# AUSTRALIA'S IMPLEMENTATION OF THE OECD *CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS*

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CONTENTS



## I INTRODUCTION

On 16 December 1996 the UN adopted the United Nations *Declaration against Corruption and Bribery in International Commercial Transactions*.[1] The

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Declaration committed UN members to criminalise bribery in an effective and coordinated manner and to deny tax deductibility for bribes. Approximately a year later the Declaration was endorsed by the 29 member states of the Organisation for Economic Cooperation and Development ('OECD') adopting the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ('*OECD Convention*').[2] In doing so, OECD members agreed to establish legislation criminalising the bribing of foreign public officials by the end of 1998.[3] In keeping with this commitment, Australia prepared appropriate draft legislation, the Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998 (Cth). Following a National Interest Analysis and a public review process by the Joint Standing Committee on Treaties ('JSCT'), this bill was passed in revised form on 3 June 1999 as the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth) ('*Bribery Act*').[4]

The passage of the legislation signifies a clear intention by the Federal Government, not only to address the issue of bribery of foreign corrupt officials, but also to ensure a legal regime that is consistent with the approach taken by other OECD countries, in particular the United States. Furthermore, as indicated by the Attorney-General's Department,[5] only a consistent approach by all OECD countries will address the ramifications of the bribery of foreign public officials.

It appears generally accepted that Australian firms are not significantly involved in corrupt practices overseas and that, arguably, Australian firms will ultimately benefit from the predicted reduction in the incidence of international

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[1] GA Res 51/191, 51 UN GAOR (86th plen mtg), UN Doc A/Res/51/191 (1996), 36 ILM 1043. The General Assembly also passed a related resolution on the same day*: Action against Corruption*, GA Res 51/59, 51 UN GAOR (82nd plen mtg), UN Doc A/Res/51/59 (1996), 36 ILM 1039, which contained an *International Code of Conduct for Public Officials*.

[2] Opened for signature 17 December 1997, [1999] ATS 21, 37 ILM 1 (entered into force 15 February 1999), OECD Doc DAFFE/IME/MR(97)20.

[3] Ibid arts 1(1), 15.

[4] The *OECD Convention*, together with its National Interest Analysis, was tabled in both Houses of Parliament on 3 March 1998. At the same time, the *OECD Convention* and the Bill were subject to a national public review process culminating in the JSCT report: JSCT, *OECD Convention on Combating Bribery and Draft Implementing Legislation,* (June 1998, 16th Report). The *Bribery Act* amends the existing *Criminal Code 1985* (Cth). The amending legislation inserts a new chapter into the *Criminal Code*, ch 4 'The Integrity and Security of the International Community and Foreign Governments', which includes only one division, div 70 'Bribery of Foreign Corrupt Officials'.

[5] Australian Attorney-General's Department, *National Interest Analysis: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Done at Paris on 17 December 1997* (1998), tabled before Parliament 3 March 1998.

bribery resulting from the OECD's action.[6] Nonetheless during the consultation process a number of Australian companies, and particularly the various Chambers of Commerce, voiced opposition to the ratification of the *OECD Convention*.[7]

Most opponents argued that not only will adoption of the *OECD Convention* hurt Australia's ability to compete for projects in the region,[8] but that it will also particularly disadvantage small and medium-sized enterprises. In any event, the document does nothing to attack corruption 'at the coal face', as it makes no mention of the extortion of bribes, nor does it try to penalise recipients. Furthermore, concern was expressed as to how companies could distinguish between necessary gifts or facilitation payments and bribes as future criminalised activities. These questions will ultimately be decided by courts after the event. Criticisms of this nature are similar to those which have been raised by US businesses in relation to the US *Foreign Corrupt Practices Act* ('*FCPA*').[9]

Despite the opposition that exists, the passing of the Australian *Bribery Act* evidences Australia's clear intention to combat the negative effects caused by the international bribery of foreign officials. On its face, the legislation is severe. However, the real issue remains the extent to which, in practice, the *Bribery Act* will be implemented and enforced.

## II THE PROBLEM OF CORRUPTION

The true cost of corruption worldwide is unknown, but it certainly runs into the billions of dollars.[10] Despite this, with the exception of the US, little effort has been made to combat this problem. While some, particularly in the West, see it as simply a part of doing business, corruption in international business transactions has significant deleterious effects. Widespread bribery:

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6 JSCT, above n 4, 7. In late 1999 the anti-corruption group Transparency International conducted its 'Bribe Payers' survey of countries, and rated Australian exporters as among the least likely to pay bribes or use corrupt practices to facilitate their business activities in those markets in which they are operating. In addition, Australia was ranked as one of the three least corrupt exporting countries. However, many of the markets into which Australia exports products (eg, China, Korea, Taiwan, Malaysia and Indonesia) were amongst those perceived as the most willing to pay bribes: Transparency International, *Bribe Payers Survey* (2000) <http://www. transparency.org/documents/cpi/bps.html> at 6 August 2001.

7 JSCT, above, n 4.

8 Apart from New Zealand, Japan and Korea, no country in the region has so far indicated any intention to adopt the *OECD Convention*.

9 Pub L No 95-213, 91 Stat 1494 (1977). For general criticisms of the *FCPA*, see Steven Salbu, 'Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act' (1997) 54 *Washington & Lee Law Review* 229, cited in Nii Lante Wallace-Bruce 'Corruption and Competitiveness in Global Business — The Dawn of a New Era' (2000) 24 *Melbourne University Law Review* 349, 354.

10 As far back as 1976, over 400 companies in the US admitted to paying bribes totalling over US$300 million: Securities and Exchange Commission (US), *Questionable and Illegal Corporate Payments and Practices* (1976), cited in Wallace-Bruce, above n 9, 359. More recently, in a World Bank survey 40% of entrepreneurs reported needing to pay bribes as a matter of course: World Bank, *World Development Report: The State in a Changing World* (1997) 34.

- Grossly distorts the tendering process for government contracts. This leads to more costly projects and, often, an adverse effect on the quality of the work;
- Distorts the prioritisation of major projects (encouraging 'white elephant' investment projects);
- Diverts money from public accounts to private individuals and often into foreign bank accounts. Poorer sections of the community suffer disproportionately as a result of this drain on government funds;
- Undermines equity, efficiency and integrity in the public service;
- Undercuts the effectiveness of, and confidence in, aid programs;
- Adds a huge extra cost for businesses and increases the level of uncertainty in doing business in countries with high corruption.[11]

Those businesses that do use bribes risk extortion, based on the threat of adverse publicity. They also face the risk of new governments taking office and cancelling contracts tainted by bribery. Overall, corruption exacerbates poverty and acts as a brake on development.

## III THE *OECD CONVENTION*

Despite widespread and entrenched corrupt practices, little effort has been made historically to address the issue. Only the US has adopted legislation prohibiting, and indeed criminalising, bribes made by national businesses to foreign officials in order to obtain business. The US legislation, the *FCPA*, grew out of abuses — primarily by government contractors — which came to light in the early to mid-1970s, in which bribes to government officials were used to obtain business in both developed and developing countries.

Its adoption, however, was criticised by many US businesses as being a commercial disadvantage, given that no other countries had adopted or intended to adopt similar legislation. Despite US efforts, this largely remained the case until the *OECD Convention* was adopted with an agreed timetable for implementation.

The *OECD Convention* focuses on 'supply-side' controls. It seeks to reduce the influx of corrupt payments into relevant markets by punishing the active bribe-givers and their accomplices, and by establishing a preventative framework. It avoids the violation of national sovereignty by not regulating the behaviour of foreign officials themselves.

The *OECD Convention* dictates that the criminal sanctions for acts of bribery should be commensurate with domestic penalties applicable to bribery of public officials.[12] '[E]ffective, proportionate and dissuasive non-criminal sanctions' are

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[11] For a more detailed discussion of these factors and general information on the problem of corruption, see Michael Ahrens 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (1999) *The International Lawyer* 269, 271–276; Henry Bosch, 'The Bribery of Foreign Public Officials' [2000] *Australian Mining and Petroleum Law Association Yearbook* 1.

[12] *OECD Convention*, above n 2, art 3(1).

to be provided in jurisdictions in which corporations are not subject to criminal sanctions.[13] Bribes and the proceeds of bribery shall be subject to seizure and confiscation, or monetary sanctions of a comparable effect,[14] and 'additional civil or administrative sanctions' for bribery are to be considered.[15]

Jurisdiction had previously been an important barrier to the prosecution of nationals for bribery. The *OECD Convention* requires that parties establish jurisdiction over acts of bribery of foreign public officials occurring (in whole or in part) within the party's territory.[16] Where possible, parties must also prosecute their nationals for offences committed abroad.[17] Parties shall consult each other where jurisdictions overlap[18] and bribery should be an extraditable offence.[19]

Finally, the *OECD Convention* contains a number of financial regulation provisions. Bank secrecy laws are to be overridden,[20] money laundering provisions are to be enlarged,[21] and accounting and disclosure procedures tightened to capture 'off-the-book' accounts.[22]

The *OECD Convention* is a clear attempt to create a more level playing field for international trade and business.

## IV THE AUSTRALIAN LEGISLATION: THE *BRIBERY ACT*

The Attorney-General's Department has outlined the reasoning behind Australia's implementation of the *OECD Convention*:

> Widespread bribery of officials distorts international trade investment by raising transaction costs, reducing efficiency and creating a level of uncertainty for business, as the size of the bribes rather than the merits of the product or service offered come to determine purchasing decisions. Bribery of public officials will ultimately disadvantage both suppliers and customers and at the same time undermine the integrity and, in some cases, the stability of governments. This is a serious international issue and the criminalisation of bribery of foreign public officials is an important step in addressing it.[23]

The *Bribery Act* implements the *OECD Convention*. Its main objectives are:

- To prohibit providing or offering a benefit not legitimately due to another person, with the intention of influencing a foreign public official in the exercise of their duties in order to obtain or retain business, or obtain or retain a business advantage that is not legitimately due;

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13 Ibid art 3(2).
14 Ibid art 3(3).
15 Ibid art 3(4).
16 Ibid art 4(1).
17 Ibid art 4(2).
18 Ibid art 4(3).
19 Ibid art 10.
20 Ibid art 9(3).
21 Ibid art 7.
22 Ibid art 8.
23 Australian Attorney-General's Department, above n 5.

- To apply the prohibition to conduct within and outside Australia, so long as, where the conduct occurs wholly outside Australia, the person is an Australian citizen or the company is a company incorporated in Australia;
- To ensure that the ancillary offences of attempt, complicity, incitement and conspiracy which occur within and outside Australia apply where they relate to conduct included in the primary offence; and
- To ensure that Australia complies with the key features of the *OECD Convention*.[24]

## V THE OFFENCE

The specific criminal offence of bribing a foreign public official is set out in s 70.2 of the *Bribery Act*:

> (1) A person is guilty of an offence if:
>
> (a) the person:
> (i) provides a benefit to another person; or
> (ii) causes a benefit to be provided to another person; or
> (iii) offers to provide, or promises to provide, a benefit to another person; or
> (iv) causes an offer of the provision of a benefit, or a promise of a benefit, to be made to another person; and
> (b) the benefit is not legitimately due to the other person; and
> (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
> (i) obtain or retain business; or
> (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Where a person is found guilty of an offence under the *Bribery Act*, the penalty is one of imprisonment for ten years and/or a fine of up to AU$66 000 per individual, or up to AU$330 000 for a company.[25] However, while penalties imposed under the *Bribery Act* are in themselves a substantial form of punishment, the potential implications of being accused, let alone convicted, will be the most damaging to corporations. The possibility of full coverage by the international media should serve as a sufficient deterrent.

## VI ELEMENTS OF THE OFFENCE

When read within the context of the remainder of s 70, the anti-bribery offence can be more easily broken down into nine key elements, all of which must be satisfied if an offence is to be committed. These are:

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24 JSCT, above n 4, 21.

25 Although s 70.2 of the *Bribery Act* establishes a penalty of imprisonment for ten years, s 4B of the *Crimes Act 1914* (Cth) allows a court to impose a fine instead of imprisonment or in addition to imprisonment.

(1) The offence is committed by a person to whom the *Bribery Act* applies (a 'covered person');
(2) With the required territorial nexus;
(3) Who provides, causes, offers or promises to provide or causes an offer or promise to provide to be made;
(4) A benefit;
(5) That is not legitimately due;
(6) To another person (a 'covered recipient');
(7) With the intention of;
(8) Influencing a public official (who may be the other person);
(9) In order to obtain or retain:
    (a) Business; or
    (b) A business advantage that is not legitimately due.

Each of these individual elements is discussed below.

### 1 *A 'Covered Person'*

Generally, to commit an offence under the *Bribery Act*, the offender must be an Australian citizen. However, residents of Australia (that is, aliens with some form of residency status) will also be subject to the *Bribery Act*. This includes executives and employees of foreign corporations working in Australia on residency visas.

In addition, bodies corporate, incorporated by or under a law of the Commonwealth or of a State or Territory, are also covered. This will include Australian companies operating domestically and abroad. However, an offshore subsidiary of an Australian company, which is not incorporated in Australia, and which acts entirely on its own right without any Australian citizens or residents involved, would be outside the scope of the *Bribery Act*. The *Bribery Act* applies to foreign corporations operating in Australia, but only where those foreign subsidiaries are incorporated in Australia.

Where an individual is representing an Australian incorporated company, the fact that they themselves are not an Australian citizen or resident will not prevent the company itself from being in breach of the *Bribery Act*.

### 2 *The Territorial Nexus*

The offence applies to the conduct of bribing a foreign public official where the conduct occurs wholly or partly in Australian territory (including on board an Australian aircraft or ship), as well as to conduct that occurs outside Australia.[26] In effect, the *Bribery Act* is clearly designed to catch conduct constituting bribery of a foreign official regardless of where that bribe is planned or where it occurs.

The willingness of the Australian Government to extend its jurisdiction beyond Australia's territorial boundaries demonstrates the Government's

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[26] *Bribery Act* s 70(5).

seriousness in tackling the bribery of foreign officials.[27] Traditionally, common law countries have only applied their domestic criminal laws to the conduct of overseas nationals in situations involving serious criminal offences,[28] particularly given the enforcement difficulties that exist.

If the conduct constituting the alleged offence occurs wholly outside Australia *and* at the time of the alleged offence the person alleged to have committed the offence is an Australian resident (as opposed to an Australian citizen), proceedings must not be commenced without the Commonwealth Attorney-General's written consent.[29] However, this does not prevent a person being arrested, charged and remanded in custody (or released on bail) in connection with an offence, before the necessary consent has been given by the Attorney-General.[30]

### 3 *Provides, Causes, Offers or Promises to Provide or Cause*

Any action that involves *providing* a benefit (that is not legitimate and contains the relevant intent and persons involved) will result in an offence being committed. However, it is not necessary that cash or any other benefit ever change hands. An offer, or a promise to provide, will suffice, and it may very well be that no benefit is ever provided.[31]

Furthermore, one who *causes* a benefit to be provided, or causes an offer or promise for a benefit to be provided, will also be caught by the *Bribery Act*. While there is no definition of 'causes', the word carries with it potentially broad consequences, assuming that it would include any form of direction or inducement for an action to be taken.[32] In this respect, steps taken in causing a benefit would more than likely include a parent company being liable for the activities of a subsidiary which it has authorised.[33] It may also include members of a board of directors or corporate officials being liable for actions they have directed, facilitated or authorised. In addition, the offences of complicity under the criminal law cast the net even wider.

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27 The application of domestic criminal laws to the conduct of their nationals while abroad is based upon the international law 'nationality principle' and is common practice within continental European legal systems. See generally Malcolm Shaw, *International Law* (4th ed, 1997) 462–3.

28 See, eg, *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth).

29 *Bribery Act* s 70.5(1).

30 *Bribery Act* s 70.5(2), (3).

31 *Bribery Act* s 70.2(1).

32 It is interesting to note that the *FCPA* s 104(a) refers to 'an offer, payment, promise to pay, or authorization of the payment'. The concept of authorisation means that a parent company can be liable for the activities of a subsidiary which it has authorised, as can members of the board of directors or other corporate officials for actions they have permitted a company to take.

33 Though no crystallised principle exists, Australian courts have demonstrated some willingness to 'pierce the corporate veil' so as to hold parent companies accountable for the actions or debts of subsidiaries in certain instances: see generally Harold Ford, *Ford's Principles of Corporations Law* (10th ed, 2000) 128.

One example may be where a company has entered into a joint venture arrangement with a local partner and that local partner's involvement is solely for the purpose of illegitimately influencing foreign public officials. Even if the corrupt actions are carried out without the direct involvement of the company, this element may well be satisfied, although there would still need to be the requisite intent on the part of the foreign company.

4 *The Benefit*

The traditional notion of bribery creates images of discrete payments of cash in brown paper envelopes. However, bribes may take many direct or indirect forms ranging from all-expenses paid holidays, to specific gifts (to the individual concerned or to a third party), contributions to educational expenses and other similar perquisites. In addition, simply paying legitimately owed fees into foreign bank accounts in order illegitimately to avoid taxation may be sufficient.

The *Bribery Act* therefore defines benefits extremely widely. A 'benefit' includes 'any advantage and is not limited to property'[34] — an approach consistent with article 1 of the *OECD Convention.* The *Bribery Act* thus avoids the need to anticipate the many creative ways in which bribes can be paid.

It is interesting to note that under the US *FCPA*, the offence specifically refers to 'money' or 'anything of value'.[35] Some US companies are known to have taken the view that this can be circumvented by rewarding foreign officials with shares in joint venture companies established for the very purpose of doing business in that foreign jurisdiction. However, as some US commentators have noted, stock allocations are a prime target for the application of the *FCPA*[36] and there is little doubt that the Australian legislation would apply in the same manner.

During the hearings of the JSCT, this particular ingredient of the principal offence was a major issue of debate. Concerns were expressed regarding the use of the terms adopted in the then draft legislation that, instead of simply discussing 'a benefit', adopted the terms 'undue benefit' and 'improper advantage'.[37] To overcome such concerns, rather than classifying the nature of the benefit being provided, it was determined that the notion of benefit would be defined in simple terms. The legitimacy of that benefit would then be determined by a statutory test of 'not legitimately due'.[38]

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34 *Bribery Act* s 70.1.

35 *FCPA* § 104(a).

36 Lucinda Lowe and John Davis, 'The FCPA in Investment Transactions: The Next Generation of Issues' (1997) 4 *Business Laws Inc* 106.001, 106.002.

37 Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998 (Cth) s 14.1(1)(b), (c)(ii).

38 *Bribery Act* s 70.2(1), (2).

### 5 *Not Legitimately Due*

A benefit will only constitute a bribe when it is 'not legitimately due'.[39] Like payments of a 'minor nature',[40] there is little assistance in the *Bribery Act* for determining what constitutes a payment that is not legitimately due. However, the *Bribery Act* does specify that it is irrelevant whether the payment is, or is perceived to be, customary.[41] Likewise the payment's value, and any official tolerance of it, should be disregarded.[42]

### 6 *To Another Person (a 'Covered Recipient')*

The clear intention of the legislation is to prevent the bribery of foreign public officials. In most circumstances, it is expected that the person to whom a benefit is being provided or offered will be either the public official whom the briber wishes to influence, or some intermediary who may serve as a conduit to that public official. However, recognising that the chain of rewards, favours and influence may be far broader, an offer or promise can be made to any person and paid in any form, including into offshore accounts.[43]

It is the ultimate intention to *influence*, through providing, offering or promising a benefit, that is to be prevented. Arguably, if an offer is made in error to a person who ultimately did not have, or even never had, any ability to influence a public official, that person will still be a covered recipient under the *Bribery Act*.

### 7 *Intention*

The most important element of any criminal offence is that of intent — the requisite mens rea. Section 70.2 of the *Bribery Act* phrases intent in a rather complex way. What is critical is proof of the intention to influence a foreign public official in order to obtain the benefit or business advantage that is not legitimately due. In the absence of a showing of any such intention there is simply no offence.

While the requirements for intent are clearly spelt out in s 70.2, the very fact that the section is embodied within the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') means that the notion of intent must be read within the broader provisions of the *Criminal Code*. These provisions classify intent depending upon whether it relates to conduct, circumstance, or a result, and act as deeming provisions.[44] In this respect, guilty intention will exist where a person has the intention to carry out particular conduct, or to achieve a particular result, irrespective of whether or not that conduct actually occurs or the desired result actually

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39 *Bribery Act* s 70.2(1)(b).
40 *Bribery Act* s 70.4, under which minor payments qualify as facilitation payments.
41 *Bribery Act* s 70.2(2).
42 *Bribery Act* s 70.2(3).
43 *Bribery Act* s 70.2(2).
44 *Criminal Code* s 5.2.

materialises.[45] Strictly, it would appear that a prosecution could be successfully mounted in either case, assuming the intent to pay or provide a bribe is proven and the other elements are present. A thwarted briber will not escape.

However, the two-pronged nature of the requisite element of guilty intention means that difficulties will still exist for the prosecutor, unless a clear nexus can be shown between the illegitimate business advantage sought and the knowledge of the essential facts on the part of the defendant.

The *Criminal Code* also provides that the mens rea for a particular act may be established through intention, knowledge, recklessness or negligence.[46] However, s 70.2 of the *Bribery Act* refers only to intent. It is worth noting that the Government, in finalising the provisions of the *Bribery Act*, rejected the recommendation of the JSCT that the offence be broadened to include acts of recklessness. An unclear element of intention is whether the offender must have intended the result of influencing an official in order to gain the relevant advantage, or whether liability will attach if the person is simply aware that it will occur in the ordinary course of events.

Determining whether criminal intention exists will not always be a simple exercise. Take, for example, the case of an Australian firm negotiating a large project in a foreign country. The firm needs a fast tax ruling. Upon approaching the foreign tax office, officials advise that they are unable to furnish the ruling without explanation and advice from a tax consultancy located down the corridor, and apparently staffed by either officials or ex-officials of the foreign tax office. The firm pays a very large fee to the consultancy and the advice is promptly given to the tax agency, resulting in a quick, clean ruling. Assuming that the payment constitutes much more than a minor facilitation payment, the issue becomes whether there is an intention to influence a public official in order to gain business or a business advantage not legitimately due. If the intention is solely to obtain the approval by using local consultancy expertise, as opposed to influencing the decision-making process, it is arguable that no criminal intent exists even if the benefit of the ruling is illegitimate.

Take another hypothetical example: an Australian company that is persuaded to contribute $1 million to a joint venture company with an Asian partner who holds 50 per cent of the joint venture for zero or limited outlay. The associate is well connected, but the Australian company is unaware of the precise application of money by its partner in pursuit of contracts, although it does know that without the contact and an associated payment no contracts will flow to the joint venture. It is later revealed that the $1 million was paid to an Asian associate with direct influence over a public official, resulting in the awarding of a lucrative contract. Given that the definition of intention excludes recklessness, the issue becomes whether or not wilful blindness is sufficient.

Under Australian law, a person is said to be wilfully blind where that person deliberately refrains from making inquiries because they prefer not to know the

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45 *Criminal Code* s 5.2.

46 *Criminal Code* s 5.1(1).

truth or reasons for particular actions.[47] Where a person is wilfully blind, that person may be treated as though they possessed the knowledge or information to which they had shut their eyes. However, actual knowledge of the essential facts of the principal offence is necessary before there can be intent. Exposure to the obvious may in some circumstances warrant the inference of knowledge,[48] although not the actual knowledge in the sense required as the basis of intent.

In this respect, proof of wilful blindness alone is insufficient to prove intent in relation to the offence. However, as a matter of evidence, proof of wilful blindness may go some way to proving that the accused in fact had actual knowledge of the elements of the offence, and therefore may go some way to proving an intent to commit the offence. If the relevant intent can be presumed by showing awareness of a likely result, this will be clearer.

According to s 12.2 of the *Criminal Code*, where intention is a fault element it must also be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Thus s 12.2 extends the common law position.[49] It provides for the attribution of liability to a company and its senior executives, where it is proved that a corporate culture existed that directed, encouraged, tolerated or led to non-compliance with the relevant provision. Alternatively, liability is imposed where the body corporate failed to create and maintain a corporate culture that required the necessary compliance. Consequently, corporations will almost inevitably have to change their practices in order to satisfy the requirements of the *Criminal Code* by making adequate efforts to instil a compliance culture which does not condone or tolerate irregular payments to officials.[50]

### 8 *Influencing a Public Official*

As expected, in s 70.1 of the *Bribery Act* adopts a broad definition of 'foreign public official' which includes the well-known categories of political figures, government members and officials of all levels. Specifically, the definition includes:

- A member or officer of a legislature of the country;
- A member of the executive, judiciary or magistracy of a foreign country; and
- An individual who is employed by, or is under contract to, a foreign government, or is holding or performing the duties of appointment, office or position of a law of a foreign country or created by custom or convention of a foreign country. This also includes any individual who is otherwise in the service of a foreign government or a public international

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47 See, eg, *R v Crabbe* (1985) 156 CLR 464, 470.

48 *Giorgianni v The Queen* (1985) 156 CLR 473.

49 *Tesco Supermarkets v Nattrass* [1972] AC 153.

50 Corporate culture is defined in the *Criminal Code* to mean an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activity takes place: s 12.3(6).

organisation or who is an intermediary of (or holds themself out to be) a foreign public official.

The *Bribery Act* covers officials employed by public international organisations such as the UN or regional trading bodies such as the Asia Pacific Economic Cooperation Forum. To qualify as a public international organisation, the body simply needs to be an organisation of which two or more countries, or the governments of two or more countries, are members. Alternatively, it may be a body that has been established by an organisation of which two or more countries or governments of countries are members, or which is a sub-group established by an international organisation. While bodies such as the United Nations Childrens' Fund would be covered, others, such as the International Committee of the Red Cross, would not.

The definition of a foreign government body seeks to cover all tiers of government by including national, local or regional governments in a foreign state, or an authority, body or enterprise of the government of the foreign country or of a part of the foreign country. Importantly, this definition captures 'foreign public enterprises', thereby incorporating paragraphs 14 and 15 of the Commentaries on the *OECD Convention*.[51]

While the definition of what constitutes a 'foreign public enterprise' is given a fairly wide ambit, there is a clear intention that it also be precise. In this regard, the definition of 'foreign public enterprise' provides that, in the case of a company, that company is one where the government of a foreign country:

- Holds more than 50 per cent of the issued share capital; or
- Holds more than 50 per cent of the voting power in the company; or
- May appoint more than 50 per cent of the company's board of directors; or
- Is in a position to exercise practical control over the company, including expecting the directors to act in accordance with directions.

Where the enterprise is a body or association other than a company, the enterprise must be one where the members of the executive committee are accustomed to act, or are under an obligation to act, in accordance with the wishes of a government of a foreign country or part of it. Alternatively, the enterprise may be one where that government is in a position to exercise control over the body or association. Finally, a company, body or association is only a foreign public enterprise if it enjoys special legal rights, status, benefits or privileges under a law of a foreign country because of its relationship with a foreign government. This implements the restriction imposed by paragraph 15 of the Commentaries on the *OECD Convention*.[52]

The *Bribery Act* thus appears to cover any enterprise over which a government directly or indirectly exerts a dominant influence, which in the case of many Asian countries, particularly China, will capture an enormous number of entities. This will be particularly important in overseas joint venture operations.

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51 OECD Anti-Corruption Division, 'Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions' (1998) 37 ILM 8.

52 Ibid.

Before participating in such joint ventures, companies will need to know the status of the foreign enterprise. It has been common practice to award an equity interest to a person or to a company to play the role of a 'fixer'. However, such an equity interest, where full and fair consideration is not given in return, could well be prosecuted as a bribe under the *Bribery Act*.

### 9 *In Order to Obtain or Retain Business or a Business Advantage not Legitimately Due*

The ultimate objective of any bribe is to obtain or retain some business or business advantage, particularly in circumstances where a company is competing against others for a particular project or opportunity. Under the *Bribery Act*, the ultimate unlawful objective must be to either:

(a) Obtain or retain business; or
(b) Obtain or retain a business advantage that is not legitimately due to the recipient or intended recipient of the business advantage.[53]

Unlike 'business advantage' in (b), the business the briber is seeking to obtain or retain in (a) is not qualified by the notion of legitimacy; seeking to obtain or retain any business will be sufficient.

When further read within the context of the definition of a 'routine government action' in s 70(4)(2), it is clear that a business advantage would involve obtaining decisions about awarding new business, continuing existing businesses, and determining the terms upon which new businesses or existing businesses are to operate.

The notion of an advantage in the conduct of business is therefore especially broad and clearly goes well beyond simply gaining or preserving business. In many cases the advantages could be very small and may include matters such as:

- Payments to obtain environmental or other waivers;
- Accelerating ruling applications, such as price approvals or product safety approvals;
- Currency transfers, repatriation of dividends, customs clearances or capital contributions; and
- Obtaining the exercise of a discretion or the grant of privilege.

In addition, as is the case with benefits, the concept of business advantage is qualified by the notion of 'not legitimately due'. As noted earlier, there is little assistance in the *Bribery Act* for determining what constitutes a business advantage that is not legitimately due. However, the *Bribery Act* does specify that one should disregard whether the payment is, or is perceived to be, customary. Likewise, the payment's value, and any official tolerance of it, should be disregarded.[54]

## VII COMPLICITY OFFENCES

By amending the existing *Criminal Code*, the ancillary offences of attempt, complicity, incitement and conspiracy which occur within and outside Australia will also apply where they relate to conduct included in the primary offence. This is particularly important because in cases where evidence can be gathered of executives conspiring with their intermediaries, joint venture partners or other executives, it can be anticipated that charges will be laid without necessarily waiting to prosecute the principal offender directly.

## VIII DEFENCES

In addition to establishing the primary offence, the amendments to the *Criminal Code* also adopt the special defences provided for in the *OECD*

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53 *Bribery Act* s 70.2(1)(c).
54 *Bribery Act* s 70.2(2), (3).

*Convention*, as well as the general *Criminal Code* defences. Three defences merit comment.

### A *Conduct is Lawful in Foreign Jurisdiction*

A person will not be guilty of an offence under the *Bribery Act* where the conduct is lawful in the foreign public official's country.[55] This defence is consistent with the existing principle under Australian law that there is a defence of lawful authority.

The provision recognises that where the nature of the person's service may involve easy access to mobility across international borders, such as where the person works for an international organisation, the defence of lawful conduct is aligned to the place where the central administration of the body is located. This is intended to prevent any of these people from undermining the intent of the legislation by deliberately locating themselves in particular jurisdictions for the purpose of taking advantage of the defence.

### B *Facilitation Payments*

Section 70.4 provides a further defence where the payment made constitutes a 'facilitation payment' for the purpose of expediting or securing the performance of a routine government action of a minor nature, provided the payment itself is of a minor value.

While the Commentaries on the *OECD Convention* do not suggest that there must be a defence in relation to the facilitation payments, they provide a rationale for including one by stating that facilitation payments are more appropriately dealt with under the domestic law of countries.[56] Furthermore, the Commentaries indicate that if facilitation payments are to be excluded as a defence, then only those of a small nature should be excluded.[57]

In effect, the OECD's position recognises that facilitation payments, which in some countries are made to induce public officials to perform their functions such as issuing licences or permits, are generally illegal in the foreign country concerned. However, given their nature, these are minor domestic offences and not ones of an international nature that, like the larger scale bribing of foreign officials, will distort international trade.

In assessing the facilitation payments issue, the JSCT considered in its enquiry the most appropriate form that the defence should take.[58] Importantly, the majority of those who made submissions to the JSCT favoured a defence closely aligned to that contained in the *FCPA*, since it was perceived to be tested and its inclusion would ensure consistency.[59] This is the approach that has now

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55 *Bribery Act* s 70.3.
56 OECD Anti-Corruption Division, above n 51, [9].
57 Ibid.
58 JSCT, above n 4, 67–85.
59 Ibid 70–82.

been adopted. A person will only be able to defend a charge of bribing a foreign official where the following conditions are satisfied:

(a) The value of the benefit is of a *minor nature*; and
(b) The payment was for the *sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature*; and
(c) A *record* of the conduct is made and retained for at least seven years.[60]

An action of a foreign public official will not be considered a routine government action unless it is ordinarily and commonly performed by the official. Examples of such actions are listed in s 70.4(2) of the *Bribery Act*, and include the granting of a permit, license or other official document that qualifies a person to do business in a foreign country; processing visa or work permit papers; loading and unloading cargo; protecting perishable products, or commodities from deterioration; and any other action of a similar nature. However, any conduct that involves encouraging a decision about whether to award new business, or to continue an existing business, will not be considered routine government action. Similarly, altering the terms of a new or existing business will not be considered routine.

On a practical level, there will often be real difficulties in successfully obtaining receipts for what are genuine facilitation payments, particularly where those payments are illegal in the very jurisdiction in which they are occurring. For example, it would be difficult to envisage a port official providing a receipt for a facilitation payment that results in the expeditious unloading of cargo. Similarly, it would also be difficult to envisage a police officer in a developing country handing over a receipt for payments made to ensure police protection while on a routine business visit.

The use of this defence will encounter a number of difficulties and ultimately its practical application is likely to be narrow. It will also very much depend upon an interpretation of the provisions, in the circumstances, by both the prosecutor and the court.

In particular, given the absence of any definition of what constitutes 'of a minor nature', there will be inherent difficulties in determining when a payment for a routine government action crosses the line from a defendable minor payment to an actual bribe. Obviously, this is a determination that will need to be made by the court in consideration of the entire circumstances, which at the time of making the payment may have been particularly difficult to determine. For example, in a situation where an Australian company is forced, due to delays, to make a facilitation payment to have perishable items unloaded, is the payment of

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60 The record must be made by the person as soon as practicable after the conduct occurred and must include that information prescribed by the *Bribery Act*: s 70.4(1). The record must be retained for at least seven years unless it can be shown that the record has been lost or destroyed because of the actions of another person over whom the accused had no control, or because of a non-human act or event over which the accused had no control, and the accused could not have reasonably been expected to have guarded against the bringing about of that loss or that destruction.

$1000 minor? What if the payment is increased to $5000 or $10 000? While it could be argued that in some circumstances payment of $10 000 to a foreman is a substantial amount, it is very minor when compared to the financial implications of such a payment not being made, especially when the cargo involved may be worth millions of dollars.

It may also be the case that in order to achieve a routine government action, a series of minor facilitation payments will need to be made to a number of government officials which, while individually of a minor nature, are together substantial. In the absence of any assistance under the *Bribery Act*, there are real difficulties in determining the practicable application of the facilitation payment defence.

### C *The Defences of Duress and Coercion*

Finally, although not provided for in the *Bribery Act*, the *Criminal Code* provides for the defences of duress or coercion.[61] An offence is not committed if the action is carried out in response to a threat and if there is no reasonable way in which that threat could be made ineffective by the offender.[62] Obviously, the existence of a defence will depend upon the business context in which it arises. It is possible that the defence may arise where a party passes a benefit on to a public official, while under a serious and believable threat, and in circumstances where the defendant already has significant investments at risk in a country and is vulnerable to extortion.

## IX APPLICATION OF THE *BRIBERY ACT*

As the examples above indicate, there is significant ambiguity within the *Bribery Act* such that it will be difficult to determine whether or not particular action being taken ultimately constitutes an offence. In the US, the Justice Department has established 'red flag' guidelines to assist in identifying potential problems that may occur in foreign investment. These include:

- The country in which the investment will be made has a history of corruption;
- Due diligence on the proposed foreign partner suggests possible ethical issues;
- The proposed foreign partner is owned by a key government official or relative of such an official;
- The US company hears rumours that the foreign partner has a 'silent partner' who is a high government official;
- The foreign partner cannot contribute anything to the joint venture except influence;
- There is a significant mismatch between the foreign partner's economic interest in the venture and its contributions;

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61 *Criminal Code* s 10.2.

62 *Criminal Code* s 10.2.

- The values ascribed to assets contributed by the foreign partner to the joint venture are excessive;
- The foreign partner insists on having sole control of any host country government approvals;
- The proposed relationship with the foreign partner is not in accordance with local laws or rules. This includes, when government officials are involved in the commercial relationship, civil service rules concerning outside interests; and
- The foreign partner refuses to agree to reasonable financial and other controls in the joint venture.[63]

While similar guidelines have not been provided in Australia, the US guidelines provide a useful reference point for Australian businesses. However, until an appellate court provides guidance, no general statement can be safely made as to whether this is the way in which the *Bribery Act* will operate.

## X MANAGING CORPORATE RISK

Given the seriousness of the offences introduced by the *Bribery Act*, it is imperative that Australian companies conducting business overseas take active steps to manage their potential exposure. Corporations may have to update their compliance practices to take into account recent amendments to the *Criminal Code*.

In particular, it will be necessary to identify areas of international risk clearly by geographical region and industry in order to focus on the problem areas. Moreover, companies may be required to change policies and strategies for overseas mergers, acquisitions, joint ventures and procurement in what they determine to be 'troubled' and 'sensitive' regions. It would be conducive for companies to include corporate responsibility issues in the due diligence checklist.[64]

It must be noted, however, that as with many compliance issues, there needs to be a change in attitude to accompany policy changes in order to achieve an effective outcome. In that regard, Australian companies should organise training and awareness raising seminars for its overseas employees. By doing so, they will promote both a greater awareness of potential problem areas and a culture of compliance, and improve the management of corporate risk by the enterprise and its executives.[65]

## XI CONCLUSION

The introduction of Australia's anti-bribery offence clearly brings Australia into line with the US, and is an important part of the broader international efforts

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63 Lowe and Davis, above n 36, 106.018.

64 See generally Standards Australia, *Australian Standards AS 3806–1998 Compliance Programs* (1998).

65 Gayle Hill, 'Laws Prohibiting Foreign Bribery: The Practicalities of Legislating for Integrity Internationally' [2000] *Australian Mining and Petroleum Law Association Yearbook* 13, 34.

to have universally agreed measures in place to combat the bribery of foreign public officials. However, the current legislative framework possesses a number of ambiguities which may affect its practical efficacy. As such, it remains to be seen whether the political significance of the *Bribery Act* will translate into practical efforts and developments on the ground to combat corruption.

Ironically, while one of the prime objectives of the *Bribery Act* is to remove, in the words of the Attorney-General's Department, the 'level of uncertainty for business',[66] the specific Australian legislation may be unsuccessful in that regard. Many of the provisions of the *Bribery Act* remain undefined or, alternatively, are so broad that companies engaging in borderline acceptable conduct may be more likely to be within the realms of the offence than not.

The practical application of the *Bribery Act* may also be problematic. For example, it may be extremely difficult to obtain receipts for even the most legitimate facilitation payments. The enforcement of the *Bribery Act* will also be particularly hard where the conduct occurs wholly outside Australia, or involves a number of parties or indirect payments. This problem will be intensified with regard to the collection of evidence and may result in government authorities only pursuing bribes of a significant and blatant nature.

Finally, given the broad nature of many of the provisions in the *Bribery Act*, their ultimate applicability may only become clear after a decision is made to prosecute. In the absence of any guidelines issued by the government, interpretation of the provisions of the *Bribery Act* will simply be left to Australian prosecutors and Australian courts.

Given such ambiguity, the penalties under the *Bribery Act* and the very serious potential commercial implications of being among the first to be prosecuted under the *Bribery Act*, it is likely that any overseas commitment that may be perceived as having some influence over a public official will have to be very carefully reassessed and monitored by all concerned. In the meantime, strong compliance programmes will need to be put in place and implemented in order to respond to the new regime provided for by the *Bribery Act*.

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66 Attorney-General's Department, above n 5.