

Foreign bribery

It is a criminal offence under Australian law to bribe a foreign public official. Details of the offence can be found within section 70.2 of the *Criminal Code Act 1995* (Criminal Code). Bribery distorts markets, artificially inflates prices, undermines democracy and leads to sub-standard products being procured.

What is bribing a foreign public official?

Foreign bribery includes providing or offering a benefit to a foreign public official, or causing a benefit to be provided or offered to a foreign public official, where the benefit is not legitimately due.

The benefit must be intended to influence a foreign public official in the exercise of their official duties for the purpose of obtaining or retaining business or a business advantage which is not legitimately due.

The benefit constituting a bribe can come in many forms including:

- cash payments
- extravagant gifts
- holidays
- employment for friends or relatives
- school fees paid for friends or relatives.

What is a foreign public official?

A foreign public official is broadly defined in the Criminal Code and includes, but is not limited to, contractors of a foreign government body, members of the military or police force, the executive, judiciary or legislature, or an individual who holds themselves out to be an authorised intermediary of a foreign public official.

When does the offence apply?

There are two broad circumstances in which the offence may apply. First, the conduct constituting the offence occurs wholly or partly in Australia and second, the conduct occurs wholly outside of Australia and the alleged offence is committed by an Australian citizen, resident or corporate entity.

In addition to the Australian legislation, Australian citizens and companies engaged in international business transactions may be subject to domestic offences in the foreign country with whom they are dealing or subject to foreign countries' foreign bribery legislation. The *UK Bribery Act 2010* and the *US Foreign Corrupt Practices Act 1977* have far reaching extraterritorial jurisdiction which can apply

to Australian companies and citizens even if they are not engaging in international business transactions directly with those countries.

What are the penalties?

Foreign bribery is an offence under Australian legislation for both individuals and bodies corporate. If convicted, individuals face up to 10 years imprisonment, and/or a fine not more than AUD1.7million. Corporate entities face a fine up to AUD17million or three times the value benefit gained from the bribe, whichever is greater.

If the value of the bribe cannot be determined, the corporate entity faces a fine of up to AUD17million or 10 per cent of the annual turnover of the corporate entity and any associated corporate entities for the period immediately preceding the offence. The penalties are substantial to reflect the seriousness of bribery and its consequences. In addition to criminal penalties, any benefits obtained by foreign bribery can be forfeited to the Australian Government under the *Proceeds of Crime Act 2002*.

Indicators of foreign bribery

Foreign bribery can be detected and reported by employees, auditors, competitors, government officials or anyone who is engaged in any form of business in or with foreign countries. The following list sets out some of the indicators that foreign bribery may have occurred, however the list is by no means exhaustive:

- unusually large commissions being paid to agents
- cash payments
- payments made through third party countries without a legitimate explanation
- contracts being won without tender
- subcontracts being awarded at inflated prices
- expensive tenders winning contracts over competitors of comparable expertise with lower cost
- any contract where agents or employees appear to have inside information on the tender process or competitors tenders
- internal company guidelines and protocols not being adhered to
- individuals who do not allow any other employee to deal with an agent, sub-contractor or government official
- lavish gifts or hospitality.

What is reasonable hospitality?

In the course of conducting international business transactions there is, in certain circumstances, a recognised requirement to provide a level of hospitality to prospective clients or vendors.

The following is a list of some of the factors to consider when determining the appropriateness of the provision of hospitality:

- is the hospitality provided to further the recipient's familiarity with the offerer's business or products?
- does the company have a clear policy on the provision of gifts and hospitality and do they comply with that policy?
- is the expenditure correctly recorded by the company?
- is the expenditure reasonable?
- could the hospitality be reasonably suspected of having influence over the recipient's decision making process?

Particular scrutiny should be applied to any hospitality which is directed at public officials.

Facilitation payments

Section 70.4 of the Criminal Code sets out a facilitation payment defence to the offence of bribing a foreign public official, under certain narrow circumstances. The Australian Government is currently assessing the possibility of repealing the facilitation payment defence. Individuals and companies should note that, even if a benefit constitutes a legitimate facilitation payment under Australian law, people making these payments may be liable for bribery under the laws that govern the foreign public official or the laws of other countries, such as the *UK Bribery Act 2010*. The Australian Government recommends that individuals and companies make every effort to resist making facilitation payments.

What are Australia's international obligations?

In 1999 Australia ratified the Organisation for Economic Co-Operation and Development (OECD) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. As part of its obligations under the convention, Australia undergoes periodic reviews by an OECD working group comprised of members of the OECD Secretariat and delegates from other member states. These reviews are published and are important to ensure Australia's anti-bribery regime is in line with international best practice.

On 9 December 2003, Australia signed the United Nations Convention against Corruption (UNCAC). As of 2 April 2014, UNCAC has 140 signatories and 171 State Parties to the convention. Australia is also a key member of the G20 Anti-Corruption Working Group, having participated in the negotiation and development of the G20 Anti-Corruption Action Plan.

Who investigates allegations of foreign bribery?

The Australian Federal Police (AFP) is responsible for the investigation of allegations of foreign bribery relating to Australian citizens, Australian residents, Australian registered companies or any instances of foreign bribery which partly or wholly occurred in Australia.

How do I contact the AFP to report someone for bribing a foreign public official?

It is incumbent upon all Australian citizens to do their part to report foreign bribery when it is discovered. This ensures the integrity and transparency of international business contracts is maintained and prevents the exploitation of vulnerable economies and people.

You can report matters:

- online by accessing the 'Reporting a Commonwealth crime to the AFP' form located at: https://forms.afp.gov.au/online_forms/report_a_crime
- by contacting an AFP liaison officer through the AFP's International Liaison Officer Network which has appointees in 30 countries
- by contacting the AFP Operations Monitoring Centre:
 - in writing to:
AOCC Client Liaison Team
GPO Box 401
Canberra ACT 2601
 - or by calling:
(02) 6126 7777
(in Australia)
or +61 2 6126 7777
(from outside of Australia).

Reports of foreign bribery should include all known information (where possible) relating to the suspected offence and contain copies, or preferably originals, of any documents or emails relied upon when making the referral.

Useful links

Attorney-General's Department

Bribery of foreign public officials
www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx

Australian Taxation Office

Tax Office guidelines for understanding and dealing with the bribery of Australian and foreign public officials
<https://www.ato.gov.au/About-ATO/About-us/In-detail/How-we-do-things/ATO-guidelines-for-understanding-and-dealing-with-the-bribery-of-Australian-and-foreign-public-officials/>

Austrade

About exporting: legal issues
<http://www.austrade.gov.au/Export/About-Exporting/Legal-issues>

Department of Foreign Affairs and Trade

Measures against corruption
www.dfat.gov.au/issues/measures-against-corruption.html

The Export Finance and Insurance Corporation

Anti-corruption Initiatives
www.efic.gov.au/corp-responsibility/Pages/anticorruptioninitiatives.aspx

Organisation of Economic Cooperation and Development

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
www.oecd.org/corruption/oecdantibriberyconvention.htm

United Nations Office on Drugs and Crime

United Nations Convention against Corruption
www.unodc.org/unodc/en/treaties/CAC/

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