Chapter 7

The facilitation payment defence

7.1 A facilitation payment is a minor payment made to a foreign public official for the purpose of speeding up minor routine government action.[1] Such a payment is legislatively recognised in Australia as a complete defence to the core foreign bribery offence in the *Criminal Code Act 1995* (Criminal Code). However, it can be difficult to differentiate between a facilitation payment and a bribe.

7.2 The 1997 Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) permits facilitation payments as an exception to member states' anti-bribery legislative frameworks. Though more recently the OECD's position has shifted, and since 2009 it has consistently recommended that states review the facilitation payment defence and encourage private enterprises to prohibit, or discourage, facilitation payments in internal company policies.

7.3 Many submissions to this inquiry noted that the defence is 'highly contested' and has been subjected to 'wide criticism' from a range of sectors and bodies.[2] This chapter explores the facilitation payment defence in Australia, scrutinises its prevalence internationally, and examines arguments to retain or abolish the defence within Australia's anti-bribery legislative framework.

Current position in Australia

7.4 Under section 70.2 of the Criminal Code, foreign bribery is punishable by up to 10 years imprisonment and a fine of up to 10,000 penalty units ($2.1 million).[3] However, under section 70.4, a person is not guilty if they can prove that the bribe was a 'facilitation payment'.

7.5 A facilitation payment for the purposes of section 70.4 is a payment of minor value, provided in return for a routine government action. Section 70.4 is a complete defence to a charge of foreign bribery. It provides in full:

> (1) A person is not guilty of an offence against section 70.2 if:
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> (a) the value of the benefit was of a minor nature; and
>
> (b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and

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1 What constitutes a 'minor payment' and 'minor routine government action' is conceptually complex and is discussed in more detail below. See the section 'A facilitation payment if distinct from a bribe'.

2 See, for example, Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 8.

3 *Criminal Code Act 1995*, ss. 70.2(4).

(c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and

(d) any of the following subparagraphs applies:

(i) the person has retained that record at all relevant times;

(ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;

(iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

7.6 Subsection (2) provides further guidance on the meaning of 'routine government action'. It explains that 'routine government action' is an action of a foreign public official that:

(a) is ordinarily and commonly performed by the official; and

(b) is covered by any of the following subparagraphs:

(i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;

(ii) processing government papers such as a visa or work permit;

(iii) providing police protection or mail collection or delivery;

(iv) scheduling inspections associated with contract performance or related to the transit of goods;

(v) providing telecommunications services, power or water;

(vi) loading and unloading cargo;

(vii) protecting perishable products, or commodities, from deterioration;

(viii) any other action of a similar nature; and

(c) does not involve a decision about:

(i) whether to award new business; or

(ii) whether to continue existing business with a particular person; or

(iii) the terms of new business or existing business; and

(d) does not involve encouraging a decision about:

(i) whether to award new business; or

(ii) whether to continue existing business with a particular person; or

(iii) the terms of new business or existing business.

7.7 Notwithstanding this statutory definition, many submissions to this inquiry indicated that businesses and regulators struggle to determine whether a particular payment does satisfy, or would satisfy, the requirements of section 70.4. In particular, King & Wood Mallesons contended that it 'is one of the more conceptually complex [issues] arising from Australia's anti-bribery legislation'.[4] Further, as the defence has never been raised before an Australian court, the absence of judicial commentary has heightened the complexity of interpreting section 70.4.

International move towards abolishing the facilitation payment defence

7.8 In examining whether Australia should abolish the facilitation payment defence, it is useful to look at other comparative countries—many of whom, in recent years, have eliminated the defence entirely. Indeed, Australian companies operating internationally or with subsidiaries domiciled in overseas jurisdictions are also increasingly acting on their own by choosing to prohibit such payments in their internal company policies.[5]

Diminishing acceptance by international organisations

7.9 As stated above, the OECD Convention does not prevent member countries from allowing a defence for facilitation payments. The Commentary on the Convention which was issued in November 1997 notes that 'small "facilitation" payments do not constitute payments "made to obtain or retain business or other improper advantage"' and are therefore not within the meaning of article 1's prohibition on bribery. The Commentary notes further that while OECD member states 'can and should' address the 'corrosive phenomenon' of facilitation payments, 'criminalisation…does not seem a practical or effective…action'.[6]

7.10 However some 12 years later, in 2009, the OECD Council adopted another set of recommendations for further combating bribery of foreign public officials in international business transactions. These included a recommendation to encourage the private sector and their public officials to discourage the use and acceptance of facilitation payments, with the aim of eliminating it entirely. The relevant section of the recommendation of the OECD reads as follows:

> **RECOMMENDS**, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:
>
> undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;

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4 King & Wood Mallesons, *Submission 11*, p. 12.

5 See for example, BHP Billiton, *Submission 37*, p. 1; International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41; and The Australian Institute and Jubilee Australia, *Submission 15*, pp. 4–8.

6 OECD, Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997, paragraph 9, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 19 February 2018).

> 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 are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records….
>
> **URGES** all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments. [7]

7.11 Since 2009, the OECD has continued to focus on alternative mechanisms other than criminalisation. For example, in its update to the Guidelines for Multinational Enterprises issued in 2011, the Council urges businesses to 'prohibit or discourage' the use of small facilitation payments 'in internal company controls, ethics and compliance programmes or measures'. However, recognising that such facilitation payments will continue to be made, the Guidelines note that where and when such payments are made, businesses should 'accurately record these in books and financial records'.[8]

7.12 The Asia Pacific Economic Cooperation (APEC) Code of Conduct for Business follows the OECD approach. Rather than recommending states criminalise facilitation payments, the Code urges businesses to eliminate them.[9] Although the OECD and APEC do not require the criminalisation of facilitation payments, other international instruments and organisations do have stronger positions on facilitation payments. For example, the United Nations Convention against Corruption (UNCAC), a multilateral treaty Australia has ratified, prohibits facilitation payments.[10] Australia's obligations under UNCAC are discussed in detail in Chapter 2.

Comparative countries

7.13 Evidence presented to the committee during the course of the inquiry drew attention to the many countries, including OECD member states, that have, or are making moves to, eliminate the facilitation payments defence.

7.14 For example, facilitation payments are prohibited in the United Kingdom (UK).[11] The *Bribery Act 2011* (UK) does not allow the use of facilitation payments,

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7 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, p. 22, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 19 February 2018).

8 OECD Guidelines for Multinational Enterprises, Section VII Combating Bribery, Bribe Solicitation and Extortion, para 3, pp. 47–48, http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 20 February 2018).

9 APEC Anti-corruption Code of Conduct for Business , September 2007, Guideline 3.C, p. 1, https://www.apec.org/Publications/2007/09/APEC-Anticorruption-Code-of-Conduct-for-Business-September-2007 (accessed 20 February 2018).

10 United Nations Convention against Corruption, Article 16.1, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (accessed 21 February 2018).

11 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 39.

and the 'defence has never been recognised as a legitimate excuse in any earlier anti-corruption or bribery legislation'.[12] The UK Serious Fraud Office is unequivocal; having stated that such a payment 'is a type of bribe and should be seen as such'.[13] Associate Professor Cindy Davids of Deakin University noted that similar prohibitions are also in force in France and Japan.[14]

7.15 Additionally, Canada 'moved to abolish its facilitation payments defence',[15] through the Fighting Corruption Act 2013 (Bill S-14).[16] Interestingly, Bill S-14 provided for the provision eliminating the exception for facilitation payments to come into force on a date to be fixed by an order of the federal Cabinet. The delayed implementation of this aspect of Bill S-14 was intended to allow businesses adequate time to amend their practices and procedures, and as of 31 October 2017, facilitation payments are no longer permitted under Canadian law, regardless of whether the payment occurred in Canada or abroad.[17]

7.16 Conversely, the United States (US) and New Zealand (NZ) currently retain the facilitation payment defence, albeit narrow in scope.

7.17 In the US, the *Foreign Corrupt Practices Act* of 1977 (FCPA) permits payment to foreign officials 'to expedite or to secure the performance of routine government action'.[18] The FCPA provides the same examples of 'routine government action' as under subection 70.4(2) of the Criminal Code—that is, 'an action which is ordinarily and commonly performed by a foreign official', including:

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
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> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

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12 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 9.

13 Transparency International Australia, *Submission 31*, p. 9; citing www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx.

14 Associate Professor Cindy Davids, *Submission 34*, p. 21.

15 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 39.

16 Bill S-14; See Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 10.

17 Government of Canada, *Canada repeals facilitation payments exception in Corruption of Foreign Public Officials Act*, https://www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeig.html (accessed 20 February 2018).

18 15 U.S.C. § 78dd-1(b).

(v) actions of a similar nature.[19]

7.18 Nevertheless, the International Bar Association Anti-Corruption Committee, (IBAACC) explained to the committee that in the US the facilitation payments defence has 'been increasingly criticised',[20] and, as Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier note, 'over the years, the scope of the defence has become narrower'.[21] Bronitt et al explain the narrowing of the defence by reference to *United States v Kay*, a federal circuit court decision concerning allegations of bribery of officials in Haiti:[22]

> In this case, the definition was narrowed to exclude acts 'that are within an official's discretion or would constitute misuse of an official's office.' As nearly every country formally prohibits its officials from taking bribes or payments as a form of misuse of public office, this change in the definition has essentially 'killed off' the defence.[23]

7.19 Further, the IBAACC noted that it understands that the Department of Justice and the Securities Exchange Commission now take the position that only the most minor and inconsequential payments can properly be characterised as facilitating or expediting payments.[24] Perhaps responding to the narrowing exception, or anticipating its eventual demise, many companies within the US have begun to prohibit facilitation payments in their own policies and procedures.[25]

7.20 As noted above, the US is not the only country that provides an exception for facilitation payments—NZ also currently retains this defence. However, as the IBAACC noted, the NZ Parliament recently considered a bill that 'significantly cut back the scope of the defence', and indeed, the Opposition attempted to amend the bill to abolish the defence altogether.[26] The Organised Crime and Anti-Corruption Legislation Bill passed into law in NZ in November 2015 by way of 15 amendment Acts. As such, the facilitation payments exception in NZ now excludes any action that

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19 15 U.S.C. § 78dd-1(f)(3)(A).

20 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 39.

21 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, pp. 9–10.

22 *United States v Kay* 359 F.3d 738 (5th Cir. 2004). The United States Court of Appeals for the Fifth Circuit is a federal court with appellate jurisdiction over 9 district courts in the federal judicial districts of Louisiana, Mississippi and Texas.

23 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, pp. 9–10.

24 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 39.

25 Norton Rose Fulbright, *Business ethics and anti-corruption world*, Publication Issue 2, February 2014, http://www.nortonrosefulbright.com/wissen/publications/113670/business-ethics-and-anti-corruption-world (accessed 20 February 2018).

26 International Bar Association, *Submission 6*, pp. 41–42. The bill is the Organised Crime and Anti-Corruption Legislation Bill, http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL56502_1/organised-crime-and-anti-corruption-legislation-bill (accessed 20 February 2018).

provides an undue material benefit to a person who makes a payment or an undue material disadvantage to any other person.[27]

Facilitation payment defence in Australia

7.21 In November 2011 the Australian Government released a public consultation paper seeking views on Australia's foreign bribery laws, and in particular the treatment of 'facilitation payments' under Australian law.[28] As noted by the IBAACC in its submission to this inquiry in 2015:

> The Government only allowed a period of approximately 30 days for submissions –that is until December 2011. Since December 2011, a period of 3 years and almost 8 months, there has been silence from Canberra on this topic.[29]

7.22 Some submissions to the 2011 consultation argued strongly for the retention of the defence.[30] However, many argued for its removal, emphasising the inconsistencies between both the defence and Australia's international treaty obligations, and Australia's domestic bribery laws and the domestic laws of comparative countries (which are some of Australia's major trading partners).[31] These submitters also observed the difficulties faced in drawing a distinction between a bribe and a facilitation payment; and considered how the defence would assist in creating a strong culture of compliance.

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27 See Organised Crime and Anti-Corruption Legislation Bill, paras. 105C(1)(c)(i) and (ii). http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL56502_1/organised-crime-and-anti-corruption-legislation-bill (accessed 20 February 2018).

28 See Australian Government, Department of Foreign Affairs and Trade, *Corruption*, http://dfat.gov.au/international-relations/themes/corruption/pages/corruption.aspx (accessed 20 February 2018) and National Library of Australia, Australian Government Web Archive, Attorney-General's Department Crime Prevention, A discussion paper assessing aspects of Australia's foreign bribery laws launched on 15 November 2011, *Bribery of foreign public officials is a crime*, http://webarchive.nla.gov.au/gov/20120316193242/http://www.crimeprevention.gov.au/agd/WWW/ncphome.nsf/Page/Financial_Crime_Bribery_of_Foreign_Public_Officials (accessed 21 February 2018).

29 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

30 National Library of Australia, Australian Government Web Archive, Attorney-General's Department Crime Prevention, *Bribery of foreign public officials*, http://webarchive.nla.gov.au/gov/20130904121500/http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx (accessed 21 February 2018). See for example the Australia-Africa Mining Industry Group submission and the Australian Institute of Superannuation Trustees submission.

31 National Library of Australia, Australian Government Web Archive, Attorney-General's Department Crime Prevention, *Bribery of foreign public officials*, http://webarchive.nla.gov.au/gov/20130904121500/http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx (accessed 21 February 2018). See for example the Regnan submission and the Australian Compliance Institute submission.

7.23 In October 2012 the Phase 3 OECD Report on Australia's implementation of the OECD Convention was released. In relation to the application and awareness of the facilitation payment defence it noted that:

> …facilitation payments appear to be frequently equated with any bribes of small value...There is a perception that Australian companies may be making facilitation payments, and that the practice may be prevalent, at least in certain regions.[32]

7.24 In light of the above, the Phase 3 OECD Report recommended that:

> Australia continue to raise awareness of the distinction between bribes and facilitation payments, 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.[33]

7.25 In March 2015 the Australian Government proposed amendments to Australia's foreign bribery laws, as detailed in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015. However, no reference was made in the bill to the facilitation payment defence.[34] This bill passed both houses on 10 November 2015.[35]

Current developments

7.26 As discussed in Chapter 2, the Attorney-General's Department (AGD) released draft legislation and a public consultation paper outlining proposed amendments to the foreign bribery offence in the Criminal Code in April 2017 (2017 consultation paper). However, the 2017 consultation paper noted that:

> It is not proposed that the existing facilitation payment defence be amended. This defence has not presented as an issue in the enforcement of the foreign bribery offence.[36]

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32 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 10, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

33 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 11, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

34 Parliament of Australia, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5430 (accessed 20 February 2018).

35 Parliament of Australia, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5430 (accessed 20 February 2018).

36 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 4.

7.27 As such, it is not surprising that the proposed amendments to Australia's foreign bribery laws, as detailed in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (CCC bill), introduced to the Parliament in December 2017, also make no reference to the facilitation payment defence.

7.28 However, of note is the December 2017 Phase 4 OECD Report which observed that despite the extensive awareness-raising initiatives and consultation processes on the use of the facilitation payment defence:

> …there remains significant dissatisfaction with the existence of the [facilitation payment] defence among Australia's public and private sectors and civil society representatives... [37]

7.29 The Report also went on to recommend that the Working Group on Bribery in International Business Transactions:

> …closely follow-up the Australian Government's ongoing review and monitoring of the defence. In particular, the WGB [Working Group on Bribery in International Business Transactions] should follow-up on any recommendations on facilitation payments that come out of the ongoing Senate Inquiry into foreign bribery.[38]

7.30 Mr Tom Sharp of the AGD, provided evidence to the committee about the previous consultation on the repeal of the facilitation payment defence. However, Mr Sharp stated that:

> There are some parts of business, operating in particular sectors and in particular parts of the world, which believe that facilitation payments are necessary and argue for retention of the defence. Essentially, it's a matter for government as to whether they retain the defence.[39]

7.31 The committee questioned representatives from the AGD as to why the recent 2017 consultation paper had not included a proposal to reform the facilitation payment defence. Ms Kelly Williams of the AGD, stated:

> No reform was proposed in the recent consultation paper…because our advice was that the defence hasn't proposed a barrier to prosecution. In line with our obligations under the OECD convention, obviously, Australia actively discourages individuals and businesses from making those payments.[40]

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37 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 35, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

38 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 35, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

39 Mr Tom Sharp, Senior Legal Officer, Criminal Law Reform Section, Attorney-General's Department, *Committee Hansard*, 31 October 2017, p. 49.

40 Ms Kelly Williams, Assistant Secretary, Criminal Law Policy Branch, Attorney-General's Department, *Committee Hansard*, 31 October 2017, p. 49.

7.32 Mr Shane Kirne of the CDPP confirmed this stance, while highlighting to the committee that:

> In the limited number of matters that we've seen come through—bearing in mind we only see what's being investigated—facilitation defence is not likely to be an issue that raises its head in the matters that we're currently looking at.[41]

7.33 Mr Kirne further explained that this is because of the scale of the matter involved and other factors, including:

> …the clandestine nature of what's gone on and the scale of the payments, and there's no record in the company records that would meet the defence, because it has to be recorded in a particular way and signed off by the relevant persons… the defence would not normally be made out, because the books and records wouldn't be recorded appropriately… I suspect many entities that are engaging in foreign bribery are not recording them in the appropriate way. They're not likely to put 'bribe to foreign official' in the expenses account.[42]

Businesses taking action to enhance integrity

7.34 Despite the lack of legislative action in this area, it appears that Australian businesses are taking matters into their own hands and increasingly restricting, or prohibiting, facilitation payments.

7.35 The Australia Institute and Jubilee Australia commissioned research from CAER (a privately owned company which provides independent research and services) on the governance arrangements concerning bribery and facilitation payments across ASX100 companies.[43] CAER's research indicated that many ASX100-listed companies are increasingly taking seriously the issues of bribery and facilitation payments, and the changing nature of governance arrangements around facilitation payments compared to gifts or bribery. Specifically, their evidence showed that governance arrangements restricting facilitation payments had become far more common over the decade before 2015 for ASX100-listed companies, increasing from 24 per cent in 2006 to 65 per cent in 2015. However, as the Australia Institute and Jubilee Australia noted, 'this leaves a third of Australia's major companies without such arrangements'.[44]

7.36 The IBAACC also noted this change, and explained that in their experience:

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41 Mr Shane Kirne, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 43.

42 Mr Shane Kirne, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 43.

43 The Australia Institute and Jubilee Australia, *Submission 15*, p. 4.

44 The Australia Institute and Jubilee Australia, *Submission 15*, p. 8.

> …many corporations operating out of Australia and a significant number of multi-national corporations with subsidiaries in Australia and many high risk jurisdictions, all ban facilitation payments in their internal codes of conduct and business policies.[45]

7.37 This is the committee's understanding as well. For example, BHP informed the committee that their code 'prohibits all forms of corruption and bribery, including expressly prohibiting facilitation payments'.[46]

Stakeholder opinion

Arguments for the retention of the defence

7.38 A number of submissions argued in favour of retaining the facilitation payment defence. These submissions generally adopted justifications consistent with the typology provided by Associate Professor Davids, who argued that the defence should be abolished. Associate Professor Davids explained that 'several justifications are often put forward to defend facilitation payments', including that:

- facilitation payments do not involve the exercise of discretion by the foreign public official and therefore do not result in the same harms;
- because a facilitation fee is one routinely required by the foreign public official, there is less moral culpability than in those situations in which larger bribes are paid voluntarily in order to influence the exercise of official discretion in specific cases;
- it is not practically possible to do business in some countries without making facilitation payments; and
- implementing a ban would unduly disadvantage Australian companies.[47]

7.39 These justifications can be classed into two broad categories—principled and pragmatic. The first two reasons are principled attempts to reject the notion that facilitation payments are bribes, while the second two explanations ignore this moral question and focus instead on the 'practical realities' of doing business.

7.40 The Australia–Africa Mining Industry Group (AAMIG) provided the strongest defence of facilitation payments and relied on both principled and pragmatic justifications. This section explores this, and other, concerns.

A facilitation payment is distinct from a bribe

7.41 On a principled approach, AAMIG explained to the committee the distinctions between facilitation payments and bribes. AAMIG noted that facilitation payments are 'small payments made to public officials to ensure the timely delivery of routine government services to which there is a legal entitlement'. In contrast, 'when

45 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

46 BHP Billiton, *Submission 37*, p. 1.

47 Associate Professor Cindy Davids, *Submission 34*, pp. 21–22.

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'.[48]

7.42 Diaspora Legal also drew a fine distinction between facilitation payments and bribes, explaining that facilitation payments are 'generally payments to obtain something lawful, in a lawful manner'.[49] However, these arguments appear to presuppose the legality of a facilitation payment, by contending that their use is 'lawful'.

7.43 In any case, where the distinction between a facilitation payment and a bribe centres on 'intent' or 'purpose', it may be difficult to differentiate between the two. For many submitters the complexity of the statutory provision has resulted in an inadequate awareness of the distinction between a facilitation payment and a bribe.

7.44 Diaspora Legal shared this concern and complained that some Australian agencies, such as Austrade, 'mischaracterise' facilitation payments as bribes. In some cases, this is so prevalent that 'prudent legal advice' recommends that Australian entities 'should not engage with Austrade in their international dealings lest they be exposed to a misguided prosecution for conduct which is lawful'.[50] As a consequence, investment and economic activity may possibly be reduced.

7.45 Diaspora Legal called upon the committee to recommend appropriate training for all Australian agencies, 'so that they may understand clearly the difference between a facilitation payment and a bribe and be able to articulate that a facilitation payment is lawful under Australian law and a bribe is not'.[51] However this can go both ways. Mr Neville Tiffen, a specialist consultant on business integrity, corporate governance and compliance, noted that, 'what many people loosely call "facilitation payments" are in fact small bribes that would not fit the definition'.[52]

7.46 King & Wood Mallesons and the Law Society of South Australia echoed the concerns of Diaspora Legal, explaining that greater guidance for businesses seeking to rely on the defence is sorely needed. The Law Society of South Australia suggested that:

> It would be beneficial to obtain greater guidance, particularly as to what payments may be characterised as permissible facilitation payments, and what payments and conduct would amount to conduct giving rise to an offence.[53]

7.47 King & Wood Mallesons clarified that:

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48 Australia–Africa Mining Industry Group, *Submission 7*, p. 2.

49 Diaspora Legal, *Submission 5*, p. 5.

50 Diaspora Legal, *Submission 5*, p. 5.

51 Diaspora Legal, *Submission 5*, p. 6.

52 Mr Neville Tiffen, *Submission 16*, p. 10.

53 Law Society of South Australia, *Submission 23*, p. 2.

> While the elements of the defence are set out in the Criminal Code, there is no case law on how to satisfy the elements. In the absence of guidance from government, businesses have been left to rely on very conservative legal advice.[54]

7.48 King & Wood Mallesons also noted some of the conceptual difficulties facing companies seeking to rely on the defence. For example, under paragraphs 70.4(1)(a) and 70.4(1)(b) of the Criminal Code, the value of the benefit offered and the routine government action that the benefit was intended to secure, must be of a 'minor nature'. However, 'there is no clear guidance about what this phrase means'.[55] King & Wood Mallesons acknowledged that it may not be possible to set a specific dollar amount, particularly because of currency fluctuations or differences in purchasing power in different countries. Nevertheless, the absence of government or judicial guidance causes difficulties for businesses that may have several questions: 'One such question is whether the value of a benefit can be assessed relative to the size of the transaction, or the relative wealth of the recipient'.[56] To illustrate this uncertainty, King & Wood Mallesons provided the following examples:

> A payment by a large multinational corporation of what it considers to be of a minor nature could be characterised very differently if the same payment is made by a small family business.
>
> A payment of $10,000 might, generally speaking, be considered significant; however, it may be perceived as relatively minor if millions of dollars were at stake if the routine governmental action were not secured.
>
> Payments considered to be of a minor nature in a corporation's home country may be viewed differently in the recipient's country depending on typical living standards, incomes and variations in cultural and business practices.
>
> Payments may need to be made to a number of officials to achieve routine government action. The payments may be small when considered individually but may be substantial once aggregated.[57]

7.49 King & Wood Mallesons argued that 'formal guidance from the Australian government' on how and when the facilitation payments defence applies 'would provide the corporate sector with much needed support'.[58] It would also provide clarity to the Australian community about the line of difference between facilitation payments and bribes.

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54 King & Wood Mallesons, *Submission 11*, pp. 2–3.

55 King & Wood Mallesons, *Submission 11*, p. 13.

56 King & Wood Mallesons, *Submission 11*, p. 13.

57 King & Wood Mallesons, *Submission 11*, p. 13.

58 King & Wood Mallesons, *Submission 11*, p. 14.

A pre-clearance process

7.50 In seeking formal guidance on what is classified as a facilitation payment, King & Wood Mallesons contended that a pre-clearance process could be beneficial. They explained that such a process is utilised in the US:

> United States companies considering a prospective payment to foreign public officials may apply to the Attorney-General for an opinion on whether the conduct would violate the FCPA. A consequent opinion must be issued within 30 days and be published online. There is a rebuttable presumption that a company which has acted in accordance with an opinion of the U.S. Attorney-General has complied with the FCPA. Advance clearance of prospective transactions provides legal certainty to companies and the security to proceed without concern for the risk of potential criminal prosecution.[59]

7.51 While acknowledging that some commentators have criticised this system as particularistic, reactive and of limited use,[60] King & Wood Mallesons suggested that adopting a pre-clearance process or an opinion procedure in Australia would be beneficial by:

- demonstrating the Australian government's commitment to enforcing the anti-bribery provisions of the Criminal Code;
- encouraging the voluntary disclosure of potential bribery issues by corporate Australia;
- providing valuable guidance to the corporate sector; and
- providing legal certainty.[61]

Australian companies will be placed at a competitive disadvantage

7.52 Some submissions contended that abolishing the facilitation payment defence would place Australian companies at a competitive disadvantage. In particular, AAMIG argued that abolishing the defence would disproportionately impact small and mid-tier mining companies. AAMIG explained that it is 'simply unrealistic' to expect that smaller companies, which 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'.[62]

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59 King & Wood Mallesons, *Submission 11*, p. 14.

60 King & Wood Mallesons, *Submission 11*, p. 15; citing OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (October 2010), p. 29, para. 94.

61 King & Wood Mallesons, *Submission 11*, p. 16.

62 Australia–Africa Mining Industry Group, *Submission 7*, p. 3.

7.53 The Export Council of Australia agreed, explaining that small and medium enterprises are at a 'specific disadvantage' and abolition of the facilitation payment defence would have a 'disproportionately adverse effect' on them and their service providers 'when called upon to make such facilitation payments'.[63] With specific reference to service providers to exporters, such as licenced customs brokers and freight forwarders, the Export Council Australia explained:

> In many cases those service providers make payments or adopt procedures based on direction from government agencies or from parties without whose consent services cannot be provided. For example, such service providers are regularly requested by local Customs' authorities or other parties to undertake separate procedures and pay additional amounts to shipping lines, airlines or port authorities to ensure that "space" is provided at times of peak demand for the passage of freight. In those circumstances, both the relevant service provider and the SME [small to medium-sized enterprises] are subjected to significant pressure in circumstances in which recourse to external assistance cannot be secured at short notice. If a relevant service provider undertakes action in accordance with those directions and makes the best effort possible to ensure that the payments are validly made or other procedures are followed as directed, then both the SME and the service provider should not be subject to further adverse action by the authorities.[64]

7.54 Diaspora Legal was also concerned about the competitive disadvantage that abolishing the facilitation payments defence might place on Australian businesses. However, it explained that it considered that Australian businesses already suffer a significant disadvantage compared to international competitors as Australian law exceeds OECD requirements. Therefore removing the facilitation payments defence would place further undue and unequal pressures on Australian businesses forced to operate on a different playing field.[65]

7.55 While acknowledging that Australian law as-written does not exceed OECD requirements, Diaspora Legal contended (as mentioned above) that Australian agencies, 'such as Austrade' miscategorise facilitation payments as bribes, and then implement 'a policy of reporting everything they have classified as bribes for investigation and prosecution'.[66] Diaspora Legal therefore considered that, in practice, Australian law surpasses OECD requirements.

7.56 However, Mr Kane Preston-Stanley, a former lead legal and policy officer on Australia's anti-corruption program, also supported the idea of debarment. However, Mr Preston-Stanley emphasised explained that the scope of the facilitation payments defence generally does not cover making companies more competitive. Mr Preston-Stanley noted that 'routine government action' is quite limited and 'does not involve a

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63 Export Council of Australia, *Submission 30*, p. 3.

64 Export Council of Australia, *Submission 30*, p. 4.

65 Diaspora Legal, *Submission 5*, p. 5.

66 Diaspora Legal, *Submission 5*, p. 5.

decision about whether to *award new business*; or whether to *continue existing business* with a particular person; or the *terms of new business or existing business*', thus:

> Any benefit to obtain or retain business is therefore a bribe, regardless of any competitive factors, perceived entitlement as the "best" bidder, or perceived threat of business not continuing…Australian law has never accepted that any benefits are acceptable in competing for business or in ensuring that one continues to do business.[67]

Prohibition will not eliminate bribery

7.57 AAMIG adopted another pragmatic justification for the retention of the facilitation payments defence—that removing the defence will have no effect on the prevalence of bribery or corruption.[68] As will be examined in the following section, a common reason given by proponents for eradicating the defence centred on its very existence as helping to maintain an environment in which corruption can flourish. For these submitters,[69] the removal of the defence would help to make clear that all forms of bribery or corruption are wrong.

7.58 However, AAMIG argued that the causes of bribery and corruption are 'very complex', and removing the defence would be a 'blunt instrument approach' which 'will not have the desired effect of helping to eliminate bribery across the African continent'.[70] AAMIG explained that 'poverty is the root cause of host government officials pushing for facilitation payments' and therefore 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.[71]

7.59 AAMIG explained further that while their members would 'like to be able to conduct business in Africa without the need for facilitation payments', such a situation 'will not materialise overnight', nor in response to legislative changes 'imposed by Ottawa, London or Canberra'. AAMIG continued, noting that it is 'simply unrealistic to expect practical progress of this scope and nature to occur overnight',[72] because

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67 Mr Kane Preston-Stanley, *Submission 40*, pp. 4–5 (emphasis in original).

68 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

69 See, for example, Regnan, *Submission 13*; Control Risks, *Submission 12*; Mr Neville Tiffen, *Submission 16*.

70 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

71 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

72 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

prohibiting such payments does not take into account the 'practical realities of doing business' in some countries in Africa.[73] In fact, according to AAMIG, banning facilitation payments will be counterproductive 'and result in driving such payments underground'.[74]

Prohibition will hurt people most in need

7.60 Relatedly, AAMIG also contended that facilitation payments should be understood in a different light—that is, rather than an exception to the anti-bribery regime, facilitation payments can have a positive effect on the receiving society. AAMIG explained:

> …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).[75]

Lack of empirical evidence

7.61 Associate Professor Davids acknowledged that there are 'undoubted complexities' for businesses that operate in high risk parts of the world and in high risk sectors, but considered that greater transparency over the use of facilitation payments by businesses would be beneficial and would allow an informed debate over their advantages. Associate Professor Davids indicated that she 'would like to see a preparedness by industry sectors subject to particular risk in these areas to open the door to researchers', so that:

> …we can have an informed debate around the ostensible need for and use of facilitation payments. It may be the case that an evidence-based argument can be made for the retention of facilitation payments, based on a nuanced micro analysis. We simply don't know.[76]

7.62 Associate Professor Davids told the committee that accurate research on the actual use of facilitation payments remains scarce. Associate Professor Davids explained:

> Proponents arguing in favour of the retention of a facilitation payments defence rarely cite surveys or empirical evidence detailing the specific circumstances and frequency of use surrounding payments…However, beyond the formal definitions provided for in the Australian framework,

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73 Australia–Africa Mining Industry Group, *Submission 7*, p. 3.

74 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

75 Australia–Africa Mining Industry Group, *Submission 7*, p. 3.

76 Associate Professor Cindy Davids, *Submission 34*, p. 24.

> there is a lot of guesswork around the varying notions of what people on the ground regard as facilitation payments.[77]

7.63 Dr Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, explained that:

> We tried to track this down. We spoke to the Australian Taxation Office about if companies declare their facilitation payments in their tax returns. The answer was 'No'. Effectively, it will be hidden in their other costs. Again, you have no sense of how many of these are being paid or what size they are.[78]

7.64 Without this information it is unclear whether the arguments in favour of the retention of the facilitation payment defence are justified.

Arguments in favour of abolishing the facilitation payment defence

7.65 A majority of submissions argued in favour of abolishing the facilitation payments defence.[79] Generally speaking, the justifications offered fell into the following categories—that, facilitation payments:

- are no different to bribery;
- help to maintain an environment in which bribery can take root and flourish;
- are already publically discouraged by the Australian government (and the OECD); and
- are prohibited by many comparative countries, meaning that retaining the defence actually places Australia at a competitive disadvantage.

7.66 Many of these arguments directly contradict those of the submitters who contended the defence should be retained and can also be divided into principled and pragmatic justifications.

7.67 Mr Mark Pulvirenti, Partner, Control Risks stated:

> I am unequivocal in my position—that the defence of facilitation payments should be removed from the Criminal Code. We see facilitation payments as bribes, period.[80]

7.68 In evidence before the committee, Mr Pulvirenti went on to explain:

> …we just consider that the government sends a very mixed message, to say to the community that facilitation payments are okay—effectively saying, 'You can bribe someone as long as it's a small amount,' which really sends a very mixed message, and one that I don't think is a proper one.[81]

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77 Associate Professor Cindy Davids, *Submission 34*, p. 24.

78 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 3.

79 Law Council of Australia, *Submission 10*, p. 10.

80 Mr Mark Pulvirenti, Partner, Control Risks, *Committee Hansard*, 7 August 2017, p. 28.

81 Mr Mark Pulvirenti, *Committee Hansard*, 7 August 2017, p. 29.

7.69 Mr Robert Wyld, the Past Co-Chair of the IBAACC agreed, and expressed an opinion that facilitation payments should be banned with 'no exceptions'.[82]

7.70 In speaking to the committee about the retention of the facilitation payment defence, Mr Tiffen stated:

> I think that's very disappointing. I think it's an archaic defence. I know it still exists in the US. The UK has clearly removed it. It was already not a defence in the UK, even before the Bribery Act, but they have clearly continued that. Canada has recently removed the exemption. It is a nonsensical exemption because facilitation payments are bribes and they are illegal in the country in which they are paid, and most companies or organisations, in their code of conduct, make the statement, 'We comply with the laws wherever we operate.' As soon as a company says, 'We will allow facilitation payments,' it is saying to its staff, 'There are some laws we don't think you need to comply with,' and that's just a crazy message to be sending to staff members.[83]

Facilitation payments are no different to bribery

7.71 On a principled front, many submissions simply did not see a distinction between facilitation payments and bribery—contending that such payments are 'nothing more than small institutionalised bribes'[84] or 'not qualitatively different to bribery'.[85] Significantly, a case was made by Transparency International Australia that while facilitation payments may be customary in certain parts of the world, it is likely that it is illegal for them to be offered or received under local law.[86] As such, if a facilitation payment is not materially different from a small bribe there is no reason for a defence to exist as an exception to Australia's anti-bribery legislative framework.

7.72 The IBAACC also argued that facilitation payments are no different to bribery. The IBAACC quoted an address by Justice Terence Cole AO that emphasised the importance of consistency in rooting out all instances of bribery and corruption:

> Once the seed of sin and corruption is planted, and society has determined that it is morally, ethically and legally wrong, the seed must be sought and rooted out. The alternative is to accept corruption, and that our society has determined not to do. Rejecting corruption means rejecting all corruption. One cannot allow just a little bit of ethically or morally wrong conduct because if one does it becomes impossible to draw the bright line which permissible conduct must not cross.
>
> Under our law business is permitted to make what are euphemistically called 'facilitation payments' and, worse, are entitled to claim such

82 Mr Robert Wyld, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 39.

83 Mr Neville Tiffen, Private capacity, *Committee Hansard*, 31 October 2017, p. 3.

84 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

85 Regnan, *Submission 13*, p. 2. See also Control Risks, *Submission 12*, p. 2; Mr Neville Tiffen, *Submission 16*, p. 9; CPA Australia, *Submission 18*, p. 4; GRC Institute, *Submission 1*, p. 6.

86 Transparency International Australia, *Submission 31*, p. 9.

> payments as tax deductions. Only sophistry enables one to distinguish a facilitation payment—which is a small bribe—from the notion of a corrupt payment.
>
> Facilitation payments constitute a departure from the anti-corruption standards which our society has accepted as a basic tenet of our governmental, economic and organisational life. The laws which permit such payments and make them tax deductible blur the bright line between permissible and impermissible conduct.[87]

7.73 The IBAACC emphasised the need for clear lines:

> …it is never acceptable for such conduct to occur. Such payments blur the clear line between a bribe and a facilitation payment to the point where ethical (and indeed legal decisions) come to depend upon an individual view on the amount, scale, frequency and for what service the payment is being made.[88]

7.74 KordaMentha likewise identified the need for a clear distinction between bribery and corruption on the one hand, and ethical conduct on the other. KordaMentha cited the UK Ministry of Justice's Guidance on the UK *Bribery Act 2010*, which explained that an exemption for facilitation payments would:

> …create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.[89]

A slippery slope to bribery

7.75 Many submissions argued that retaining the facilitation payments defence is inconsistent with Australia's wider anti-bribery efforts.

7.76 Woodside Petroleum considered that the permissibility of facilitation payments 'helps to maintain an environment in which bribery can take root and flourish',[90] and therefore, it 'will be difficult, if not impossible, to comprehensively stamp out bribery of foreign public officials whilst Australian laws continue to condone the making of facilitation payments'.[91]

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87 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41, citing 'Corruption', an address by The Honourable Terence Cole AO RFD QC to the 6th National Investigations Symposium, 2 November 2006, pp. 2–3 and 7.

88 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

89 KordaMentha, *Submission 22*, p. 9; citing Guidance on the UK *Bribery Act 2010* issued by the UK Ministry of Justice (March 2011), p. 18.

90 Woodside Petroleum Ltd, *Submission 4*¸ p. 2. See also Mr David Wildman, FTI Consulting, *Submission 38*, p. 5.

91 Woodside Petroleum Ltd, *Submission 4*¸ p. 2.

7.77 Control Risks agreed, explaining that the 'legislative aim should be to eradicate corruption',[92] and that facilitation payments make this impossible.

7.78 Transparency International Australia concurred, arguing that 'removing the facilitation payments defence will reinforce the notion of zero tolerance towards all forms of bribery by a company'.[93]

7.79 These submissions also highlighted the importance of consistency in Australia's anti-bribery framework. Emphasising these points was the submission from Bronitt et al which argued that abolishing the facilitation payments defence will convey a 'strong and consistent policy message that corporations should not stimulate markets for bribes, irrespective of size and whether or not such payments to foreign public officials are considered to be "mandatory"'.[94] FTI Consulting agreed with this position, making a strong case that 'legislation should be unequivocal about prohibiting facilitation payments'.[95]

7.80 The Australia Institute and Jubilee Australia made a similar point. In surveying the trend towards private enterprises prohibiting facilitation payments internally, they noted:

> Prohibition of facilitation payments has become an accepted policy approach for an increasing number of Australian corporations, in line with international policy. Action by one country has led to improvements in corporate governance in others. An Australian policy to prohibit facilitation payments would therefore contribute to efforts to stamp out the practice well beyond our borders.[96]

7.81 A number of submissions also took issue with the claim by proponents of retaining the defence that facilitation payments are benign. KordaMentha explained that allowing facilitation payments 'muddies the waters' and 'may lead to a culture of expediency to achieve results'.[97] Associate Professor Davids noted that while facilitation payments were previously considered 'harmless', they are now recognised to be 'harmful' as they are often 'funnelled up through the system and help nurture and sustain corrupt bureaucracies, political parties and governments'.[98]

7.82 Dr Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, explained that:

> Our concern here is not primarily that a small bribe might be paid. The issue we found with this is the wider impact. We have had conversations

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92 Control Risks, *Submission 12*, p. 2.

93 Transparency International Australia, *Submission 31*, p. 9.

94 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 12.

95 Mr David Wildman, FTI Consulting, *Submission 38*, p. 5.

96 The Australia Institute and Jubilee Australia, *Submission 15*, p. 3.

97 KordaMentha, *Submission 22*, p. 9.

98 Assoiciate Professor Cindy Davids, *Submission 34*, p. 23. See also Uniting Church in Australia Synod of Victoria and Tasmania and Publish What you Pay Australia, *Submission 17*, p. 2.

> with people who have worked in companies where small bribes are paid, and they indicated that it quickly escalated. The issue is: once you start paying bribes to low-level officials, it's hard to see how you then resist demands for bribes from those further up the chain.[99]

7.83 Indeed, Regnan explained that facilitation payments have 'wider corrosive effects', including:

> …the potential for regulatory or bureaucratic capture by businesses when officials and public sector wage structures come to depend on such payments and entrenchment of other forms of corruption (e.g. nepotism) when opportunities for disproportionate gains are available.[100]

OECD discourages the use of facilitation payments

7.84 Some submissions noted that the Australian government appears ambivalent about the efficacy or value of the defence, and, in fact, actively discourages the use of facilitation payments.[101] The cross-agency submission led by the AGD's explained that 'Australian agencies strongly discourage businesses from making facilitation payments', because while such payments are permissible under Australian law, they 'may still constitute a criminal offence in the jurisdiction they are made'.[102] Woodside Petroleum noted that this suggests that government already understands the broader adverse consequences to which facilitation payments can give rise.[103] Dr Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, agreed, stating that:

> At the very minimum it should be illegal to pay bribes in places where it is illegal for the bribe to be paid. Australia should not be facilitating the breaking of other people's laws. What [sic] would be the logic to that.[104]

7.85 This position also accords with the OECD's 2009 recommendations for further combating bribery of foreign public officials in international business transactions. As noted above, the OECD has recommended that member states should encourage companies to 'prohibit or discourage the use of small facilitation payments in internal company controls'.[105] As research from CAER cited above demonstrated, many ASX-100 listed companies already prohibit facilitation payments and a trend, particularly post the 2009 OECD recommendations, is clearly identifiable. In light of

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99 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 2.

100 Regnan, *Submission 13*, p. 2.

101 Mr Neville Tiffen, *Submission 16*, p. 10.

102 Attorney-General's Department, *Submission 32*, p. 25.

103 Woodside Petroleum Ltd, *Submission 4*, p. 2.

104 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 3.

105 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, p. 22, Recommendation 6, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 19 February 2018).

this, some submissions noted that Australia's current position is increasingly isolated.[106]

Removing the defence will level the playing field

7.86 In stark contrast to AAMIG and Diaspora Legal, some submissions argued that removing the facilitation payment defence will actually better position Australian companies in the international market.

7.87 As the previous section noted, there is a growing trend internationally towards eradicating the distinction between facilitation payments and ordinary bribery. As such, many Australian businesses that operate internationally may already be subject to such laws, either as a subsidiary or through operating in different jurisdictions. Control Risks noted that these Australian corporations are therefore 'currently subject to a "high water mark" of legislative requirements, effectively prohibiting the payment of facilitation payments, notwithstanding the current legality of these payments under Australian legislation'.[107]

7.88 Woodside Petroleum, one company subject to these dual regimes, considered that removing the defence will 'support a level playing field', by ensuring that all Australian businesses are subject to the same regulatory framework.[108]

7.89 BHP Billiton agreed. BHP explained that they do not believe that removing the defence would adversely impact the competitiveness of Australian companies because:

- facilitation payments are prohibited in the current foreign bribery legislation with extraterritorial application, such as the UK Bribery Act;
- such payments are also not permitted by 'local law' in most countries and therefore, companies should not be making the payment in any event; and
- the defence as it currently stands is limited in scope, applying only to payments of a minor nature to expedite routine government action and where the payments are recorded in a company's books and records.[109]

7.90 Removing the defence would bring Australia into line with international comparator countries and mean that multinational companies will face the same regulatory burden across jurisdictions.

Grace period

7.91 Many submissions that advocated for the abolition of the facilitation payments defence contended that this abolition should proceed with a transition period to allow businesses time to implement the change in its internal processes and inculcate a culture of compliance amongst its employees. For example, Control Risks noted:

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106 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 9.

107 Control Risks, *Submission 12*, p. 8.

108 Woodside Petroleum Ltd, *Submission 4*¸ p. 2.

109 BHP Billiton, *Submission 37*, pp. 6–7.

> The Australian position would, in our view, do well to offer a moratorium period, within which corporations would be required to amend their business practices, to eventually comply with amended legislation that would take effect at some later date.[110]

7.92 BHP Billiton also agreed with this approach, suggesting that to mitigate any disruption to Australian businesses, a 'reasonable period of time' should be granted to allow companies to introduce systems to minimise the risk of contravention.[111] Mr Tiffen and Transparency International Australia considered that two years would be a reasonable timeframe for transition.[112]

7.93 However, Transparency International Australia and FTI Consulting argued that Australian businesses should only be able to rely on this grace period if the company demonstrates 'the steps it is taking to eradicate such payments within their operations'.[113] Transparency International Australia further suggested a number of steps that could be considered as part of a commitment to zero tolerance towards facilitation payments:

- the company issues a clear policy prohibiting facilitation payments;
- the company's employees and associated persons have access to and are trained on written guidance on the procedure they should follow if they are asked to make a facilitation payment;
- the company assesses whether the employees and associated persons are following the procedures;
- all facilitation payments are recorded in the company's books and records; and
- the company takes proper action (collective or otherwise) to tell the appropriate authorities in the countries concerned that facilitation payments are being demanded.[114]

Tax deductions for facilitation payments

7.94 Facilitation payments can be claimed as tax deductions under subsections 26-52(4) and 26-52(5) of the *Income Tax Assessment Act 1997* (Income Tax Assessment Act). Submissions that considered that the facilitation payments defence should be abolished, simultaneously argued that these provisions in the Income Tax Assessment Act should also be repealed.[115]

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110 Control Risks, *Submission 12*, p. 2. See also Regnan, *Submission 13*, p. 2; Mr Neville Tiffen, *Submission 16*, pp. 3, 10.

111 BHP Billiton, *Submission 37*, p. 7.

112 Mr Neville Tiffen, *Submission 16*, pp. 3, 10; Transparency International Australia, *Submission 31*, p. 9.

113 Mr David Wildman, FTI Consulting, *Submission 38*, p. 5.

114 Transparency International Australia, *Submission 31*, p. 9.

115 See, for example, Uniting Church in Australia Synod of Victoria and Tasmania and Publish What you Pay Australia, *Submission 17*, p. 4.

Committee view

7.95 The committee agrees with submitters that determining whether a particular payment does satisfy, or would satisfy, the requirements of section 70.4 of the Criminal Code is extremely difficult. Indeed, the committee considers facilitation payments are one of the more conceptually complex issues arising from Australia's anti-bribery legislation, and recognises that this is heightened by the fact that the defence has never been raised before an Australia court, and therefore judicial commentary has not been able to shed any light on this vexed issue.

7.96 While the committee acknowledges that the government has undertaken awareness-raising initiatives on the use of the facilitation payment defence, the committee is concerned that the OECD's December 2017 Phase 4 OECD Report observed that there remains significant dissatisfaction with the existence of the facilitation payment defence among Australia's public and private sectors and civil society representatives.

7.97 The committee notes the evidence received during the course of the inquiry which drew attention to the many comparator countries, including the UK and Canada, that do not permit facilitation payments. In this context, the committee believes Australia's position on this issue is increasingly isolated, and the committee is concerned about the inconsistencies between international standards and Australia's domestic bribery laws and the domestic laws of comparative countries (of which some are Australia's major trading partners).

7.98 The committee is persuaded by the majority of submissions to both this inquiry and to the government's 2011 public consultation seeking views on Australia's foreign bribery laws (including the treatment of facilitation payments) which argued in favour of abolishing the facilitation payment defence.

7.99 The committee notes the government's efforts to strongly discourage businesses from making facilitation payments on the basis that the payment may constitute a criminal offence in the jurisdiction where they are made. The committee further observes that these efforts suggest that the government already understands the broader adverse consequences to which facilitation payments can give rise. However, the committee is deeply concerned and disappointed about the lack of legislative action that the government has taken in this area, and wishes to recognise the initiatives of Australian businesses who have taken matters into their own hands by implementing internal policies prohibiting facilitation payments.

7.100 The committee notes the government's proposed amendments to Australia's foreign bribery laws, as detailed in the CCC bill which are currently before the Parliament. In light of this inquiry and the evidence received, the committee considers that the CCC bill is deficient as it makes no provision for the abolishment of the facilitation payment defence. In the committee's view this exacerbates the perception that Australia is not serious about combatting foreign bribery (and other forms of corruption), and further isolates Australia from international norms.

7.101 In the committee's view a facilitation payment is not materially different from a small bribe and therefore should not be recognised as a defence to a foreign bribery

offence in Australia. It is apparent to the committee that there is a need for a clear distinction between bribery and corruption on the one hand, and ethical conduct on the other. The committee considers that removal of the defence will make clear that all forms of bribery and corruption are wrong.

7.102 The committee believes that retaining the facilitation payment defence is inconsistent with Australia's wider anti-bribery efforts and accepts that allowing facilitation payments muddies the waters and risks encouraging a culture of expediency to achieve results. In the committee's opinion, abolishing the facilitation payments defence will convey a strong and consistent policy message that corporations should not stimulate markets for bribery, irrespective of their size, and whether or not such payments to foreign public officials are considered to be mandatory. In this context, it is apparent to the committee that removing the facilitation payment defence will better position Australian companies in the international market.

7.103 Based on the evidence presented during the course of the inquiry, the committee is persuaded that abolition of the facilitation payment defence should proceed with a transition period to allow businesses time to implement the changes to their internal processes and to inculcate a culture of compliance amongst its employees. In conjunction with this change, the committee also suggests that subsections 26-52(4) and 26-52(5) of the Income Tax Assessment Act, which allow facilitation payments to be claimed as tax deductions, be repealed.

Recommendation 18

7.104 The committee recommends that the facilitation payment defence currently provided for in section 70.4 of the *Criminal Code Act 1995* (and the associated subsections 26-52(4) and 26-52(5) of the *Income Tax Assessment Act 1997*) be abolished over a transition period, to enable companies and individuals to adjust their business practices and procedures to comply with the law as amended.