



Australian Government
Attorney-General's Department
Criminal Justice Division

Divisions 70 and 141 of the Criminal Code Act 1995

Assessing the 'facilitation payments' defence to the
Foreign Bribery offence and other measures

Public Consultation Paper

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Disclaimer: This document is designed to inform discussion of issues. It does not necessarily reflect the views of the Commonwealth, or indicate a commitment to a particular course of action.

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Introduction

1. The Australian Government is committed to stamping out corruption and has a comprehensive anti-corruption system for the public and private sectors.
2. Australia has a strong record of global, regional and domestic action to prevent and expose corrupt activity, and is ranked as the 8th most corruption-free nation in the world in the most recent Transparency International Corruption Perceptions Index.
3. In September 2011, the Australian Government announced the commitment of \$700,000 to develop and implement Australia's first National Anti-Corruption Plan. A key objective of the Plan is to strengthen Australia's existing governance arrangements by developing a whole-of-government policy on anti-corruption. The Plan will bring the relevant agencies together under a cohesive framework and strengthen the Government's capacity to identify and address corruption risks.
4. Even though Australia has an admirable anti-corruption record, it is important to consider possible additional measures. Such measures include assessing Australia's anti-bribery laws.
5. The offence of bribing a foreign public official is contained in Division 70 of the *Criminal Code Act 1995* (Criminal Code). It ensures that a person can be prosecuted under Australian law for offering or providing a bribe to foreign public officials for the purpose of obtaining business or an undue business advantage.
6. Division 141 of the Criminal Code provides offences for bribing a Commonwealth public official and for a Commonwealth public official soliciting a bribe.
7. The Australian Government is examining legislation in relation to these serious corruption offences, in accordance with Australia's commitment to combating corruption at home and abroad and our international obligations.
8. In particular, the Government is reviewing:
 - the treatment of facilitation payments under Australian law
 - the factors that influence whether a benefit is 'legitimately due' to the recipient
 - the current requirement to identify a particular foreign public official in order to establish an offence, and
 - the role of dishonesty in domestic corruption offences.
9. This paper invites submissions from the public on these issues.

The Foreign Bribery offence

10. Division 70 of the Criminal Code provides an offence for bribing foreign public officials.
11. A person is guilty of an offence if:

- the person provides a benefit to another person,
- offers or promises to provide a benefit to another person, or
- causes a benefit to be provided, offered or promised to another person

AND

- the benefit is not legitimately due to the other person

AND

- step 1 was carried out with the intention of influencing a foreign public official (who may or may not be the recipient of the benefit) in the exercise of the official's duties, in order to obtain or retain business or obtain or retain a business advantage which is not legitimately due.

12. The offence applies where the conduct constituting the offence occurs wholly or partly in Australia, or wholly or partly onboard an Australian aircraft or an Australian ship. The offence also applies to conduct committed wholly outside Australia when the person committing the offence is an Australian citizen, a resident of Australia, or a body corporate incorporated by or under a law of the Commonwealth of Australia or of an Australian State or Territory.

13. The maximum penalty for an individual who bribes a foreign official is 10 years imprisonment and/or a fine of 10,000 penalty units (\$1.1 million).

14. The penalty for a body corporate can be a fine issued in penalty units or it can be a proportional penalty, calculated according to the value of benefits obtained from bribery or the annual turnover of the company. If the value of benefits obtained through bribery can be ascertained, the penalty is 100,000 penalty units (\$11 million) or 3 times the value of benefits obtained, whichever is greater. If the value of benefits obtained through bribery cannot be ascertained, the penalty for a body corporate is 100,000 penalty units or 10% of the annual turnover of the body corporate, whichever is greater.

15. Two defences are provided for the foreign bribery offence: (i) that the benefit was permitted or required by written law and (ii) that it was a 'facilitation payment'.

The facilitation payment defence

16. The facilitation payment defence is set out in section 70.4 of the Criminal Code, the text of which is included at **Attachment A**. In summary, it provides a defence to the offence of foreign bribery if:

- the value of the benefit was of a minor nature; and
- 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
- as soon as practicable after the conduct occurred, the person made a record of the conduct.

17. While charges have recently been laid against two Australian companies, Securrency and Note Printing Australia, and individuals from those companies under section 70.4 of the Criminal Code, as yet there have been no prosecutions under the foreign bribery provisions of the Criminal Code so the defence has not been raised before the courts.

International approaches

18. Australia is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention). The Convention requires signatories to criminalise bribery of foreign public officials in the course of international business. The 1997 Commentaries to the Anti-Bribery Convention considered facilitation payments separate to bribery on the grounds that 'small facilitation payments' did not constitute an attempt 'to obtain or retain business or other improper advantage'.

19. Australia is also a party to the United Nations Convention Against Corruption (UNCAC), which requires States Parties to criminalise bribery of foreign public officials in the course of international business. The Legislative Guide for the Implementation of UNCAC, developed by the United Nations Office on Drugs and Crime, does not differentiate between bribery and facilitation payments.

20. In 2009, the OECD Working Group on Bribery reviewed the treatment of facilitation payments in the Anti-Bribery Convention. Member countries agreed on a new recommendation for countries to 'periodically review their policies' and a new approach on facilitation payments to effectively combat this 'corrosive phenomenon' and to encourage companies to prohibit the use of facilitation payments.

21. The United States' Foreign Corrupt Practices Act, on which the Australian law was modelled, includes a similar exemption to the offence of foreign bribery for facilitation payments. The United States Government has stated that it does not condone facilitation payments. The OECD has recommended that the United States review its policy.

22. The United Kingdom's Bribery Act, which came into force on 1 July 2011, prohibits facilitation payments.

Arguments for prohibiting facilitation payments

23. There are several main arguments for prohibiting facilitation payments, which are summarised below.

I. Compliance with international treaty obligations

The key international anti-bribery instruments, the UNCAC and the OECD Anti-Bribery Convention, demonstrate a move towards criminalising facilitation payment.

UNCAC, which Australia ratified in 2005, requires States Parties to criminalise bribery and does not differentiate between facilitation payments and bribes. UNCAC does not recognise facilitation payments. United Nations Office on Drugs and Crime, the custodian of implementation of the UNCAC, has advised that a 'facilitation payment is simply another term for a bribe'. The OECD Working Group on Bribery is encouraging parties to the OECD Anti-Bribery Convention to prohibit the use of facilitation payments.

II. *Consistency with foreign laws and international standards*

Under the Australian definition of a “facilitation payment”, a facilitation payment is an illegal payment in the country in which it is paid (unless the local law specifically requires or permits it in written law).

Australian businesses operating overseas may be subjected to UK, US and Australian foreign bribery laws. As the UK defines facilitation payments as illegal, Australian law represents an inconsistency which translates into additional risk mitigation requirements in order for Australian companies to act within the law.

Increasingly, facilitation payments are considered to constitute a bribe under laws governing public officials, including Australian domestic officials. The international movement towards criminalising facilitation payments is demonstrated by the recent UK bribery legislation. International pressure to demonstrate a commitment to reducing corruption in countries with low governance levels is increasingly tied to development assistance.

In recognition of this, the 2007 Asia-Pacific Economic Cooperation (APEC) Code of Conduct for Business issued during the APEC meeting in Sydney, states that businesses should eliminate facilitation payments because ‘they are prohibited under the anti-bribery laws of most countries’.

III. *Promoting overseas aid objectives*

Facilitation payments are generally detrimental to good governance. They encourage corruption and the illicit enrichment of public officials by supporting the practice, and expectation, of delivering private benefits in exchange for access to government services. Supporting good governance is one of the aims of Australia’s overseas aid programs in developing countries.

IV. *Regulatory certainty*

Businesses advise that it is very difficult to define a clear distinction between a bribe and a facilitation payment. This makes it hard for businesses to provide appropriate training to their staff. An outright ban removes doubt and provides clear direction to businesses seeking to implement systems and training to ensure that bribery does not occur.

V. *Reducing corruption and associated delays and costs*

There are demonstrated benefits to resisting facilitation payments. Research and the reported experiences of a number of companies demonstrate that refusing to pay public officials can result in savings and reduced delays, as demands for payment from public officials can decline when a business is known to be a ‘non-lucrative’ target.

VI. *The reported practices of Australian companies*

Anecdotal evidence indicates that the extent to which the facilitation payments are made by Australian businesses, and the corresponding deduction is claimed, is relatively low.

Arguments against prohibiting facilitation payments

24. There are also several arguments often put forward in support of permitting facilitation payments, which are summarised below:

I. Competitive disadvantage

Businesses that do not make facilitation payments may be less competitive, that is, they will obtain less business and lower profits than businesses that make payments to public officials.

II. Duress

Facilitation payments to influence business dealings may be solicited or extorted under threat, making refusal difficult, and it would be unfair to penalise people for acts necessary to prevent threatened detriment.

III. Uneven playing field

Large businesses have greater bargaining power to refuse demands for payments than smaller businesses. Consequently, banning facilitation payments will be more detrimental for small businesses than it will for larger enterprises.

25. Each of these arguments has, at its source, the problem of corruption. These arguments predominantly arise in business environments where facilitation payments are common and will become increasingly difficult argument to sustain. The Australian Government encourages Australian businesses to work actively to reduce corruption by resisting demands for facilitation payments and reporting them to authorities and works closely with foreign governments to improve governance and reduce corruption.

Potential legislative implications

26. The Government is considering whether to remove the defence for facilitation payments by repealing section 70.4 of the Criminal Code, and is seeking submissions from interested parties on this issue.

27. If the facilitation payment defence is removed from the Criminal Code, the *Income Tax Assessment Act 1997* (Cth) (the ITAA) would also need to be amended to remove tax deductions for facilitation payments. This could be achieved by repealing sections 26-52(4) and 26-52(5) of the ITAA 1997. Comments are also sought on this issue.

When a benefit is legitimately due

28. When considering whether a benefit offered or provided to a person is legitimately due, paragraph 70.2(2)(b) states a court should disregard the value of the benefit. This is to ensure that bribery is an offence irrespective of the value of the benefit offered or provided, as required by paragraph seven of the Commentaries to the OECD Anti-Bribery Convention.

29. However, paragraph 70.2(2)(b) may prevent a court considering the value of a benefit in circumstances where the value alone may suggest that a benefit is not legitimately due. For example, there may be situations where a person would be legitimately due a moderate fee in return for providing a particular service related to obtaining business. However, in the same situation a very large fee may be highly improper and not legitimately due to the public official or other person.

30. The Government is considering an amendment to paragraph 70.2(2)(b) with the intention of clarifying that bribery remains an offence irrespective of the value of the benefit offered or given but a court may consider the value where value alone suggests a benefit is not legitimately due.

The official intended to be influenced by a bribe

31. Under subsection 70.2 of the Criminal Code it is an offence to offer or provide an undue benefit to a person with the intention of influencing a public official in the course of their duties, in order to obtain business or an undue business advantage.

32. In some circumstances, it will be possible to establish that a bribe has been offered or provided to a person to induce a Government agency to grant business or an undue business advantage but it may be difficult to identify the specific official who will be influenced. For example, it may be possible to prove a person offered or provided a bribe to an agency in charge of granting public infrastructure contracts, but not possible to identify whether the payment is destined for the official directly responsible for granting contracts or another official who will direct their staff to grant a certain contract.

33. The Government therefore is considering whether to amend legislation so that, when proving that a benefit was offered or provided with an intention to influence a foreign public official, it is not necessary to prove an intention to influence a particular foreign public official.

34. The Government is also considering an equivalent amendment to the offence of bribing a Commonwealth official in Division 141 of the Criminal Code.

A benefit provided or requested 'dishonestly'

35. It is an offence under Division 141 of the Criminal Code to 'dishonestly' offer or provide a benefit, or cause a benefit to be offered or provided, to a person with the intention of influencing a Commonwealth public official in the course of his or her duties. It is also an offence for a Commonwealth public official to 'dishonestly' request, receive, obtain or agree to receive or obtain a benefit for himself, herself or another person, where the official intends the benefit will influence the performance of his or her duties or intends to foster the belief the performance of duties will be influenced.

36. The requirement to prove that a bribe was offered, provided, requested or received 'dishonestly' is not a requirement of the foreign bribery offence at Division 70. The additional requirement in Divisions 141 and 142 to prove 'dishonesty' as well as bribery could make it more difficult to prosecute crimes of domestic corruption.

37. UNCAC provides that in criminalising bribery of public officials, the offer, promise, request or receipt of a bribe by a public official must be committed 'intentionally'. As 'intent' is already a requirement in Divisions 141 and 142, removal of 'dishonesty' from these Divisions would make Australian legislation more in line with our international obligations under UNCAC.

38. The Government therefore is considering deleting the word 'dishonestly' from Divisions 141 and 142 of the Criminal Code. This could assist to harmonise the domestic and foreign bribery offences.

Submissions

39. The Government invites submissions on the matters outlined above, by **close of business on 15 December 2011**.

40. Please send written responses to:

Director

Financial Crime Section, Criminal Justice Division

Attorney-General's Department

3 – 5 National Circuit

Barton ACT 2600

Australia

or by email to foreign.bribery@ag.gov.au.

Arrangements for providing verbal submissions can be made by contacting the Department using the details above or by telephoning +61 2 6141 2812.

Attachment A

Criminal Code Act 1995 – Division 70

70.2 Bribing a foreign public official

- (1) A person is guilty of an offence if:
- (a) the person:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the benefit is not legitimately due to the other person; and
 - (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
 - (i) obtain or retain business; or
 - (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Note: For defences see sections 70.3 and 70.4.

- (1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

Benefit that is not legitimately due

- (2) For the purposes of this section, in working out if a benefit is **not legitimately due** to a person in a particular situation, disregard the following:
- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
 - (b) the value of the benefit;
 - (c) any official tolerance of the benefit.

Business advantage that is not legitimately due

- (3) For the purposes of this section, in working out if a business advantage is **not legitimately due** to a person in a particular situation, disregard the following:
- (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation;
 - (b) the value of the business advantage;
 - (c) any official tolerance of the business advantage.

Penalty for individual

- (4) An offence against subsection (1) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

Penalty for body corporate

- (5) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:
- (a) 100,000 penalty units;
 - (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;

- (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the **turnover period**) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.
- (6) For the purposes of this section, the **annual turnover** of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:
 - (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
 - (b) supplies that are input taxed;
 - (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);
 - (d) supplies that are not made in connection with an enterprise that the body corporate carries on.
- (7) Expressions used in subsection (6) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning in that subsection as they have in that Act.
- (8) The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this section in the same way as for the purposes of the *Corporations Act 2001*.

70.4 Defence—facilitation payments

- (1) A person is not guilty of an offence against section 70.2 if:
 - (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
 - (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 a 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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

Routine government action

- (2) For the purposes of this section, a **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.

Content of records

- (3) A record of particular conduct engaged in by a person complies with this subsection if the record sets out:
- (a) the value of the benefit concerned; and
 - (b) the date on which the conduct occurred; and
 - (c) the identity of the foreign public official in relation to whom the conduct occurred; and
 - (d) if that foreign public official is not the other person mentioned in paragraph 70.2(1)(a)—the identity of that other person; and
 - (e) particulars of the routine government action that was sought to be expedited or secured by the conduct; and
 - (f) the person's signature or some other means of verifying the person's identity.

Attachment B

Criminal Code Act 1995 – Division 141

141.1 Bribery of a Commonwealth public official

Giving a bribe

- (1) A person is guilty of an offence if:
 - (a) the person dishonestly:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the official's duties as a public official; and
 - (c) the public official is a Commonwealth public official; and
 - (d) the duties are duties as a Commonwealth public official.
- (2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:
 - (a) that the official was a Commonwealth public official; or
 - (b) that the duties were duties as a Commonwealth public official.

Receiving a bribe

- (3) A Commonwealth public official is guilty of an offence if:
 - (a) the official dishonestly:
 - (i) asks for a benefit for himself, herself or another person; or
 - (ii) receives or obtains a benefit for himself, herself or another person; or
 - (iii) agrees to receive or obtain a benefit for himself, herself or another person; and
 - (b) the official does so with the intention:
 - (i) that the exercise of the official's duties as a Commonwealth public official will be influenced; or
 - (ii) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a Commonwealth public official will be influenced.

Geographical jurisdiction

- (4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1) or (3).

Penalty for individual

- (5) An offence against subsection (1) or (3) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

Penalty for body corporate

- (6) An offence against subsection (1) or (3) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:
- (a) 100,000 penalty units;
 - (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
 - (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.
- (7) For the purposes of this section, the annual turnover of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:
- (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
 - (b) supplies that are input taxed;
 - (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the A New Tax System (Goods and Services Tax) Act 1999);
 - (d) supplies that are not made in connection with an enterprise that the body corporate carries on.
- (8) Expressions used in subsection (7) that are also used in the A New Tax System (Goods and Services Tax) Act 1999 have the same meaning in that subsection as they have in that Act.
- (9) The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this section in the same way as for the purposes of the Corporations Act 2001.