



## ANALYSIS

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1994-95, No. 26

An Act to provide for offences in relation to secret commissions

(21 April 1995)

**BE IT ENACTED** by the Parliament of the Cook Islands in Session assembled, and by authority of the same, as follows:

1. Short Title - This Act may be cited as the Secret Commissions Act 1994-95.
2. Interpretation - In this Act, unless a contrary intention appears, -

"Agent" includes any person who is or has been, or desires, or intends to be, employed by or acting for any other person, whether as agent, servant, broker, auctioneer, architect, solicitor, director, or in any other capacity whatever, either alone or jointly with any other person;

"Principal" includes any person by whom an agent is or has been, or intends or desires to be, employed, or for whom an agent acts or has acted, or intends or desires to act;

"Consideration" means valuable consideration of any kind; and includes discounts, commissions, rebates, bonuses, deductions, percentages, employment, payment of money (whether by way of loan, gift, or otherwise howsoever), and forbearance to demand any money or valuable thing.

Price \$1.50

3. Persons deemed to be agents - (1) For the purposes of this Act -

- (a) every officer of a corporation and every member of a governing body of a corporation shall be deemed to be an agent of the corporation;
- (b) every officer or member of any Authority, Board, Council, committee, or other body of persons, whether incorporated or unincorporated, charged by statute with any public functions shall be deemed to be an agent of that Authority, Board, Council, committee, or other body;
- (c) every person in the service of the Crown, or acting for or on behalf of the Crown, or holding any office in the public service, shall be deemed to be an agent of the Crown;
- (d) every partner in a firm shall be deemed to be an agent of the firm;
- (e) an executor, administrator, or trustee shall be deemed to be an agent of the beneficiaries under the will, intestacy, or trust;
- (f) an arbitrator, umpire, or valuer shall be deemed to be an agent of every party to the arbitration or valuation;
- (g) a liquidator of a company shall be deemed to be an agent of the company.

(2) If by virtue of the provisions of this Act any agent is deemed to be the agent of 2 or more principals in respect of the same matter, this Act shall apply to each of those principals in the same manner as if he was the sole principal.

(3) Nothing in this section shall be so construed as to restrict in any matter the meaning of the terms "agent" or "principal" as used in this Act.

4. Gifts according to custom and tradition - (1) Nothing contained in this Act shall be deemed to prohibit or render illegal any recognised custom, tradition, or practice, or usage of any trade or calling, if the Court is satisfied that such custom, tradition, practice or usage is honest and reasonable.

(2) In determining whether any custom, tradition practice or usage is reasonable and honest, the Court shall have regard to -

- (a) the circumstance that the commissions, rebates, or allowances paid or made by the third party to the agent under such practice or usage were lawfully received by the agent without any breach of his duty towards his principal; or
- (b) the circumstance that the said commissions, rebates, or allowances so paid or made would not in any case be paid or allowed by such third party to the principal; or
- (c) the circumstance that the same were paid or allowed in respect of services lawfully rendered by the agent to such third party without injury or loss to the principal and without any breach by the agent of his duty towards his principal.

(3) Except as provided by this section, evidence shall not be admissible in any proceeding for an offence against this Act to show that any such gift or consideration is customary in any trade or calling, nor shall the customary nature of any such gift or consideration be any defence in such proceedings.

5. Gifts to agent without consent of principal an offence - (1) Every person is guilty of an offence who corruptly gives, or agrees or offers to give, to any agent any gift or other consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business (whether such act is within the scope of the agent's authority or the course of his employment as agent or not), or for showing or having shown favour or disfavour to any person in relation to the principal's affairs or business.

(2) Any gift or other consideration given or offered or agreed to be given to any parent, husband, wife, or child of any agent, or to his partner, clerk, or servant, or (at the agent's request or suggestion) to any other person, shall be deemed for the purposes of this section to have been given or offered or agreed to be given to the agent.

6. Acceptance of gifts by agent an offence - (1) Every agent is guilty of an offence who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, or solicits from any person, for himself or for any other person, any gift or other consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business (whether such act is within the scope of the agent's authority or the course of his employment as agent or not), or for showing or having shown favour or disfavour to any person in relation to the principal's affairs or business.

(2) Every agent who diverts, obstructs, or interferes with the proper course of the affairs or business of his principal, or fails to use due diligence in the prosecution of such affairs, or business, with intent to obtain for himself or for any other person any gift or other consideration from any person interested in such affairs or business, shall be deemed to have corruptly solicited a consideration within the meaning of this section.

7. Duty of agent to disclose pecuniary interest in contract - (1) Every agent is guilty of an offence who makes a contract on behalf of his principal and fails to disclose to his principal, at the time of making the contract or as soon as possible thereafter, the existence of any pecuniary interest which the agent has in the making of the contract, unless to the knowledge of the agent the existence of such pecuniary interest is already known to his principal.

(2) For the purposes of this section any pecuniary interest which a parent, husband, wife, child, or partner of the agent has in the making of the contract shall be deemed to be the pecuniary interest of the agent, unless he proves that he had no knowledge of that interest at the time when he made the contract.

(3) For the purposes of this section an agent shall not be deemed to have any pecuniary interest in the making of a contract by reason merely of the fact that he or any person mentioned in the last preceding subsection is a shareholder in an incorporated company having more than 20 members.

8. Giving false receipt or invoice, to agent an offence - Every person is guilty of an offence who, with intent to deceive the principal, gives to any agent, or signs or otherwise authenticates for the use of any agent, any receipt, invoice, account, or other document of any nature whatsoever in relation to the affairs or business of the agent or his principal which contains any statement which is false, defective, or misleading in any material particular, or which omits to state explicitly and fully the fact of any commission, percentage, bonus, discount, rebate, repayment, gratuity, or deduction having been made, given, or allowed, or agreed to be made, given, or allowed, in relation to the matters referred to in that document.

9. Delivery of false receipt to principal an offence - Every agent is guilty of an offence who delivers or presents to his principal any receipt, invoice, account, or other document of any nature whatsoever in relation to the business or affairs of his principal which to the knowledge of the agent, is false or defective in any material particular, or is in any way likely to mislead the principal, or which to the knowledge of the agent omits to state the fact of any commission, percentage, bonus, discount, rebate, repayment, gratuity, or deduction having been made, given, or allowed or agreed to be made, given, or allowed, in relation to the matters referred to in that document, or which to the knowledge of the agent omits to disclose the fact of any gift or other consideration having been received by or promised to the agent in respect of those matters, unless in any such case the fact which is not disclosed is, to the knowledge of the agent, already known to the principal at the time when the said document is so delivered or presented to him.

10. Receiving secret reward for procuring contract an offence - (1) Every person is guilty of an offence who advises any person to enter into a contract with a third person and receives or agrees to receive from that third person, without the knowledge and consent of the person so advised, any gift or consideration as an inducement or reward for the giving of that advice or the procuring of that contract, unless the person giving that advice himself acts as the agent of the third person in entering into the contract, or is to the knowledge of the person so advised the agent of that third person.

(2) For the purposes of this section a person shall be deemed to advise another person to enter into a contract if he makes to that other person any statement or suggestion with intent to induce him to enter into the contract.

11. Aiding and abetting offences - Every person is guilty of an offence who aids, abets, counsels, or procures, or is in any way directly or indirectly knowingly concerned in or privy to the commission of any offence against this Act, or the commission outside the Cook Islands of any act in relation to the affairs or business of a principal residing or carrying on business in the Cook Islands which if committed in the Cook Islands would be an offence against this Act.

12. Offences by persons acting on behalf of agents - Every person is guilty of an offence who, with or without authority, does on behalf of any other person who is an agent any act which if done by that agent himself would be an offence against this Act.

13. Penalty on conviction - (1) Every person convicted of an offence against this Act is liable -

- (a) if a body corporate, to a fine not exceeding \$100,000, and;
- (b) if any other person, to imprisonment for any period not exceeding 10 years or to a fine not exceeding \$20,000 or to both such fine and imprisonment.

(2) Where the Court is satisfied that an act or omission constituting an offence under this Act has caused any loss or damage to any other person, the Court shall, in addition to any other penalty imposed under this section, and after giving the prosecutor and the offender an opportunity to be heard on the question of quantum, order the offender to make reparation for the amount of the loss or damage.

(3) An order for reparation made pursuant to subsection (2) may provide for payment of reparation in one sum by a date specified by the Court or, having regard to the means of the offender, may provide for payment by instalments of such amount and at such times as the Court may, at the time of making the order or by subsequent order, direct.

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This Act is administered by the Justice Department