
**THE ANNOTATED
WAOML
MINERS' AND INVESTORS'
MODERN MODEL MINING CODE
DRAFT ANTI-CORRUPTION PART**

2017

Note to Reader - Comments welcomed at agourley@fasken.com

PART [XA]

CORRUPTION OFFENCES AND REMEDIES

Definitions 61A. In this Part,

"Agent" in relation to a person, means:

- (a) a Group Member of such person; and
- (b) an agent or contractor acting on its behalf or on behalf of any of its Group Members.

[NTD: any person that is an Agent of a person is presumed to be acting on behalf of the person.]

See s. X2(b)(1)]

"Associate" in relation to a natural person, means:

- (a) any natural person having a familial relationship with such individual, including: (i) a spouse, partner, brother, sister, cousin, uncle, aunt, son, daughter, father, mother, grandfather, grandmother, grandson and granddaughter of such individual; (ii) a natural person that would be described as having one of the forms of relationship with such individual as set out (i) if the relevant description of the relationship were preceded by the word 'adopted,' 'step-' or words of a similar effect; and (iii) a natural person that has or is habitually residing with such individual; and
- (b) persons that are Controlled by such individual or any of the natural persons outlined in (a).

[NTD: any person that is an Associate of a Government Official is effectively treated, prima facie, as part of the official's family and therefore enriching the official if any payment is made to him, her or it.]

See s. X2.]

"Certificate of Origin" means a certificate issued by a Holder or its Agent to any person dealing in Minerals that have been taken pursuant to a Mineral Right held by such Holder.

"Class A Offence" has the meaning set out in section 61C hereof.

"Class B Offence" has the meaning set out in section 61E hereof.

"Class C Offence" has the meaning set out in section 61G hereof.

"Corruption Offence" means a Class A, Class B or Class C Offence.

"De Minimis Threshold" means [US\$250] or the equivalent thereof.

"Development Right" means a right that would materially facilitate exploration, development, mining or operational activities, including permits, licences, rulings, decrees or other authorisations in respect of environmental impacts, waste management, water management or treatment, power usage, land or surface usage, rezoning, construction activities, air or other emissions, imports or exports, beneficiation or processing activities, mineral or metal transport or storage, expatriate visa permissions, labour or employment activities, or the usage of Government-Controlled infrastructure, such as railways, roads and ports.

[NTD: Anyone seeking to make a corrupt payment or confer a benefit for the purpose of obtaining a Substantive Right is subject to greater sanction.]

The definition of Substantive Right includes the basic title rights (i.e., Exploration Rights and Mining Rights), as well as a Development Right, which includes any right – essentially – that is critical to development.

"Government" means any [federal, state or municipal] government of the Republic, including any executive, administrative or judicial organ thereof and any agency or political subdivision thereof, including a court, tribunal or other judicial body.

[NTD: it is important to include in the definition all organs of government because decisions affecting mine development could be made at the political level (such as a Minister of Mines), the administrative level or the judicial level (such as a court hearing to consider an Environmental Approval).]

"Government Official" means any person that is, is a member of, is employed by or is otherwise engaged by:

- (a) Government;
- (b) a political party of Government, including a party in opposition thereto;
- (c) an elected member of Government or a candidate thereof; or
- (d) a public international organization exercising power or authority over any matter that has been ceded or delegated by Government, including a community formed through the economic union of several states by way of treaty or agreement, and such organisation's executive, administrative and judicial organs.

[NTD: The drafting of this part is extremely difficult; the scope of government needs to be broad enough to capture all organs of government, as well as persons to whom decision making might be delegated or whose judgement on a report or advisory mandate might be key to a decision – e.g., an expert in an Environmental Approval hearing.]

"Group Member" means a person that, in relation to another person (second-mentioned person):

- (a) Controls or, at any time during the activity or conduct giving rise to the Corruption Offence, Controlled, directly or indirectly, such second-mentioned person;
- (b) is Controlled by or, at any time during the activity or conduct giving rise to the Corruption Offence, was Controlled by, directly or indirectly, such second-mentioned person;
- (c) is or, at any time during the activity or conduct giving rise to the Corruption Offence, was a Senior Officer of such second-mentioned; or
- (d) is or, at any time during the activity or conduct giving rise to the Corruption Offence, was a Senior Officer of any other Group Member.

[NTD: The definition is used to capture the larger group associated with the relevant person.]

"Participant" means a Holder and any person seeking to acquire a Mineral Right.

[NTD: There is a need for a broader definition than Holder to capture applicants for rights.]

"Payment" means any payment of cash, any provision of goods or services, or any other form of compensation, reward or benefit, whether or not legally enforceable, or transferred or ceded, including:

- (a) cash, tickets, airfare, hotel accommodation, food and drink;
- (b) the usage of assets without fee or at a lesser cost than would be otherwise available on arm's length terms;

- (c) the facilitation of third party services without fee or at a lesser cost than would be otherwise available on arm's length terms; and
- (d) the avoidance of costs, such as the payment of school fees in respect of Associates.

[NTD: The definition is broad enough to capture most forms of corruption – both direct and indirect.]

"Register of Government Payments" means a register maintained by a Holder recording any and all Payments made to Government or any Government Official.

"Routine Action" means any activity or conduct performed by a Government Official:

- (a) in issuing an authorisation to qualify or facilitate a person to do business in the Republic, such as the approval of a business name or the acceptance of corporate filings or registrations;
- (b) in providing or facilitating access to existing governmental services, such as police protection, customs clearance, loading and unloading of cargo, hospital and medical care, mail delivery, and the usage of telephone, water, power and infrastructure;
- (c) in processing routine governmental papers, such as applications for temporary visas, tax identification numbers or certificates of incorporation; and
- (d) in respect to any activity or conduct of a similar nature;

provided such activity or conduct is either non-discretionary or, if discretionary, meets all of the following criteria:

- (e) it is ordinarily and commonly undertaken by such Government Official in similar circumstances;
- (f) any Payment was made with the intent of merely accelerating the performance of the activity or conduct, rather than securing the exercise of discretion;
- (g) the Payment was documented by the person in its Register of Government Payments within 24 hours of it having been made with an explanation as to why and under what circumstances it was made; and
- (h) where the activity or conduct concerned government services, such services were available to the general population and subject to standard tariffs, which the person has not sought to avoid.

[NTD: Effectively Payments made in relation to routine action are not made criminal in the MMC; the definition is broader than even facilitation payments under the safe harbour provisions of the FCPA in order to give comfort that minor payments that offer no particular advantage to a person will not result in a crime; the object of the legislative framework is to make criminal the failure to record such payments rather than the making of the payment itself criminal in the hope of enhancing transparency, identifying corrupt agencies and actors and otherwise learning more about such payments in order to address them through changes to gov't policy.]

"Senior Officer" means:

- (a) a director of the board of the relevant person;
- (b) the chief executive officer, chief financial officer, chief operating officer and all other management personnel normally reporting for work at the head office of the relevant person, where such head office is located outside of the Republic;
- (c) a person located within the Republic that has general budgetary authority to incur costs equal to or exceeding [ten] times the Substantive Threshold without prior approval of other Senior Officers;

and, in the case of legal entities other than a body corporate, persons performing functions akin to those in (a), (b) and (c).

[NTD: The definition is broader than one might think from the description name; the model is to capture anyone in country that has the discretion over substantial payments and anyone in a foreign head office in a management role; payments by such parties can enhance culpability and increase the sanction under the offence provisions and vice versa where (particularly small) payments are made by “rogue employees” who are not sufficiently senior to implicate the entire organization of a more serious offence.]

"Substantive Action" means any of:

- (a) the grant, renewal or transfer of a Substantive Right;
- (b) the approval or acceptance of any person as a Participant; and
- (c) the determination of any Dispute;

but, for purposes of certainty, excluding any Routine Action.

[NTD: Payments made in relation to Substantive Action – where a clearly important right or object is made the object of a corrupt payment – can enhance culpability and increase the sanction under the offence provisions.]

"Substantive Right" means a Mineral Right or Development Right.

[NTD: A Substantive Right is used in Substantive Action – see above comment.]

"Substantive Threshold" means [US\$250,000].

[NTD: A financial threshold should be chosen that would ordinarily be picked up in any audit process; major mining companies will have larger audit thresholds, on a global basis, but often a lower threshold will apply locally.]

Interpretation 61B. The following shall be rebuttable presumptions in the application of this Part:

- (a) Where:
 - (1) any Payment is made to an Associate of a Government Official or, at the direction of a Government Official, to any other person; and
 - (2) such Payment does not have any basis in law or contract;such Payment shall be *prima facie* presumed to be made to the Government Official in the absence of proof to the contrary.
- (b) A person shall be *prima facie* presumed to have:
 - (1) engaged in any activity or conduct that has been undertaken by its any of its directors, officers or employees; or
 - (2) the intent to engage in any activity or conduct where any of its directors, officers or employees had such intent.
- (c) A person that has made a Payment to a Government Official in order to procure any activity or conduct shall be *prima facie* presumed to be acting on behalf of another person, where the activity or conduct is manifestly of direct and singular benefit to such second person.
- (d) Where any person has, could have or, by virtue of such person's objects, intentions or circumstances, may have in the future any power, authority or influence over a Substantive Action, including by way of an opinion, report, assessment or consultation that is required or likely to be sought in connection with same, such person shall be *prima facie* presumed to be a Government Official in the absence of proof to the contrary.
- (e) A person shall be *prima facie* presumed to deal in Minerals that have been unlawfully obtained, where such person:
 - (1) has entered into a contract to purchase, sell, option, store, transport, export, process or otherwise deal in such product; and

- (2) knows that such product has been unlawfully obtained or does not obtain a Certificate of Origin in respect thereof.

[NTD: In (a), (b) and (c), the presumptions are rebuttable, but shift the onus on the relevant actor to explain the Payment or conduct; in (b), the definition of 'person' is essentially expanded to include all natural persons that would normally be considered to be actors of such person, whether or not forming its 'acting will and mind'; in (d), the presumption helps to address third party environmental experts, judicial experts or others who may influence a decision, but would not ordinarily be considered a part of government; in (e), the object is to put on notice all parties that are dealing in minerals within the Republic and who handle minerals on export that they need to show proper paperwork for the origin of the minerals; a certificate or origin regime has been built into the regulations of the MMMC.]

*Class A
Offence*

61C. A person is guilty of a Class A Offence when, in order to procure a Substantive Action, such person, or its Agent, makes or offers to make a Payment to a Government Official and both of the following criteria are satisfied:

- (a) the Payment exceeds the Substantive Threshold; and
- (b) at least one of the persons making or offering to make such Payment is a Senior Officer of the person or, where applicable, its Agent.

[NTD: If the goal of a corrupt payment is to secure a vital commercial advantage and the goal was pursued through a large payment and by very senior people in an organisation then the highest level of offence has taken place.]

*Class A
Penalty*

61D. A person that commits a Class A Offence shall:

- (a) be liable, in the case of an individual, to imprisonment not to exceed five (5) years;
- (b) be liable, in the case of a Participant, to a fine up to three times the relevant Payment;
- (c) forfeit the relevant Mineral Right; and
- (d) where the Payment exceeds [ten] times the Substantive Threshold:
 - (1) forfeit all Mineral Rights of which such person is the Holder; and
 - (2) be prohibited from being a Holder of any Mineral Right for a period of ten (10) years;

and, subject to section 61R, any Group Member of a person that has committed a Class A Offence, other than an individual, shall be jointly liable to pay any fine in subsection 61D(b) and, in the circumstances of subsection 61D(d), similarly forfeit all Mineral Rights of which such person is the Holder and similarly be prohibited from being a Holder of any Mineral Rights for a period of ten (10) years.

[NTD: The penalty provisions are designed to ensure that there are real consequences to serious corruption – a Class A offence being the most serious. The Group Member liability provisions are designed to ensure that any ultimate parent entity takes measures to ensure that all operations conducted by its daughter companies are conducted free of corruption; otherwise the potential for contagion is quite material.]

*Class B
Offence*

61E. A person is guilty of a Class B Offence when, in order to procure:

- (a) a Substantive Action, the person, or its Agent, makes or offers to make a Payment to a Government Official and the activity or conduct is not a Class A Offence; or
- (b) any activity or conduct by a Government Official other than Routine Action, the person, or its Agent, makes or offers to make a Payment to a Government Official and the Payment equals or would exceed the Substantive Threshold.

[NTD: If the goal of a corrupt payment is to secure a vital commercial advantage through a smaller payment or any large corrupt payment is made for any purpose, then the second level of offence has taken place. Senior Officers need not be involved in such a payment.]

*Class B
Penalty*

61F. A person that commits a Class B Offence shall:

- (a) be liable, in the case of an individual, to imprisonment not to exceed two (2) years;
- (b) be liable, in the case of a Participant, to a fine up to three times the relevant Payment; and
- (c) be prohibited for a period of two (3) years from acquiring Mineral Rights to Blocks in respect of which the person was not previously a Holder;

and, subject to section 61R, any Group Member of a person that has committed a Class B Offence, other than an individual, shall be jointly liable to pay any fine in subsection 61F(b).

Class C Offence 61G. A person is guilty of a Class C Offence when, in order to procure any activity or conduct by a Government Official other than Routine Action, such person, or its Agent, makes or offers to make a Payment to a Government Official that does not result in a Class A nor Class B Offence.

[NTD: If the goal of a corrupt payment is to secure any commercial advantage through a smaller payment, then the lowest level of offence has taken place.]

Class C Penalty 61H. A person that commits a Class C Offence shall:
(a) be liable, in the case of an individual, to imprisonment not to exceed one (1) year;
(b) be liable to a fine up to the relevant Payment.

Failure to Maintain Register 61I. A Holder is guilty of an offence where the Holder fails to maintain a Register of Government Payments that records:
(a) the date of any Payment made to Government or any Government Official;
(b) the recipient(s) of such Payment;
(c) the purpose of such Payment; and
(d) the directors, officers or employees of the Holder, or its Agent, who were responsible for the Payment.

[NTD: The framework encourages transparency of all payments; we would expect guidelines to be adopted that outlined rules concerning the register in further detail – e.g., we might expect there to be a presumption that no holder would miss recording a Payment that exceeded the Substantive Threshold; on the other hand, it might be understandable to miss a payment made by an agent that was not known to the Holder.]

Annual Delivery of Register 61J. The Register of Government Payments shall be:
(a) copied by a Holder and delivered to the Government, on or before January 31 of each calendar year; and
(b) promptly corrected, as soon as any error or omission becomes known to the Holder.

[NTD: See prior comment.]

Publication of Register 61K. The Republic shall make available on a Government website accessible to the public all Registers of Government Payments by reference to the name of each Holder.

Dealing in Minerals Unlawfully 61L. A person that deals in Minerals originating from the Republic knowing them to have been unlawfully obtained is guilty of an offence.

[NTD: The offence is aimed at ensuring that those who deal in illegally obtained minerals will be held to account, in addition to those who perpetrate the offence in the first place.]

[See ss. 13, 62(2)(b) and 62(3)(a) of the MMMC.]

Other Penalties 61M. A person that commits an offence pursuant to, or breaches, sections 61I, 61J or 61L shall be liable to those fines set out in subsection 62(1).

[NTD: See s. 62(1) of the MMMC.]

Salting 61N. A person that knowingly places, deposits or commingles, or causes to be placed, deposited or commingled, in any place any Mineral with intent to mislead any other person as to the value of any Mineral Right is guilty of an offence.

Salting Penalty 61O. A person that commits an offence pursuant to section 61N shall:
(a) be liable, in the case of an individual, to imprisonment not to exceed five (5) years;
(b) be liable, in the case of a Participant, to a fine as determined by the Court;
(c) be ordered to forfeit the relevant Mineral Right; and
(d) be prohibited from being a Holder of any Mineral Right for a period of ten (10) years.

[NTD: The infamous case of Bre-x led to little in the way of successful prosecution; at a minimum, one should lose the right to operate in a country for a prolonged period of time; this provision is designed to address this weakness in most mining codes.]

*Power to
Order Further
Prohibitions*

- 61P. A court may make a prohibition order, on application of the Republic, against any person that:
- (a) acquiesced in, failed to report or obstructed the discovery of any offence hereunder; or
 - (b) acquired any interest, direct or indirect, in a person or any of its Mineral Rights, if such acquisition took place subsequent to the period in which such person engaged in any activity or conduct giving rise to a Corruption Offence;

which order shall be on such terms as may be determined by the court on application therefor by the Republic.

[NTD: The goal of s. X16(b) is to capture a party that recklessly perpetuates a fraud or finances a title that has been received through fraudulent activity. It must be read with s. X17.]

*Due Diligence
Mitigation for
Subsequent
Investor*

- 61Q. A court shall take into account the extent to which a person made due diligence inquiries with the aim of testing for relevant activity or conduct in determining whether or not to make, and the form of, any prohibition order pursuant to subsection 61P(b).

[NTD: See prior comment.]

*Due Diligence
Defence for
Group
Members*

- 61R. Notwithstanding sections 61D and 61F, a Group Member shall not be jointly liable for fines of a person, or subject to forfeiture or prohibition orders in the circumstances described therein, where the Group Member Controls a Participant and proves that it:
- (a) implemented control systems designed to preclude persons that it Controlled from engaging in the relevant activity or conduct;
 - (b) systematically conducted audits designed to test for such activity or conduct; and
 - (c) had no knowledge of the relevant activity or conduct giving rise to the offence at the relevant time.

END