

Australia

I. Brief Introduction to the Legal System of Australia

The Australian legal system is based on a fundamental belief in the rule of law, justice, and the independence of the judiciary. Principles such as procedural fairness, judicial precedent, and the separation of powers are fundamental. Like the United States and Canada, and distinct from the civil law systems that operate in regions such as Europe, South America, and Japan, Australian jurisprudence is based on the common law system developed in the United Kingdom.

The Australian Constitution establishes a federal system of government under which powers are distributed between the federal government and the states and territories. It defines exclusive powers (including the federal government's power to make laws on matters such as trade and commerce, taxation, defense, external affairs, and immigration and citizenship) and concurrent powers (where both tiers of government are able to enact laws). The states and territories have independent legislative power in all matters not specifically reserved to the federal government. Federal laws apply to the whole of Australia. Where there is any inconsistency between federal and state or territory laws, federal laws prevail.

In effect, Australia has nine legal systems – the eight state and territory systems and one federal system. Each of the federal and state systems incorporates three separate branches of government – legislative, executive, and judicial. Parliaments make the laws, the executive government administers the laws, and the judiciary independently interprets and applies them.

II. Australia's Anticorruption Law

Australia ratified the OECD Convention¹ on October 18, 1999 and subsequently implemented its provisions through domestic legislation coming into force on December 17,

¹ For a description of the Convention, see Introduction at page ___.

1999. The Criminal Code Amendment (Bribery of Foreign Officials) Act 1999 inserted Division 70 into the Criminal Code Act², which criminalizes the bribery of foreign officials. The law applies to conduct occurring in Australia or in a foreign country by an Australian resident or citizen, or by a corporation incorporated in Australia.³

As a result of the amendment to the Criminal Code, it is now a criminal act for a person to provide, offer to provide, promise to provide, or cause a benefit to be provided to another person to whom such a benefit is not legitimately due, with the intention of influencing a foreign public official in the exercise of his or her duties, in order to obtain or retain business, or a business advantage,⁴ that is not legitimately due to the recipient or intended recipient.⁵

Penalties

On February 4, 2010, the penalties for bribery of a foreign public official were increased.⁶ If an individual is guilty of bribery of a foreign official under the Criminal Code, the offence is punishable by imprisonment for up to 10 years, a fine of up to 10,000 penalty units⁷, or both. If the offence is committed by a corporation, the sanction is the greater of 100,000 penalty units or three times the value of the benefit gained by the bribe. However, if the value of the benefit obtained by the offence cannot be ascertained, the sanction may be set at ten percent of the annual revenue of the offending corporation.

Defenses

There are two affirmative defenses to the bribery offence established by the Criminal Code, the local law defense and the facilitation defense. If the accused is able to prove that his conduct was required or permitted by local law in force at the time of the conduct in the

² [Commonwealth Criminal Code Act 1995 \(Cth\)](#) ('Criminal Code').

³ See Criminal Code s 70.5.

⁴ It is important to note that prosecution of this offence does not require proof that business, or a business advantage, ever actually materialised. See Criminal Code s 70.2(1A).

⁵ There is specific direction in the legislation to judges to disregard any arguments of 'custom' that might be put forward by persons charged with these bribery offences. See Criminal Code s 70.2(2)-(3).

⁶ Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Cth).

⁷ A penalty unit is 110 Australian dollars (AU\$110).

jurisdiction where the conduct occurred, such proof will constitute a sufficient defense to a bribery charge under the Criminal Code.⁸ Certain “facilitation payments” are permitted: the Criminal Code defines “facilitation payments” as minor benefits provided to a person for the dominant purpose of expediting or securing the performance of a routine governmental action of a minor nature, recorded by the provider of the benefit.⁹ The Criminal Code distinguishes between simple administrative government functions (permitted) and business decisions made by foreign public officials when defining routine government actions (not permitted).¹⁰

Corporate criminal responsibility

The Criminal Code creates something close to strict liability for a corporation whose employee bribes. The law provides that the corporation is liable for offences committed by an employee or agent acting within the scope of his employment or with apparent authority, where the company expressly or impliedly authorized the act.¹¹

State laws

Australia’s Constitution grants states and territories the power to make laws on any matter. The Federal law on bribery of foreign officials specifically states “it is not intended to exclude or limit the operation of another law of the Commonwealth or any law of a State or Territory.”¹² Several state criminal codes contain broad general bribery offenses, which could be used to prosecute bribes paid to foreign officials; for example, the New South Wales Criminal Code¹³ and the Australian Capital Territory Criminal Code.¹⁴ Bribery is a common law offence in many states and territories. While there is an obvious overlap between federal and regional laws, Australian authorities say this is the nature of a federal system and aver that

⁸ See Criminal Code s 70.3(1).

⁹ While there is an evidentiary burden on the alleged offender to prove that a benefit was a facilitation payment, the Criminal Code does not go so far as to require the record of the provision of the benefit to be produced; so long as there is a sufficient explanation for its non-production. There is also a prescribed format for the keeping of such records. See Criminal Code s 70.4.

¹⁰ See Criminal Code s 70.4(2).

¹¹ See Criminal Code Part 2.5.

¹² See Criminal Code s 70.6.

¹³ Crimes Act 1900 (NSW).

¹⁴ Criminal Code 2002 (ACT).

state and territorial law enforcement officials would be glad to turn over prosecutions to federal authorities.¹⁵

Section 286 of the Corporations Act 2001¹⁶ contains a provision, similar to the United States Foreign Corrupt Practices Act, that requires companies to keep books and records that correctly record transactions and that would enable the preparation of true and fair financial statements. Facilitation payments in the federal law are also modeled on the FCPA. To qualify as an affirmative defense, a facilitation payment must be of a minor nature for a routine government act and be recorded on the company's books. That is the federal law. However, these same payments are prohibited under most state criminal codes¹⁷

To increase awareness of the bribery law, the government published *Bribery of Foreign Public Officials is a Crime*¹⁸, a pamphlet describing the legal consequences of violating the law for both companies and individuals.

Australia ratified the United Nations Convention against Corruption on December 7, 2005. In accordance with the Articles of the Convention against Corruption, Australia has implemented the mandatory requirements and some non-mandatory requirements.¹⁹

III. Assessment

¹⁵ OECD Directorate for Financial and Enterprise Affairs, Australia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, January 4, 2006 (hereinafter, "Australia Working Group Report." Website: <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/35937659.pdf> .

¹⁶ Australia Working Group Report at 40 and Corporations Act 2001 (Cth).

¹⁷ Australia Working Group Report at 41.

¹⁸ [Foreign Bribery Information and Awareness Pack](#).

¹⁹ The Criminal Code has been amended to include provisions relating to corrupting benefits given to Commonwealth public officials, abuse of public office and other dishonest acts involving Commonwealth public officials. The UN review team assessed Australia's implementation and enforcement in 2012, producing an [Executive Summary](#) detailing its results.

From June 6 to June 10, 2005, the OECD Working Group on Bribery in International Business Transactions (the “Working Group”) conducted its Phase 2²⁰ examination of Australia’s implementation of the OECD Convention and thereafter issued a report with evaluations and recommendations, which offers helpful insights into the efficacy of Australia’s anticorruption legal regime. The Working Group liaised with and took advice from various institutions of Australia’s government and representatives of the judiciary, the legal profession, the private sector, and civil society. The Australian government thereafter made its own follow-up report. The Working Group found that while the legal regime to police corruption and implement the OECD Convention was, for the most part, in place, enforcement lagged. No cases of bribery of foreign officials had been prosecuted. Only three investigations by the Australian Federal Police, the institution responsible for administering the Federal law prohibiting bribery of foreign officials, had been initiated and one of them had been terminated. As of the date of the Working Group’s visit, no company or individual had been charged with the bribery of a foreign official. The Working Group noted that bribes had been tax deductible in Australia until recently and suggested that because tax auditors would not have paid attention to bribes before, they now be given specific instructions on how to identify bribes.²¹ Those who knew or had suspicions about bribes being paid identified the lack of a sufficient whistleblower protection law as a problem because the absence of protection chilled the interest to report.²²

While prosecutions for violations of the bribery laws may not have lived up to expectations of the Working Group, enforcement of the books and records provisions of the Corporations Act has had a somewhat better recent history: the Working Group reported 18 prosecutions between 1991 and 2005. Still, it criticized the low number of prosecutions and the lenient penalties provided by the law. The Working Group made a few specific recommendations, which Australia has taken on board. As mentioned above, penalties for violating the bribery law have been increased, for example.

The OECD Working Group completed its Phase 3 Review of Australia in October 2012. While it commented on the positive development that foreign bribery is now a priority of the government, leading to the proposed adoption of Australia’s first National Anti-Corruption Plan, the Working Group expressed its “serious concerns that overall enforcement of the

²⁰ The Working Group examines a country’s implementation of the OECD Convention in three separate on-site evaluations, called “Phases.” The Phase I examination of Australia took place in December 1999. The Phase 3 examination was conducted in June 2012; it typically takes the Working Group five months to produce its report.

²¹ Australia Working Group Report at 29.

²² Australian Working Group Report at 31.

foreign bribery offence to date has been extremely low. Only one foreign bribery case has led to prosecutions.”²³

IV. **Texts**

A. Criminal Code Amendment (Bribery of Foreign Officials) Act 1999

<http://www.comlaw.gov.au/Details/C2004A00434>

B. Criminal Code Act 1995

<http://www.comlaw.gov.au/Details/C2004A04868>

C. Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000

<http://www.comlaw.gov.au/Details/C2004A00730>

D. Corporations Act 2001

<http://www.comlaw.gov.au/Details/C2013C00003>

²³ Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia at 4.



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