

FOREIGN BRIBERY & CORRUPTION – GOVERNMENT TO TOUGHEN UP

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Consultation sought

On 15 November 2011, the Australian Government released a Public Consultation Paper seeking submissions regarding its proposed amendments to Australia's foreign bribery legislation, currently found in Division 70 of the Criminal Code (Cth).

The issues subject to public consultation are:

- **facilitation payments:** whether the facilitation payments defence should be removed;
- **value of benefit:** whether the value of a benefit should be expressly considered when determining if a benefit is 'not legitimately due'; and
- **identity of foreign public official:** whether the requirement to prove an intention to influence a foreign public official should be removed.

The Public Consultation Paper can be accessed [here](#).

Current legislative regime

Offence

Division 70.2 provides that a person (which includes a body corporate) is guilty of an offence if that person:

- promises, provides or causes to provide a benefit;
- which is not legitimately due;
- with the intention of influencing a foreign public official (which may be the other person);
- in order to obtain or retain business or a business advantage that is not legitimately due.

In determining whether a benefit is 'not legitimately due' the court is expressly precluded from considering the value of the benefit conferred or offered.

Defences

A defence to Division 70.2 will be established where it can be proved that a benefit conferred or offered to the foreign public official:

- is required or permitted by the written law of the foreign public official's country; or
- is a facilitation payment.

A facilitation payment is a payment where the value of a benefit given is of a minor nature and is given with the sole or dominant purpose of expediting or securing the performance of a routine government action.

For a comprehensive review of Australia's foreign bribery legislation, please click [here](#) for our article.

How the changes could affect you?

Practically speaking, the proposed amendments will, if adopted, considerably broaden the scope of conduct which may be caught by Division 70.2. Accordingly, widely accepted business practice and conduct once within the law may subsequently become illegal.

Companies, their officers and other traders in breach of Division 70.2 risk incurring significant imprisonment terms; monetary penalties; reputational damage and possible black-listing from future government and private sector tenders or contracts.

What can you do?

Organisations with operations in Australia that have business dealings overseas, especially in what may be called “red flag” jurisdictions, should review their anti-corruption policies and their implementation and ongoing education programs in light of these possible changes. The removal of the facilitation payment defence in particular, could have serious implications for the way many organisations and their personnel conduct business dealings in other countries.

Submissions in response to the Public Consultation Paper can be sent to the Attorney-General's Department at foreign.bribery@ag.gov.au and will be accepted until 15 December 2011.

We intend to provide updates of developments and reforms arising from this consultation process but we recommend that organisations that may be affected by the proposed changes keep a close watch on the progress of legislative changes.

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