Australia is a party to the following conventions (“the Conventions”):

- UN Convention against Corruption; and
- OECD Convention on Combating Bribery of Foreign Public Officials.

The Conventions promote anti-bribery and anti-corruption behaviour and place obligations on member countries to, amongst other things, criminalise bribery of foreign officials.

Unlike the United Kingdom (UK) and the United States of America (USA), Australia does not have a dedicated anti-bribery legislation. That being said, in 1999, Australia sought to implement its commitment to its obligations under the Conventions by amendments to the Criminal Code. By amending the Criminal Code, Australia introduced section 70 which acts to establish an offence for offering or providing any undue benefit to a foreign public official to obtain or retain a business advantage (hereinafter referred to as “Section 70”). The offence applies to conduct in Australia or on board an Australian ship or aircraft and to conduct outside Australia, where the person committing the offence is an Australian citizen, a resident of Australia, or an Australian company.

However, since introduction of Section 70, Australia has been criticised by the OECD on its level of enforcement activity. In particular, Australia had been criticised on the relatively low penalties provided for an offence pursuant to Section 70. As a consequence, in February 2010 the Criminal Code was amended so as to introduce higher penalties.

The new penalties provide that individuals or corporations that are found guilty of bribing a foreign public official will be liable to the following maximum penalties:

- **Individuals**: 10 years imprisonment, a fine of AUD$1.1 million or both.
- **Corporations**: the great of:
  - AUD$1.1 million; or
  - Three times the value of any benefit that the corporation has directly or indirectly obtained that is attributable to the conduct constituting the offence (which will include the conduct of any related corporation); or
  - If the court cannot determine the value of that benefit, 10% of the annual turnover of the corporation during the twelve (12) months preceding the offence.

It is important to note that in addition to primary liability, a corporation can be criminally liable if:

- its corporate culture directs, encourages, tolerates or leads to non-compliance with Section 70; and
- the corporation fails to create and maintain a corporate culture that requires awareness of, and compliance with, the law.

“Corporate culture” has been defined to mean an attitude, policy, rule, course of conduct or practice existing within the corporation generally and, in particular, within that part of the corporation where the relevant activities take place.

In broad terms there are two defences to a Section 70 offence, these being:

- that the benefit was permitted or required by written law; or
- that the payment was a facilitation payment.

To be a facilitation payment, the payment must:

- be of a minor value;
- have been paid for the dominant purpose of securing or expediting a routine government function which itself is of a minor nature; and
- have been recorded as soon as reasonably practicable after the payment was made.

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1 Article by Christopher Keane titled “Australia’s Foreign Bribery Legislation and the Facilitation Payment Defence” and published in TerraLex Connections
In general, a facilitation payment is a payment made to facilitate the occurrence of a process. It must not involve a decision or encourage a decision to be made about whether to award new business or contracts or the continuation of existing business or contracts. Examples of facilitations payments are:

- granting a permit, licence or other official document that qualifies a person to conduct a business in a foreign country;
- processing government papers such as visas or work permits for foreign nations;
- police protection for employees, vessels, cargo and valuable property; and
- loading and unloading cargo.

Till recently, a defence on the grounds that the payment was a facilitation payment was not only available for a breach of the Australia Criminal Code but also the equivalent laws in the UK and the USA. However, in the UK the defence has now been outlawed with the passing on 1 July 2011 of the Bribery Act 2010 (“the UK Act”). The USA continues to allow the defence under its Foreign Corrupt Practices Act (“the USA Act”).

Australia is also reviewing the defence following international criticism that its retention is not in tune with recent developments around the world. In November 2011, the Australian Government published a consultation paper on whether the defence should be removed (“the Consultation Paper”). Depending on the outcome of the Consultation Paper the facilitation payments defence may soon no longer be available.

In the instance that the defence is abolished, Australian organisations carrying on business overseas either directly, via a joint venture agreement or through third party intermediaries will need to assess the way in which they conduct their business. In particular, they may need to amend their Codes of Conduct and policies and procedures so as to ensure that their corporate culture does not allow or promote the making of any facilitation payments by employees, agents, subsidiaries or related entities. Failure to do so, could see corporations and/or individuals the subject of Australian criminal proceedings.

It has been argued that the move to abolish the facilitation payments defence will have a detrimental effect on corporations, particularly those entering offshore markets such as Africa where facilitation payments are not only common but essential to the viability of a corporation’s existence. This argument, however, has been criticised as being weak and not in line with the aim or intention of the Conventions.

Irrespective of the outcomes of the Consultation Paper it has been suggested that the defence should be treated by organisations as no longer being applicable. The extraterritorial application of the UK Act and USA Act means that Australian organisations carrying on business overseas, and which have a jurisdictional link to either the UK or the USA, are not only at risk of being prosecuted for bribery offences in Australia but also in the UK and/or USA. For example, an Australian organisation carrying on business in the UK can be prosecuted pursuant to the UK Act for acts done by its employees, subsidiaries and agents in Australia or any other country.

With the University’s increasing presence overseas, it is essential that the University regularly assesses its anti-bribery and anti-corruption policies and ensures that it maintains a strict corporate culture which condemns and punishes any acts in contravention of these policies and procedures. It is further recommended that if the University has any jurisdictional link to the UK that it amend any policies which allow or promote the making of facilitation payments. The latter will nevertheless need to be attended to should the Consultation Paper result in the removal of the facilitation payments defence.

The issue surrounding anti-bribery and anti-corruption and the means by which the University can better protect itself against possible prosecution for offences against local or international laws is extremely complicated. Accordingly, if anyone has any questions on this issue they should contact the Legal Services Group.

Anna Vancea, Solicitor
November 2012