

The Bribing Of Foreign Public Officials

Introduction

Corruption. Cronyism. Lack of transparency. These are said to be some of the reasons for the meltdown of the economies of South East and North East Asia. How much corruption exists, if it exists at all, in these economies is a matter of conjecture. Some of what an ordinary Australian perceives as a corrupt act may be nothing more than a customary way of conducting business in Asia. On the other hand, there are clearly acts which by any measure are corrupt and should be discouraged.

Recognising that corruption, wherever it exists, hinders competition, distorts trade and harms consumers, taxpayers and efficient honest traders who lose contracts, production and projects, the OECD adopted the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* in 1997. The Convention deals only with the bribery of public officials. The bribing of people connected with commercial entities is not covered. This focus is intentional. Corruption undermines the integrity and, in some cases, the stability of governments.

Australian legislation

The Federal Government proposes to pass legislation consistent with the Convention on Combating Bribery which will make the bribing of foreign public officials a criminal offence. To this end, in February 1998 the Minister of Justice released for public comment an exposure draft of the Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998.

Under this Bill, a person found guilty of bribing a foreign public official could be:

- imprisoned for 10 years; or
- fined \$66,000 (people) or \$330,000 (corporations).

The courts would also have the option of imposing both a term of imprisonment and a fine.

The Bill is meant to have limited extra-territorial application. Where the illegal act is conducted wholly outside of Australian jurisdiction it will not apply. However, where there is a nexus with Australia, for example, where the act was initiated in Australia or approved of in Australia, the new law will have full application. It will also apply where the benefit (the bribe) is received in Australia.

Initially, the Convention will only begin to operate when a substantial number of major OECD countries, not including Australia, have joined the Convention. The

Australian legislation will only come into force when the Convention enters into force for Australia.

Elements of the crime

Under the Bill, it will be an offence under Australian law for any person to provide a bribe to a foreign public official for the purpose of:

- obtaining or retaining business; or
- obtaining or retaining an improper advantage in the conduct of business.

The official may be a civil servant, government official or member of the local legislature. Alternatively, he or she may be an employee of a government-controlled entity or even an international organisation. It follows, then, that not only will the bribing of a minister of state be illegal, so will the bribing of the managing director of a government-controlled petroleum company or the field director of an international organisation such as the World Bank or the IMF.

The bribe may be in the form of cash or other consideration to which the official is not legitimately entitled. For example, the legislation catches the payment of an administrative fee directly to the official as opposed to the relevant government agency or the directing of lucrative contracts to that official in his or her personal capacity.

The bribe need not be paid directly to the official. Even causing the bribe to be paid to the official, say through a third party, will result in a breach of the proposed law. Thus, Australians who tell their local partners to “*do all that is necessary*” to win a government contract, knowing this would include the paying of a bribe, could also fall foul of the law.

Any excuses?

The mere acceptance and tolerance of such conduct in the community at large is no defence.

The Convention on Bribery and the Bill recognise only two situations where the giving of a bribe can be excused. These are:

- where its payment is sanctioned by the laws of the local jurisdiction (or in the case of an international organisation, the law of the place where its central administration is located); or
- where it is a small “*facilitation*” payment. (These are defined in the OECD commentaries to the Convention.

These two excuses are recognised under the Bill. The second excuse recognises that in some countries "grease" payments may sometimes have to be made to public officials in order to move things along. Such payments are typically made to officials who carry out administrative tasks rather than (usually high ranking) officials who have policy-making responsibilities. Hence, payments (usually small ones) paid to have a telephone line installed by a government-owned telephone company at a factory would be acceptable; bribes (usually large ones) paid to win a tender to make telephone sets for the same telephone company would not.

Corporate governance

The legislation will give rise to corporate governance issues for Australian companies. Its interaction with the Corporate Criminal Responsibility provisions of the Criminal Code will require corporations to ensure that their corporate culture requires compliance with the legislation. Companies will need to begin developing and implementing a Code of Conduct that includes the components of a compliance program.

Conclusion

The Joint Standing Committee on Treaties is examining the Convention and the Government's Bill to implement it. Its report will be issued shortly.

The Allens Arthur Robison Group has made a submission supporting the Convention and the proposed legislation, stressing that only a broadly-based co-ordinated approach involving major OECD countries can successfully combat corruption in international business transactions. It has pointed out also that the Bill does not properly reflect the distinction between bribes and "facilitation" payments and that the approach in the US *Foreign Corrupt Practices Act 1977* should be followed. A modified Bill is likely to be introduced into Parliament soon.

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