AAMIG
Australia-Africa Mining Industry Group

Email

15 December 2011

Director
Financial Crime Section, Criminal Justice Division
Attorney-General's Department
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Dear Director

PUBLIC CONSULTATION PAPER: ASSESSING THE 'FACILITATION PAYMENTS' DEFENCE TO THE FOREIGN BRIBERY OFFENCE AND OTHER MEASURES

I am the Chairman of the Australia Africa Mining Industry Group (**AAMIG**), which has been established to support and promote the social license to operate of Australian mining companies in Africa and be the interface for partnerships with the Australian Government, NGO's and academia.

I refer to the Public Consultation Paper for Assessing the 'facilitation payments' defence to the Foreign Bribery offence and other measures, dated 15 November 2011, which invites submissions on the following proposed changes to Divisions 70, 141 and 142 of the *Criminal Code Act 1995* (Cth):

1. removing the facilitation defence by repealing section 70.4 of the Criminal Code;

2. amending section 70.2(2)(b) of the Criminal Code to allow a court to consider the value of the benefit offered where value alone suggests a benefit is not legitimately due;

3. amending section 70.2 of the Criminal Code to remove the current requirement to identify a particular foreign public official in order to establish an offence; and

4. amending Divisions 141 and 142 of the Criminal Code to delete the word 'dishonestly'.

I enclose AAMIG's submission for the Attorney-General's consideration.

Yours faithfully,

Bill Turner

Chairman

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PUBLIC CONSULTATION PAPER: ASSESSING THE 'FACILITATION PAYMENTS' DEFENCE TO THE FOREIGN BRIBERY OFFENCE AND OTHER MEASURES

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Australia Africa Mining Industry Group Submission

Re: Public Consultation Paper: Assessing the 'facilitation payments' defence to the Foreign Bribery offence and other measures

(15 December 2011)

1. AAMIG & Mining in Africa

1. The Australia Africa Mining Industry Group (**AAMIG**) welcomes the opportunity to provide a submission to the Attorney General's department as part of its assessment of the facilitation payments defence to the foreign bribery offence and other measures.

2. AAMIG is the largest and leading industry group representing the views and interests of the Australian mineral exploration, mining and mining-service sectors operating in Africa.

   (a) More than 220 such companies operate in Africa, with over $250 billion market capitalisation. This is also rapidly growing, with about 20 companies and 100 projects added since the beginning of 2011.

   (b) Africa is very important to Australia, contributing about 40% of all Australian overseas mining projects. Australian companies are active in over 40 African countries, with 17 operating mines in African countries.

3. AAMIG was established after requests made by the Department of Foreign Affairs and Trade to facilitate the Australian government's re-engagement with Africa and enhance support for the Australian mining industry in that region.

4. AAMIG has an important role to play in the continued development and ethical operation of mining in Africa. It represents an invaluable source of information and a forum of advice to Australian companies and government on the way mining is conducted in Africa.

5. AAMIG has a unique understanding of African government and society, garnered through hard earned experience on the continent. It draws on extensive first hand dealings with foreign officials in Africa in relation to exploration, discovery, infrastructure, production, extraction and refining of the minerals.

6. AAMIG's committee is comprised of individuals within the Australian mining sector with extensive interests and experience in Africa.

7. A focus of AAMIG is to assist companies and government to address and mitigate some of the reputational risk exposure issues that come with doing business in Africa, particularly those relating to foreign corruption.

8. AAMIG requires its members to adopt corporate values that ensure the highest standards of operations in Africa, particularly concerning good governance, the environment and human rights. AAMIG also maintains on its website (http://aamig.com) a suite of guiding principles that prospective member companies are required to abide by and commit to embed into their cultures. The principles cover key issues of governance, foreign corrupt practices, human rights and social and environmental issues.

2. Executive Summary

2.1 Submissions

9. The Attorney General's department has published a Public Consultation Paper for Assessing the 'facilitation payments' defence to the Foreign Bribery offence and other measures, dated 15 November 2011(**Public Consultation Paper**), and invited submissions on the following proposed changes to Divisions 70, 141 and 142 of the *Criminal Code Act 1995* (**Criminal Code**):

   (a) removing the facilitation payments defence by repealing section 70.4 of the Criminal Code;

   (b) amending section 70.2(2)(b) of the Criminal Code to allow a court to consider the value of the benefit offered where value alone suggests a benefit is not legitimately due;

   (c) amending section 70.2 of the Criminal Code to remove the current requirement to identify a particular foreign public official in order to establish an offence;[1] and

   (d) amending Divisions 141 and 142 of the Criminal Code to delete the word 'dishonestly'.

10. The proposed removal of the facilitations defence is a legally complex and practically difficult area. The Public Consultation Paper skirts over that complexity and appears to start from a belief that facilitation payments are inherently corrupt or are just a bribe and must be prohibited. AAMIG does not agree.

   (a) As noted in the Public Consultation Paper, the 1997 Commentaries to the OECD Convention considered facilitation payments separate to bribery as 'small facilitation payments' do not constitute an attempt 'to obtain or retain business or other improper advantage'. Nothing has occurred in the interim to call into question that critical distinction.

   (b) As outlined below, the Public Consultation Paper fails to take account of issues such as, developing countries' unsophisticated tax systems and the inability to afford to pay for fundamental public services.

11. In AAMIG's submission, the proposed removal of the facilitation payments defence:

   (a) ignores the reality that such payments need to be made from time to time and the importance of improved governance to promote necessary change in African countries;

   (b) will eliminate a clear system of transparent accounting for such payments and almost certainly be counterproductive to the objectives of Australia's foreign bribery laws. The change will be from a legal framework that encourages open and accountable payments, to one that encourages secrecy and subversion. Rather than accelerating the ultimate desired removal of any need to make such payments, it will drive them underground;

[1] The government is also considering an equivalent amendment to the offence of bribing a Commonwealth official in Division 141 of the Criminal Code.

(c) removes critical certainty for Australian companies and individuals as to their legal obligations and how such payments can best be managed by companies committed to upholding anti-bribery principles;

(d) constitutes an intervention into the sovereignty of other nation states and the prohibition of these payments should be left to local/domestic governments;

(e) may have the unintended consequence of preventing companies investing altogether, in circumstances where such payments are often unavoidable to continue doing business;

(f) will lead to the loss of many significant local infrastructure and social development programs allied to the mining activities of AAMIG members, if these businesses can't operate (for example, the AAMIG website contains a summary of various substantial social programs implemented by its members operating in Africa); and

(g) will unfairly restrict AAMIG members' competitiveness due to an inability to make small payments in order to secure routine government services in countries with insufficient resources to provide them, including in circumstances where the public officials involved do not benefit in a personal capacity.

12. These themes are consistent with the Australian government's new $127.3 million Mining for Development Initiative, which notes Australia's support for improved resource governance in Africa and acknowledges that the mining sector can unlock significant socioeconomic benefits, reduce poverty and support progress towards the Millennium Development Goals in developing countries. Of particular relevance is the initiative's proper focus on promoting transparency, good governance and local / regional development.[2]

13. AAMIG endorse the importance of initiatives to reduce bribery and corruption and to improve the practices of companies operating in countries where these issues are particularly problematic. It agrees that bribery and corruption impedes economic development, particularly in developing countries, but notes the importance of good governance principles and appropriately managed foreign investment to drive economic prosperity and raise living conditions.

14. It is a slow process but, in AAMIG's view, it is the engagement with foreign investment and attendant inflow of funds that makes it possible to improve living conditions and public infrastructure in these impoverished developing countries. With increasing public services and even distribution of wealth, the incentive for government officials to engage in corrupt practices is dramatically diminished.

15. Australia's current foreign bribery legislation reflects international obligations and appropriately targets the type of corruption related to the conduct of international companies that is of particular concern to the international community.

16. The current defence provides a confined and well defined exemption to illegal payments based upon a recognised practical need. It provides much needed certainty to businesses

[2] Australia's Mining for Development Initiative (October 2011), Available at: www.ausaid.gov.au/keyaid/pdf/mining-for-development.pdf

operating in difficult jurisdictions about how their conduct will be judged against international anti-bribery obligations.

17. Given the great importance of this issue, AAMIG respectively submits that the consultation process should as broad as possible and that an opportunity should be afforded for public hearings to be held. This would occur if the matter were to be taken up by the Parliament, possibly by the Social Policy and Legal Affairs Committee of the House of Representatives. Such in depth consideration should occur before any legislative changes are contemplated.

2.2 Recommendation

18. The Australian government should not repeal, or amend, section 70.4 of the Criminal Code to remove or substantially limit the facilitation payments defence. To do so would be counterproductive to anti-corruption objectives and would surrender an important and practical exception to criminality that addresses the realities faced by Australian companies operating in Africa.

19. AAMIG makes no formal submission on the other proposed changes.

3. Facilitation Payments Defence

3.1 Purpose for introduction of foreign bribery legislation

20. It is evident from contemporaneous parliamentary documents that the underlying purpose of Australia's foreign bribery legislation was to level the playing field and ensure that companies compete for market share by legitimate means, rather than by offering bribes.

(a) The Explanatory Memorandum to the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999* (**Bribery Bill**) states that it was designed to free up competition by eliminating bribery as a hidden factor in world trade, which will result in more merit based commercial decisions.[3]

(b) Parliament recognised that this will advantage Australia and allow its businesses to be competitive by preventing a serious distortion of trade, whereby purchasing decisions are not made on the basis of bribes but rather on the merits of the product or service.[4]

21. This is consistent with the explicit aims of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1998* (**OECD Convention**).[5]

22. It is evident that the mischief the legislation has sought to prohibit is a corporate culture whereby companies offer illegitimate benefits to government officials in order to obtain an unfair or undue advantage over their competitors.

23. Prohibiting this mischief encourages public confidence in both corporations and governments. The United Nations Convention Against Corruption (**UNCAC**),[6] foreword

[3] Explanatory Memorandum Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 page 8.

[4] Ibid, page 3, 6, 7.

[5] Convention of Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on 21 November 1997, Preamble: Available at: http://www.oecd.org/dataoecd/4/18/38028044.pdf

and preamble considers that bribery undermines democracy and the rule of law, jeopardising sustainable development and the stability and security of society. The OECD Convention also considers it undermines good governance and economic development.[7]

24. AAMIG agrees unreservedly with that view and maintains that the Australian legislation already substantially achieves this laudable purpose. As outlined below, removal of the facilitation payments defence will not advance that cause and, in fact, is likely to undermine it.

3.2 Operation of the defence

Exclusion of corruption

25. As outlined in the Explanatory Memorandum to the Bribery Bill, the rationale for introducing the facilitations payments defence was based on complying with Australia's international obligations, under the 16 December 1996 UN Declaration Against Corruption and Bribery in International Commercial Transactions (**UN Declaration**) and the OECD Convention, as well as aligning Australia's laws with the United States' (**US**) *Foreign Corrupt Practices Act 1977* (**FCPA**).

(a) The Explanatory Memorandum quotes paragraph 9 of the Commentaries to the OECD Convention and states that, although the Commentaries to the OECD Convention do not require a facilitation payments defence, they provide a rationale for including one by stating that facilitation payments are more appropriately dealt with under the domestic law of countries.

(b) Relevantly the Explanatory Memorandum highlights that the Commentaries to the OECD Convention indicate that the aim of the bribery offence is to target large scale international bribery which may distort trade and not small facilitation payments.

26. AAMIG will not repeat here the elements of the defence, as set out in Section 70.1 of the Criminal Code, but notes the following provisions, which AAMIG considers impact critically on its importance and operation in the context of minimising bribery and corruption.

27. The most critical element is that the defence is only available for payments that are clearly and accurately recorded. This reflects a similar approach in the US FCPA, where failure to keep proper records is itself a breach of the legislation and has frequently been successfully prosecuted by the Securities and Exchange Commission. In the US, the focus is rightly on transparency because it is recognised that this is one of the most significant requirements to flush out, and ultimately eliminate, corruption.

28. In the Australian legislation it is not an offence to fail to keep proper records but the defence is wholly dependent on it for similar reasons. The natural consequence is that this criterion enforces transparency. The requirements are also sufficiently clear and prescriptive that contemporaneous records must, *prima facie*, reflect the non-corrupt nature of any payments and allow a proper assessment of the *bona fides* of the payment. For example:

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[6] United Nations Convention Against Corruption, 31 October 2003, Foreword and Preamble Available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

[7] Supra, 5.

(a) A person must have retained the payment records at all relevant times, or if the records have been lost, the person could not reasonably be expected to have guarded against that loss; and

(b) each record of particular payments contains all of the following information:

(i) the value of the benefit concerned;

(ii) the date on which the conduct occurred;

(iii) the identity of the foreign public official in relation to whom the conduct occurred and the identity of the "other person" for whom the benefit was ultimately intended, if different;

(iv) particulars of the routine government action that was sought to be expedited or secured by the conduct; and

(v) the person's signature or some other means of verifying the person's identity.

29. The facilitation payments defence applies only to payments made to secure or expedite a "routine government service" that the company would have been entitled to in the ordinary course of business, such as provision of essential services, issuing administrative papers and providing police protection. Important guidance is provided by specific examples of relevant types of services set out in the legislation.

(a) Not only must the service be routine, but it must be something to which the company has an entitlement under the laws of that country in the ordinary course of conducting its business.

(b) The significance of this "entitlement" should not be underestimated. It cannot be corrupt intent to pay for something to which you are entitled, notwithstanding that it may be corrupt for the African national to require payment (although typically it is an issue of resourcing, not corruption).

30. Allied to that requirement, the service or action must not relate in any way to a decision about whether to award new business, continue existing business or the terms of new or existing business.

31. Together, these criteria rightfully recognise such payments as an appropriate exception that ought not be criminalised and guard against any payments that might be made to obtain any business advantage that the company is not legitimately entitled to.

32. Companies cannot legally pursue or enjoy the fruits of any corrupt intent or activities. That is the object of the OECD Convention and Australian legislation. To do so is to fall outside the facilitations payment defence.

33. Any corruption can only be domestic, which falls outside the ambit of the legislation and is a matter for the local government and, on occasion, inter-government diplomacy. It is not conduct for which Australian companies or individuals ought to face criminal sanction.

Consistency with international anti-bribery objectives

34. The defence is consistent with the OECD Convention, which was designed to provide a model upon which member states would implement their own domestic legislation. In

AAMIG's submission, the Australian government should remain guided by this Convention, which has not relevantly changed.

35. The Convention, and associated reports which informed it, considered the treatment of facilitation payments in detail at the time and concluded that they should not be prohibited. Their rationale is consistent with the issues outlined above.

(a) Paragraph 9 of the Commentaries to the OECD Convention explained that small facilitation payments are not made "to obtain or retain business or other improper advantage" and therefore are not to be treated as an offence under article 1 of the OECD Convention, or in any enabling legislation.

(b) The Commentaries also make the point that although these payments are generally illegal, criminalisation by other countries does not seem a practical or effective complementary action. To the extent that there is any illegality, AAMIG agrees that it is a domestic issue.

(c) In the Joint Standing Committee of Treaties' report entitled "OECD Convention on Combating Bribery and Draft Implementing Legislation", dated June 1998 (**Report**), submissions by the Attorney General's Department included that although "facilitation benefits were bribes, and regardless of size, probably illegal in every country...they are not intended to be caught within the offence created by the Bill.[8]

(d) The Report also included submissions, which explained that the benefits of facilitation payments "ultimately cause less harm and distortion than grand corruption",[9] and that there is a distinction between inducing a public official to perform their duty and inducing a public official to breach their duty and confer an advantage.[10]

(e) Additionally, a number of submissions in the Report explain that in numerous countries it would not be possible to do any business without minor facilitation payments to petty officials.[11]

(f) The Report concluded that, from the evidence before the Joint Standing Committee of Treaties, it was clear that Australian firms doing business overseas will need to provide facilitation payments in order to carry on business.[12] The Report stated that "it flies in the face of reality to expect all such activity to cease when the Bill is enacted, and it is totally unsatisfactory for Australian organisations potentially to be exposed to a criminal conviction however small the benefit may be".[13]

36. AAMIG submits that these considerations remain equally powerful and applicable today. The facilitation payments defence operates to reflect the practical realities faced by its

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[8] Joint Standing Committee of Treaties' report entitled "OECD Convention on Combating Bribery and Draft Implementing Legislation", dated June 1998, Mr Macdonald, Senior Adviser, Criminal Law Reform of Attorney General's Department,[9.12]. Available at: http://www.aph.gov.au/house/committee/jsct/reports/report16/report16.pdf

[9] Ibid, Law Counsel of Australia, [9.33].

[10] Ibid, Mr Thomas Bartos, Smith and Bartos, [9.22].

[11] Ibid, Law Counsel of Australia and Overseas Service Bureau, [9.33] & [9.46].

[12] Ibid, [9.79].

[13] Ibid.

members operating in Africa. Removing the defence would not alleviate or prevent the mischief that the foreign bribery legislation was designed to address.

3.3 The rationale for removing the facilitation payments defence is flawed

Overview

37. The Public Consultation Paper sets out a number of arguments in favour of removal of the facilitation payments defence (our response to those arguments is set out separately in section 3.5 below).

38. In AAMIG's considered view, the proposed change appears primarily to be a reaction to the introduction of the UK Bribery Act on 1 July 2011, which does not contain the defence.

39. Additional reasons for considering removal of this defence, which in AAMIG's view do not by themselves provide persuasive support for that change, include:

(a) that the OECD Recommendations 2009,[14] characterised facilitation payments as a "corrosive phenomenon" and recommended that member countries should periodically review their policies and encourage companies to "prohibit or discourage" the use of these payments;

(b) that US law, which Australia's bribery law is modelled on, has a similar exemption, but the US government has stated that it does not condone these facilitation payments;

(c) that the UNCAC,[15] requires parties to criminalise bribery of foreign public officials and the UNCAC's Legislative Guide does not differentiate between bribery and facilitation payments; and

(d) a lack of consistency across jurisdictions.

40. For the reasons set out below, AAMIG does not consider that these provide an appropriate, or sufficient, rationale for change.

The OECD and UNCAC have not recommended prohibition of facilitation payments

41. The government has highlighted the fact that the OECD 2009 Recommendations,[16] characterise small facilitation payments as "corrosive" and "generally illegal". AAMIG recognises that this can be the case. It should be noted that any illegality relates to that country's domestic criminal system, not foreign bribery and corruption laws.

42. Importantly, the OECD Recommendations do not encourage "member countries" to prohibit facilitation payments and, notwithstanding the comments above, the OECD has made no formal moves to amend the Convention to recommend that facilitation payments be prohibited.[17]

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[14] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 26 November 2009, Recommendation VI available at: http://www.oecd.org/dataoecd/11/40/44176910.pdf

[15] Supra 6, entire Convention.

[16] Supra, 14.

[17] Supra, 5, entire Convention.

43. Consistent with the requirements of the Australian defence, the OECD 2009 Recommendations overtly recognise that facilitation payments "must in all cases be accurately accounted for in ... companies' books and financial records."

44. Critically, the OECD Convention Commentaries,[18] recognise that facilitation payments are not bribery and that foreign nations should not criminalise this conduct. Instead foreign nations should address the need for such payments by means of support for programmes of good governance.

45. Accordingly such payments must be assessed on a case by case basis by companies forced to make them, in accordance with good governance, best ethical practice and the provisions of the Criminal Code.

46. Thus, the net effect of the OECD guidance to Australia is that it should not criminalise facilitation payments.

47. Although UNCAC,[19] does not provide a defence for facilitation payments, the Convention's Legislative Guide,[20] refers to the fact that a State may have a domestic law which provides a defence to the offence of bribing a foreign official. Thus the UN Convention does contemplate and accommodate a facilitation payments defence in those jurisdictions where it exists.

The US facilitation payments defence

48. The FCPA contains a similar explicit exception for "facilitating payments" for "routine governmental action". The US is the leading and most mature jurisdiction in relation to foreign anti-bribery legislation and prosecution and the Australian defence was modelled on the US provisions.

49. As with the Australian legislation, the FCPA identifies specific examples of acceptable payment types to facilitate or expedite such routine services, including obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

50. The Australian defence is arguably explicitly narrower than the US exemption,[21] as it provides that it will apply only to “minor” payments. Although there has been no jurisprudence to guide interpretation of that requirement, this is potentially a significant measure.

51. The Public Consultation Paper notes the OECD recommendation that member countries review their policies and that the US government does not condone facilitation payments. However, AAMIG is aware of no formal moves to amend the FCPA to remove the defence.

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[18] Commentaries on the Convention of Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on 21 November 1997, [9] available at: http://www.oecd.org/dataoecd/4/18/38028044.pdf

[19] Supra 6, Article 1

[20] Legislative Guide for the Implementation of the United Nations Convention Against Corruption ,at footnote 2 on page 8 and 41(e) at page 87, Available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/06-53440_Ebook.pdf

[21] 15 U.S.C. §§78dd-1 (b) and (f) (3) http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf

52. In those circumstances, AAMIG submits that it cannot be argued that the US provides support for the proposed change. To the contrary, it represents an example where the defence is clearly functioning as intended, in a jurisdiction where bribery and corruption is aggressively prosecuted.

UK Bribery Act

53. The UK Bribery Act entered into force on 1 July 2011, preceded by a guidance paper (**UK Guidance Paper**) to explain the policy behind the anti-bribery laws and to help commercial organisations understand the procedures they can put in place to prevent bribery.[22]

54. The UK Bribery Act does not provide for a legislated facilitation payments defence. Instead, any company forced to make a payment that might be construed as such must rely on uncertain general defences to bribery and corruption to escape prosecution. In particular, the UK Bribery Act provides that companies will have a legitimate defence against such charges if they can show that "adequate procedures" were in place to prevent bribery.

55. There is genuine and significant uncertainty in what might meet the requirements for the defence of "adequate procedures" for any particular company. There exists no reliable precedent to guide companies in that regard.

[22] The Bribery Act 2010 Ministry of Justice Guidance, Available at: http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf

56. This is further complicated by the:

(a) UK requirement that procedures be "proportionate" to the bribery risks faced by a particular company and to the nature and complexity of its activities. This means that what is deemed “adequate” for one company may not be a reliable indicator of what would be adequate for another; and

(b) foreshadowed reliance in the UK on "prosecutorial discretion" for such payments. The UK Guidance Paper claims that prosecutorial discretion provides "a degree of flexibility which is helpful to ensure the just and fair operation of the [Bribery] Act", and further states that, in cases where "facilitation payments do, on their face, trigger the bribery offences, the prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute".[23]

57. The UK Guidance Paper also suggests relying on the common law defence of duress.[24]

58. In place of the certainty provided by Australia’s prescriptive legislative defence, UK companies are invited in informal Ministry of Justice guidance papers to rely on the (unregulated) exercise of a "prosecutorial discretion".

59. The Serious Fraud Office and Director of Public Prosecutions issued a guidance paper that set out the factors to be taken into consideration in exercising the prosecutorial discretion in the context of facilitation payments.[25]

60. Factors tending against a prosecution are:

(a) a single small payment likely to result in only a nominal penalty;

(b) payment came to light as a result of a genuinely pro-active approach involving self-reporting and remedial action;

(c) the organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed; and

(d) the payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

61. Factors tending in favour of a prosecution are:

(a) large or repeated payments likely to attract a significant sentence;

(b) payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated;

(c) payments may indicate an element of active corruption of the official in the way the offence was committed; and

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[23] Ibid, at [50].

[24] Ibid, at [48].

[25] Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public prosecutions, at page 9, Available at: http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf

(d) the organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed.

62. The Serious Fraud Office guidance factors achieve a similar end as the Australian legislation by setting out criteria to be taken into consideration, albeit ill-defined (e.g. "vulnerable position"), but without the certainty provided by the clear prescribed criteria and legal obligations contained in the Australian facilitation payments defence. In AAMIG's view that is an untenable approach where criminal sanctions are at stake.

63. The Australian Parliament considered imposing a prosecutorial discretion when it drafted the legislation,[26] and opted for a legislated defence. In AAMIG's view, this was the correct approach because it provides far greater clarity for Australian businesses.

64. The prohibition of facilitation payments in the UK Bribery Act, coupled with no jurisprudence to guide how such payments ought to be interpreted and little clarity forthcoming from the UK government, poses unique difficulties for companies subject to that jurisdiction seeking to comply with anti-bribery and corruption obligations. The Public Consultation Paper makes light of those difficulties.

Lack of consistency across jurisdictions

65. AAMIG acknowledges that compliance issues can be complicated by the fact that many companies fall within a number of jurisdictions with differing obligations, including in particular Australia, US, UK and Canada.

66. The Public Consultation Paper outlines that concern but, in AAMIG's view, places too much emphasis on its significance, particularly with regard to consistency with the UK Bribery Act in preference to the FCPA.

67. The key jurisdiction for AAMIG members is the US. A number of submissions made to the Joint Standing Committee on Treaties, as part of the drafting processes for the Bribery Bill were in favour of aligning Australia's laws with the FCPA. The Joint Standing Committee on Treaties was convinced by evidence from business that it was commercially important that Australia's laws were consistent with those in the US.

68. The Explanatory Memorandum explains that this is because consistency across this jurisdiction would be beneficial as the FCPA already applied to Australian corporations that issue stock in the US and the leading role of the US in world trade. In addition, the FCPA facilitation payment defence has been tested in the US, which provides further guidance and certainty to Australian companies.

69. AAMIG would emphasise that consistency with the FCPA remains particularly significant for Australian companies because of the exceptionally broad international jurisdiction that the US government has publicly claimed over non-US companies with modest links to its jurisdiction and the aggressive “world’s policeman” role it has adopted in the prosecution of non-US companies. The result being that Australian companies mining in Africa remain far more likely to be subject to US scrutiny of their actions than to the UK.

70. Canada and China are also significant jurisdictions for many AAMIG members.

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[26] Supra 8, [9.78] -[9.81], [9.87]; See also discussions at Joint Standing Committee on Treaties: *OECD Convention on Combating Bribery*, Canberra, Official Hansard Report 9 March - 11 May 1998, Senator Vanstone 3, Mr Davis 44, Chair Taylor 109, Available at http://www.aph.gov.au/hansard/joint/commttee/committee_transcript.asp?MODE=YEAR&ID=153&YEAR=1998;

71. A number fall under the Canadian jurisdiction by virtue of being listed on the Toronto Stock Exchange (**TSX**). The Canadian Corruption of Foreign Public Officials Act (**CFPOA**) has a facilitation payments defence,[27] which was modelled (like Australia) on the FCPA.

(a) Canada has recently had its implementation of the OECD Convention, including the facilitation defence, reviewed by the OECD Working Group on Bribery (**Working Group Paper**).[28]

(b) Although this review noted "significant concerns... about Canada's framework for implementing the Convention" those concerns did not include facilitation payments and no recommendations were made to remove the defence.

(c) The Working Group Paper also relevantly noted the following.

(i) Canada's Phase 2 follow-up report to the OECD emphasised that the CFPOA "clearly delineates" what constitutes a facilitation payment.

(ii) That report highlighted that "it is a longstanding practice of the Canadian government to not issue guidelines on the interpretation of criminal law provisions; the law speaks for itself, and the courts alone are responsible for interpreting the application of the law to individual cases."

(iii) That "...one would expect that providing a statutory defence for facilitation payments would create more certainty in the application of the CFPOA than relying on the exercise of prosecutorial discretion in this regard." The CFPOA itself provides guidance as to what constitutes a facilitation payment.

(iv) Canada continues to monitor interpretation of relevant provisions by the courts and will consider amending the CFPOA if the courts interpret the defence in a manner inconsistent with the spirit of the Convention.

72. China is an important jurisdiction to AAMIG members due to Chinese companies' increasing involvement in Australia's extractive industries (for example as joint venture and trading partners or majority shareholders).

(a) Like Australia and other OECD nations, China has a legislative regime in place to prohibit bribery offences, including bribery of foreign officials.

(b) Although there is no express facilitation payments defence, Chinese foreign bribery laws permit small benefits of the kind offered as facilitation payments and in some cases it is encouraged as a core value in their business culture (known as 'Guanxi').

73. AAMIG acknowledges that the majority of signatories to the OECD Convention either do not have a facilitation payments defence or have expressly prohibited such payments. In most cases there is reliance on a prosecutorial (or some other) discretion to permit these

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[27] Subsection 3(4) of the *Canadian Corruption of Foreign Public Officials Act*.

[28] Canada: Phase 3 - Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions, dated 18 March 2011, Available at: http://www.oecd.org/dataoecd/55/25/47438413.pdf

payments. Apart from the UK, those countries that do not tolerate facilitation payments generally have a limited jurisdictional reach, by comparison to the US, and do not have a relevant connection to our members. Accordingly, the issue of consistency across those jurisdictions does not, and is unlikely to, arise.

74. In any event, AAMIG encourages its member companies to manage the issue of inconsistencies across different jurisdictions by adopting the more onerous obligations applicable to their circumstances.

75. For example, an Australian company subject to the UK Bribery Act ought to have appropriate procedures in place to meet the requirements of the facilitations payment defence, such as detailed records of all payments, but also do all it could to ensure it had in place "adequate procedures" to prevent bribery generally.

(a) We note, in that situation, compliance with the Australian legislation is a matter of meeting clear requirements for a relatively well-defined and confined type of payment.

(b) In stark contrast, it is difficult to envisage how any company could assess with certainty what would be required to avoid criminal prosecution for facilitation payments under the UK Bribery Act.

76. Adopting a “best practice” approach would not cure the problems and uncertainty with UK compliance, nor negate the utility of having the benefit of the far more readily characterised certainty of compliance with the Australian prescriptive requirements. However, it illustrates that “inconsistency” with a jurisdiction that does not have the defence is not in itself a reason to remove the Australian provisions.

3.4 Arguments in support of the facilitation payments defence

77. In AAMIG’s submission, the government must ensure that it is clear that these payments remain lawful. Failure to preserve a legislative exclusion for such payments will criminalise conduct by AAMIG members that bears no connection to foreign corruption. It runs the very real risk of making it untenable to operate in these underdeveloped countries and to contribute to their communities through social development programmes that deliver important services, infrastructure and other support.

78. The Public Consultation Paper fails to consider many important practical issues in favour of retaining a facilitation payments defence. AAMIG considers the following to be of particular significance to its members.

Transparency

79. Most critically, as alluded to elsewhere, removal of the defence will eliminate the requirement to keep accurate records and, rather than reducing the number of such payments will, in AAMIG’s submission, drive them underground.

(a) The defence currently prescribes a well-defined system of detailed transparent accounting for such payments and its removal will almost certainly be counterproductive to the objectives of Australia’s foreign bribery laws.

(b) The change will be from a legal framework that encourages open and accountable payments, to one that encourages secrecy and subversion. Rather than accelerating the ultimate desired removal of any need to make such payments, the absence of a facilitation payments defence will encourage

corruption of the very type that the foreign bribery laws were designed to address.

80. It will also be counterproductive to the international drive for transparency in this area pursuant to the Extractive Industries Transparency Initiative (**EITI**), a broad international coalition that supports improved governance and transparency. EITI relevantly sets and manages a global standard for full verification and publication of company payments, including in the mining sector, and requires participant companies to report on payments made to government.

81. Removal of the defence would also be inconsistent with the Australian government's Mining for Development Initiative, in which "promoting transparency" is one of the six components. The government has made it clear that it "will continue to support developing countries to implement the [EITI] which increases the transparency of transactions between governments and companies operating in this sector".[29]

82. With regard to Africa, the October 2011 report on the initiative notes that "Australia is also negotiating an agreement with the UN Economic Commission for Africa to support implementation of the African Mining Vision, adopted by the African Union Summit in February 2009. The vision is for the transparent, equitable and optimal extraction of mineral resources for broad-based sustainable growth and socio-economic development."[30]

Lack of resources

83. In AAMIG's experience, facilitation payments typically fall into two main categories. The first relates to payments made to public officials because the local government does not have the resources to provide routine services required by our members.

84. The minor benefits currently permitted by the facilitation payments defence are frequently not obtained because of greed on the part of the public officials involved and are unrelated to any attempt by business to tip the playing field in its favour.

85. This is not a moral or corruption issue. It has nothing to do with bribery. It is simply about addressing developing countries' fundamental lack of resources so that business can operate.

86. It is AAMIG's experience that, to be successful in Africa, it is critical that companies gain the support of the people affected by a company's activities. To do so requires meaningful engagement with local communities, in particular respectful of the immense disparity in wealth. The use of facilitation payments to address a chronic lack of public resources in these countries is important not only to help build support within the local community, but also to redress some of the wealth imbalance in the community and ensure appropriate resources are made available to members of the public service.

87. AAMIG members have encountered many such situations operating in Africa. The following is a selection of illustrative examples.

(a) In one instance, a company was advised by the director of the local EPA that the department had insufficient staff to complete an EPA assessment within the required timeframe. At the director's suggestion, the company paid a fee

[29] Supra 2, page 7.

[30] Supra 2, page 10.

at normal commercial international rates to engage external consultants selected by the EPA to complete the process within the timeframe.

(b) In one African country the Mines Department Inspectorate must inspect each load of concentrate prior to dispatch from the mine site, for which a fixed fee of US$20 per load is paid direct to State Central Revenue. The nearest Mines Department Inspectorate office is 50 km from the company's mine site. The local government provides the Inspector with a vehicle, but not fuel, and his annual salary is less than US$5,000. He is not provided with an allowance for fuel or servicing of his vehicle. To ensure that the required daily inspections proceed smoothly the company provides him with fuel, a meal and a place to work at site.

(c) In West Africa, mining companies must present mining plans at a scale of 1:500 to the Mines Department. The Mines Department did not have electronic storage or any scanning capabilities. A company provided the Mines Department with a scanner and computer so that it could store and receive plans electronically.

(d) At remote outposts in Africa a visa can take up to three weeks to be delivered from the national capital, which can be up to 2,500 km away. Company employees can secure authorisation for a visa approval provided a faxed copy of the visa is presented. Being so remote, the local Customs and Immigration office did not have the necessary infrastructure and it was necessary for the company to assist with provision of such things as a fax machine, electricity, a generator set, fuel, paper and a printer to ensure visa approval could be expedited by fax.

(e) Officials from the District Office, the Ministry for Energy and Minerals and the police are often required to attend remote mine sites. Companies find that there is a will to conduct the visits, but officials often complain of a lack of funds for fuel and accommodation (if overnight stays are required). To ensure site visits occur and officials continue to provide the service that is expected of their respective offices, companies make payments for fuel and accommodation expenses from time to time. In lieu of payment, sometimes companies will physically fill an official's fuel tanks.

(f) Similarly, in one African country, companies are obliged to assist with (at least) quarterly inspections of their mining operations by the Mines Inspectorate EPA. In one case, the travelling distance to a company's mine was approximately 1500 km (by unsealed road during the dry season). The company allowed the Inspectors to use its aircraft to alleviate the access problem, which resulted in a 2.5 hour flight and meant that the inspection could be completed in one day. The company also provided a meal and paid the Inspectors a reasonable commercial rate for their services during the day. The company faced the prospect of being fined if it did not facilitate the inspections in accordance with its obligations.

(g) It is critical for AAMIG members to engage with the local community, which requires liaising with local traditional village chiefs who help to promote harmony with the community and also to ensure it is appropriately compensated for disruption to the community, use of land (e.g. for airstrip or access roads) and loss of freedoms caused by a company's activities in that

region. The local chiefs are often paid a modest per diem (typically <$150 per month) to reflect their contribution, which typically includes to attend and assist with formal community consultation along with representatives of the Ministry of Mines. Stipends or per diems are also typically paid to the Government representatives for similar reasons.

Local issues

88. The second category relates to payments that benefit foreign officials in their personal capacity, which they often rely on due to the deeply-rooted structural poverty in their nation.

89. These payments are nominal and secure only routine government services to which the company making the payment is entitled. They are demonstrably far removed from any corrupt intent or outcome on the part of the company making the payments.

90. This is a form of domestic bribery and is very different from the type of payments that foreign bribery legislation is directed at and should be regulated, or addressed, by the local/domestic government concerned.

91. The following are typical real world examples of such situations encountered by AAMIG members operating in Africa. AAMIG member companies make every effort to avoid such payments where practicable and, if unavoidable, understand the strict obligation to keep detailed records, in accordance with the clear requirements of the facilitation payments defence.

(a) AAMIG is aware of numerous instances where member companies have felt they have no reasonable choice but to make minor payments (typically US$20-$50) to police, immigration or customs inspectors for such things as alleged traffic or visa irregularities (where there are none) or to secure timely release of goods.

(b) A local driver and Australian company representative were stopped at a road block manned by police and, following an inspection of papers, were informed that they did not have a "Permit to Park in a Public Place". Having followed the policeman to the police station, they were advised that there would be a fine of approximately $100. The police would not respond to questions about where the permit requirement and fine were to be found in the traffic code. They believed that they would be held for some time at the police station if they did not pay the fine. On paying the fine the police refused to provide a receipt. The company considered reporting the incident to the mayor but decided against it because the driver had given his address details in the police report.

(c) Six stages of customs clearance are required in the DRC to import goods. At each stage the company is required to pay a small “motivation fee”. If not paid, goods typically sit at customs as part of an “unmotivated” clearance process for up to two weeks. If a company has a reputation for not paying the fee, the common experience of AAMIG members is that it becomes difficult to source trucking companies to move the goods because they do not want trucks delayed at the border for two weeks waiting for customs officers to do their job in a timely manner.

(d) A company established a West African base in Ghana. During the first of subsequent monthly border crossings, complete with vehicle fleet and equipment, the customs officer on the Ghana side of the border indicated that a small facilitation payment (or 'dash', as it is termed in Ghana) was required to ensure the smooth transit of vehicles. Instead, the company offered all the customs officers a company T-shirt and cap, which had recently been printed for promotional purposes. This secured smooth passage through customs and immigration. The customs officers preferred the cooler T-shirts to the heavy customs uniform in the hot climate.

(e) It is critical for some AAMIG members to be able to erect appropriate fencing (usually electrified) around tenements, to provide a definite boundary for their project and to keep artisanal miners out of the project area (as it raises difficult safety and legal issues). One company needed the local power authority to come and inspect the fence before it could be activated. This required payment of a modest per diem to cover the power authorities "costs" and time, as well as approval from the local mayor's office and court. Both the mayor's office and the head of the court also asked for facilitation fees. The mayor's office dropped its request for payment after the company hired a grader to upgrade site roads, as did the court after the company made a donation to the court to help run a local seminar. The cost of the fence was around US$1 million and it could not be activated until the various approvals had been obtained.

(f) Under the DRC Mining Code, exoneration lists must be approved by the Ministry of Mines and Finance, which first must be signed off by an exoneration committee, before equipment and materials can be brought in at a reduced import tax rate to develop a project. It is this company's experience that nothing will be signed off unless minor payments are made directly to the committee. If the company refused, and the necessary approval was not obtained, it would have to pay full import duties (30-40% instead of the 2% mandated by the Mining Code) and increase its capital raising, which is difficult enough for the DRC.

92. AAMIG urges the Australian government to acknowledge that its role is not to regulate foreign governments via the Criminal Code and its foreign bribery laws.

(a) The Report by the Joint Standing Committee on Treaties, referred to above, stated that facilitation payments are a corruption that is a domestic matter and should be best addressed by strengthening good governance in the countries, rather than legislative action by the parties to the OECD Convention.[31] As noted in the executive summary, to strengthen good governance is a key theme of the Australian government's Mining for Development Initiative.

(b) Furthermore the OECD Convention Commentaries,[32] state that foreign nations should not criminalise facilitation payments, instead they should address the payments by means of support for programmes of good governance in these foreign countries. The Explanatory Memorandum,[33] also states that the

[31] Supra 8, [3.26], [9.6].

[32] Supra, 18.

[33] Supra 3, page 23.

offence is international in nature and primarily aimed at larger scale bribes which may distort trade.

93. If all OECD nations attempt to regulate foreign governments by prohibiting facilitation payments of this nature there is a risk that some companies may either:

(a) need to withdraw their business from countries where these sort of payments are a practical necessity, which will cause many companies and projects to fail and will deprive many developing countries of much needed investment, infrastructure and social development opportunities. For example, the need to withdraw could relate to either an inability to obtain or rely on critical public services and infrastructure, or difficulty hiring appropriate senior people because of their prosecution risk; or

(b) continue to make these payments in order to conduct business, notwithstanding that they have been made unlawful. This situation risks replacing the current framework, which encourages open and accountable payments with one that may encourage secrecy and subversion.

94. AAMIG also note that the Australian Parliament gave extensive and careful consideration to this defence when it was introduced and it was concluded that it was necessary. Nothing has occurred in the interim to disturb the key issues on which that decision was based.[34]

95. A Joint Standing Committee on Treaties (**Committee**) was established before the facilitation payments defence was introduced and it received considerable submissions.[35] After careful consideration the Committee provided a Report which recommended that the defence be allowed.[36] Their Report states that facilitation payments are usually quite different in character to making a much larger payment as a bribe to obtain or retain a business advantage.[37]

(a) The Committee's Report stated that it was clear that Australian firms doing business overseas will need to provide facilitation benefits in order to carry on business.[38] They considered that it was totally unsatisfactory for Australian organisations potentially to be exposed to criminal conviction.[39]

(b) The Committee also was not attracted to leaving the issue of facilitation payments to prosecutorial discretion.[40]

(c) There is no need to act on Transparency Internationals' ideal that we no longer need a defence, because they have always held the view that we should have

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[34] Supra 26, complete Report and Hansard.

[35] See the Joint Standing Committee on Treaties: *OECD Convention on Combating Bribery*, Canberra, Official Hansard Report 9 March 1998 - 11 May 1998 Available at http://www.aph.gov.au/hansard/joint/commttee/committee_transcript.asp?MODE=YEAR&ID=153&YEAR=1998;

[36] Supra 8, [9.87].

[37] Supra 8, [9.3].

[38] Supra 8, [9.79].

[39] Supra 8, [9.79].

[40] Supra 8, [9.78].

prosecutorial discretion. The Committee specifically considered and neglected to follow this approach.[41]

(d) When introducing the defence the Attorney General's Department also stated to the Committee that the intention behind a facilitation payment is something that is particularly within the knowledge of the defendant and therefore it is appropriate that they carry the onus of legitimising the payment and thereby establishing the defence.[42]

(e) The Committee also felt that these facilitation payments were generally made to overseas officials who were dependent upon such benefits to supplement their livelihood in a culture where corruption and bribery is expected.[43]

96. Accordingly, removal of the facilitation defence would target a different mischief to that intended to be regulated by foreign bribery laws; that being bribery tied to the local operations and culture of foreign local governments, rather than international corruption capable of distorting trade.

Other arguments in favour of the facilitation payments defence

97. Having briefly articulated arguments to remove the defence, all of which AAMIG submits have difficulties (as outlined below), the Public Consultation Paper appears to have largely dismissed the few arguments it has acknowledged in favour of keeping the defence on the basis that each has, at its source, the problem of corruption.[44]

98. Whilst of lesser significance compared with the issues outlined above, AAMIG considers that these arguments warrant brief scrutiny.

(a) Competitive disadvantage

(i) AAMIG agrees that companies that do not make facilitation payments may be less competitive.

(ii) Critically that issue would arise primarily in competition with companies subject to the US and Canadian jurisdictions, which are rapidly increasing their presence in Africa. Complex issues can also arise in competition with Chinese businesses.

(b) Duress

(i) AAMIG's experience is that facilitation payments made under duress can occur, but that their frequency varies from jurisdiction to jurisdiction. It is more likely to relate to payments that would ordinarily fall outside the defence in any event and could be defended on that basis.

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[41] Supra 8, [9.25].

[42] Supra 8, [9.17] (referring to the comments of Mr Meaney in the Joint Standing Committee on Treaties: *OECD Convention on Combating Bribery*, Canberra, Official Hansard Report 11 May 1998 at 332 Available at http://www.aph.gov.au/hansard/joint/commttee/committee_transcript.asp?MODE=YEAR&ID=153&YEAR=1998)

[43] Supra 8, [9.71].

[44] Australian Government: Attorney-General's Department, *Assessing the 'facilitation payments' defence to the Foreign Bribery offence and other measures: Public Consultation Paper*, 15 November 2011, pages 4 to 5.

(ii) AAMIG submits that their existence does not provide important support for the need to retain the facilitation payments defence. That is not the intended function of the defence.

(iii) Nevertheless, relevant payments to influence business dealings may be solicited or extorted under threat, or a perceived threat, making refusal difficult, and AAMIG agrees that it would be unfair to criminalise acts necessary to prevent threatened detriment.

(iv) Professor Sampson gave evidence to the Committee that the element of duress in these payments meant that they could not be seen as a grand corruption of the type that the legislation was aimed at.[45]

(v) The UK guidance also suggests that companies subject to the UK Bribery Act might rely on the common law defence of duress.[46] AAMIG submits that a similar defence is also available to Australian companies.

(vi) AAMIG members owe a non-delegable duty to their employees to protect them from harm. Although a common law defence of duress may be available, it is of considerable comfort to our members that they can educate employees on the specifics of the facilitation payments defence and what they can do to properly make and record relevant payments in dangerous situations without concern for potential repercussions. This is especially important for perceived duress where it may not always be clear, or readily proved, that the perception was warranted.

(c) Uneven playing field

(i) AAMIG submits that this argument ignores the fact that the ability to refuse demands is not a reflection of corporate might, at least not concerning bargaining power and the ability to absorb such payments.

(ii) Instead it is a function of the importance of the particular routine government service that the company needs to secure for its business.

(iii) A single small payment to secure a routine service that is fundamental to that operation can be critical to a business of any size.

(iv) For instance, a border crossing near an isolated mine site being open for 12 hours per day, rather than the usual 6 hours, may be the difference between that mine being viable or not.

(v) Nevertheless, a large business may more readily absorb a failed endeavour and, in that regard, banning facilitation payments will be more detrimental for small businesses than for larger businesses.

99. The Public Consultation Paper notes that "each of these arguments have, at its source, the problem of corruption". The Public Consultation Paper states that "these arguments

[45] Supra 8, [9.59] (referring to the comments of Mr Sampford in the Joint Standing Committee on Treaties: *OECD Convention on Combating Bribery*, Canberra, Official Hansard Report 17 April 1998 at 261 Available at http://www.aph.gov.au/hansard/joint/commttee/committee_transcript.asp?MODE=YEAR&ID=153&YEAR=1998)

[46] Supra 24.

predominantly arise in business environments where facilitation payments are common and will become increasingly difficult arguments to sustain".[47]

100. These comments proceed from a false assumption that facilitation payments are just bribes. They are not. Also, what corruption exists (e.g. duress) is not of the type that foreign bribery laws are rightfully concerned with, but rather domestic laws should address this.

101. Accordingly, an inability to rely on the current defence to make legitimate small payments for routine government services will put Australian companies at a significant disadvantage across a range of industries and jurisdictions, particularly those associated with mining in Africa, compared with US, Chinese and Canadian companies.

102. It would be ironic if, in a misguided attempt to strengthen Australia's laws, Australian companies were competitively disadvantaged compared with US companies, given the US' leading role in development and prosecution of foreign bribery laws.

3.5 There are no valid arguments for prohibiting facilitation payments

103. The Public Consultation Paper briefly outlines a number of arguments for removing the defence, which contain significant deficiencies.

104. The substance of many of these has been addressed above. The following summarises AAMIG's view on each of them.

Compliance with international treaty obligations

105. The Public Consultation Paper overstates the direction given by relevant international instruments as to how facilitation payments ought to be viewed and, in AAMIG's view, mischaracterises them to claim that they reflect a trend to prohibit the defence.

106. For example, as discussed above in connection with the rationale for removal of the defence:

(a) the OECD Convention does not recommend that facilitation payments should be prohibited (see para 42 and 44). Instead the Conventions' Commentaries suggest that foreign countries should not criminalise facilitation payments.

(b) the UNCAC,[48] also does not specifically state that facilitation payments should be prohibited, and it allows for domestic States to implement defences to the offence (see para 47).

107. AAMIG submits that there have been no relevant substantive changes to Australia's treaty obligations concerning foreign bribery laws and no basis to remove a defence that was introduced in accordance with those international recommendations.

Consistency with foreign laws and international standards

108. As is evident from the analysis above, AAMIG submits that the Public Consultation Paper has overstated the international support for removal of a facilitation payments defence and mischaracterised recent developments as a "trend" to increasing prohibition.

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[47] Supra 44, page 5

[48] Supra 6, Article 1

109. Outside of the UK Bribery Act, there is relevantly no evident trend that impacts on AAMIG's member companies operating in Africa.

110. Countries that Australia has modelled its laws on have the defence. Importantly, most AAMIG member companies remain subject to the leading jurisdiction in foreign bribery, the US, which has the defence and is known to broadly interpret the reach of its jurisdiction and to aggressively pursue and prosecute international countries. Many are also subject to Canadian law, which has the defence, due to listing on the TSX. Far fewer are subject to the UK Bribery Act.

111. APEC have stated that businesses should eliminate facilitation payments because they are prohibited under the anti-bribery laws in most countries. However, APEC does not suggest that countries should prohibit facilitation payments. It states only that companies should seek to eliminate those payments to comply with those countries that do not have a defence.

112. AAMIG supports that goal and agrees that we need to trend away from facilitation payments, but driving them underground is not the way to achieve this. AAMIG encourages and assists its members to eliminate such payments where practicable as a matter of good governance, but that is a separate issue to criminalising them, in circumstances where they are often unavoidable to secure routine entitlements.

Promoting overseas aid objectives

113. The Public Consultation Paper makes no mention of the very real and substantive social and infrastructure benefits that AAMIG has seen flow to developing countries from its members.

114. AAMIG's website contains a summary of various real world examples of substantial local social and infrastructure programs implemented by its members operating in Africa.

115. The proposed removal of the facilitation payments defence may lead to a reduced investment in those countries by AAMIG member companies, due to a lack of necessary public services or infrastructure and an inability to hire appropriate senior managers, along with an attendant loss of opportunities for those countries to benefit, as described above.

116. That outcome would be contrary to Australia's aid objectives and to its support of the social and economic independence of developing countries, including those in Africa.

Regulatory certainty

117. As outlined above, the alternative to the facilitation payments defence is reflected in the recently enacted UK Bribery Act, which doesn't have the defence and, instead, relies on an absolute and unfettered prosecutorial discretion of the British Serious Fraud Office and DPP, to prosecute bribery and corruption in light of uncertain general defences.

118. These defences rely on showing ill-defined "adequate procedures" were in place to prevent bribery that are "proportionate" to that company's particular circumstances.

119. There is genuine and significant uncertainty in when prosecutorial discretion will be exercised and what might meet the requirements for the defence of "adequate procedures" for any particular company. There exists no reliable precedent to guide companies in that regard.

120. That situation is unsatisfactory and must not be replicated in Australia. For good reason, the Australian Parliament rejected imposing a prosecutorial discretion when it drafted the legislation and opted for the prescriptive legislated facilitation payments defence. That approach has given Australian companies greater regulatory certainty, and nothing calls the decision into question.

Reducing corruption and associated delays and costs

121. The facilitation payments defence does not cause foreign corruption because facilitation payments specifically exclude any connection to the company receiving a business advantage.

122. The corruption potentially inherent in facilitation payments is not one of foreign bribery. For Australia to penalise Australian companies and individuals for the conduct of local officials, is to stray into domestic issues and doesn't favourably impact on the foreign corruption that is the intended target of the legislation.

123. Critically, as described elsewhere, removal of the defence will reduce transparency and drive the payments underground and almost certainly increase corruption and be counterproductive to the objectives of Australia's foreign bribery laws.

124. The removal of the defence will most likely increase delays and costs because many companies will not be able to secure routine decisions which they are entitled to under the laws of that country. Without access to routine government services these companies will face delays in operations, which will increase their costs and could jeopardise projects.

The reported practices of Australian companies

125. AAMIG makes two observations with regard to the Public Consultation Paper's treatment of this issue.

(a) The evidence referred to is anecdotal only. There is no reliance on a properly conducted review of the frequency of claims for tax deductions in relation to facilitation payments.

(b) In any event, a low frequency of claims for tax deductions in relation to facilitation payments is, in AAMIG's view, of modest importance and to be expected.

(i) A comparatively small number of Australian companies, from amongst the wider Australian business community, are currently

operating in countries where facilitation payments are necessary. To those companies, many of which are AAMIG members, the facilitation payments defence is highly significant.

(ii) It would be unjustly harsh to remove an important protection for those companies on the basis that many companies that do not operate in those difficult developing countries do not need to make claims for deductions.

(iii) Also, the frequency of such payments does not reflect their importance to secure basic services to which they are entitled and their continued operation in those countries.

126. In AAMIG's submission this does not represent a valid, or significant, basis for removing the facilitation payments defence.