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Commercial Law e-alert

Anti Bribery Laws about to get tougher?

The Federal Government has asked industry and the public for their views on changing Australia's anti-foreign bribery laws to remove the "facilitation payments" defence. Australian businesses and individuals who are engaged in international trade or other business dealings overseas should think carefully about responding to this proposed reform.

Background – Anti Bribery Laws

The *Criminal Code Act 1995* (Cth) ("the Act") sets out Australia's laws against bribery ("the offence.") Under the Act, a person is guilty of the offence if:

- » they provide a benefit to another person, offer or promise to provide a benefit to another person, or cause a benefit to be provided, offered or promised to another person; and
- » the benefit is not legitimately due to the other person; and
- » the act of providing, causing to be provided, offering or promising was carried out with the intention of influencing a foreign public official (who may or may not be the other person) in the exercise of the official's duties as a foreign public official in order to obtain or retain business or obtain or retain a business advantage which is not legitimately due.

International reach

The Act applies when the offence is carried out wholly or partly in Australia and when at the time of the alleged offence, the person who is alleged to have committed it is an Australian citizen, a resident of Australia, or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

In simple terms, the Act has a wide reach and can catch Australian individuals and companies even if they are acting in breach of the Act overseas

Defences

Essentially, there are two defences under the Act – the first is where the advantage was permitted or required by the written laws that govern the foreign public official.

The second defence under the Act, which is now under review, is where the benefit constituted a "facilitation payment."

How the "facilitation payment" defence works

Under the Act, you can claim the defence of facilitation payment if:

- » the value of the benefit was of a minor nature; and
- » the 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
- » as soon as practicable after the conduct occurred, the person made a record of the conduct containing specified information; and
- » the person has retained that record;
- » the record is lost due to an event outside of that persons control; or
- » a prosecution for the offence is instituted more than 7 years after the conduct occurred.

For example, a freight forwarding company, already behind in deadlines, may pay certain minor premiums at the port in order to keep business moving and to avoid further delays. As is routine practice at the overseas port, priority treatment is given to that freight upon payment of the premium. Records are then made of this transaction as required. Should a later issue regarding bribery arise, the organisation will claim recourse under the "facilitation payment" defence.

The Federal Government is now considering abolishing this defence and is calling on large and small companies to provide their views on the need or otherwise of this defence. If successful, the abolition of the "facilitation payments" would bring Australian law into line with the UK's Bribery Act, which

prohibits facilitation payments and which came into force on 1 July 2011. In the United States, the Foreign Corrupt Practices Act still contains a similar defence, although the OECD has recommended the US review that policy.

It is important to note that even if a benefit constitutes a legitimate "facilitation payment" under the Act, people and businesses making such payments still face the risk of breaching domestic bribery laws that govern the foreign public official in that country.

If you are doing international business and think that the removal of this defence would place your business in a weaker position, please contact us to discuss your position. Hunt & Hunt Lawyers is well placed to advise on how the Act applies to your business practices and has extensive experience in drafting submissions to Government on legislative reforms

Contact us

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