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LEGAL PRACTICE



Australia's reformed foreign bribery laws to commence September 2024

Date: Sunday March 17, 2024

Updated May 2026

On 29 February 2024, in line with Australia's commitment as a member of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Crimes Legislation Amendment (Combating Foreign Bribery) Act 2024 (**Combating Foreign Bribery Act**) passed both houses of Parliament.

The Combating Foreign Bribery Act amended the foreign bribery provisions in place prior to 8 September 2024 to significantly broaden the scope of the offence. These amendments included the repeal of the definition of 'business advantage' and the introduction of a broader concept of 'advantage', being an advantage of any kind and not limited to property.

Changes resulting from Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024

In summary, key aspects of the Combating Foreign Bribery Act included:

- Introducing a new indictable offence for companies failing to prevent foreign bribery;
- Removing the requirement that a benefit or business advantage be 'not legitimately due' and replacing it with the concept of 'improperly influencing' a foreign public official;
- Clarifying that an offence under the foreign bribery provisions does not require proof that an accused had a specific business, or business or personal advantage in mind at the time of the alleged offending; and

- Extending the offence to include:
    1. bribery of candidates for public office; and
    2. bribery to obtain personal advantage.

The offence of failure to prevent foreign bribery

The Combating Foreign Bribery Act introduced a new indictable offence for corporations by way of a new s 70.5A of the Criminal Code 1995 (Cth) – the offence of 'failure to prevent foreign bribery'.

In summary, that new section stipulated that a body corporate commits an offence where:

An associate of the body corporate commits foreign bribery (or engages in conduct outside of Australia which, if it was engaged in Australia, would constitute the offence of foreign bribery) and does so for the profit or gain of the corporation.

Notably, the requirement that the bribe be done for the purpose of obtaining a 'profit or gain' for the body corporate was not defined and was to be given its ordinary meaning.

The legislature specifically intended for this offence to be one of absolute liability (i.e. the prosecution is not required to prove intent or fault or negligence etc, of the corporation). The provisions go so far as to clarify that the prosecution is not required to prove that the associate has been convicted of foreign bribery.

Defence to being charged with failure to prevent foreign bribery

Importantly, a defence for an offence of failure to prevent foreign bribery is available if the body corporate can show they had adequate procedures in place to prevent the commission of the offence.

The purpose of this defence is to incentivise corporations to have appropriate internal mechanisms and safeguards in place to prevent conduct that may amount to foreign bribery. In this respect, the defence holds the legal burden to prove, on the balance of probabilities, that they had adequate procedures in place at the time of the offending.

The Addendum to the Explanatory Memorandum states that *'what constitutes 'adequate procedures' would be determined by the courts on a case-by-case basis'*.

Combating Foreign Bribery Act 2024 – what were the changes?

The Combating Foreign Bribery Act amended the provisions in place prior to 8 September 2024 to broaden the scope of the offence to include the following:

- Previously, section 70.1 of the Criminal Code 1995 (Cth) only defined a 'business advantage'. The Act repealed the definition of 'business advantage' and introduced a new definition of

‘advantage’, meaning an advantage of any kind and not limited to property.

- Extended the offence under section 70.2 to include a ‘personal advantage’, not just a business advantage. The introduction of ‘personal advantage’ is intended to increase the scope of conduct to matters such as a bribe for the grant of a visa, bestowing of a scholarship or other like situations.
- It was clarified that there is no need for the prosecution to prove the particular business or other advantage sought by the bribe.
- Introduced the definition of ‘associate’, meaning an ‘officer, employee, agent, contractor or subsidiary of the other person, who is controlled by another person or performs services for or on behalf of another person’. This is relevant to the new offence under section 70.5A to seek to capture situations where the body corporate engages another person in an attempt to distance themselves from what would otherwise be bribery.
- Amended the definition of ‘foreign public official’ to include a political candidate. This amendment is intended to capture scenarios where a benefit is provided to a person running for a public office on the basis that the candidate will provide the person with an advantage upon entering office. It is relevant to note that the defence of lawful conduct has also been extended to include circumstances involving a candidate.
- Removed the requirement that the prosecution prove that the foreign official in question was influenced in the exercise of their official duties. As in the current regime, there is no requirement that the relevant foreign official was actually influenced, but only that the accused person intended to influence. This is clarified in the new section 70.2.
- Removed the requirement that the prosecution proves that a benefit was ‘not legitimately due’ and instead replaced it with the term ‘improperly influencing’. The intention of which was to form a new section 70.2A. Whether a matter is ‘improper’ is to be a matter of fact. The new provisions include a number of non-exhaustive factors that ought to be disregarded (including, for example, any official tolerance of the benefit or that the advantage was customary) and factors which may be considered (including, for example, the nature of the benefit and how the benefit was provided and whether there was any legal obligation to provide the benefit).

Guidance on adequate procedures

The new section 70.5B provided that the Minister is required to publish guidelines concerning steps that a body corporate can take to prevent an associate from bribing foreign public officials.

In August 2024, the Attorney General’s Department published the “Guidance in adequate procedures to prevent the commission of foreign bribery” (the Guidelines).

The Guidelines provided six considerations which, whilst not intended to be a prescriptive checklist, should be considered by corporations in creating adequate controls to prevent foreign bribery, including:

- Fostering a control environment to prevent foreign bribery;
- Responsibilities of top-level management;
- Undertaking risk assessment;
- Communication and training of employees and associates;
- Creating a mechanism for reporting foreign bribery;
- Creating a compliance program to monitor and review controls

Developments since commencement of the reforms

The amendments have now been operational for over 18 months. Since commencement, regulatory and enforcement attention has increasingly focussed on corporate compliance frameworks and the availability of the 'adequate procedures' defence. While judicial consideration of the new provisions remains limited, the reforms have already prompted a significant shift in how corporations assess foreign bribery risk and implement compliance controls.

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