

The Criminal Code **Schedule**
The integrity and security of the international community and foreign governments
Chapter 4

Bribery of foreign public officials **Division 70**

Section 70.1

Chapter 4—The integrity and security of the international community and foreign governments

Division 70—Bribery of foreign public officials

70.1 Definitions

In this Division:

benefit includes any advantage and is not limited to property.

business advantage means an advantage in the conduct of business.

control, in relation to a company, body or association, includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

duty, in relation to a foreign public official, means any authority, duty, function or power that:

- (a) is conferred on the official; or
- (b) that the official holds himself or herself out as having.

foreign government body means:

- (a) the government of a foreign country or of part of a foreign country; or
- (b) an authority of the government of a foreign country; or
- (c) an authority of the government of part of a foreign country; or
- (d) a foreign local government body or foreign regional government body; or
- (e) a foreign public enterprise.

Schedule The Criminal Code

Chapter 4 The integrity and security of the international community and foreign governments

Division 70 Bribery of foreign public officials

Section 70.1

foreign public enterprise means a company or any other body or association where:

- (a) in the case of a company—one of the following applies:
 - (i) the government of a foreign country or of part of a foreign country holds more than 50% of the issued share capital of the company;
 - (ii) the government of a foreign country or of part of a foreign country holds more than 50% of the voting power in the company;
 - (iii) the government of a foreign country or of part of a foreign country is in a position to appoint more than 50% of the company's board of directors;
 - (iv) the directors (however described) of the company are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
 - (v) the government of a foreign country or of part of a foreign country is in a position to exercise control over the company; and
- (b) in the case of any other body or association—either of the following applies:
 - (i) the members of the executive committee (however described) of the body or association are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
 - (ii) the government of a foreign country or of part of a foreign country is in a position to exercise control over the body or association; and
- (c) the company, body or association:
 - (i) enjoys special legal rights or a special legal status under a law of a foreign country or of part of a foreign country; or

The Criminal Code **Schedule**
The integrity and security of the international community and foreign governments
Chapter 4

Bribery of foreign public officials **Division 70**

Section 70.1

(ii) enjoys special benefits or privileges under a law of a foreign country or of part of a foreign country; because of the relationship of the company, body or association with the government of the foreign country or of the part of the foreign country, as the case may be.

foreign public official means:

- (a) an employee or official of a foreign government body; or
- (b) an individual who performs work for a foreign government body under a contract; or
- (c) an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country; or
- (d) an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country; or
- (e) an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force); or
- (f) a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country; or
- (g) an employee of a public international organisation; or
- (h) an individual who performs work for a public international organisation under a contract; or
- (i) an individual who holds or performs the duties of an office or position in a public international organisation; or
- (j) an individual who is otherwise in the service of a public international organisation; or
- (k) a member or officer of the legislature of a foreign country or of part of a foreign country; or
- (l) an individual who:
 - (i) is an authorised intermediary of a foreign public official covered by any of the above paragraphs; or

Schedule The Criminal Code

Chapter 4 The integrity and security of the international community and foreign governments

Division 70 Bribery of foreign public officials

Section 70.2

- (ii) holds himself or herself out to be the authorised intermediary of a foreign public official covered by any of the above paragraphs.

public international organisation means:

- (a) an organisation:
 - (i) of which 2 or more countries, or the governments of 2 or more countries, are members; or
 - (ii) that is constituted by persons representing 2 or more countries, or representing the governments of 2 or more countries; or
- (b) an organisation established by, or a group of organisations constituted by:
 - (i) organisations of which 2 or more countries, or the governments of 2 or more countries, are members; or
 - (ii) organisations that are constituted by the representatives of 2 or more countries, or the governments of 2 or more countries; or
- (c) an organisation that is:
 - (i) an organ of, or office within, an organisation described in paragraph (a) or (b); or
 - (ii) a commission, council or other body established by an organisation so described or such an organ; or
 - (iii) a committee, or subcommittee of a committee, of an organisation described in paragraph (a) or (b), or of such an organ, council or body.

share includes stock.

70.2 Bribing a foreign public official

- (1) A person is guilty of 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
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The Criminal Code **Schedule**
The integrity and security of the international community and foreign governments
Chapter 4

Bribery of foreign public officials **Division 70**

Section 70.2

- (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 benefit is not legitimately due to the other person; and
- (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
 - (i) obtain or retain business; or
 - (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Note: For defences see sections 70.3 and 70.4.

- (1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

Benefit that is not legitimately due

- (2) For the purposes of this section, in working out if a benefit is *not legitimately due* to a person in a particular situation, disregard the following:
- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
 - (b) the value of the benefit;
 - (c) any official tolerance of the benefit.

Business advantage that is not legitimately due

- (3) For the purposes of this section, in working out if a business advantage is *not legitimately due* to a person in a particular situation, disregard the following:
- (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation;
 - (b) the value of the business advantage;

Schedule The Criminal Code

Chapter 4 The integrity and security of the international community and foreign governments

Division 70 Bribery of foreign public officials

Section 70.2

(c) any official tolerance of the business advantage.

Penalty for individual

- (4) 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

- (5) 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 conduct constituting the offence occurred.
- (6) For the purposes of this section, 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.

The Criminal Code **Schedule**
The integrity and security of the international community and foreign governments
Chapter 4

Bribery of foreign public officials **Division 70**

Section 70.3

- (7) Expressions used in subsection (6) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning in that subsection as they have in that Act.
- (8) The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this section in the same way as for the purposes of the *Corporations Act 2001*.

70.3 Defence—conduct lawful in foreign public official’s country

- (1) A person is not guilty of an offence against section 70.2 in the cases set out in the following table:

Defence of lawful conduct			
Item	In a case where the person’s conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person’s conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
1	an employee or official of a foreign government body	in the place where the central administration of the body is located	a written law in force in that place
2	an individual who performs work for a foreign government body under a contract	in the place where the central administration of the body is located	a written law in force in that place
3	an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be

Schedule The Criminal Code

Chapter 4 The integrity and security of the international community and foreign governments

Division 70 Bribery of foreign public officials

Section 70.3

Defence of lawful conduct			
Item	In a case where the person's conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person's conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
4	an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
5	an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force)	in the place where the central administration of the body is located	a written law in force in that place
6	a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
7	an employee of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
8	an individual who performs work for a public international organisation under a contract	in the place where the headquarters of the organisation is located	a written law in force in that place
9	an individual who holds or performs the duties of a public office or position in a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place

The Criminal Code **Schedule**
The integrity and security of the international community and foreign governments
Chapter 4

Bribery of foreign public officials **Division 70**

Section 70.3

Defence of lawful conduct			
Item	In a case where the person's conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person's conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
10	an individual who is otherwise in the service of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
11	a member or officer of the legislature of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

- (2) A person is not guilty of an offence against section 70.2 if:
- (a) the person's conduct occurred in relation to a foreign public official covered by paragraph (l) of the definition of *foreign public official* in section 70.1 (which deals with intermediaries of foreign public officials covered by other paragraphs of that definition); and
 - (b) assuming that the first-mentioned person's conduct had occurred instead in relation to:
 - (i) the other foreign public official of whom the first-mentioned foreign public official was an authorised intermediary; or
 - (ii) the other foreign public official in relation to whom the first-mentioned foreign public official held himself or herself out to be an authorised intermediary;
 subsection (1) would have applied in relation to the first-mentioned person.

Schedule The Criminal Code

Chapter 4 The integrity and security of the international community and foreign governments

Division 70 Bribery of foreign public officials

Section 70.4

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

- (3) To avoid doubt, if:
- (a) a person's conduct occurred in relation to a foreign public official covered by 2 or more paragraphs of the definition of *foreign public official* in section 70.1; and
 - (b) at least one of the corresponding items in subsection (1) is applicable to the conduct of the first-mentioned person;
- subsection (1) applies to the conduct of the first-mentioned person.

70.4 Defence—facilitation payments

- (1) A person is not guilty of an offence against section 70.2 if:
- (a) the value of the benefit was of a minor nature; and
 - (b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
 - (c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and
 - (d) any of the following subparagraphs applies:
 - (i) the person has retained that record at all relevant times;
 - (ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;
 - (iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

The Criminal Code **Schedule**
The integrity and security of the international community and foreign governments
Chapter 4

Bribery of foreign public officials **Division 70**

Section 70.4

Routine government action

- (2) For the purposes of this section, a *routine government action* is an action of a foreign public official that:
- (a) is ordinarily and commonly performed by the official; and
 - (b) is covered by any of the following subparagraphs:
 - (i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;
 - (ii) processing government papers such as a visa or work permit;
 - (iii) providing police protection or mail collection or delivery;
 - (iv) scheduling inspections associated with contract performance or related to the transit of goods;
 - (v) providing telecommunications services, power or water;
 - (vi) loading and unloading cargo;
 - (vii) protecting perishable products, or commodities, from deterioration;
 - (viii) any other action of a similar nature; and
 - (c) does not involve a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business; and
 - (d) does not involve encouraging a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business.

Content of records

- (3) A record of particular conduct engaged in by a person complies with this subsection if the record sets out:
- (a) the value of the benefit concerned; and
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Schedule The Criminal Code

Chapter 4 The integrity and security of the international community and foreign governments

Division 70 Bribery of foreign public officials

Section 70.5

- (b) the date on which the conduct occurred; and
- (c) the identity of the foreign public official in relation to whom the conduct occurred; and
- (d) if that foreign public official is not the other person mentioned in paragraph 70.2(1)(a)—the identity of that other person; and
- (e) particulars of the routine government action that was sought to be expedited or secured by the conduct; and
- (f) the person's signature or some other means of verifying the person's identity.

70.5 Territorial and nationality requirements

- (1) A person does not commit an offence against section 70.2 unless:
 - (a) the conduct constituting the alleged offence occurs:
 - (i) wholly or partly in Australia; or
 - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
 - (b) the conduct constituting the alleged offence occurs wholly outside Australia and:
 - (i) at the time of the alleged offence, the person is an Australian citizen; or
 - (ii) at the time of the alleged offence, the person is a resident of Australia; or
 - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Note: The expression *offence against section 70.2* is given an extended meaning by subsections 11.2(1), 11.2A(1) and 11.6(2).

- (2) Proceedings for an offence against section 70.2 must not be commenced without the Attorney-General's written consent if:
 - (a) the conduct constituting the alleged offence occurs wholly outside Australia; and
 - (b) at the time of the alleged offence, the person alleged to have committed the offence is:

The Criminal Code **Schedule**
The integrity and security of the international community and foreign governments
Chapter 4

Bribery of foreign public officials **Division 70**

Section 70.6

- (i) a resident of Australia; and
 - (ii) not an Australian citizen.
- (3) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence against section 70.2 before the necessary consent has been given.

70.6 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.