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24 August 2015

Senate Standing Committee on Economics  
P.O. Box 6100  
Parliament House  
Canberra ACT 2600

Dear Chairman,

### **PUBLIC CONSULTATION PAPER: FOREIGN BRIBERY**

The **Australia-Africa Mining Industry Group (AAMIG)** was established in 2011 to support the Australian mining industry active in the countries of Africa to deal with non-technical risk issues. These include political and social risk, bribery and corruption, health risk, security and military issues, poverty and the behaviour it promotes, and a number of other relatively challenging issues, as well as promoting partnerships with the Australian Government, African Governments, international organisations, NGOs and academia.

In response to the call for public comment on foreign bribery by the **Senate Standing Committee on Economics** in early July 2015, AAMIG refers the Committee in the first instance to the AAMIG submission made on 15<sup>th</sup> December 2011 to the Federal Attorney General, a copy of which is **attached**.

AAMIG is committed to efforts that improve governance, including efforts directed at combatting bribery and corruption, which can have a significant effect on a country's attractiveness as an investment destination. However AAMIG is strongly of the view that excessive focus on the issue of Facilitation Payments is unwarranted and is a distraction. AAMIG believes it is a serious error of judgement to consider that the removal of the Facilitation Payments Defence from the Australian legislation would have a material impact on the issue of bribery and corruption. This issue is much more complex than that.

### **OECD Phase 3 Report**

In April 2015, Australia issued its response<sup>1</sup> to the recommendations in the OECD Phase 3 Report on Australia's implementation of the "OECD Convention on Combatting Bribery of Foreign Public Officials in International Business" which was issued in October 2014.

Of particular interest to AAMIG members operating in Africa were the OECD's recommendations on facilitation payments and Australia's response now to this issue, as well as certain of the other capacity-building recommendations.

The OECD Phase 3 Report recommended that Australia "Continue to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records."

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<sup>1</sup> <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf>

In its April 2015 response to the OECD Report, the Australian Government reported that it “has continued to raise awareness of the distinction between facilitation payments and bribes through outreach engagements at workshops, forums and training opportunities.” In addition, it reported that the Federal “Attorney-General’s Department has developed an online learning module on foreign bribery, in consultation with other agencies involved in foreign bribery outreach activities.” AAMIG’s approach is consistent with that of the Australian Government.

### **Definition of Facilitation Payments**

Facilitation payments, in layman’s terms are defined as small payments made to public officials to ensure the timely delivery of routine government services to which there is a legal entitlement. When the intent of such payments is to influence a public official with regard to the awarding or retention of business, it crosses the line and becomes an act of bribery.

### **AAMIG’s Efforts to improve awareness**

From the time of AAMIG’s submission to the Federal Attorney-General in December 2011, which advocated for the retention of the Facilitation Payment Defence, AAMIG has held a number of Anti-bribery & Corruption workshops in Australian capital cities. These workshops were aimed at raising the awareness of:

- a) the distinction between facilitation payments and bribes,
- b) the need for contemporaneous, accurate financial recording of such payments, including the full circumstances under which a payment has been made,
- c) the importance of minimising the use of facilitation payments to the extent possible, and
- d) the need for appropriate systems and processes to be put in place to enable the development of a demonstrable ethical corporate culture.

At AAMIG’s Networking Session held in Perth in April 2015, there were three related presentations: one by AAMIG member Deloitte on their Bribery & Corruption Survey of Australia & New Zealand 2015<sup>2</sup>; the second by a senior representative of the Federal Attorney-General’s Department presenting their on-line learning module on foreign bribery<sup>3</sup> and other guidance; and the third by a senior representative from the Australian Federal Police presenting on the establishment of the Fraud and Anti-Corruption Centre and other initiatives.

These AAMIG initiatives are part of an on-going collaborative effort involving the Government and the resources industry operating in Africa, aimed at establishing a unified Australian approach to anti-bribery and corruption and other important issues.

### **Other Legislative Frameworks**

The use of facilitation payments in the conduct of business in lesser-developed countries is accepted under the USA *Foreign Corrupt Practices Act (FCPA)* and Australian *Commonwealth Criminal Code (Bribery of Foreign Public Officials) Act* and is consistent with OECD Guidelines, though the latter encourages companies to gradually move away from the practice.

The UK Bribery Act 2011 does not allow the use of Facilitation Payments, although the UK Serious Fraud Office has indicated that it is not concerned with minor payments.

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<sup>2</sup> <http://www2.deloitte.com/au/en/pages/risk/articles/bribery-corruption-2015-survey.html>

<sup>3</sup> <http://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/OnlineModule/index.html>

In June 2013, a number of amendments were made to Canada's *Corruption of Foreign Public Officials Act (CFPOA)*, designed to close what were seen by some as significant loopholes, create certain new offences and strengthen Canada's key international anti-corruption legislation. These changes to the Canadian legislation came at a time when similar changes made to the UK legislation two years earlier were coming under increased scrutiny with questions being raised in the UK about the appropriateness of a blanket ban on facilitation payments.

It is interesting to note that Canada has not put in place the implementing regulations to give effect to these legislative changes, which received royal assent more than 2 years ago.

### **The African Context**

Australian companies have been active on the African Continent for well over a decade and a half and have enjoyed a good measure of success along with their competitors from Canada and elsewhere around the world. However, the governments of many impoverished host countries in Africa lack the resources to pay some public servants adequately, or sometimes at all, particularly in those countries recently emerging from conflict. This has led to a tendency for public officials to often need some additional modest support to satisfactorily complete their work, hence the facilitation payment, e.g. a public official may need petrol for his government vehicle, to enable him to carry out on-site inspections (notwithstanding he may have already been given a small but inadequate allowance for this purpose).

Furthermore, Africa is not a uniform entity; it comprises 54 countries in various stages of development, some with enormous social, economic and governance challenges. In some of the more advanced countries, it is reasonable to expect to be able to conduct business without the need to use facilitation payments. Unfortunately, for most countries this is not the case. Legislative changes designed to govern corporate behaviour, but which treat Africa as a single entity, are likely to be ineffective as they do not take into account the practical realities of doing business there.

### **Requirement for a Team Approach**

The major mining companies work in very few African countries whilst the junior and mid-tier companies are the dominant operators across the African continent. It is simply unrealistic to expect these smaller companies that do not have the financial resources to withstand being delayed for extended periods of time, or the political capital to influence host-country Government officials to carry out their duties in a timely fashion, to carry the responsibility for changing the behaviour of public officials adversely influenced by poverty, or influence government resourcing.

AAMIG holds the view that a team approach is required to deal with the issue of facilitation payments, involving:

- large companies taking a strong stand against the use of facilitation payments because they have the political clout and financial strength to be able to do so, including the capacity to engage with bilateral agencies to help influence / improve host-government resourcing,
- small and mid-tier companies, working with facilitation payments, but minimising use where possible, and recording transactions appropriately and transparently in their accounts,
- bi-lateral (eg AusAID) and multi-lateral (World Bank) agencies helping with capacity building and providing a better working environment for government employees working in areas critical for the future economic development of host countries, and
- where appropriate, encouraging host governments to gazette the requirement for the payment for particular government services.

As poverty is the root cause of host government officials pushing for facilitation payments, behavioural change is unlikely to occur until:

- sufficient industrial development has occurred (largely through continued flows of Direct Foreign Investment),
- governments collect reasonable levels of taxes from newly established industry and individuals who are gainfully employed, and
- host governments have the financial resources and governance structures to ensure their officials are reasonably well paid and provided with the essential tools to do their jobs effectively.

We would all like to be able to conduct business in Africa without the need for facilitation payments. However, such a situation will not materialise overnight, nor in response to legislative changes imposed by Ottawa, London or Canberra. It will take time to achieve and will occur progressively across the continent as the economic well-being of citizens of host countries improves. It is simply unrealistic to expect practical progress of this scope and nature to occur overnight.

### **Concluding Remarks**

In the opinion of AAMIG, and as expressed in the AAMIG Submission to the Federal Attorney-General in 2011, the removal of the Facilitation Payments Defence would be a blunt instrument approach to what is a very complex issue, and doing so will not have the desired effect of helping to eliminate bribery across the African continent. AAMIG believes that there is a real risk that such action would be quite counterproductive and result in driving such payments underground.

Under the Australian legislation, facilitation payments are very specifically defined and strict adherence to recording such payments in a company's accounts is essential. This ensures transparency and clearly distinguishes between what is a facilitation payment and what is an act of bribery.

Facilitation payments are likely to be a continuing feature of business activity in a number of impoverished developing countries in which host governments are unable to fully fund the delivery of key services that are essential for businesses to operate. Facilitation payments need to be transparent, not pushed back under the table.

Yours faithfully,

Bill Turner  
Chairman

Trish O'Reilly  
Chief Executive Officer

Attach: AAMIG Submission to the Federal Attorney General: "Assessing the 'Facilitation Payments' Defence to the Foreign Bribery Offence and Other Measures", 15 December 2011.