Division 70 of the Criminal Code Act 1995

Foreign Bribery offence – AFP view

1. Removal of the facilitation defence

The AFP supports the proposal to remove the facilitation defence from the bribery of foreign public officials offence in Division 70 of the Commonwealth *Criminal Code*. In doing so we acknowledge that removal of the defence will remove doubt for businesses as to appropriate business practices and ensure Australia's compliance with the United Nations Convention Against Corruption (UNCAC). This convention, of course, requires signatories to criminalise bribery of foreign public officials in the course of international business and does not differentiate between bribery and facilitation payments.

2. Negotiated settlements

The AFP supports exploring the adoption of a "negotiated settlement" regime similar to that which exists in the UK and the US whereby co-operative offenders will be subject to civil penalty action (rather than criminal prosecution) with lower pecuniary penalties where they self-report corruption.

The introduction of negotiated settlements in the US has encouraged self reporting of corruption and over time reduced the incidence of foreign bribery.

3. Other legislative amendment supported by the AFP

Other matters that the AFP would seek to have addressed in any legislative reform process are as follows:

A. The definition of "not legitimately due" in subsection 70.2(2)

Subsection 70.2(2)(b) provides in effect that, in working out whether a benefit is "not legitimately due" to a person, the "value of the benefit" is to be disregarded.

The original intention of s 70.2(2)(b) was most likely to ensure that where the value of a benefit was small this fact could not be used to render it insignificant or legitimate. The provision was probably intended to deal with payments made in developing countries which may be small in Australian dollar terms but relatively large for a foreign public official in that country.

However, this provision also appears to exclude from the Court's consideration of whether a benefit was legitimately due, the fact that a very large amount of money may have been paid. As such this provision precludes any argument that an exorbitant payment may be, of itself, circumstantial evidence of illegitimacy.

Perhaps subparagraph 70.2(2)(b) could be re-worded to read "the fact that the benefit was of a minor nature" (adopting the wording from s70.4(1)(a).

The removal of the facilitation defence will not alter the need to amend this provision.

B. Extra-territorial application of the foreign bribery and ancillary offences

The nature of foreign bribery offences means that all or most of the crime will take place overseas often through overseas intermediaries who are foreign citizens. As such, the AFP is of the opinion that the legislation should be designed to clearly prevent Australians and Australian companies using such intermediaries to bribe foreign officials. There is currently a lack of clarity as to whether the illegal activities of foreign nationals acting on behalf of, or in concert with, Australian entities are captured under the existing provisions.

Advice from the Commonwealth Director of Public Prosecutions highlights that there are two possible views as to the liability of foreign citizens for their involvement in a foreign bribery offence committed by an Australian entity.

One analysis is that if the conduct by the principal offenders (the Australian entities) constituting the offence has taken place wholly or partly in Australia then a non-resident who aids and abets that offending will be liable to prosecution whether or not any of their conduct took place wholly or partly in Australia. This approach is based on the view that the words “conduct constituting the offence” in s 70.5 only require that conduct related to the primary offence took place in Australia and the fact that all of the conduct constituting an ancillary offence occurred outside Australia does not remove the provision’s jurisdiction.

An alternative view is that aiders and abettors are only liable for the conduct that they have committed which has occurred wholly or partly in Australia. This view is based on a narrower interpretation of the phrase “conduct constituting the alleged offence” in s 70.5 of the Code such that it refers only to conduct of the offender.

In our view this issue needs clarity through legislative reform and our preference would be that section 70.5 is amended to make it clear that a foreign intermediary who facilitates an Australian foreign bribery offence is caught by the ancillary offences, i.e. aid, abet, counsel, procure, even where their conduct occurred wholly outside Australia. This would only apply in circumstances where the conduct of the principal offender, i.e. the Australian citizen or company, took place wholly or partly in Australia.

Section 14.1(2)(c) of the Criminal Code provides a guide on how such an amendment could be framed.

Currently, the miscellaneous provisions related to jurisdiction in sections 16.2 and 16.3 of the Criminal Code cannot be used in foreign bribery offences. These provisions provide some important guidance on when conduct is taken to have occurred partly in Australia. The AFP would support these sections, in particular section 16.2, being added to the geographical jurisdiction provisions in section 70.5 to clarify that the sending of electronic communications or other things would constitute conduct that occurred partly in Australia.

C. Bribery of a foreign public department, office or organisation

The current offence requires that the person paying the benefit intends to influence "a foreign public official". That term is defined in section 70.1 of the *Criminal Code* to refer to an individual/member or employee.

The AFP is concerned that where no specific individual is able to be identified as the person sought to be influenced, that the current offence will not capture a proposal to pay a benefit to a foreign public department generally.

This situation is likely to arise particularly where the offence sought to be prosecuted is a preparatory one, such as conspiracy, and no payment has yet been made.

A recent AFP operation encountered this set of circumstances, such that the only evidence available was that a benefit was planned to be provided to a number of foreign public departments and offices.

The AFP wishes to further explore whether the current offence sufficiently caters for these kinds of preparatory offences, specifically whether any legislative amendment might be required to make it clear that it is not necessary to identify a particular foreign public official in order to prosecute a foreign bribery offence.

If the AFP's concerns about the existing offence are validated they may be addressed either by a new provision making it an offence to provide a benefit (etc) to a foreign public department, office or organisation, that is not legitimately due.

In the alternative, it may be appropriate to address such a concern by introducing a "to avoid doubt" provision to makes it clear that it is not necessary to identify a particular individual in order to prosecute the offence. For example, to avoid doubt, it is not necessary, in order to prove for the purposes of section 70.1, that a person paid money with the intention of influencing a foreign public official, to establish an intention to influence a particular foreign public official.

D. Place record-keeping obligations on companies procuring foreign contracts

Obtaining evidence of foreign bribery offences is difficult in a context where corporations hold extremely large quantities of electronic data in several different locations. This situation is compounded by the problems encountered in obtaining evidence from foreign countries.

Given these difficulties, the AFP is of the opinion that placing obligations on companies to report certain matters relating to the procurement of foreign government contracts would aid the AFP in its investigations of foreign bribery matters.

The AFP envisages that these obligations would entail a requirement to report and/or keep accurate records of foreign transactions made during the procurement of a foreign government contract, record foreign agents (advisors/consultants) paid for services relating to the procurement of foreign government contracts and all recipients of success payments as well as the roles they performed during the procurement of those contracts. Such an obligation should also cover transactions made from offshore accounts held by an Australian citizen or company.

The requirement to report could be accompanied by an offence for failure to report or at the very least contemporaneously record matters relating to the procurement of foreign contracts.

The requirement to record such transactions could be based on s 70.4(3) (which specifies the required content for a record of a facilitation payment).

The US laws have some comparable transparency provisions.

The US *Foreign Corrupt Practices Act* requires companies whose securities are listed in the US to meet its accounting provisions (15 USC 78m) which require

corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to maintain a system of internal accounting controls. The provisions require the records to be filed with the Commission.

Section 13 of the US *Securities Exchange Act* 1934 provides that the Securities Exchange Commission should issue rules that require each "resource extraction issuer" to include in their annual report information relating to any payment made by them, a subsidiary, or an entity under their control to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals

Alternatively, perhaps such obligations could form part of a compliance program accompanying an offence directed at a company for failing to prevent bribery (similar to that which exists in the UK). The defence to this offence is that the company had adequate procedures in place designed to prevent bribery. In the UK there is no definition of adequate procedures in the legislation, the secretary of state is yet to publish guidance on what needs to be done to comply.