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Bribery in Commerce - New Zealand

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Bribery in Commerce

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discusses criminal liability for corruption in the private sector

INTRODUCTION

This article considers the adequacy of New Zealand's criminal law in relation to the payment of bribes in the public and private sectors to facilitate commercial transactions. The principal repositories of this criminal law are the Secret Commissions Act 1910 and certain provisions of the Crimes Act 1961. The assessment is that, while the existing criminal law remains appropriately focused, there is difficulty with the meaning of the word "corruptly" in the relevant offences. This goes to the heart of the criminal sanctions against bribery in this country and should be addressed by the Legislature.

Whilst New Zealand has long prided itself on being free of institutionalised corruption in both the public and private sectors, this has not always been the case. In moving the introduction of the Secret Commissions Bill in October 1910, the Prime Minister Sir Joseph Ward stated (at 152 NZPD 659):

This Bill proposes to render it illegal for agents to secretly accept payments or other valuable considerations from third persons in respect to the business of their principals and, as I have said, there is reason to believe this system is in operation in this country to a large extent.

And a 1920 textbook, The Law Relating to Secret Commissions and Bribes by Albert Crew, contains in an appendix a 1911 commentary on the then recently enacted Secret Commissions Act 1910 by the Department of Commerce and Labour. The Act was thought to have proved effective in:

- eliminating an abuse that had cost companies in this country large sums of money every year in the payment of gratuities and commissions for business turned their way through the influence of officials of local concerns from which trade was solicited.
- The Secret Commissions Act 1910 might thus be described as both timely and of enduring effect. Yet it would be a mistake to suppose that New Zealand has acquired over the ensuing years some natural immunity to the forces of corruption in the marketplace. Growth in our international trade and the constant search for new markets is bringing ever increasing contact with countries in Asia, South America and Eastern Europe where institutionalised corruption is notorious. Likewise, it is reasonable to suppose that immigration and investment from such countries carries the risk of a tolerance, or at least ambivalence, towards such practices being imported into the domestic marketplace.

Perception of corruption in New Zealand

In July 1997, the international probity watchdog Transparency International released its third annual "Corruption Perception Index". This seeks to measure the perception of corruption in the countries surveyed, as gleaned from a number of different polls and surveys amongst residents of, or people dealing with, those countries. In this most recent index, New Zealand has slipped from first to fourth of the 52 countries surveyed. This does not mean that there is any more corruption in this country than in the previous two years when New Zealand topped the index. Rather, by application of a nominal rating to the necessarily subjective responses in the surveys utilised, New Zealand's score had slipped - albeit slightly - from closest to the perfect ten employed by the Index to fourth closest (now behind three Scandinavian countries).

Double its is possible to take issue with the methodology, of which interested readers with Internet access can learn more at Transparency International's web site (http://www.transparency.de). While no reasons are offered for the reduction in New Zealand's rating, undoubtedly the perception of corruption in a country will be influenced by media stories quite apart from any personal experience of respondents. And it is in the nature of media reporting that allegations tend to receive more coverage than outcomes.

In New Zealand over the last few years, there has been extensive media coverage of alleged (and in some instances proven) fraudulent practices by listed company chief executives, heads of the Audit Office and Accident Compensation Corporation and District Court Judges. All were prosecutions by the Serious Fraud Office, whose publicised activities and high media profile could themselves have heightened perceptions of "institutional" wrongdoing. Allegations of corrupt practices levelled at the heads of the Serious Fraud Office and Inland Revenue Department featured in the lengthy, and intensively reported, "winebox" Commission of Inquiry (only to be discredited in the Commission's report). And there have been at least two reported criminal prosecutions where the Crown alleged the payment of bribes to facilitate business transactions (R v McDonald [1993] 3 NZLR 354, considered below, and R v Hufflett [1994] 2 NZLR 143). It is perhaps the cumulative effect of such instances which has produced the slippage in New Zealand's rating on the Transparency International index.

The Crimes Act

Part VI of the Crimes Act 1961 is entitled "Crimes Affecting the Administration of Law and Justice". It contains, in ss 100 to 105A, penal sanctions against corruptly giving and accepting bribes in relation to Judges and Court officers, ministers of the Crown and members of Parliament, prosecutors and other law enforcement personnel, and Crown and local body "officials". The soliciting or acceptance of bribes by such functionaries is treated as twice as serious (14 years' imprisonment for Judges and ministers and seven years in other cases) as the offering or making of such payments.

All these Crimes Act provisions have the potential to apply to bribery aimed at private sector business activities. A Judge may be targeted in respect of commercial litigation, a prosecutor or departmental official over an environmental...
breach, a local body official in respect of a planning application or a contract to be awarded by the local body. Such examples are typically the stuff of corrupt practices in other countries.

The Secret Commissions Act

However, the Crimes Act provisions cannot apply to purely "private sector" bribery, by which is meant payments to an employee or agent of a company to induce or reward favourable treatment of the payer in a business relationship. The only statute which criminalises such conduct is the Secret Commissions Act 1910.

It would be fair to say that neither the existence nor the content of the Secret Commissions Act 1910 is widely known in the business community today. Prosecutions under the Act have been infrequent. In response to the writer's request for information, the Crown Law Office advised that, in the period since 1981, consideration has been given to 15 prospective prosecutions referred for the Attorney-General's consent. Nine prosecutions were approved, resulting in one conviction (on a guilty plea), four acquittals and one stay of proceedings. The outcome of the remaining three prosecutions was unknown. Data on prosecutions under the Act prior to 1981 was described as being "in a less easily retrievable form".

It is apparent that the Secret Commissions Act was inspired by the English Prevention of Corruption Act of 1906. Similar legislation based on the English statute was adopted over the same period in Australia, Canada and South Africa. In introducing the Bill, Sir Joseph Ward described it as containing "the best features" of these antecedents. Certainly, there are differences but the wording of the principal offence provisions in the Secret Commissions Act plainly derives from the English legislation. Perhaps reflecting its limited use, there have been few amendments to the Act over the years.

Sections 3 and 4 create the principal offences of "corruptly" giving to, or receiving by, an agent of any valuable consideration as an "inducement or reward" for the agent acting in some way in relation to, or for showing favour in respect of, his principal's business. The term "agent" extends to employees and to representatives of both central and local government organisations. Unlike the Crimes Act offences, the same penalty applies to both payment and receipt contrary to the Act. Conviction on indictment carries a maximum penalty of two years' imprisonment or a fine of $1000 ($2000 for a corporation). The consent of the Attorney-General is required for a prosecution.

Other sections create offences by an agent in failing to disclose an interest in the principal's contract, giving or delivering false receipts, invoices, etc, and receiving an undisclosed reward for advising persons to enter into contracts.

"Corruptly" – Useless appendage or critical ingredient?

In both of the primary offences in ss 3 and 4 of the Secret Commissions Act, the description of the prohibited conduct is introduced by the word "corruptly". As noted earlier, the same term is employed in the Crimes Act offences. In the second edition of Adams, Criminal Law and Practice in New Zealand (published in 1971 and largely written by Sir Francis Adams himself), it is doubted whether, in respect of the Crimes Act provisions, the word "corruptly" added any ingredient to the crime. For example, a Judge accepting a bribe "can hardly be said to act otherwise than 'corruptly' and, in such a case, the word may well be regarded as a mere 'designation' of his act". (Ibid, at para 821.)

In relation to ss 3 and 4 of the Secret Commissions Act, the meaning and effect of "corruptly" was considered by Williamson J in R v McDonald [1993] 3 NZLR 354. In this case, M had been indicted for making, and H for accepting, a payment alleged by the Crown to have taken the form of money paid by M directly to a car dealer of part of the purchase price for a motor home acquired by H. The Crown alleged that M was either inducing H to show favour to M's company in respect of its dealings with H's employer or rewarding H for past favours.

In applying to be discharged under s 347 of the Crimes Act, both accused pointed to steps supposedly taken by M, with the assistance of the car dealer, to conceal from H the fact of M's contribution to the purchase price of the motor home. This evidence, adduced at the preliminary hearing, was the basis for a submission that, if there was a credible possibility that H was indeed ignorant of M's benefaction, the Crown could not prove that the payment was either an inducement or a reward for favours or that the payment was made (and by the same token accepted) "corruptly".

In a short judgment, Williamson J held that the function of "corruptly" in ss 3 and 4 of the Secret Commissions Act was to indicate the "mental ingredient" which the accused must have when making or accepting the payment:

... namely that degree of deliberate criminal intent necessary not only to perform the act itself but also to do it for the purpose of influencing another person or to be influenced to the detriment of a third party's business.

Williamson J observed that the presence or otherwise of such intent would have to be ascertained by way of inference from proven facts, for which purpose it was necessary for the trial to proceed. The application under s 347 was accordingly denied. (It should however be noted that both accused were subsequently acquitted.)

With respect, it must be questioned whether the meaning thus given to "corruptly" in ss 3 and 4 of the Secret Commissions Act is sustainable. Arguably, the mens rea of the offences is apparent from the express requirement that the payment be made or accepted "as an inducement or reward". On the face of it, the Crown could satisfy this ingredient only by proving not only that the payment was knowingly made to, and knowingly accepted by, an agent qua the relationship with a principal but also that it was intended by the payer as a means of inducing the agent to act in a certain way or to reward him for having done so.

Perhaps Williamson J meant that "corruptly" added an additional mental ingredient, being the intent of the payer to cause detriment to the principal's business or an intent of the agent/recipient to produce such detriment. But if so, it can reasonably be asked why should such additional burden be imposed on the Crown in the absence of express language to that effect?

Although McDonald was concerned solely with the Secret Commissions Act, the current edition of Adams cites the decision on the meaning of "corruptly" in the Crimes Act provisions. This is unconvincing since, even accepting the "detriment" requirement in relation to payments made to agents of private firms, it seems an unlikely, and unnecessary, ingredient to be included in crimes relating to the bribery of Judges, politicians and law enforcement officers.

And in relation to the Secret Commissions Act itself, it is not difficult to imagine cases where an agent seeking or accepting a payment to influence his principal's affairs has
no intention of acting to the detriment of the principal or, at least, does not believe that the action which the payment induces will be detrimental. Surely the evil which these offences are aimed at is the inherent likelihood that, in some way or another, there will be detriment to a principal whose agent's fidelity is suborned by acceptance of a "secret commission" from a third party doing business with that principal. It is difficult to avoid the conclusion that a need for the prosecution to prove an intent to cause such detriment is an unwarranted imposition on the reach of the Secret Commissions Act.

**Liability for “gratuities”?**

A possible justification for this additional mental ingredient is the prospect that, without it, ss 3 and 4 of the Secret Commissions Act might be invoked in the wide range of situations where employees or other agents receive various forms of gratuity from suppliers of goods or services to the principal. The operative term “consideration” is defined as to clearly embrace non-cash inducements. Examples abound in many industries and, for that matter, professions. These can range from modest gifts at Christmas to feting customer or client representatives at luxury resorts. It would be fatuous to suggest that such largesse is not aimed at maintaining and embellishing the business relationship. Equally, it would be surprising to hear it suggested that such practices inevitably constitute offences under ss 3 and 4 of the Secret Commissions Act.

However, the risk of ss 3 and 4 casting a net over what should otherwise be considered unobjectionable practices was the specific reason for the requirement, in s 12 of the Act, that the Attorney-General's consent be obtained for a prosecution. In moving the Bill's second reading, the then Attorney-General, Dr Findlay, noted (at 153 NZPD 453) that the House had been furnished with "illustrations of how impossible it is to draft an effective clause which will not hit some case that does not deserve to be punished". The solution was "to throw on the shoulders of some officer - here the Attorney-General - the duty of seeing that the case is one which deserves to be punished".

**OTHER COUNTRIES**

**Canada**

In delivering judgment in McDonald, Williamson J did not consider the then recently reported decision of the Supreme Court of Canada in Kelly v The Queen [1992] 2 SCR 170, on precisely the same issue and in respect of a penal provision sharing common origins with ss 3 and 4 of the Secret Commissions Act. There the appellant, an investment adviser, had been convicted in respect of commissions received from the promoter of certain investment products on the sale of such products by the appellant's company to its clients. The thrust of the prosecution case had been that the offence lay in concealment from those clients, or at least non-disclosure, of the commission payments. The central ground of appeal was that the commissions, received over a period of several years, had been neither paid nor accepted "corruptly".

The Supreme Court held by a majority that the word "corruptly" adds to the actus reus of the crime in the Canadian Criminal Code: "corruptly" means "secretly or without the requisite disclosure". The attendant mens rea is a requirement for the agent, in accepting the commission, to be aware that its payment and receipt is unknown to his principal.

In a robust dissent, Sopinka J would not accept that non-disclosure is the meaning of "corruptly" in the wording of the crime. What this term connoted was malice lides, which will most easily be satisfied through proof of dishonesty. Whilst non-disclosure of the commission might be a "strong indicator" of such dishonesty, equally it may amount to no more than a breach of a duty owed by an agent to the principal in a commercial relationship. It should not however, in Sopinka J's view, inevitably elevate non-disclosure of the commission to a criminal offence.

It is unfortunate that, in respect of similarly worded offences sharing a common origin, Courts in New Zealand and Canada should have arrived at such different views on the meaning to be given to the word "corruptly" in relation to payments made to agents to influence them in respect of the affairs of their principals. And, with respect, the views of neither the majority nor the dissent in Kelly are any more satisfying than that of Williamson J in McDonald. As to the majority view it can plausibly be asked why, if non-disclosure of the payment was intended to be an essential ingredient of the offence, this was not expressly stated in the statutory wording? Similarly, if the legislative intent had been that "corruptly" means "dishonestly", it would have been a simple (and obvious) thing to expressly say so.

**England and Australia**

To compound the problem, neither the New Zealand nor the Canadian view appears to accord with the position which has been taken in England and Australia.

In England, which has what might be termed the "parent" statute in the Prevention of Corruption Act 1906 (expanded by the Act of 1916), the current judicial view appears to remain that expressed by the Court of Appeal in R v Wellburn (1979) 69 Cr App R 254. In McDonald, Williamson J briefly noted but rejected this case in the New Zealand context.

In Wellburn, the Court of Appeal expressly disapproved earlier English cases which had equated "corruptly" with "dishonestly". Rather, its meaning was as stated in Cooper v Slade (1857) 6 H L Cas 746, namely, deliberately doing an act which the law prohibits as "tending to corrupt". It was specifically without reference to this dictum that Sir Francis Adams thought that "corruptly" added nothing to the Crimes Act offences and was at most a "mere designation" of the prohibited conduct. In McDonald, Williamson J considered the Wellburn definition "unhelpful" as begging the question of what is meant by "corrupt".

R v Dillon [1982] VR 434 is an Australian case noted briefly in McDonald. This was a voir dire judgment on how the jury would be directed as to the meaning of "corruptly" in the Victorian Crimes Act equivalent of ss 3 and 4 of the Secret Commissions Act, the origins of which likewise are to be found in the English statute. Brooking J held that a payment to an agent would be made "corruptly" if paid with the intent that it should result in the prohibited conduct, namely, causing the agent to show favour to the payer in respect of the principal's affairs. The agent would receive the
payment "corruptly" if it was proved that in accepting the payment he believed the payer to have that intent, irrespective of whether the agent intended to act in the way expected. Brooking J plainly saw his formulation as being consistent with the Welsbourn approach, without formally adopting that approach. It is also apparent that Brooking J was alive to the prospect that his formulation would impose liability in cases where the agent's defence is that acceptance of the bribe was motivated by a desire to "entrap" the payer (as, for example, in R v Smith [1960] 1 All ER 256 (CA)).

What makes bribery "corrupt"?
If the question is asked, "what makes bribery corrupt?", the lay response might well be that bribery is inherently "corrupt" and that, as considered by Sir Francis Adams, the addition of the word "corruptly" adds nothing to either the Crimes Act or the Secret Commissions Act offences. But as a matter of law the next question which must be asked is, what is "bribery"? At least in the context of the Secret Commissions Act, that can be answered by saying that bribery is the conduct prohibited by ss 3 and 4 of the Act.

The attraction of this approach is that it avoids what is considered to be the unwarranted ingredient introduced by the McDonald formulation, namely, the need for the Crown to prove that the payer and the agent intended that the payment should cause the agent to act to the detriment of the principal's business. This requirement has not been identified in the other countries having similar legislation and McDonald should not, with respect, be followed in New Zealand.

What then of those other approaches? There is a certain attraction in the proposition that the essence of criminality in relation to bribes lies in concealment of the payment from the principal. Our statute is after all titled the Secret Commissions Act. It is thus problematic that concealment is not spelt out as an ingredient of the primary offences under ss 3 and 4. And it must be doubtful whether the Courts in New Zealand have the constitutional mandate to undertake the legislative process employed by the Canadian Supreme Court in Kelly. There the majority not only ruled that "corruptly" means non-disclosure by the agent but went on to prescribe rules as to the nature of the requisite disclosure and the requisite timing if criminal liability is to be avoided.

As recognised by the dissent in Kelly, there are difficulties with the proposition that it is the fact of concealment which renders criminal what might, from a civil law perspective, be legitimate behaviour. In all probability, the conduct found to be criminal in Kelly is, or in the past has been, commonplace in New Zealand in relation to the marketing of investment and insurance products. Notably, the recently operative Investment Advisers (Disclosure) Act 1996 compels disclosure by such "agents" of remuneration to be taken from client payments but requires disclosure of third party remuneration only on request by the client.

Additionally, a requirement that a payment will be made or received "corruptly" only where there is concealment from the principal raises the question of who is to be treated as the principal for this purpose. Where receipt, or the offer, of a bribe is disclosed by an employee of a listed company to its chief executive who is himself "on the take" and who for that reason acquiesces in the practice, will there have been disclosure to the "principal"? Is it feasible to legislate a rule which would require disclosure to the board of directors or even the shareholders in such a situation?

If the word "corruptly" does constitute an ingredient of the offences in ss 3 and 4 of the Secret Commissions Act, it is difficult to go beyond the formulation of that ingredient in the Australian case of Dillon. Thus, a payment will be made corruptly when the payer intends that it should operate as an inducement or reward to the agent to act in a certain way in relation to the principal's business. It will be received corruptly when the agent believes the payer to have that intent. Concealment from (or non-disclosure to) the principal will usually be a feature of the conduct but should not be an ingredient which the Crown must prove. The prospect that the sections might reach what is considered to be the acceptable offering and receipt of "gratuities" should be, as was intended, addressed by the need for the Attorney-General's consent to a prosecution. And finally, the criminal law would be (tolerably) clear that the way for well-intentioned recipients of offers of bribes to bring the offender to book is not to entrap by accepting payment (since a defence of "innocent" receipt would fail) but to report the overtore to the police.

It might be asserted that in reality the Dillon formulation leaves no role for "corruptly" at all since, as noted earlier, the need to establish such mens rea is implicit in the requirement in ss 3 and 4 that both payment and receipt must operate as "an inducement or reward". But such criticism would go more to the existing statutory language than to what should be the substantive basis for criminality in respect of bribes in the domestic marketplace. In truth, and reflecting its antiquity, the Secret Commissions Act 1910 is cumbersome in its drafting and would benefit from the improvements in statutory drafting over the ensuing years. At the very least, there should be legislative annulment of the meaning given to "corruptly" in McDonald.

Footnote
This commentary leaves for later consideration two further issues in relation to bribery in commerce. First, the question of domestic criminal liability for bribery in other countries. New Zealand's participation in a recent OECD agreement on the subject requires the enactment in this country of legislation imposing sanctions against foreign corrupt practices by New Zealand citizens. The writer intends to comment on the draft legislation in a subsequent issue of the New Zealand Law Journal.

Secondly, the implications of the Privy Council decision in Attorney-General for Hong Kong v Reid [1994] 1 NZLR 1, which overturned long-standing authority to the contrary in holding that bribes become the property of the principal upon receipt by the agent. On the face of it, Reid paves the way for theft charges to now be brought against agents who fail to account to their principals for the bribe. But in turn such prospect challenges the underlying integrity of our criminal law in relation to theft.