Why You Need To Know About Foreign Bribery and Its Implications

The consequences for individuals and companies who bribe or attempt to bribe

Bribing or attempting to bribe a foreign public official is a serious crime. Australian companies or individuals that bribe an official in a foreign country can be prosecuted under Australian law and the laws of foreign countries.

Australia takes a strong stance against foreign bribery and other forms of corruption.

The offences for foreign bribery carry significant penalties for individuals and companies.

This includes offences which carry maximum penalties of 10 years imprisonment and fines of up to $1.8 million for individuals. The maximum penalty for a company is the greater of the following:

- an $18 million fine
- three times the total benefit obtained from the bribe, or
- 10% of the company’s annual turnover.

These penalties reflect the serious criminal nature of bribery and the detrimental effects it has on Australian trade and reputation, and international governance.

You must be aware of the types of activities that are legal and illegal when interacting with foreign officials. It is not possible to argue that you did not realise that your conduct constituted bribery. The offence applies whether or not the alleged offender intended to bribe a particular foreign public official. The offence also applies regardless of the outcome or result of the bribe or the alleged necessity of the payment: companies and individuals may be held liable regardless of whether or not the bribe obtains the advantages sought and whether or not the bribe was considered necessary to do business. (See Fact Sheet 2 – The Offence for more information on the offence and defences.)

The consequences for Australia

Australia is a party to the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention). Australia is also a party to the United Nations Convention against Corruption (UNCAC). Australia’s obligations under the Anti-Bribery Convention and UNCAC include making foreign bribery an offence and prosecuting the individuals and companies who engage in it. More information on Australia’s international obligations is at Fact Sheet 4.
Supporting ethical business practices, and prosecuting those who engage in unethical practices, helps to improve Australia’s investment opportunities overseas and is an important aspect of Australia’s excellent global reputation as a corruption-free trading partner.

Foreign bribery and other types of corruption skew competition, inhibit business growth and ultimately shrink the global market for Australian exports and investment.

Incidents of foreign bribery in Australia or by Australians undermine the reputation of all Australian businesses and impact negatively on business and government relations.

**The broader effects of foreign bribery**

As stated in the Anti-Bribery Convention, ‘bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions’.

Foreign bribery results in an inefficient allocation of resources and economic distortions. It is also a threat to democracy, corrosive of good governance and an impediment to economic development.

**Liability under foreign laws**

Nearly all countries have criminal laws against bribing domestic officials and a growing number of countries have laws against bribing foreign officials.

Bribery by an Australian company or individual of an official in a foreign country may give rise to liability under the laws of that country.

However, Australian companies and businesses may also be liable under anti-corruption laws of third-party countries. For example, the extended jurisdiction of the United States Foreign Corrupt Practices Act of 1977 includes businesses that issue registered securities under US law.

This extended jurisdiction has enabled the United States to prosecute non-US companies and individuals for actions outside the United States, including mobile phone manufacturer Siemens, which in 2008 was fined a record US$1.6 Billion in the United States for corrupt activity in Europe. People considering whether or not a payment to a foreign official is lawful must therefore consider a wide range of potential liability, may face prosecution in multiple countries, and should take all appropriate steps to ensure neither they nor their employees or agents engage in bribery.
The offence

What is the offence of bribing a foreign public official?

The offence of bribing a foreign public official is contained in section 70.2 of the Criminal Code Act 1995 (Cth). It has a number of elements which can be divided into steps. All of these elements must be present for the offence to apply. A person is guilty of an offence if:

1. The person:
   • provides a benefit to another person,
   • offers or promises to provide a benefit to another person, or
   • causes a benefit to be provided, offered or promised to another person

   AND

2. the benefit is not legitimately due to the other person

   AND

3. step 1 was carried out with the intention of influencing a foreign public official (who may or may not be the other person) in the exercise of the official’s duties as a foreign public official in order to:
   • obtain or retain business or
   • obtain or retain a business advantage which is not legitimately due.

When does the offence apply?

The offence applies where the conduct constituting the offence occurs in Australia, or on board an Australian aircraft or an Australian ship.

The offence also applies to conduct outside Australia in three situations. This is where, at the time of the alleged offence, the person who is alleged to have committed it is:

1. an Australian citizen
2. a resident of Australia, or
3. a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

The offence applies regardless of the outcome or result of the bribe or the alleged necessity of the payment.

The offence applies whether or not the alleged offender intended to bribe a particular foreign public official.

Attachment A to this Fact Sheet provides some examples of how the offence applies. These examples do not cover every manner or method by which the crime may occur.
What is a benefit?

A benefit is any advantage and is not limited to property. A benefit can be a non-monetary or non-tangible inducement. It does not need to be provided or offered to the foreign public official, it can be provided or offered to another person. A benefit can also be provided or offered by an agent.

Who is a foreign public official?

The definition of ‘foreign public official’ is very broad, and includes:

- an employee / official of a foreign government
- a member of the executive, judiciary or magistracy of a foreign country
- a person who performs official duties under a foreign law
- a member / officer of the legislature of a foreign country, or
- an employee / official of a public international organisation [such as the United Nations].

What are the penalties?

The maximum penalty for an individual is 10 years imprisonment and/or a fine of 10,000 penalty units, that is, $1.8 million.

The penalty for a body corporate can be a fine issued in penalty units or it can be a proportional penalty, calculated according to the value of benefits obtained from bribery, or the annual turnover of the company. If the value of benefits obtained through bribery can be ascertained, the penalty is 100,000 penalty units ($18 million) or 3 times the value of benefits obtained, whichever is greater. If the value of benefits obtained through bribery cannot be ascertained, the penalty for a body corporate is 100,000 penalty units or 10% of the ‘annual turnover’ of the body corporate and related bodies corporate, whichever is greater.

The high penalties for foreign bribery 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 (Cth).

Corporate and agent liability

Companies need to be aware that they may be liable for the actions of their employees and agents under Australian law and foreign law. People that engage in bribery while acting as an agent also may be individually liable and may be prosecuted under Australian or foreign law.

It is important to be aware of what actions may constitute a bribe and what obligations companies have to ensure employees and agents comply with the law. The foreign bribery offence is defined in Division 70 of the Criminal Code and the nature of corporate liability is defined in Division 12 of the Criminal Code.

Companies and individuals engaging in bribery may be liable under the laws governing the foreign public official and may be liable under the laws of third-party countries. The United States Foreign Corrupt Practices Act 1977, for example, has extended jurisdiction over any company issuing registered securities under US law (eg. companies listing shares on a United States stock exchange).
What are the defences to the Australian foreign bribery offence?

There are two defences to the foreign bribery offence.

1. The advantage was permitted or required by the written laws that govern the foreign public official

This defence applies where a written law governing the foreign public official expressly permits or requires the benefit to be given. Subsection 70.3(1) of the Criminal Code lists the laws that govern different public officials.

2. The benefit provided constituted a ‘facilitation payment’

A defence is also provided where a benefit constitutes a ‘facilitation payment’. This defence can apply where:

- the benefit is of ‘of a minor value’
- the benefit was offered ‘for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature’, and
- the person made a record of the payment as soon as practicable afterwards.

A ‘routine government action’ does not include any decision to award or continue business, or any decision related to the terms of new or existing business.

If a payment is to qualify as a legitimate facilitation payment, detailed records must be kept including the value of the benefit concerned, the identity of the foreign official and the person receiving the benefit, and particulars of the routine government action sought. The records that must be kept are detailed in full in subsection 70.4(3) of the Criminal Code.

Individuals and companies must be aware 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.

The Australian Government recommends that individuals and companies make every effort to resist making facilitation payments. A growing body of research and the experiences of a growing number of major companies demonstrate that businesses can achieve net gains by refusing to make payments. The Australian Government acknowledges that this can be a difficult position to take, with short-term risks for business, and that this difficulty is increased for smaller businesses that may feel they lack the bargaining power of major companies. However, the Australian Government is committed to global efforts to reduce corruption and to supporting Australian businesses seeking to eliminate payments to officials. Fact Sheet 3 outlines ways to report bribery.

Queries about foreign bribery

Individuals and companies with questions about the offence of foreign bribery may seek further information by writing to the Australian Government’s foreign bribery inbox at <foreign.bribery@ag.gov.au>. Correspondents should be aware the Government does not provide legal advice on the application of offence provisions or the legality of payments in a particular situation but can assist with general information about the offence.
ATTACHMENT A

Examples of foreign bribery

Australians overseas

An Australian businessman in country X wants to enter into a contract with the local provincial authority. He offers the provincial planning officer a payment in a bid to have his tender proposal considered favourably.

Even though all the activity took place in country X, the businessman can be prosecuted in Australia and could be imprisoned for up to 10 years and/or receive a fine of up to $1.8 million, regardless of whether the businessman secured the contract.

Payments through intermediaries

An Australian businesswoman wants to enter into a contract with the local provincial authority in country X. She instructs her accountant in country X to offer the provincial planning officer a payment in a bid to have her tender proposal considered favourably.

Even though the businesswoman did not offer the bribe herself, and the offer of the bribe occurred in country X, the businesswoman can be prosecuted in Australia and could be imprisoned for up to 10 years and/or receive a fine of up to $1.8 million, regardless of whether the businesswoman secured the contract.

Note: if the accountant was an Australian citizen or resident of Australia, the accountant may also be prosecuted in Australia.

Payments to third parties

An Australian businessman in country X has entered into a contract with the local provincial authority. Certain legislative obligations apply to the contract. In an attempt to have those legislative obligations waived, the Australian businessman provides expensive gifts to the wife of the provincial planning officer.

Even though all the activity took place in country X, and the bribe was not paid to the government official, this businessman can be prosecuted in Australia and could be imprisoned for up to 10 years and/or receive a fine of up to $1.8 million, regardless of whether the legislative obligations were waived.

Indirect benefit

An Australian businesswoman wants to win a tender in country X. The foreign official in country X arranges for the Australian businesswoman to purchase services at an inflated price and in return the foreign official will award the Australian businesswoman the government contract.

The purchase of services from the foreign official at an inflated price is a benefit not legitimately due and this businesswoman can be prosecuted in Australia, and could be imprisoned for up to 10 years and/or receive a fine of up to $1.8 million, regardless of whether the businesswoman secured the contract.
Foreign Bribery

How to report suspected foreign bribery

Who should I report to?

All incidents of suspected bribery of foreign public officials should be reported to the Australian Federal Police (AFP). The AFP has offices in all Australian capital cities.

The AFP is separate from State and Territory police forces. Every effort should be made to provide information directly to the AFP.

What information should I report?

All information relating to incidents of suspected foreign bribery should be communicated to the AFP, either orally or in writing.

Information you provide may supplement other information provided to the AFP and assist an investigation.

You may be asked to provide the following information, if available:

- advice as to whether the alleged criminal activity is ongoing or has ceased
- details of the suspected offender(s) – name, date of birth, location (where known)
- a chronological account of the information known about the suspected criminal activities
- if the suspect(s) is aware of the allegation
- details of witnesses
- the action being requested of the AFP
- criminal history, if known, and information relating to the circumstances where the person[s] has previously come to attention
- the significance or impact of the matter on the agency, company or individual
- value of the revenue loss or potential loss at risk, if any, to the agency, company or individual
- a summary of any enquiries already undertaken
- details regarding how the alleged criminal activity is suspected of breaching the *Criminal Code Act 1995 (Cth)*
- copies of any relevant documentation, and
- copies of any relevant legal advice, sought and provided, to the party contacting the AFP.

If information is provided over the telephone you may be asked to provide any relevant documentation as soon as possible, subject to availability.
What happens if my suspicions are incorrect?

There is no offence for reporting suspected criminal activity to the AFP. However, it is important that you do not make a report which is vindictive or malicious, knowing that what you are alleging is incorrect. There are offences that may relate to reports made under these circumstances.

The AFP will not provide details of who made an allegation to the alleged offender. In the event of the matter coming before a court, the Commonwealth Director of Public Prosecutions is required to provide the full brief of evidence to the defence counsel, which will contain this information. You may be required to give evidence in court relating to your knowledge of the facts.

What happens if I don’t report foreign bribery?

There is no criminal penalty if a person who discovers foreign bribery does not report it to police. However, companies that discover evidence or strong suspicions of foreign bribery and do not report it may face increased liability for maintaining a corporate culture that tolerates bribery.

Commonwealth agencies – reporting suspected foreign bribery to the AFP

Information on referrals by Commonwealth agencies, including a template for referrals, can be found at: <www.afp.gov.au/what-we-do/referrals.aspx>.

Commonwealth agencies are asked to read this fact-sheet in conjunction with the Commonwealth Fraud Control Guidelines and any agency-specific information in relation to reporting suspected foreign bribery.

The Commonwealth Fraud Control Guidelines can be found at the Attorney-General’s Department website at <www.ag.gov.au>.


Where do I send the referral?

You can report bribery matters online at the AFP website <www.afp.gov.au>, following the ‘Reporting a Commonwealth Crime to the AFP’ link. Telephone referrals should be directed to the AFP Operations Monitoring Centre (OMC) in Canberra on (02) 6126 7777, or from outside Australia on +61 2 6126 7777, or write to Australian Federal Police, GPO Box 401, Canberra, ACT 2601, Australia. You can also call Crime Stoppers on 1800 333 000.

Can I report these matters to the AFP overseas?

Yes – The AFP has an extensive global presence with Liaison Posts in many countries. If a report is not able to be referred to an AFP OMC, AFP liaison officers are able to receive this information. For further details on the location of AFP liaison posts, please refer to the AFP web site <www.afp.gov.au>.

Information can also be provided to Australian embassies in foreign countries which will then be passed on to the AFP and actioned accordingly.
Useful Links

Relevant Australian Government Departments
Australian Taxation Office – <www.ato.gov.au>
Department of Foreign Affairs and Trade – <www.dfat.gov.au>

Reporting Allegations of Foreign Bribery

Australian Industry Bodies
The Australian Chamber of Commerce and Industry – <www.accicn.asn.au>
The Australian National Contact Point for the Guidelines on Multinational Enterprises – <www.ausncp.gov.au>

Information about international conventions

Links to anti-corruption groups and information
Transparency International – <www.transparency.org>
The U4 Anti-Corruption Resource Centre – <http://www.u4.no/themes/private-sector/>
Australia’s International Obligations

What is the OECD Anti-Bribery Convention?

The Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) was developed in response to recognition of the need for national efforts and multilateral cooperation to address the problem of bribery.

The Convention requires countries to legislate against the giving or offering of a bribe to a foreign public official to gain or retain a business advantage. It also requires countries to adopt common rules to punish individuals and companies who engage in bribery transactions.

In 2009, parties to the Convention agreed to put in place new measures to reinforce their efforts to prevent, detect and investigate foreign bribery with the adoption of the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

Australia’s implementing legislation for the Convention is contained in Division 70 of the Criminal Code Act 1995 (Cth). (See Fact Sheet 2 – The Offence, for information on what constitutes a bribe.)

The Convention has a rigorous monitoring process to ensure that the legislation passed is appropriate and strictly enforced. Under the Convention, the Working Group on Bribery in International Business Transactions is responsible for the monitoring of the Convention. Monitoring is carried out through both self and mutual evaluation of the Convention and the 1997 Revised Recommendation.

Australia has completed three phases of monitoring. Phase 1 evaluated whether the legislation passed to implement the Convention is adequate. Phase 2 studied the structures put in place to enforce and implement the Convention and the 1997 Revised Recommendation, and assessed how effective those structures are in practice. Phase 3 focussed on enforcement of the Convention, the 2009 Anti Bribery Recommendation, and outstanding recommendations from Phase 2. Australia’s Phase 4 evaluation is scheduled to commence in 2017.

How was the Convention developed?

In December 1996, the United Nations General Assembly adopted a Declaration Against Corruption and Bribery in International Business Transactions. In May 1997, the OECD Ministerial Council recommended that measures to combat bribery in international business transactions, including the criminalisation of bribery of foreign public officials, should be legislated in all member countries. Australia endorsed this recommendation. The Convention was developed in response to the OECD Ministerial Council recommendation.

On 21 November 1997, OECD Member countries and five non-member countries adopted the Convention.
When did Australia sign the Convention?


A number of countries have ratified the Convention and further information about international efforts under the Convention can be found at the OECD homepage <www.oecd.org>.

What is the OECD?

The Organisation for Economic Cooperation and Development (the OECD) is a group of democratic countries that assist governments to tackle economic, social and governance challenges. It works with more than 70 non-member countries and a range of civil society and international organisations on a number of issues, including economic growth and stability, employment, education and social cohesion, trade and international investment, sustainable development, governance, best use of new technologies, development cooperation and cooperative relations.
Frequently Asked Questions

When does the foreign bribery offence apply?
The offence applies to conduct in Australia, or on board an Australian aircraft or an Australian ship. The offence also applies to conduct outside Australia in three situations. This is where, at the time of the alleged offence, the person who is alleged to have committed it is:

1. an Australian citizen
2. a resident of Australia, or
3. a body corporate incorporated by, or under a law of, the Commonwealth or of a State or Territory.

See Fact Sheet 2 – The Offence, for further details on when the offence applies.

Can a company be held criminally responsible for the conduct of a corporate agent?
Yes, companies can be found guilty of the foreign bribery offence and can be held criminally responsible for the actions of their agents. In certain circumstances, a company must be held responsible for the illegal acts of employees and agents.

Companies should be aware that they will be liable for foreign bribery offences where:

- the company’s board of directors, or a high managerial agent of the company, intentionally, knowingly or recklessly committed the foreign bribery offence
- the company’s board of directors, or a high managerial agent of the company, expressly, tacitly or impliedly authorised, or permitted the commission of, the foreign bribery offence by an agent of the company
- an agent of the company offered a bribe and it is shown that a corporate culture existed within the company that directed, encouraged, tolerated or led to the commission of the foreign bribery offence, or
- an agent of the company offered a bribe and it is shown that the company failed to create and maintain a corporate culture that required compliance with the laws against bribing foreign public officials.

Companies must create and maintain a corporate culture that requires compliance with the law or they may face increased liability for the corrupt activities of company officers and agents. Companies must take reasonable steps to ensure that their employees do not commit foreign bribery offences.

Companies should also ensure that they have appropriate channels for reporting suspected breaches of the law and that people who do report breaches are protected from persecution within the company.

Corporate criminal liability is detailed in Division 12 of the Criminal Code Act 1995 (Cth).

See Fact Sheet 2 – The Offence, for further details on corporate liability for foreign bribery.
Are bribes tax deductible under Australian law?

Bribes are illegal under Australian law and are not tax deductible.

Who can report allegations of foreign bribery?

Any person, organisation or government department may refer an allegation of foreign bribery to the Australian Federal Police (AFP). This includes the media or a foreign government.

See Fact Sheet 3 – How to Report Suspected Foreign Bribery, for details on referring a matter to the AFP.

Who investigates allegations of foreign bribery?

The AFP has primary law enforcement responsibility for investigating criminal offences against Commonwealth laws, which includes the foreign bribery offence.

All allegations of foreign bribery are treated as a high priority by the AFP.

Who do I contact if I suspect that someone is bribing a foreign public official?

If you suspect that an individual or company has bribed, or attempted to bribe, a foreign public official, please report the matter online at <www.afp.gov.au> or to the AFP Operations Monitoring Centre (OMC) in Canberra on (02) 6126 7777 or from outside Australia on +61 2 6126 7777. The OMC in Canberra can also provide address details for written referrals. See Fact Sheet 3 – How to report suspected foreign bribery, for details on reporting a matter to the AFP.