The changing face of bribery and corruption laws — legal risks and ways to mitigate them

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- Case involving subsidiaries of the Reserve Bank, as well as proposed amendments to anti-bribery laws and international liaison all draw attention to Australian efforts to combat bribery
- Given that facilitation payments are not permitted in various foreign jurisdictions, it is prudent for Australian corporations working internationally to refrain from using them, despite being potentially allowable under the Criminal Code
- Comprehensive and robust compliance program is essential to guard against corrupt culture operating in an organisation, and also to demonstrate a commitment to anti-bribery policy and practice to regulators and enforcement bodies

Edmund Burke once said that 'Among a people generally corrupt, liberty cannot long exist'. This sentiment explains why, at the international level, there is a strong current focus on corruption issues.

Corruption is also a significant issue domestically, as a result of a case currently being heard by the Supreme Court of Victoria involving Securency International Pty Ltd (Securency) and Note Printing Australia Limited (NPA), corporate subsidiaries of the Reserve Bank of Australia (RBA).[1]

The purpose of this article is to remind corporate officers and employees of Australian laws used to prosecute corrupt behaviour, in particular attempts to bribe foreign public officials. The article discusses possible future changes to Australian laws and highlights the importance of good corporate governance, particularly when conducting a business in an overseas jurisdiction.

On 1 July 2011, the Australian Federal Police charged Securency and NPA, and eight individuals, with false accounting and conspiring to bribe foreign public officials. These charges concern alleged bribes paid to public officials in Malaysia, Nepal and Vietnam between 1999 and 2005 in order to secure banknote printing contracts.[2]

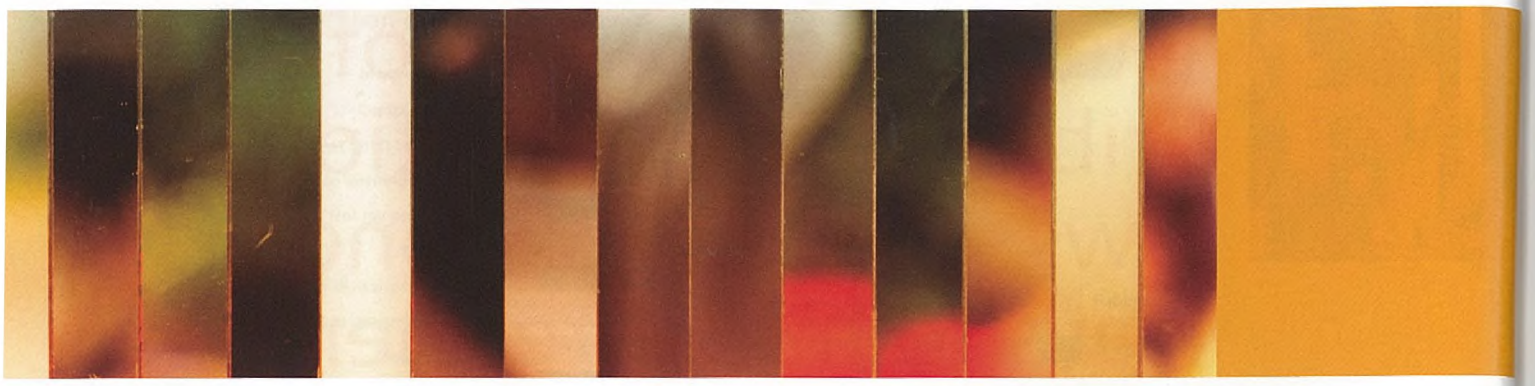
On 20 August 2012, the former company secretary and chief financial officer of Securency was handed a six-month suspended sentence after pleading guilty to a charge of false accounting in relation to a $79,502 payment.[3] The payment was made to allegedly corrupt Kuala Lumpur arms broker Abdul Kayum. Another foreign agent said to have been engaged by the RBA subsidiaries, Colonel Anh Ngoc Luong, of Vietnam's state intelligence service, allegedly received up to $20 million in suspected bribes to help Securency win contracts valued at more than $110 million.[4]

The case is high-profile, being Australia's first prosecution under the *Criminal Code Act 1995* (the Code) as amended by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999*. It is expected that the court will provide useful judicial guidance on the elements of the bribery offence. Should the prosecution succeed, judicial consideration will also be given to the imposition of appropriate penalties.

Consultation and international connections

There are other recent developments in Australia that are likely to further affect our anti-corruption laws:

- the visit to Australia of Anti-Bribery Convention examiners from the OECD Working Group on Bribery in June 2012



- the public consultation paper, launched by the Minister for Home Affairs on 15 November 2011, seeking views on possible changes to existing anti-bribery laws and
- the announcement by the Australian Government in September 2011 of the development of a national anti-corruption plan.[5] The government has stated that the findings of the OECD Working Group's current review will be closely considered by the government in developing the plan.[6]

With the spotlight firmly on Australia's implementation of its international anti-bribery obligations, this article is intended as a timely reminder of the scope of, and defences under, Australian anti-bribery laws.

Division 70 of the Criminal Code

Elements of the offence

The offence of bribing a foreign public official is found in s 70.2 of the Code and the defences to any such offence are found in ss 70.3 and 70.4.

The particular elements of the offence are as follows.

1. A person provides or offers or promises to provide a benefit, or causes a benefit to be offered, promised or provided, to another person.
2. The benefit is not legitimately due to that other person.
3. The first person acted with the intention of influencing a foreign public official in the exercise of that 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.

A 'benefit' is defined in s 70.1 of the Code as being an advantage. It is not limited to property. A benefit therefore could extend to a non-monetary, or non-tangible, inducement.

It is important to note that the offence applies regardless of whether the bribe achieved the outcome sought by the offender and despite any argument that the payment was, or was perceived to be, customary, necessary or required in the situation. The value of the benefit, and any official tolerance of it, is disregarded for the purposes of determining whether that benefit is not legitimately due to the other person. Furthermore, there need not be a direct relationship between the person whose influence is sought and the alleged offender.

Finally, s 70.2(1) merely refers to the 'intention of influencing a foreign public official'. Division 70 is silent as to whether actual knowledge of the factual circumstances is required and it is necessary to refer to other divisions of the Code (particularly Div 5) in relation to the 'fault' elements of a bribery offence.

Jurisdiction

Division 70 of the Code can apply to acts committed in Australia but also extends to executives and employees of foreign corporations who are ordinarily resident in Australia under a visa. It does not, however, apply to a related corporation that conducts its operations entirely offshore.

Who is a 'foreign public official?

The definition in s 70.1 of the Code is very broad. It includes:

- an employee or official of a regional or local government, or government authority, of another country
- a contractor to a foreign government body
- a member of the police force, executive, judiciary or magistracy of a foreign country, and
- an employee or officer of a public international organisation (such as the Asian Development Bank).

Penalties

The penalties for bribery offences under Australian law have been increased significantly. In February 2010, the Australian Parliament passed the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010*. Schedule 8 of the Act increased the financial penalties for bribery offences. As a result the new penalty:

- for an individual is imprisonment for up to ten years, a fine of up to 10,000 penalty units (currently $1.1 million), or both
- for a corporation is a fine of not more than the greater of:
  - 100,000 penalty units (currently $11 million) or
  - if the court can determine the value of the benefit obtained by that the

corporation (and any corporation related to the corporation), three times the value of that benefit.

If the court cannot determine the value of that benefit, ten per cent of the annual turnover of the corporation during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred. The Act defines 'annual turnover' for the purposes of the penalty provision. It includes the annual turnover of related corporations.

The Australian Government has said that the formula for the penalties is based on existing penalties for restrictive trade practices and cartel behaviour. The monetary fine is greater, however, to reflect the serious criminal nature of bribery and to act as a significant deterrent to attempts to bribe foreign or Commonwealth public officials.

Defence to the Australian foreign bribery offence — conduct lawful in foreign jurisdiction and facilitation payments

There are essentially two defences under the Code.

- The first is that the advantage was permitted or required by the written laws that govern the foreign public official.[7]
- The second defence applies if the benefit constitutes a 'facilitation payment'.[8] In order to plead this defence, the value of the benefit must be of a minor nature and the conduct 'engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature'.

Section 70.4(2) provides examples of 'routine government actions'. They are actions that are ordinarily and commonly performed by a foreign public official such as granting a permit or a licence to do business in the foreign country or processing government papers (such as a visa or work permit).

In order to rely on the defence in s 70.4, a person must:

- as soon as practicable after the conduct occurred, prepare a document that sets out the value of the benefit concerned, the date on which the conduct occurred, the identity of the foreign public official (or other person, such as an intermediary) and particulars of the routine government action in question
- sign the document or it must identify the author in some other way and
- retain it at all relevant times (excepting where the document is unexpectedly and unavoidably destroyed).

Practically speaking, it seems unlikely that Australian corporations will be able to obtain receipts or other official acknowledgement of the payment for the 'routine government action' and, accordingly, may have difficulty maintaining to the satisfaction of a prosecutor the kinds of records required by the Code. In addition, the legislation does not address the issue of a corporation making many, ongoing facilitation payments which, in aggregate, do not have a 'minor' value. It is currently unclear how a court would approach such a scenario.

Notwithstanding that a 'facilitation payment' may be a defence under Australian law, one of the issues raised by the Minister for Home Affairs' public consultation paper is whether the facilitation payment exception should be removed the from the Code. The defence itself is not favoured by the OECD Working Group on Bribery because of the potential aggregate adverse effect of facilitation payments on a country's economy and governance.

The issue of facilitation payments is also a matter of current controversy in the US. There is an ongoing investigation by the Securities and Exchange Commission and the Department of Justice into the activities of Wal-Mart Stores Inc (Wal-Mart) and its subsidiaries, and in particular whether payments made to Mexican public officials are strictly in the nature of facilitation payments for the purposes of the *Foreign Corrupt Practices Act 1977* (FCPA).[9]

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As part of its compliance program, a corporation should carry out regular risk assessments to identify the 'red flags' that may signal the need for a closer inspection of the operations of any business or circumstances of any transaction. Personnel should be trained to identify these red flags.

Wal-Mart's Mexican subsidiary, Walmex, stands accused of paying more than US$24 million to Mexican public officials to obtain building permits which would enable Walmex to open new stores in Mexico more quickly. It seems likely that Wal-Mart's defence to any prosecution will include the facilitation payment defence. It could potentially argue that the payments under investigation were not those targeted by the FCPA because they did not involve 'obtaining or retaining business' from the Mexican Government but were instead made to secure the faster processing of a routine government action. On the other hand, it could equally be argued that the payments were made to influence the discretion of government officials under relevant building law requirements and were used to obtain a business advantage.

As the Wal-Mart situation illustrates, there is a significant grey area between a facilitation payment and a bribe. However, some smaller Australian corporations operating in developing countries have, in their lobbying of the Australian Government, been suggesting that the removal of the facilitation payment exception would prevent them from doing overseas what most corporations do on a routine basis without being punished. According to this view, what constitutes a bribe has to be assessed on an individual basis, taking into account the socioeconomic and cultural characteristics of the country in question.

The argument made by these smaller corporations receives little support internationally. For example, any corporation that makes facilitation payments in the ordinary course of business must be alert to the potential implications under the UK Bribery Act. If an Australian corporation carries on a business, or part of a business, in any part of the UK, it may fall within the jurisdiction of that Act. As the Bribery Act does not permit facilitation payments, there is the potential for an Australian corporation that engages in facilitation payments to be prosecuted in the UK.

With this background in mind, it is prudent for Australian corporations working internationally to follow the recommendation of the OECD Working Group on Bribery and refrain from using facilitation payments.

Anti-bribery legislation looking forward

It is fair to say that one of the criticisms of Australia's anti-corruption regime has been the lack of prosecutions under applicable laws. The criticism has led to a considerable tightening of relevant Australian laws (including tax laws, to disallow the tax deductibility of bribe payments). At the same time, and following pressure from the OECD Working Group on Bribery, the Australian Government has taken significant steps to improve the detection and investigation of offences.

As an example of the tightening of Australian laws, Australian corporations engaged in bribery may also face prosecution under the *Corporations Act 2001*. For example, Chapter 2M of that Act contains detailed provisions regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards. Corporations are required to comply with these provisions and the establishment of off-the-books accounts is prohibited. A range of civil and criminal penalties apply for breach of these provisions.

Acts of foreign bribery are also likely to constitute actions contrary to the fiduciary duties of directors and office holders. By way of illustration, on 9 August 2012, the Supreme Court of Victoria handed down its judgment in civil proceedings between the Australian Securities & Investments Commission (ASIC) and Andrew Lindberg for alleged breaches of his duties to exercise reasonable care and skill as Chief Executive Officer of the Australian Wheat Board (AWB). The court found four contraventions of his duty as a director in failing to make adequate enquiry of AWB's activities in selling wheat to Iraq under the United Nations Oil-for-Food Programme and for failing to advise the board of

AWB of certain matters that came to his attention as an officer of the company.[10]

Compliance

Corporations, particularly those involved in cross-border transactions for the first time or managing existing international operations, need to ensure that their corporate values are aligned to doing business abroad. They also need to ensure that these corporate values are enforced — simply giving lip service to the concept of 'zero tolerance' is insufficient, especially where the corporation operates in countries in which official corruption is known to exist. The best measure of enforcement is a robust compliance program.

A properly constructed compliance program will:

- demonstrate a proven management commitment to anti-bribery measures and accountability
- include an anti-bribery policy that is in writing and sets out the corporation's clear commitment to 'zero tolerance' of bribery and to working only with third parties whose ethical standards are consistent with those of the corporation
- be clearly communicated in a manner that is readily visible and available to all personnel.

The corporation should also consider devising an appropriate training program, for all levels of personnel, which may involve seminars, manuals, online training and/or workshops of small groups of personnel.

As part of its compliance program, a corporation should carry out regular risk assessments to identify the 'red flags' that may signal the need for a closer inspection of the operations of any business or circumstances of any transaction. Personnel should be trained to identify these red flags. Some of the most common categories of risk are:

- *country risk* — Is there the perception of any location in which the corporation operates that it involves high risks of corruption and/or an absence of effectively implemented and monitored anti-bribery legislation? The Corruption Perceptions Index published by Transparency International may provide useful guidance[11]
- *sectoral risk* — Does the corporation operate in an industry where the opportunities and rewards for corrupt activities are known to be higher? Extractive industries and the large-scale infrastructure sector may be sectors which should be considered at risk of corrupt activities
- *transaction risk* — Is the success of the transaction dependant on obtaining a government approval, licence or authorisation and it not being revoked? Does the transaction have any political or charitable implications?
- *business opportunity risk* — Is the corporation involved in projects that are high-profile, contain numerous intermediaries or involve essential public services?
- *business partnership risk* — Is the corporation involved in any form of joint venture or collaboration with a government entity or does a public body have significant oversight of, or economic interest in, a significant project (for example, public private partnerships may fall into this category).
- *new business risk* — Greater vigilance might be required where the corporation has not been operating in a country, or transacting with a government entity, over a period of several years. Has a third-party stakeholder shown any reservations about including anti-corruption clauses in its contracts? Has a third-party stakeholder proposed any unusual remuneration arrangement (for example, payment via a third party)?

The corporation must also maintain a clear audit trail of the due diligence it performs in relation to transactions, projects and business opportunities (including at the tendering stage). A due diligence checklist should be developed for these purposes, and should specifically address the risks identified in the risk assessments carried out by the corporation.

Regular monitoring and review at specified intervals of the individual elements of the compliance program, and personnel's compliance with that program, is essential. Corporations should develop a clear process for reviews to take place and ensure that the results of the reviews are shared with the highest levels of management of the corporation (for example, by way of compliance reports to the board).

There must also be a clear process within the compliance program for amending the program, as required, to address lessons learned. This will create a framework for continuous improvement by the corporation. The scope, frequency and extent of the review process will be guided by existing risk assessments.

Given the potential criminal penalties attached to breaches of anti-bribery laws, it is essential that there is proper record keeping in relation to compliance with the compliance program and audits or reviews of its effectiveness. In particular, all risk assessments should be documented, along with the agreed risk avoidance or mitigation measures. Progress in addressing identified risks should be monitored. Similarly, it is essential to keep proper records of any internal or independent investigations into potentially corrupt conduct and resultant disciplinary processes.

Corporations should be aware that comprehensive record keeping and reporting processes perform two important purposes. First, they provide strong evidence of a corporation's commitment to its anti-bribery policy and guidelines. Second, in the event of a regulatory investigation, they provide proof that the corporation had in place adequate procedures designed to prevent corruption. This will be weighed up by prosecutors in the exercise of any prosecutorial discretion and in proposing an appropriate penalty.

Conclusion

This article commenced with the observation that, at the international level, there is a strong current focus on corruption issues. This focus is only likely to become greater as barriers to

international commerce are reduced and cross-border transactions, often involving governments, increase.

The article has a necessary focus on anti-bribery laws enacted in Australia. However, perhaps the most important point that should be taken away by readers is its focus on the need for a strong corporate culture, underpinned by ethical corporate values and demonstrated by an effective compliance program.

Senior management must therefore, as the primary strategy in preventing corrupt behaviours, encourage and sustain ethical behaviours in their organisations. Where ethical obligations and fiduciary responsibilities are truly embraced by corporations in their dealings with third-party stakeholders, then inevitably the cost of doing business will reduce and Australian corporations with strong anti-corruption stances will enjoy both enhanced international reputations and increased commercial opportunities.

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You can hear a podcast on this topic at www.CSAust.com/knowledge-resources/podcasts

Notes

1 For more information about the background to this matter, see Nicholson G and Elms N, 2011, 'Corruption, corporate culture and the board's responsibilities', *Keeping good companies*, Vol 64 No 10, pp 594–599
2 Australian Federal Police, 2011, 'Foreign bribery charges laid in Australia', media release, 1 July
3 Durkin P, 2012, 'Ellery's early plea pays off', *The Australian Financial Review*, 21 August, p 5
4 Durkin P, 2012, 'Spy who loved her got $20m: RBA case', *The Australian Financial Review*, 24 August, p 6
5 Attorney-General's Department, 2011, 'National anti-corruption plan', www.ag.gov.au/anticorruptionplan [20 September 2012]
6 Roxon N, 2012, 'Australia receives top marks for anti-corruption practices', 18 June, www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/18-June-2012-Australia-receives-top-marks-for-anti-corruption-practices.aspx [20 September 2012]
7 s 70.3(1)
8 s 70.4
9 For more detail about the FCPA, see also Slavin J, 2011, 'Bribery Act and comparison with US law', *Keeping good companies*, Vol 63 No 2, pp 82–86
10 *ASIC v Lindberg* [2012] VSC 332
11 As this article was being finalised, the last available research was published in 2011: see http://cpi.transparency.org/cpi2011/ [20 September 2012] ■