



Crimes Legislation Amendment (Combating Foreign Bribery) Act 2024

No. 5, 2024

**An Act to amend the law in relation to foreign
bribery, and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

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Crimes Legislation Amendment (Combating Foreign Bribery) Act 2024

No. 5, 2024

An Act to amend the law in relation to foreign bribery, and for related purposes

[Assented to 8 March 2024]

The Parliament of Australia enacts:

1 Short title

This Act is the *Crimes Legislation Amendment (Combating Foreign Bribery) Act 2024*.

No. 5, 2024

*Crimes Legislation Amendment (Combating Foreign Bribery) Act
2024*

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2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|---|---|------------------|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Sections 1 to 4 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. | 8 March 2024 |
| 2. Schedule 1, Part 1 | The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent. | 8 September 2024 |
| 3. Schedule 1, Part 2 | The first 1 January, 1 April, 1 July or 1 October to occur after the end of the period of 6 months beginning on the day this Act receives the Royal Assent. | 1 October 2024 |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Review of operation of amendments

- (1) The Minister must cause a review of the operation of the amendments made by this Act to be conducted as soon as practicable after the end of the period of 18 months starting on the day Part 2 of Schedule 1 to this Act commences.
- (2) The persons who conduct the review must give the Minister a written report of the review.
- (3) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

Schedule 1—Amendments

Part 1—Main amendments

Criminal Code Act 1995

1 Before section 70.1 of the *Criminal Code*

Insert:

Subdivision A—Definitions

2 Section 70.1 of the *Criminal Code*

Insert:

advantage means an advantage of any kind and is not limited to property.

annual turnover has the meaning given by section 70.5C.

associate: a person is an *associate* of another person if the first-mentioned person:

- (a) is an officer, employee, agent or contractor of the other person; or
- (b) is a subsidiary (within the meaning of the *Corporations Act 2001*) of the other person; or
- (c) is controlled (within the meaning of the *Corporations Act 2001*) by the other person; or
- (d) otherwise performs services for or on behalf of the other person.

3 Section 70.1 of the *Criminal Code* (definitions of *benefit* and *business advantage*)

Repeal the definitions.

4 Section 70.1 of the *Criminal Code* (at the end of the definition of *foreign public official*)

Add:

; or (m) an individual standing, or nominated, (whether formally or informally) as a candidate to be a foreign public official covered by any of paragraphs (a) to (k) of this definition.

5 After section 70.1 of the *Criminal Code*

Insert:

Subdivision B—Bribery of foreign public officials

6 Section 70.2 of the *Criminal Code*

Repeal the section, substitute:

70.2 Bribing a foreign public official

- (1) A person commits an offence if:
- (a) the person:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the first-mentioned person does so with the intention of improperly influencing a foreign public official (who may be the other person) in order to obtain or retain business or a business or personal advantage (whether or not for the first-mentioned person).

Note: See also section 70.2A. For defences, see sections 70.3 and 70.4.

- (2) For the purposes of paragraph (1)(b):
- (a) the first-mentioned person does not need to intend to influence a particular foreign public official; and
 - (b) the first-mentioned person does not need to intend to obtain or retain particular business or a particular business or personal advantage; and
 - (c) business, or a business or personal advantage, does not need to be actually obtained or retained.

Penalty for individual

- (3) An offence against subsection (1) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

Penalty for body corporate

- (4) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:
- (a) 100,000 penalty units;
 - (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
 - (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the *turnover period*) of 12 months ending at the end of the month in which the body corporate committed, or began committing, the offence.

70.2A Improper influence

Determination to be a matter for the trier of fact

- (1) In a prosecution for an offence against section 70.2, the determination of whether influence is improper is a matter for the trier of fact.

Matters that must be disregarded

- (2) In determining whether influence is improper for the purposes of paragraph 70.2(1)(b), a trier of fact must disregard the following:
- (a) the fact that the benefit, or the offer or promise to provide the benefit, may be, or be perceived to be, customary, necessary or required in the situation;
 - (b) any official tolerance of the benefit;

- (c) if particular business or a particular business or personal advantage is relevant to proving the matters referred to in that paragraph—the following:
 - (i) if the value of the business or advantage is insignificant—that fact;
 - (ii) in the case of an advantage—any official tolerance of the advantage;
 - (iii) in the case of an advantage—the fact that the advantage may be customary, or perceived to be customary, in the situation.

Matters to which regard may be had

- (3) In determining whether influence is improper for the purposes of paragraph 70.2(1)(b), a trier of fact may have regard to the following:
 - (a) the recipient or intended recipient of the benefit;
 - (b) the nature of the benefit;
 - (c) the manner of the provision of the benefit (or, if applicable, the offered or promised manner of the provision of the benefit);
 - (d) whether the value of the benefit is disproportionate to the value of any consideration provided or purported to have been provided for the benefit;
 - (e) if the benefit was provided, or the offer or promise to provide the benefit was made, in the absence of any legal obligation to do so—that fact;
 - (f) whether the benefit was provided, or the offer or promise to provide the benefit was made, dishonestly;
 - (g) whether, and to what extent, the provision of the benefit, or the offer or promise to provide the benefit, is recorded or documented;
 - (h) if the provision of the benefit, or the offer or promise to provide the benefit, is recorded or documented:
 - (i) the accuracy of the record or documentation; and
 - (ii) whether the record or documentation is consistent with the ordinary practices of the person who made the record or documentation;

- (i) whether there is evidence that due diligence was exercised by the first-mentioned person in section 70.2 in relation to the benefit, or the offer or promise to provide the benefit;
 - (j) whether any of the following conduct is contrary to a written law in force in the place where that conduct occurs:
 - (i) the provision of the benefit, or the offer or promise to provide the benefit;
 - (ii) the acceptance of the benefit;
 - (iii) any conduct directly connected with conduct referred to in subparagraph (i) or (ii);
 - (k) if particular business or a particular business or personal advantage is relevant to proving the matters referred to in that paragraph—the following:
 - (i) whether the business or advantage was awarded on a competitive or non-commercial basis;
 - (ii) whether there is any demonstrable conflict of interest in the provision of the business or advantage.
- (4) To avoid doubt, subsection (3) does not limit the matters to which the trier of fact may have regard.

7 After subsection 70.3(2) of the *Criminal Code*

Insert:

- (2A) A person does not commit an offence against section 70.2 if:
- (a) the person's conduct occurred in relation to a foreign public official (the **relevant foreign public official**); and
 - (b) the relevant foreign public official is covered by paragraph (m) of the definition of **foreign public official** in section 70.1 because the relevant foreign public official is a candidate to be a particular foreign public official (the **substantive foreign public official**); and
 - (c) assuming that the first-mentioned person's conduct had occurred wholly in the place, the foreign country or the part of the foreign country, as the case may be, (the **relevant place**) referred to in the item of the table in subsection (1) that would be applicable if the first-mentioned person's conduct had occurred in relation to the substantive foreign public official, a written law in force in the relevant place

permits the provision of the benefit to the relevant foreign public official.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A). See subsection 13.3(3).

8 After section 70.5 of the *Criminal Code*

Insert:

Subdivision C—Failure to prevent bribery of foreign public officials

70.5A Failing to prevent bribery of a foreign public official

Offence

- (1) A person (the **first person**) commits an offence if:
 - (a) the first person is a body corporate:
 - (i) that is a constitutional corporation; or
 - (ii) that is incorporated in a Territory; or
 - (iii) that is taken to be registered in a Territory under section 119A of the *Corporations Act 2001*; and
 - (b) an associate of the first person:
 - (i) commits an offence against section 70.2; or
 - (ii) engages in conduct outside Australia that, if engaged in in Australia, would constitute an offence (the **notional offence**) against section 70.2; and
 - (c) the associate does so for the profit or gain of the first person.
- (2) Absolute liability applies to:
 - (a) paragraphs (1)(a) and (c); and
 - (b) the circumstance in subparagraph (1)(b)(i) that the associate commits an offence against section 70.2; and
 - (c) the circumstance in subparagraph (1)(b)(ii) that the associate engages in conduct outside Australia that, if engaged in in Australia, would constitute the notional offence.
- (3) To avoid doubt, the first person may be convicted of an offence against subsection (1) because of the commission by the associate

of an offence against section 70.2 even if the associate has not been convicted of that offence.

- (4) Section 12.6 applies in relation to an offence against subsection (1) of this section as if the reference in section 12.6 to an employee, agent or officer of a body corporate included any associate of the body corporate.

Exception

- (5) Subsection (1) does not apply if the first person proves that the first person had in place adequate procedures designed to prevent:
- (a) the commission of an offence against section 70.2 by any associate of the first person; and
 - (b) any associate of the first person engaging in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2.

Note: A defendant bears a legal burden in relation to the matter in subsection (5): see section 13.4.

Penalty

- (6) An offence against subsection (1) is punishable on conviction by a fine not more than the greatest of the following:
- (a) 100,000 penalty units;
 - (b) if the court can determine the value of the benefit that the associate obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence, or that would have constituted the notional offence, against section 70.2—3 times the value of that benefit;
 - (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the first person during the period (the *turnover period*) of 12 months ending at the end of the month in which the associate committed, or began committing, the offence or notional offence against section 70.2.

Geographical jurisdiction

- (7) Section 15.1 (extended geographical jurisdiction—category A) applies to an offence against subsection (1).
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Indictable offence

- (8) An offence against subsection (1) is an indictable offence.

70.5B Guidance on preventing bribery of foreign public officials

- (1) The Minister must publish guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials.
- (2) Guidance under subsection (1) is not a legislative instrument.

9 Before section 70.6 of the *Criminal Code*

Insert:

Subdivision D—Miscellaneous

70.5C Meaning of annual turnover

- (1) For the purposes of this Division, the *annual turnover* of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:
- (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
 - (b) supplies that are input taxed;
 - (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);
 - (d) supplies that are not made in connection with an enterprise that the body corporate carries on.
- (2) Expressions used in this section that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning in this section as they have in that Act.

70.5D Related bodies corporate

The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this Division in the same way as for the purposes of the *Corporations Act 2001*.

10 Application of amendments

The amendments made by this Part apply in relation to conduct engaged in on or after the commencement of this Part.

Part 2—Other amendments

Income Tax Assessment Act 1997

11 Subsection 26-52(2)

Repeal the subsection, substitute:

- (2) An amount is a *bribe to a foreign public official* to the extent that:
- (a) you incur the amount in, or in connection with:
 - (i) providing a benefit to another person; or
 - (ii) causing a benefit to be provided to another person; or
 - (iii) offering to provide, or promising to provide, a benefit to another person; or
 - (iv) causing an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) you incur the amount with the intention of improperly influencing a *foreign public official (who may be the other person) in order to obtain or retain business or a business or personal advantage (whether or not for yourself).

The benefit may be any advantage and is not limited to property.

12 Subsection 26-52(2A)

Omit “a business advantage”, substitute “a business or personal advantage”.

13 Subsections 26-52(6) and (7)

Repeal the subsections, substitute:

Improper influence

- (6) In determining whether influence is improper, disregard the following:
- (a) the fact that the benefit, or the offer or promise to provide the benefit, may be, or be perceived to be, customary, necessary or required in the situation;
 - (b) any official tolerance of the benefit;

- (c) if particular business or a particular business or personal advantage is relevant to determining whether influence is improper—the following:
 - (i) if the value of the business or advantage is insignificant—that fact;
 - (ii) in the case of an advantage—any official tolerance of the advantage;
 - (iii) in the case of an advantage—the fact that the advantage may be customary, or perceived to be customary, in the situation.

14 Application of amendments

The amendments of the *Income Tax Assessment Act 1997* made by this Part apply to a loss or outgoing incurred on or after the commencement of Part 1 of this Schedule.

*[Minister's second reading speech made in—
House of Representatives on 22 June 2023
Senate on 6 September 2023]*

(135/22)
