcome these challenges, the Government is considering possible amendments to the foreign bribery offence. These amendments would:

- extend the definition of foreign public official to include candidates for office
- remove the requirements that the benefit/business advantage must be ‘not legitimately due’ and replace it with the concept of ‘improperly influence’ a foreign public official
- extend the offence to cover bribery to obtain a personal advantage
- create a new foreign bribery offence based on the fault element of recklessness
- create a new corporate offence of failing to prevent foreign bribery
- remove the requirement of influencing a foreign public official in the exercise of their official capacity, and
- clarify that the offence does not require the accused to have a specific business or advantage in mind, that business or an advantage can be obtained for someone else.

These amendments are discussed in further detail below.

It is not proposed that the existing facilitation payment defence be amended. This defence has not presented as an issue in the enforcement of the foreign bribery offence. The Government will continue to review the operation of this defence, as required under the *OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions 2009*.

### **Extend the definition of foreign public official to include candidates for office**

The current definition of ‘foreign public official’ in section 70.1 does not include candidates for office. Law enforcement experience indicates that companies may bribe candidates for public office, with the intent of obtaining business advantages once the candidate takes office. The Government considers that such conduct should be captured by the foreign bribery offence. From a policy perspective, it is appropriate to criminalise bribery of a candidate as such conduct equally undermines good governance and free and fair markets.

The Government proposes to extend the definition of ‘foreign public official’ to include candidates for office. This amendment would not prevent individuals or companies from making legitimate donations to candidates for

office, as the amended offence would still require the prosecution to show that the benefit was provided, offered or promised to improperly influence the candidate to obtain/retain an advantage.

## **Clarify the offence is about ‘improperly influencing’ a foreign public official**

As noted above, there are challenges in showing that the benefit/business advantage was ‘not legitimately due’, particularly when payments are disguised as legitimate business transactions. This limitation is particular to Australia’s foreign bribery offence. Other likeminded countries do not require the benefit (ie, the bribe) or a business advantage to be ‘not legitimately due’.<sup>3</sup>

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. This concept would ensure the offence more accurately reflects the conduct of foreign bribery.

The revised offence could outline factors to be considered in determining ‘improper influence’. These could include:

- the recipient or intended recipient of the benefit
- the nature of the benefit
- how the benefit was provided
- whether the value of the benefit is disproportionate to the value of any goods or services provided, or purported to have been provided, in consideration for the benefit (for instance, disproportionately large ‘marketing fees’ paid to a third party agent)
- whether the value of the benefit is disproportionate to the value of consideration or purported consideration (if any) for the benefit
- whether the benefit, or the offer or promise to provide the benefit, was provided in the absence of any legal obligation to do so
- whether, and to what extent, the benefit, offer or promise is recorded or documented
- if the provision of the benefit, or the offer or promise to provide the benefit, is recorded or documented:
  - the accuracy of the record or documentation, and
  - whether the record or documentation is consistent with the ordinary practices of the person who made the record or documentation.
- whether there is evidence that due diligence was exercised
- whether any of the following conduct is contrary to a written law in the place where the conduct occurs:
  - the provision of the benefit, or the offer or promise to provide the benefit
  - the acceptance of the benefit, or
  - any conduct directly connected with the provision or acceptance of the benefit.

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<sup>3</sup> For instance, the US *Foreign Corrupt Practices Act 1977*, the UK *Bribery Act 2010*, the Canadian *Corruption of Foreign Public Officials Act 1998* and the New Zealand *Crimes Act 1961*.

- 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.

The legislation would not provide an exclusive list and it would remain open to a court to consider other factors in determining whether improper influence has occurred.

In determining whether influence is improper, a court would also be required to disregard:

- the fact that the benefit or advantage may be, or be perceived to be, customary, necessary or required in the situation
- the fact that the value of the business or advantage is insignificant, and
- any official tolerance of the benefit or advantage.

These are similar to the factors that courts must currently disregard in determining whether a benefit or business advantage is ‘not legitimately due’ under subsections 70.2(2) and (3) of the current foreign bribery offence.

#### Possible alternative approaches

The Government has considered alternative approaches to amending the offence. One alternative approach is to replace the threshold of ‘not legitimately due’ with the concept of ‘dishonesty’. Introducing ‘dishonesty’ to the foreign bribery offence has two main advantages.

The first advantage is that the concept is known and understood in Australian law. In this sense it may provide some certainty as to the conduct captured by the offence. The definition of ‘dishonesty’ in relation to Commonwealth offences in Chapter 7 of the *Criminal Code* involves both an objective and a subjective test.<sup>4</sup> That is, the conduct must be found to be both objectively dishonest, according to the standards of ordinary people, and known by the defendant to be dishonest according to the standards of ordinary people (the *Ghosh* test).<sup>5</sup>

Should ‘dishonesty’ be introduced into the foreign bribery offences, the provision could specify that the ‘dishonesty’ is to be judged according to the standards of ordinary people *in Australia*. A similar approach has been taken by the United Kingdom (UK), with an exception for conduct permitted or required by the written law of the jurisdiction in which the conduct occurs.<sup>6</sup>

It is also possible that an alternative test of ‘dishonesty’—one that removes the subjective limb of the two-limb test—could be used in the foreign bribery provisions. This would bring the definition in line with the test adopted by the High Court in *Peters*.<sup>7</sup> Further, specifying that a purely objective test applies would ensure that ‘dishonesty’ would be judged solely by Australian standards.

The second advantage is that this approach would align the foreign bribery provisions with the domestic bribery provisions set out at Division 141 of the *Criminal Code*. The domestic offences apply where a person ‘dishonestly’ provides, offers or promises a benefit to a Commonwealth public official, or where a Commonwealth public official dishonestly asks for, receives or obtains a benefit. Such an approach would simplify the language of the offence.

<sup>4</sup> See section 130.3 of the *Criminal Code*.

<sup>5</sup> *R v Ghosh* [1982] QB 1053.

<sup>6</sup> See section 5 of the *Bribery Act 2010* (UK).

<sup>7</sup> *Peters v R* (1998) 192 CLR 493 at 504 [18]. The *Peters* test remains the relevant test for the purpose of prosecuting offences in a number of States and some Commonwealth offences, including offences under the *Corporations Act 2001*. See for example section 184 Corporations Act and the judgment of Weinberg JA and Davies AJA in *S A J v The Queen* [2012] VSCA 243.

A potential concern with any ‘dishonesty’ approach is whether an accused could be found to be simultaneously ‘reckless’ and ‘dishonest’. In order to establish ‘dishonesty’ under the *Ghosh* test, the prosecution must establish knowledge on the part of the accused, whereas ‘recklessness’ requires the prosecution to establish an awareness of the existence of a substantial risk.<sup>8</sup>

A further issue is that there is some uncertainty as to how ‘dishonesty’ will interact with the corporate criminal liability provisions set out in Division 12 of the *Criminal Code*. The OECD Convention requires that State parties’ foreign bribery offences are capable of applying to companies.

Another alternative approach could be to provide that the benefit must be ‘improper’ (replacing ‘not legitimately due’). This would increase the number of factors the court could consider in determining whether the provision, offer or promise of a benefit constitutes bribery. This approach would focus a court’s attention on the nature of a benefit rather than all the relevant circumstances surrounding an attempt to influence the foreign public official.

## **Extend 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. Law enforcement experience has shown in some cases, foreign bribery can occur where the advantage sought is personal. These could include instances where a foreign official is improperly influenced in the bestowal of personal titles or honours or the processing of visa/immigration requests.

Should the offence be extended in this way, the existing defences would be available. These defences include the facilitation payment defence (which applies to payments of minor value to expedite a routine government action of a minor nature) and the defence of duress (which applies where a person reasonably believes that a threat will be carried out unless an offence is committed, there is no reasonable way that the threat can be rendered ineffective, and the conduct is a reasonable response to the threat). The CDPP would retain the discretion to prosecute matters which are in the public interest.

Such matters would also likely constitute offences in the foreign country, and may be prosecuted there. However, there is a sound policy justification for ensuring that such conduct is also criminalised under Australian law.

## **Create a new separate foreign bribery offence based on recklessness**

As noted above, the current offence requires the prosecution to establish intention – both for the conduct of providing or promising a benefit, and for influencing a foreign public official.

The Government is consulting on whether it could be appropriate to create a new separate foreign bribery offence based on recklessness. This would still require intention as to the conduct of providing, promising or offering the benefit. However, unlike the current foreign bribery offence, this new offence would apply where a person is reckless as to whether that conduct would improperly influence a foreign public official in relation to the obtaining or retaining business or an advantage.

Recklessness is defined in section 5.4 of the *Criminal Code*. A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

The maximum penalty for the new recklessness offence will be half that of the corresponding intention offence, reflecting the differing degree of culpability attaching to these fault elements.

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<sup>8</sup> Section 5.4, *Criminal Code*. This would not be the first time that ‘recklessness’ and ‘dishonesty’ had been combined in an offence. For example, sections 184(2)(b) and 184(3)(b) of the *Corporations Act* create offences where a director or a former director dishonestly uses their position and is reckless as to whether it will result in advantage being gained by another or detriment being caused to the corporation.

The aim of the proposed recklessness offence would be to ensure that foreign bribery offences are of greater utility in addressing foreign bribery (which often occurs in situations where it is difficult to establish intention) while at the same time differentiating between differing degrees of culpability. This offence would also serve as a deterrent and encourage greater vigilance in providing, offering or promising benefits in circumstances where there is a substantial risk that a foreign public official will be improperly influenced by this conduct.

A similar approach has been taken with the money laundering and false accounting offences in Divisions 400 and 490 of the Criminal Code. Money laundering offences apply a tiered structure spanning intention, recklessness and negligence, while false accounting offences only incorporate intention and recklessness. The proposed penalties are comparable with the penalties imposed for these other offences.

## **Create a new corporate offence of failing to prevent foreign bribery**

The Anti-Bribery Convention requires each State party, in accordance with its legal principles, to establish the liability of legal persons (ie companies) for the bribery of foreign public officials. Australia achieves this through the corporate criminal liability provisions in Division 12 of the Criminal Code, which provides that companies can be held liable for Commonwealth offences. However, due to the complex nature of foreign bribery, it can be challenging to establish criminal liability for companies.

To help address this, the Government is consulting on a possible new corporate offence of failing to prevent foreign bribery. This provision means that a company would be automatically liable for bribery by employees, contractors and agents (including those operating overseas), except where they can show they had a proper system of internal controls and compliance in place to prevent the bribery from occurring. This would be similar to section 7 of the UK *Bribery Act 2010*.

A failure to prevent offence would create an incentive for companies to implement measures to prevent bribery. The proposed amendments provide that the Minister for Justice must publish guidance on the steps companies can take to help prevent its employees, agents and contractors from engaging in foreign bribery.

## **Remove the requirement of influencing a foreign official ‘in their official capacity’**

The current foreign bribery offence requires that the bribe be provided, promised or offered with the intention of influencing a foreign public official *in the exercise of their duties as foreign public official* to obtain or retain business or an advantage that is not legitimately due.

The AFP has noted that foreign public officials can be bribed to act outside their official duties to secure business or an advantage. Investigations have identified instances where senior ministers in foreign countries may have been bribed to act beyond their official scope of their work.

Additionally, to prove a foreign official was acting within their official duties, the prosecution must establish the scope of their duties. In most circumstances, this will require a statement from the foreign jurisdiction. As such, proving this offence relies on the successful execution of mutual assistance request, which may be difficult and time consuming.

It is more relevant that the foreign official holds a particular position of power within the foreign country, rather than whether they were in fact influenced to act specifically within their official capacity.

The Government is consulting on amendments to the offence to remove the requirement that the foreign public official be influenced to act in their official capacity.

## Clarify that business or advantage can be obtained for someone else

The existing offence is intended to cover instances where a person provides, promises or offers a benefit in order to secure business or a business advantage for another person. The Government considers that the offence applies in this way, but notes that the inclusion of ‘who may be the first-mentioned person’ in subparagraph 70.2(1)(c)(ii) potentially makes the scope of the offence ambiguous.

The Anti-Bribery Convention clearly intends to criminalise bribery of foreign public officials where bribery is carried out by one person to secure business for another person. The Commentaries to the Anti-Bribery Convention note that ‘the conduct ... is an offence whether the offer or promise is made, or the pecuniary or other advantage is given, on the person’s own behalf or on behalf of any other natural person or legal entity.’ Other countries (such as the US and UK) explicitly provide that a person who obtains the business does not have to be the same person who provides/offers the benefit.<sup>9</sup>

## Clarify that the accused does not need to have specific business or advantage in mind

The Government is consulting on amendments to the offence to clarify that business can be obtained for someone else and to provide that the accused does not need to have a specific business or advantage in mind.

This approach would also ensure the offence covers situations where a person is ‘currying favour’ with the intention that the foreign public official will assist in providing an unspecified undue advantage in the future.

## Implementation of the OECD Anti-Bribery Convention

The proposed amendments are consistent with the objects and purposes of the OECD Anti-Bribery Convention and would improve Australia’s ability to enforce foreign bribery laws. Some aspects of the proposed amendments would go beyond the requirements of the Convention. These include amendments extending the offence to bribes for personal advantage and bribes made to candidates for public office, and the removal of the requirement that the foreign public official be influenced in relation to the performance of their official duties.

The Government’s view is that these amendments would appropriately criminalise conduct which should be regarded as criminal. These amendments are consistent with the approaches taken in other countries, including the US and UK. Due to the extra-territorial operation of these countries’ laws, Australian companies operating overseas are already subject to these standards.

As such, these amendments should not impede Australian companies doing business overseas. They would provide greater certainty to business about what constitutes foreign bribery. The amendments would also help to maintain Australia’s international reputation as one of the least corrupt countries in the world.

## Possible consequential amendments

If the proposed amendments to the foreign bribery offence are implemented, this may necessitate consequential amendments to ensure consistency across other relevant Commonwealth laws.

The *Income Taxation Assessment Act 1997* (the ITAA) provides that a loss or outgoing that is a ‘bribe to a foreign public official’ cannot be subject to a tax deduction. The proposed amendments will make the foreign

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<sup>9</sup> For instance, the US *Foreign Corrupt Practices Act 1977*, the UK *Bribery Act 2010*, the Canadian *Corruption of Foreign Public Officials Act 1998* and the New Zealand *Crimes Act 1961*.

bribery offence substantially different to the definition of a 'bribe to a foreign public official' under section 26-52 of the ITAA. This provision would require amendment to align with the revised offence.

The amended offence would also represent a departure from the approach taken in the false accounting offence under Division 490 of the Criminal Code, which incorporates the concept of 'not legitimately due/incurred'. The amended offence would also differ from the related offence of bribing of a Commonwealth official under section 141 of the Code, as this offence incorporates the concept of 'dishonesty' and requires an intention to influence a public official 'in the exercise of their official duties'. Further consideration would be needed as to whether comparable amendments to those provisions are desirable.

# Appendix 1 — Notes on exposure draft

## Schedule 1—Amendments relating to foreign bribery

### Item 1 – Before section 70.1 of the *Criminal Code*

1. Item 1 would insert new heading for Subdivision A — Definitions. This reflects the restructuring of Division 70.2 to include subdivisions.

### Item 2 — Section 70.1 of the *Criminal Code*

2. Item 2 would amend section 70.1 to include new definitions for relevant terms in the Division. The new definitions would provide that: ‘advantage’ means an advantage of any kind and is not limited to property; ‘annual turnover’ has the meaning given by new section 70.5B; and a person is an ‘associate’ of another person if the first-mentioned person is an employee, agent, contractor or subsidiary of the other person, is controlled by the other person or performs services for or on behalf of another person.

3. These definitions expand on key terms included in the new offences of intentionally bribing a foreign public official (new section 70.2), recklessly bribing a foreign public official (new section 70.2A) and failing to prevent bribery of a foreign public official (new section 70.5A).

### Item 3 — Section 70.1 of the *Criminal Code* (definitions of benefit and business advantage)

4. Item 3 would repeal the existing definitions of ‘business advantage’ and ‘benefit’ in section 70.1.

5. The term ‘business advantage’ is included in existing section 70.2 and would be removed from Division 70 entirely should this section be repealed under Item 6 of this Schedule.

6. The existing definition of ‘benefit’ has been repealed as this definition has already been provided in the Dictionary of the *Criminal Code Act 1995*.

### Item 4— Section 70.1 of the *Criminal Code* (at the end of the definition of foreign public official)

7. Item 4 would amend the definition of ‘foreign public official’ in section 70.1 to include a person standing, or nominated, (whether formally or informally) as a candidate to be a foreign public official covered by any of paragraphs (a) to (k) of the existing definition.

8. This amendment would ensure that the foreign bribery offences extend to bribes made to candidates for public office.

### Item 5 — After section 70.1 of the *Criminal Code*

9. Item 5 would insert new Subdivision B — Bribery of foreign public officials. This reflects the restructuring of Division 70.2 to include subdivisions.

### Item 6 — Section 70.2 of the *Criminal Code*

10. Item 6 would repeal the existing foreign bribery offence in section 70.2 and replace it with an offence of intentionally bribing a foreign public official (**‘the intention offence’**).

11. The intention offence in new section 70.2 would provide that a person commits an offence if:

- the person provides, offers, or promises a benefit to another person, or causes the benefit to be given or offered to another person (new paragraph 70.2(1)(a)), and

- the person does so with the intention of improperly influencing a foreign public official in order to obtain or retain business or an advantage (new paragraph 70.2(1)(b)).

12. Item 6 would also insert new section 70.2A (**'the recklessness offence'**), which provides that a person commits an offence if:

- the person provides, offers, or promises a benefit to another person, or causes the benefit to be given or offered to another person (new paragraph 70.2A(1)(a)), and
- the person is reckless as to whether the conduct will improperly influence a foreign public official in relation to the obtaining or retaining of business or an advantage (new paragraph 70.2A(1)(b)).

13. Providing, offering, or promising a benefit to another person or causing the benefit to be given or offered to another person under new paragraphs 70.2(1)(a) and 70.2A(1)(a) is conduct that carries the default fault of intention under subsection 5.6(1) of the Criminal Code, meaning that the person must mean to engage in that conduct (as per subsection 5.2(1) of the Criminal Code).

14. A person will have intention with respect to the circumstance in new paragraph 70.2(1)(b) if they believe that a foreign public official has been, or will be, improperly influenced (as per subsection 5.2(2) of the Criminal Code). A person will be reckless with respect to the circumstance in new paragraph 70.2A(1)(b) if they are aware of a substantial risk that a foreign public official has been, or will be, improperly influenced in relation to the obtaining or retaining of business or an advantage and, having regard to the circumstances known to them, it is unjustifiable to take this risk (as per subsection 5.4(1) of the Criminal Code).

15. Subsection 70.2(2) would provide that a person does not need to intend to improperly influence a particular foreign public official, intend to obtain or retain a particular business or particular advantage or actually obtain or retain a particular business advantage. This subsection mirrors subsection 70.2A(2), which applies these principles to the recklessness offence in section 70.2A.

16. Subsections 70.2(3) and (4) would provide the maximum penalty applicable for the new intention offence. This penalty would be the same as that for the current foreign bribery offence under existing subsections 70.2(4) and (5).

17. Subsections 70.2(3) and (4) would provide the maximum penalty applicable for the new recklessness offence. For an individual, the maximum penalty would be imprisonment for not more than 5 years, a fine not more than 5,000 penalty units, or both. This is half of the maximum penalty for the intention offence in section 70.2.

18. For bodies corporate, the maximum penalty would be a fine not more than the greatest of:

- 50,000 penalty units
- if the court can determine the value of the benefit to the body corporate or related bodies corporate—1.5 times the value of that benefit
- if the court cannot determine the value of the benefit—5% of the annual turnover of the body corporate in the 12 months preceding the offending conduct.

19. This is half of the maximum penalty for the intention offence in section 70.2.

20. The amendments would change the existing foreign bribery offence in the following ways:

- creating a new offence based on the fault element of recklessness
- removing the requirement that the foreign official must be influenced in the exercise of the official's duties

- removing the requirement that a benefit or business advantage must be ‘not legitimately due’ and replacing with the concept of ‘improperly influence’ of a foreign public official, and
- extending the offence to cover bribery to obtain a personal (ie non-business) advantage.

21. These changes will ensure that the offence covers situations where a person bribes a foreign public official in their private capacity to obtain a personal advantage, rather than an advantage for particular businesses.

22. The separate recklessness offence would differentiate between differing degrees of culpability and would assist in addressing typical cases of foreign bribery, in which it is often difficult to establish intention. The recklessness offence would also serve as a deterrent and encourage greater vigilance in providing, offering or promising benefits in circumstances where there is a substantial risk that a foreign public official will be improperly influenced by conduct.

23. Both the intentional offence and recklessness offence would be based on the concept of improper influence of a foreign public official. This term would better characterise the conduct of foreign bribery than the current term ‘not legitimately due’.

24. New section 70.2B would provide detail on the new concept of improper influence. Subsection 70.2B would provide that, in a prosecution for the intention or recklessness offences, the determination of whether influence is improper is a matter for the trier of fact.

25. Subsection 70.2B(2) would provide factors to be disregarded in determining whether influence is improper for the purposes of paragraph 70.2(1)(b) or 70.2A(1)(b). These factors are modelled on existing subsections 70.2(2) and (3) and include:

- the fact that the benefit, or the offer or promise to provide the benefit, may be, or be perceived to be, customary, necessary or required in the situation
- any official tolerance of the benefit, and
- if particular business or a particular advantage is relevant to proving the matters referred to in that paragraph 70.2(1)(b) or 70.2A(1)(b):
  - the fact that the value of the business or advantage is insignificant
  - any official tolerance of the advantage
  - the fact that the advantage may be customary, or perceived to be customary, in the situation.

26. Subsection 70.2B(3) would provide factors which may be considered in determining whether influence is improper. These factors include:

- the recipient or intended recipient of the benefit
- the nature of the benefit
- how the benefit was provided
- whether the value of the benefit is disproportionate to the value of consideration or purported consideration (if any) for the benefit
- whether the benefit, or the offer or promise to provide the benefit, was provided in the absence of any legal obligation to do so
- whether, and to what extent, the benefit, offer or promise is recorded or documented
- if the provision of the benefit, or the offer or promise to provide the benefit, is recorded or documented:
  - the accuracy of the record or documentation, and

- whether the record or documentation is consistent with the ordinary practices of the person who made the record or documentation
- whether there is evidence that due diligence was exercised in relation to the benefit, or the offer or promise to provide the benefit
- whether any of the following conduct is contrary to a written law in the place where it occurs:
  - the provision of the benefit, or the offer or promise to provide the benefit
  - the acceptance of the benefit, or
  - any conduct directly connected with the provision, offer or promise to provide, or acceptance of the benefit, and
- in relation to business or a particular advantage:
  - whether the business or advantage was awarded on a competitive or non-commercial basis
  - whether there is any demonstrable conflict of interest in the provision of the business or advantage.

27. The factors listed above would not limit the matters which can be considered in determining whether influence is improper – as per proposed subsection 70.2B(4).

Items 7, 9, 11, 12 and 13 — Subsections 70.3, 70.4, 70.5 of the *Criminal Code*

28. These items would amend sections 70.3, 70.4 and 70.5, as well as the note in subsection 70.5(1), to replace references to ‘section 70.2’ with ‘this Subdivision’. This reflects the fact that Subdivision B — Bribery of foreign public officials is being amended to include new offences beyond the existing offence of foreign bribery in section 70.2.

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

29. Item 8 would insert new subsection 70.3(2A). This would extend the existing defence of lawful conduct to offences in Division 70 where the conduct relates to a candidate to be a foreign public official.

30. Existing section 70.3 sets out the terms of the defence of conduct lawful in the foreign public official’s country. The table in subsection 70.3(1) prescribes the method by which the applicable law is determined. The source of applicable law will differ according to the nature of the connection of the officer with the foreign government or public international organisation.

31. New subsection 70.2(2A) would provide a defence where the conduct occurred in relation to a candidate for the position of foreign public official and, assuming the conduct occurred wholly in a place determined by reference to the type of foreign public official the candidate is to become and the existing table in subsection 70.3(1), this conduct was lawful pursuant under a written law in force in this place.

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

32. Item 10 would insert a reference in paragraph 70.4(3)(d) to the physical element of the new recklessness offence at paragraph 70.2A(1)(a).

Item 14 — After section 70.5 of the *Criminal Code*

33. Item 14 would insert new Subdivision C — Failure to prevent bribery of foreign public officials.

34. New Section 70.5A of this Subdivision would insert a new offence of failing to prevent bribery of a foreign public official.

35. Subsection 70.5A(1) would provide that a person will commit an offence if the person:

- is a body corporate that is a constitutional corporation, incorporated in a Territory or taken to be registered in a Territory under the *Corporations Act 2001*,
- an associate of the body corporate:
  - commits an offence against section 70.2 or 70.2A, or
  - engages in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2 or 70.2A (the notional offence), and
- the associate does so for the profit or gain of the body corporate.

36. An associate is defined in amendments to section 70.1 described above under item 2. A person is an 'associate' of another person if the first-mentioned person is an employee, agent, contractor or subsidiary of the other person, is controlled by the other person or performs services for or on behalf of another person.

37. Subsection 70.5A(2) would provide that absolute liability to apply to aspects of the offence in subsection 70.5A(1), including paragraphs (1)(a) and (c), and the circumstances contained in subparagraphs (1)(b)(i) and (ii). The fault elements of the underlying conduct by the associate described in those subparagraphs would still need to be established.

38. Subsection 70.5A(3) would clarify that the body corporate may be convicted of an offence against this section even if the associate has not been convicted of an offence against section 70.2 or 70.2A.

39. Subsection 70.5A(4) would provide that section 12.6 of the Criminal Code applies in relation to an offence against subsection (1) as if the reference in section 12.6 to an employee, agent or officer of a body corporate included any associate of the body corporate.

40. This would mean that the general principle of 'intervening conduct or event' in section 10.1 of the Criminal Code would not apply. Section 12.6 provides that a body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate. Proposed subsection 70.5A(4) would extend this to also include any associate of the body corporate (which could include a subsidiary or a controlled entity of the body corporate).

41. Subsection 70.5A(5) would provide that the offence will not apply if the body corporate had in place adequate procedures designed to prevent:

- the commission of the offence against either section 70.2 or 70.2A by any associate of the body corporate, and
- any associate of the first person engaging in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2 or 70.2A.

42. The defendant bears a legal burden in relation to this matter. What constitutes 'adequate procedures' would be determined by the courts on a case by case basis. As noted below, proposed new section 70.5B would also provide that the Minister must publish guidance on the steps that body corporates can take to prevent an associated from bribing foreign public officials.

43. Subsection 70.5A(6) would provide that the maximum penalty for an offence against subsection 70.5A(1), where the underlying offence by the associate is the intention offence in new section 70.2, is the greatest of the following:

- 100,000 penalty units (at March 2017, this amounts to \$18 million)

- if the court can determine the value of the benefit obtained by the associate, 3 times that value
- if the court cannot determine the value of that benefit, 10% of the annual turnover of the body corporate for the 12 month period ending at the end of the month in which the associate’s conduct occurred.

44. Similarly, subsection 70.5A2(7) would provide that the maximum penalty for an offence against subsection 70.5A(1), where the underlying offence is the recklessness offence in new section 70.2A, is the greatest of the following:

- 50,000 penalty units (at March 2017, this amounts to \$9 million)
- if the court can determine the value of the benefit obtained by the associate, 1.5 times that value
- if the court cannot determine the value of that benefit, 5% of the annual turnover of the body corporate for the 12 month period ending at the end of the month in which the associate’s conduct occurred.

45. Subsection 70.2(8) would provide that extended geographical jurisdiction — category A applies to an offence against subsection 70.5A(1). This is defined in section 15.1 of the Criminal Code This means the offence would apply where the conduct which constitutes the offence occurs wholly overseas where the offender is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

46. New section 70.5B would provide that the Minister must publish guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials. This is intended to assist companies in implementing appropriate measures to prevent bribery from occurring within their organisations. This guidance would not be legislative in character, and as such, would not take the form of a legislative instrument.

#### Item 15 — Before section 70.6 of the Criminal Code

47. Item 15 would insert Subdivision D — Miscellaneous.

48. New section 70.5C would include the details for determining ‘annual turnover’ for the purpose of the maximum penalty for the new intention offence, recklessness offence and offence of failing to prevent bribery of a foreign public official. Section 70.5C would remain unchanged from existing subsections 70.2(6) and (7), but is now included in a new section to reflect the introduction of new foreign bribery offences.

49. New section 70.5D provides that the question of whether two bodies corporate are related to each other is to be determined for the purposes of Division 70 in the same way as for the purposes of the *Corporations Act 2001*.

#### Item 16— Application of amendments

50. Item 16 would provide that these amendments would apply in relation to conduct engaged in on or after the commencement of this item. It is proposed that the amendments would commence six months after the amending legislation receives the Royal Assent to allow sufficient time for businesses to make any adjustments for the new provisions.