

## **Submission regarding the Criminal Code Act 1995: the “facilitation payments” defence to the offence of Foreign Bribery**

**Regnan favours amending the legislation in the manner contemplated by the consultation paper, including amendments that:**

- Eliminate the facilitation payment defence to charges of bribery of foreign officials;
- Enable the value of any benefit to be considered as evidence that a payment was not legitimately due to a foreign official;
- Remove the requirement to prove “dishonesty” when prosecuting bribery of Commonwealth officials);
- Remove the requirement that any particular individual be identified as the target of a bribe.

### **Background to Regnan**

Regnan represents institutions who invest across domestic and international asset classes for long term returns. Investments typically span (but are not limited to) listed and unlisted domestic and international companies; corporate and sovereign fixed income securities; and property and infrastructure.

Diversification on this scale characterises these investors as “universal owners”. Their interests encompass many and varied investments, but also extend to the efficient functioning of the markets and the effectiveness of the regulatory frameworks underpinning those economies in which those investments are made.

Regnan accepts research that shows bribery and corruption to be harmful to these economic interests and to economic development and has since 2004 in both private and public forums undertaken proprietary research and sought improved corporate controls and oversight of ethics issues, including bribery and corruption<sup>1</sup>.

This submission is made by Regnan and does not necessarily represent the views of client institutions.

---

<sup>1</sup> See for instance Position Paper – Business Ethics (the entity which became Regnan was then known as the BT Governance Advisory Service).

Regnan understands the facilitation payment defence to be a means by which to focus the Criminal Code Act 1995 – Division 70 (“The Act”) on those activities that are most distortionary to trade and/or most detrimental to governance in the jurisdiction in which the official is employed (foreign jurisdiction). In principle we find this objective unproblematic.

However Regnan views carving out facilitation payments and benefits (“facilitation payments”) as a defence to the charge of foreign bribery as an inappropriate means by which to achieve this – and therefore supports the removal of this defence - for the following reasons.

**1. Regnan does not view facilitation benefits as qualitatively different to bribery.**

We note that the definition of facilitation payments under The Act relies on the value of the benefit being “minor” and its purpose being to secure or expedite routine government action of a “minor” nature. Both express differences in degree and not differences in kind. Moreover in many instances securing or expediting “routine government actions<sup>2</sup>” can in practice confer indirect but non-trivial business advantages (relative to other market participants) that are not legitimately due. Examples include instances where expedited service can amount to preferential allocation of a limited resource (e.g. where there are quotas on number of visas granted, physical constraints on utilities supply or port infrastructure).

Without qualitative differences between bribery and facilitation payments, distinguishing the two relies on arbitrary criteria (e.g. a threshold for payment amount) which relate poorly to the objective of preventing distortions to trade and governance and offer loopholes for those wishing to circumvent charges of foreign bribery.

**2. Regnan notes research concluding that while facilitation payments seem efficient in the short term, businesses report them to be associated with detriment in the longer term<sup>3</sup>**

Reasons include:

- a. Accounting, compliance, transparency and other difficulties associated with permitting contraventions of foreign laws;
- b. Incentivising the increase and / or entrenchment of bureaucratic burden on companies as officials attempt to preserve or maximise opportunities for “grease money”;
- c. Additional risks, costs and uncertainty, including repeat (and escalated) targeting for payments or benefits, and
- d. Vulnerability to reputation damage or even extortion where the foreign jurisdiction’s laws have been broken.

**3. While individual facilitation payments and their purpose may in many instances be minor, their cumulative impact can significantly impair development.**

---

<sup>2</sup> Eg Those identified in the Criminal Code Act 1995 – Division 70, 70.4 (2) (a) to (d)

<sup>3</sup> Eg Trace International 2009 *The High Cost of Small Bribes*

Regnan notes the wider corrosive effects of illegal payments made to officials of the foreign jurisdiction including:

- a. The potential for regulatory or bureaucratic capture by businesses when officials and public sector wage structures come to depend on such payments;
- b. The increase and/or entrenchment of other forms of corruption (eg nepotism) when opportunities for disproportionate gains are available;
- c. The erosion of local trust in local institutions and consequently reduced confidence in and compliance with the rule of law;
- d. The undermining of efforts to reduce corruption and to improve governance within the foreign jurisdiction, including efforts of the foreign jurisdiction as well as those of home country agencies (eg AusAID).

4. **Regnan views it as inappropriate for The Act to provide an explicit defence of facilitation payments to foreign officials.**

Regnan does not see it as appropriate for Australian law to make explicit provision for payments that are an offence in both the foreign jurisdiction and would be an offence in Australia (when relating to Australian official). An explicit defence for illegal facilitation payments to foreign officials under Australian law appears to condone Australian businesses contravening foreign law.

Regnan considers that the language of 70.2 (1) (c) “a person is guilty of an offence if [they paid someone in order to] obtain or retain a business advantage that is not legitimately due”) gives adequate emphasis to the elements of *unfair advantage* and *illegitimacy* such that a separate defence of facilitation payments is unnecessary.

5. **Regnan views the retention of the facilitation payments defence as likely to have unintended consequences that are unhelpful to many Australian businesses**

Regnan notes that the facilitation payments defence could be construed as Australian businesses being unfairly advantaged even where no such payments are made.

Regnan also notes that the facilitation payments defence under Australian laws could expose Australian businesses as likelier targets for officials seeking such payments, and could also hinder Australian businesses wishing to resist such requests.

Regnan acknowledges that any strengthened anti-corruption measures can cause businesses to seek other means by which to obtain advantages (or foreign officials seeking other means by which to solicit benefits) ranging from conventionally unobjectionable (hospitality) to potentially corrosive but poorly detectable benefits (nepotistic hires, hollow consultancy contracts).

Notwithstanding this, Regnan views it as inappropriate for Australian legislation to make explicit provision for facilitation payments made illegally to foreign officials.