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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**CRIMINAL CODE AMENDMENT
(BRIBERY OF FOREIGN PUBLIC OFFICIALS)**

BILL 1999

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice and Customs,

Senator the Honourable Amanda Vanstone)

CRIMINAL CODE AMENDMENT

(BRIBERY OF FOREIGN PUBLIC OFFICIALS)

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GENERAL OUTLINE

The Bill amends the *Criminal Code Act 1995* by inserting part of a new Chapter 4 (The integrity and security of the international community and foreign governments) into the *Criminal Code*; the Bill inserts Division 70 of Chapter 4. Division 70 provides an offence of bribing a foreign public official.

The effect of the Bill is:

- to prohibit providing or offering a benefit which is not legitimately due to another person with the intention of influencing a foreign public official in the exercise of his or her duties in order to obtain or retain business or obtain or retain a business advantage that is not legitimately due to the recipient or intended recipient;
- to apply the prohibition to conduct within and outside Australia, so long as, where the conduct occurs wholly outside Australia, the person is an Australian citizen or the company is a company incorporated in Australia;
- to ensure that the ancillary offences of attempt, complicity, incitement and conspiracy which occur within and outside Australia apply where they relate to conduct included in the primary offence (clause 70.2);
- to ensure Australia complies with the key feature of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the OECD Convention').

In December 1996 the United Nations General Assembly adopted a Declaration Against Corruption and Bribery in International Business Transactions. Following this, in May 1997 the OECD Ministerial Council recommended that measures to combat bribery in international business transactions, including the criminalisation of bribery of foreign public officials, be introduced to the legislative process in each country.

The recommendation was endorsed by the Australian Government.

The OECD Convention was opened for signature in December 1997. Australia signed it on 7 December 1998 and it came into force on 15 February 1999.

Bribery of foreign public officials in the course of international trade is unacceptable. Although Australian business has high ethical standards, it is important that Australia maintains a good reputation by supporting the OECD in this initiative and therefore benefiting from the improvements it should bring to world trade. In particular, a reduction in the role played by bribery should result in more merit based commercial decisions. This will advantage Australia because as a rule its businesses are competitive.

The OECD Convention and its Commentaries provide details on the elements of the offence of bribery of a foreign public official.

Clause 3 of the Bill is a Schedule which contains amendments to the *Criminal Code Act 1995*. Item 2 of the Schedule inserts Division 70 of Chapter 4 into the *Criminal Code*. The following is a brief outline of the clauses in Division 70.

Clause 70.1 - Definitions

Clause 70.1 defines important terms which delineate the scope of the offence such as 'benefit', 'business advantage', 'control', 'duty', 'foreign country', 'foreign government body', 'foreign public enterprise', 'foreign public official', 'public international organisation' and 'share'.

Clause 70.2 - Bribing a foreign public official

Subclause 70.2(1) sets out the elements of what can be an offence under the Bill. The maximum penalty is 10 years imprisonment.

Subclauses 70.2(2) and 70.2(3) are both interpretation provisions in that they set out matters which must be disregarded in determining whether a benefit caught by the offence is *not legitimately due* (subclause 70.2(2)) to a person in a particular situation and whether a business advantage caught by the offence is *not legitimately due* to a person in a particular situation (subclause 70.2(3)).

Clauses 70.3 and 70.4

These clauses both provide defences. Clause 70.3 sets out the terms of the defence of conduct lawful in the foreign public official's country. The table in subclause 70.3(1) prescribes the method by which the applicable law is determined. The source of applicable law will differ according to the nature of the connection of the officer with the foreign government or public international organisation.

Clause 70.4 provides a defence where a payment is a facilitation payment made to expedite or secure the performance of a routine government action of a minor nature.

Clause 70.5

Clause 70.5 sets out the territoriality and nationality requirements. Under section 11.6 of the *Criminal Code* the ancillary offences (attempt, aiding and abetting, incitement and conspiracy) will apply in the same terms as the principal offence at clause 70.2. The jurisdiction restrictions set out in clause 70.5 will thereby also apply to the ancillary offences.

Clause 70.6

Clause 70.6 is a savings clause in relation to other relevant Commonwealth, State or Territory laws.

FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue.

REGULATION IMPACT ON BUSINESS

There is the potential for impact on all Australian businesses operating internationally but it is not possible to be certain of the short term impact.

Key areas of impact

Key impacts of the proposals:

- impact on costs and benefits cannot be assessed because it is uncertain how much trade depends on payment of bribes to foreign officials,
 - costs could either;
 - be significant if competitors do not pass or enforce the proposed laws, or
 - significant savings could be made if distortion of free trade is prevented (to date there has been significant compliance by other OECD countries (and by 5 non-OECD countries)),
- significant long term advantages to Australian businesses if purchasing decisions are made on the merits of the product or service rather than on the size of the bribe,
- applies to conduct occurring outside Australia where the person is an Australian citizen or the company is a company incorporated in Australia,
- complies with the key feature of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

REGULATION IMPACT STATEMENT

The following information is provided in accordance with Guidelines provided by the Office of Regulation Review, Industry Commission.

A. Problem identification and objective

This regulatory initiative seeks to prohibit under Australian law the bribery of foreign public officials by Australian companies or officials. The initiative is in response to the OECD Convention which came into effect on 15 February 1999 and to the 16 December 1996 UN Declaration Against Corruption and Bribery in International Commercial Transactions.

B. Identification of Options

One of the OECD initiatives is to criminalise bribery of foreign public officials.

The available option which faced Australia was whether it would support this Recommendation.

As a member of the OECD and the UN, Australia is required to respond to the OECD Convention and UN Declaration.

Rejection of OECD Convention

The main argument in favour of not supporting the OECD Convention is that competitiveness of Australian business may be reduced if bribery of foreign public officials is criminalised, because many of our business competitors will not pass or enforce laws of this nature.

Acceptance of OECD Convention

The main argument in favour of accepting the OECD Convention is that if countries take action on a multilateral basis to criminalise foreign bribery, serious distortion of trade could be prevented that could otherwise occur if purchasing decisions are made on the basis of the size of the bribe, rather than on the merits of a product or service.

Bribery is a serious international issue and it is in the interests of all countries to prevent the serious distortion of trade that could result if foreign bribery is not prevented.

C. Conclusion and Recommended Option

The recommended option is that Australia take appropriate steps to support the OECD Convention that bribery of foreign public officials be criminalised.

D. Impact Analysis

Impact Group Identification

The proposed changes will potentially impact on all Australian businesses operating internationally.

Assessment of Costs and Benefits

The proposed provisions will criminalise the bribery of foreign officials. It is not possible to assess the costs and benefits as it is uncertain how much trade depends on the payment of bribes to foreign officials. For example, it has been suggested that the cost could be significant if our competitors will not pass or enforce the proposed laws. However, others take the longer term view and recognise that free trade is being undermined by the bribery of officials because purchasing decisions could be determined by the size of bribes rather than the merits of the product or service for sale.

Restrictions on competition

The proposal is designed to free up competition by eliminating bribery as a hidden factor in world trade.

Trade Impact Assessment

It is not possible to be certain of the short term impact. Some believe the proposed course of action is likely to compromise the capacity of Australian commerce and

industry to compete in existing and emerging foreign markets, especially those outside the limited membership of the OECD, and against the aggressive exporters and investors from non-OECD countries. However, if countries move together on this issue, it should prevent serious distortion of trade that could result if purchasing decisions are not made on the merits of a product or service but on the size of the bribe.

E. Consultation Statement

On 19 February 1998 the Minister for Justice (now the Minister for Justice and Customs) released an Exposure Draft of the Bill.

The OECD Convention, together with its National Interest Analysis (“NIA”), was tabled in both Houses of the Parliament on 3 March 1998.

The States and Territories were consulted on the matter via the Commonwealth-State Standing Committee on Treaties’ Schedule of Treaty Action and the Minister for Justice and Customs also contacted each of them separately on the matter.

Following the release by the Minister for Justice on 19 February 1998 of a Exposure Draft Bill the Minister forwarded a copy of the Exposure Draft to the Joint Standing Committee on Treaties. The Minister expressed the view that an inquiry by the Committee could be ‘the focus of consultations on the legislation and the Convention’.

The Committee subsequently conducted an inquiry into the OECD Convention and the draft implementing legislation. For the purposes of the inquiry the Committee called for written submissions (35 were received) and conducted public hearings in Canberra on 9 and 30 March, 6 April and 11 May 1998, in Melbourne on 16 April 1998 and in Sydney on 17 April 1998. The Committee’s reported was tabled on 2 July 1998.

The Committee recommended, inter alia, that Australia sign and ratify the OECD Convention and, subject to certain amendments which it recommended be made to the draft implementing legislation, that implementing legislation be introduced into Parliament as soon as practicable.

Consideration of the Bill also took place at a number of public seminars including seminars convened in Canberra and Sydney by Transparency International Australia.

NOTES ON CLAUSES

Clause 1: Short Title

1. This clause provides for the short title of the Act.

Clause 2: Commencement

2. Subclause 2(1) provides that the Act commences on Proclamation.
3. Subclause 2(2) provides that the Act, if it is not proclaimed earlier, will commence 6 months after it receives Royal Assent. This will provide the Government some flexibility about the date of commencement to ensure there is adequate awareness of the new provisions. It also avoids the undesirable outcome of having unproclaimed legislation on the statute book for too long.

Clause 3: Schedule

4. This clause provides that the Act specified in the Schedule to the Bill, the *Criminal Code Act 1995*, is amended as set out in the Schedule.

Schedule 1 - Amendment of the Criminal Code Act 1995

Item 1 of the Schedule- Clauses 3A and 3B

5. This item inserts 2 new clauses (clauses 3A and 3B) in the *Criminal Code Act 1995* (the Act) after section 3 of the Act.

Clause 3A - External Territories

6. New clause 3A provides that the *Criminal Code* applies to every external Territory of Australia. This clause is necessary to ensure that Australia's external territories are not treated as foreign countries for the purpose of the *Criminal Code*.

Clause 3B - Offshore installations

7. This clause provides that certain installations which section 5C of the *Customs Act 1901* deems to be part of Australia shall be taken to be part of Australia for the purposes of the *Criminal Code*. Section 5C of the *Customs Act 1901* deems, subject to subsections 5C(2) and (3) *Customs Act 1901*, that resources installations that become attached to, or that are attached to, the Australian seabed and sea installations that become installed in, or that are installed in, an adjacent area or a coastal area, to be part of Australia. It is important that the *Criminal Code* and its offences apply on the basis that the installations are in Australia.

Item 2 of The Schedule - Chapter 4 - The integrity and security of the international community and foreign governments**Division 70 - Bribery of foreign public officials**

8. This item inserts a new Chapter 4 after Chapter 2 of the *Criminal Code*. The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995* which, at the time of this Bill, contains Chapter 1 - Codification, Chapter 2 - General Principles of Criminal Responsibility and a Dictionary. The new Chapter 4 is titled 'The integrity and security of the international community and foreign governments' and, at this stage, only contains one Division, Division 70, which is titled 'Bribery of foreign public officials'. In time other Divisions may be added to this Chapter, and other Chapters may be added to the *Criminal Code*, when the Government inserts other offences, including new offences such as in this Bill, and offences which will eventually replace those contained in the *Crimes Act 1914* and in some cases elsewhere. While many of the offences that are to be inserted into the *Criminal Code* are likely to mirror the Model Criminal Code (which is being prepared in co-operation with State and Territory Governments), some, such as this offence (which implements the OECD Convention), will vary from the model. In other cases there will be variations because of the peculiar nature of the Commonwealth jurisdiction.

Clause 70.1 - Definitions.

9. “*Benefit*” is defined to include any advantage and is not limited to property. This is consistent with Article 1(1) of the OECD Convention and with the domestic bribery offence recommendation of the Model Criminal Code Officers Committee in its December 1995 Final Report titled ‘Theft, Fraud, Bribery and Related Offences’.

10. “*Business advantage*” is defined to mean an advantage in the conduct of business. This definition is consequential upon the term ‘*benefit*’ being defined to include any advantage; the term ‘*business advantage*’ is defined to mean a particular class of advantages, namely advantages in the conduct of business. Insertion of this definition is consequential upon acceptance of the recommendation at paragraph 6.39 of the Treaties Committee Report that the definitions in the Exposure Draft of the Bill be re-examined.

11. “*Control*” is defined to include, in relation to a company, body or association, control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights. This definition is consequential upon use of the word ‘control’ in the definition of ‘*foreign public enterprise*’ in clause 70.1 (for example that term is defined to mean, inter alia, a company over which the government of a foreign country is in a position to exercise control - further details of the definition of the term ‘*foreign public enterprise*’ are set out below in paragraphs 15 to 18 inclusive).

12. “*Duty*” of a foreign public official is defined to mean any authority, duty, function or power that is conferred on the official or which the official holds himself or herself out as having. This definition is intended to cover every situation where an official is required to make a decision in the course of his or her work.

13. “*Foreign country*” is widely defined to include colonies or overseas territories or territories outside Australia whose international relations are governed by another country and other territories outside Australia which are partly self-governing but are not recognised by Australia as sovereign states.

14. “*Foreign government body*” is defined to include national, local or regional governments in a foreign country or an authority, body or enterprise of the government of the foreign country or of a part of the foreign country. The importance of different tiers of government varies markedly from one country to another.

15. “*Foreign public enterprise*” is defined after taking into account the terms of paragraphs 14 and 15 of the Commentaries to the OECD Convention which state:

‘14. A “public enterprise” is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.’

16. It is necessary that the legislation be precise. In order to capture the objectives of paragraph 14, paragraph (a) of the definition provides that in relation to a company, it includes one where the government of a foreign country holds more than 50% of issued share capital (subparagraph (a)(i)) or more than 50% of the voting power in the company (subparagraph (a)(ii)) or may appoint more than 50% of the company’s board of directors (subparagraph (a)(iii)) or the foreign government is in a position to exercise control over the company (subparagraph (a)(v)) including expecting the directors to act in accordance with directions ((subparagraph (a)(iv)) - subparagraph (a)(iv) is similar to that part of the ‘practical control’ [of a company] test contained in subparagraph 55(1)(a)(i) of the *Airports Act 1966*).

17. Paragraph (b) of the definition provides that if the enterprise is a body or association other than a company it must be one where either:

- the members of the executive committee are accustomed or are under an obligation to act in accordance with the wishes of the government of a foreign country or part of it; or
- the government of a foreign country or part of it is in a position to exercise control over the body or association.

18. Finally paragraph (c) provides that the company (paragraph (a)) or, body or association (paragraph (b)) is only a '*foreign public enterprise*' if it enjoys special legal rights, status, benefits or privileges under a law of a foreign country because of its relationship with the foreign government. This implements the restriction proposed at paragraph 15 of the Commentaries to the OECD Convention.

19. The term "*foreign public official*" is widely defined to mean a member or officer of a legislature of the country, a member of the executive, judiciary or magistracy of a foreign country or an individual who is employed by, or is under contract to, a foreign government or is holding or performing the duties of an appointment, office or position under a law of a foreign country or created by custom or convention of a foreign country or is otherwise in the service of a foreign government or a public international organisation or is an intermediary (or holds himself or herself out to be an authorised intermediary) of a foreign public official. This subclause was amended consequential upon acceptance of the recommendation at paragraph 6.39 of the Treaties Committee Report that the definitions in the Exposure Draft of the Bill be re-examined.

20. The term "*public international organisation*" is defined because foreign public officials can include persons who are officials of an public international organisation as well as persons who are officials of a foreign government. The term is defined to mean an organisation of which 2 or more countries or the governments of 2 or more countries are members or which has been established by an organisation of which 2 or more countries or governments of countries are members or which is a sub-group

established by such an international organisation. The definition accords with paragraph 17 of the Commentaries to the OECD Convention and is similar to the definitions of “international organisation” in section 30B of the *Veterans’ Entitlement Act 1986* and in section 4 of the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

21. The term “*share*” is defined to include ‘stock’. This can be taken to mean the capital of a company as contributed by investors in the company. This definition is necessary because the term “issued share capital” occurs in the subparagraph (a)(i) of the definition of “foreign public enterprise”.

Clause 70.2 - Bribing a foreign public official

Subclause 70.2(1) - Offence elements

22. Clause 70.2(1) provides that a person is guilty of an offence if a combination of the elements set out in paragraphs 70.2(1)(a), (b) and (c) can be proved. The elements set out in this subclause follow those which are contained in Article 1 of the OECD Convention.

23. Paragraph 70.2(1)(a) prohibits a person from providing or causing a benefit to be provided to another person. It also covers offering to provide, or promising to provide, a benefit to another person or causing an offer of the provision of a benefit or a promise of the provision of a benefit to be made to another person. Consistent with Article 1(1) of the OECD Convention, ‘benefit’ is defined at subclause 70.1 to include any advantage and is not limited to property.

24. In other words the conduct described will be an offence (providing the other elements of the offence are proved) whether the offer or promise is made or the pecuniary or non-pecuniary benefit is given on that person’s own behalf or on behalf of any other person. It would, for example, cover the provision of a benefit to the partner of the foreign public official to influence the exercise of the official’s duties (through the partner).

25. Paragraph 70.2(1)(b) requires that the benefit provided must be one that is not legitimately due to the other person. Subclause 70.2(2) provides that in working out if a benefit is “not legitimately due” to a person in a particular situation, there should be no regard to the fact that the benefit may be customary, or perceived to be customary, no regard to the value of the benefit and no regard to any official tolerance of the benefit. In other respects the term is to have its ordinary meaning - the prosecution must establish that the benefit was not legitimately due to the person who received it. This element of the offence is required by Article 1(1) of the OECD Convention and is also consistent with domestic bribery offences.

26. Paragraph 70.2(1)(c) requires that the person who has undertaken the conduct of providing the benefit to another person where that benefit is not legitimately due to that other person (who could be the foreign public official or a third person - for example, the partner of the official) must do so with the intention of influencing a foreign public official in the exercise of the official’s duties in order to obtain or retain business (subparagraph 70.2(1)(c)(i)) or in order to obtain or retain a business advantage that is not legitimately due to the recipient or intended recipient of the business advantage (subparagraph 70.2(1)(c)(ii)).

27. Subclause 70.1 provides that “duty” in relation to a foreign public official, means any authority, duty, function or power that is conferred on the official or that the official holds himself or herself as having. Sub-clause 70.2(3) provides that in working out if a business advantage is not legitimately due to a person in a particular situation, there should be no regard to the fact that the business advantage may be customary, or perceived to be customary, or to any official tolerance of the business advantage. This is generally consistent with the interpretation of a benefit that is not legitimately due. In other respects the meaning of “legitimately due” is to have its ordinary meaning - there must be a legal basis for the activity and it therefore could not include an activity which is in breach of a statutory requirement (as per paragraph 5 of the Commentaries on the OECD Convention).

28. The first limb (subparagraph 70.2(1)(c)(i)) covers the situation where the intention to influence the official was in order to obtain or retain business. The focus is firmly on benefits significant enough to influence trade and its scope is such that on its own it would not include smaller “facilitation” benefits (for example, a manager in Australia authorises the payment of \$100.00 to a foreign official to expedite the connection of a single telephone in an office that already has 50 telephones). In those circumstances it may be difficult to prove the connection of one telephone was “in order to obtain or retain business.” In May 1997 the OECD considered that this should be the only provision concerning this aspect of the offence. However the December 1997 OECD Convention added a second limb (detailed in subparagraph 70.2(1)(c)(ii) of the Bill) which expands the scope of the offence (see Article 1 of the OECD Convention and paragraphs 4 and 5 of the Commentaries on the OECD Convention).

29. The second limb, subparagraph 70.2(1)(c)(ii), covers the situation where the intention to influence the official was in order to obtain or retain a business advantage that is not legitimately due to the recipient or intended recipient. This is far less specific and, without the defence at clause 70.4, is more likely to catch smaller “facilitation” benefits such as the one described in the example. Assuming it is illegal to make the payment in the country where the example occurs, it is more likely that it could be proven that it was intended to influence the official to obtain a business advantage that was not legitimately due to the person than it could be proven that it was intended to obtain or retain business.

30. Subparagraph 70.2(1)(c)(ii) is aimed at the situation where the benefit is intended to cover a bribe in order to obtain or retain a business advantage to which the person was clearly not entitled. This is demonstrated by the example given at paragraphs 4 and 5 of the Commentaries to the OECD Convention: a bribe paid in order to receive an operating permit for a factory where the person has failed to satisfy the statutory requirements for issue of such a permit. The OECD Convention authors make it clear that they intend that sort of benefit to be covered by countries in their implementing legislation.

31. The offence carries a maximum penalty of 10 years imprisonment. As is noted at the foot of subclause 70.2(1), section 4B of the *Crimes Act 1914* allows a court to impose a fine or a sentence of imprisonment or both and automatically provides for a maximum fine based on the maximum term of imprisonment. Under section 4B the fine would be \$66, 000.00 for an individual and \$330, 000.00 for a corporation. A maximum of 10 years imprisonment is consistent with the penalty for theft and fraud and the penalty recommended for domestic bribery offences in the Model Criminal Code (December 1995 Final Report issued by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General).

Subclause 70.2(2) - Benefit that is not legitimately due

32. As explained in relation to subclause 70.2(1), subclause 70.2(2) provides that in working out whether a benefit is not legitimately due to a person in a particular situation, there should be no regard to the fact that the benefit may be customary, or perceived to be customary, no regard to the value of the benefit and no regard to any official tolerance of the benefit. In other respects the term is to have its ordinary meaning. This element of the offence is discussed at paragraph 7 of the Commentaries to the OECD Convention. This provision was revised as a result of the review of definitions which was recommended at paragraph 6.39 of the Treaties Committee Report.

33. Any allowance for local cultural norms would undermine the offence. The provision follows Article 1(1) of the OECD Convention and is also consistent with domestic bribery offences. However the general defences available under Part 2.5 of the *Criminal Code* will apply. These defences include duress.

Subclause 70.2(3) - Business advantage that is not legitimately due

34. As mentioned above in this Explanatory Memorandum, subparagraph 70.2(1)(c)(ii) requires proof that the person must have provided the benefit to influence the foreign official in order to obtain or retain a business advantage that is not legitimately due to a person in a particular situation. Subclause 70.2(3) provides that in working out if a business advantage is not legitimately due to a person in a particular situation, there should be no regard to the fact that the advantage may be customary, or perceived to be customary, or that there is any official tolerance of the business advantage. This is generally consistent with the interpretation of “benefit that is not legitimately due”. In other respects the meaning of “business advantage that is not legitimately due” is to have its ordinary meaning - there must be a legal basis for receiving the advantage and it would not include conduct which is in breach of a statutory requirement (per paragraph 5 of the Commentaries on the OECD Convention). This provision was revised as a result of the review of definitions which was recommended at paragraph 6.39 of the Treaties Committee Report.

Clause 70.3 Defence - conduct lawful in foreign official's country

35. Paragraph 10 of the Commentaries to the OECD Convention makes it clear that it is intended that the conduct referred to in subclause 70.2(1) should not be an offence if the advantage was permitted under the law of the foreign public official's country. This is consistent with the existing principle in our law that there is a defence of lawful authority. The table in subclause 70.3(1) prescribes the source of the applicable law that will apply to the different classes of foreign public officials. This table was amended consequential upon acceptance of the recommendation at paragraph 6.39 of the Treaties Committee Report that the definitions in the Exposure Draft of the Bill be re-examined. The eleven different classes of officials listed in the table are those which are contained in the definition of '*foreign public official*' in subclause 70.1 (see the list at paragraph 19 above). These include a member or officer of a legislature of the country or anybody employed by, under contract to, appointed by or otherwise in the service of a foreign government or an international organisation. Where the nature of the person's service may involve easy access to mobility across international borders, such as where the person works for an international organisation, the defence of lawful conduct is aligned to the place where the central administration of the body is located. This is intended to prevent any of these people and the accused from undermining the intent of the legislation by deliberately locating themselves in particular jurisdictions for the purpose of taking advantage of the defence.

Clause 70.4 Defence - facilitation payments

36. Paragraph 9 of the Commentaries to the OECD Convention states:

'Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licences or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However,

criminalisation by other countries does not seem a practical or effective complementary action.’

37. While the Commentaries to the OECD Convention do not suggest there must be a defence in relation to facilitation payments, they provide a rationale for including one by stating that such payments are more appropriately dealt with under the domestic law of countries. This is a reminder that the offence here is international in nature and primarily aimed at larger scale bribes which may distort trade.

38. The facilitation payments issue was one of the central issues which the Joint Standing Committee on Treaties (“the Treaties Committee”) considered in its inquiry into the OECD Convention and the draft implementing legislation.

39. The majority of those who made submissions to the Treaties Committee on this issue favoured including a defence in the legislation which was aligned to the defence in the United States (US) *Foreign Corrupt Practices Act 1977* (“FCPA”) since they perceived the FCPA defence to be tested and they wanted consistency because of the role of that country in world trade, and because of the fact that those laws already apply to large Australian corporations which issue stock in the US.

40. All the members of the multipartisan Treaties Committee appear to have been convinced by evidence from business that it was commercially important that Australia’s rules in this area be on a par with those in the US.

41. In its Report which was tabled on 2 July 1998 the Treaties Committee recommended that payment or provision of a facilitation payment to secure a routine governmental action should be a defence (based on the FCPA provision) to a charge under the Exposure Draft of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill* (recommendation at paragraph 9.87 of the Treaties Committee Report).

42. Paragraph 9 of the Commentaries to the OECD Convention indicate that only ‘small “facilitation” payments’ should be excluded from the offence. It is believed that the basis on which the US “routine governmental payments” defence in the FCPA complies with the OECD Convention is that US courts apply the “sense of Congress”

doctrine which effectively means that the US courts will only exempt such payments if they are small payments. Australian criminal courts generally give a narrow interpretation to criminal legislation and will generally interpret imprecise punitive provisions in favour of the accused. To achieve a similar result in Australian courts, the availability of the defence is limited to payments related to *routine government actions of a minor nature*, and where a record was made as soon as practicable after the payment occurred.

43. Paragraph 70.4(1)(a) provides a defence against charges laid under clause 70.2 if the sole or dominant purpose of the person's conduct was to expedite or secure the performance of a routine government action of a minor nature. The sole or dominant purpose test ensures that the defence cannot be abused by a person whose main motivation for conduct proscribed by subclause 70.2(1) was evidently not to expedite or secure the performance of a routine government action of a minor nature.

44. The term "routine government action" is defined in subclause 70.4(2) in a manner intended to exclude discretionary payments'. The term 'minor nature' (as used in the term 'routine government action of a minor nature') is similar to the term 'minor benefit' which is used in section 58P of the *Fringe Benefits Tax Assessment Act 1986*. Use of the term 'minor nature' ensures that the legislation achieves the intention of the OECD Convention that the quantum be small (as evidenced by paragraph 9 of the Commentaries on the OECD Convention) while at the same time overcoming the practical difficulty that it is not possible to set a specific dollar limit in legislation which is appropriate in all circumstances. This is particularly the case in the international environment where currency differences and fluctuations are a factor. Use of the term 'minor nature' will enable the court to take all appropriate circumstances into account and to decide whether the nature of the payment in a particular case is minor.

45. Paragraphs 70.4(1)(b) and (c) provide that the defence will only apply if the person also made a record of the conduct as soon as practicable after the conduct occurred and retained that record, or the record has been lost or destroyed in

circumstances over which the person had no control, or the prosecution was instituted more than 7 years after the conduct occurred. The 7 year limit is consistent with other Commonwealth legislation and the limitation period on prosecutions.

46. The restrictions in paragraphs 70.4(1)(b) and (c) are consequential upon the further recommendation by the Treaties Committee that there should be an obligation to record facilitation payments in the accounts of organisations (recommendation at paragraph 10.19 of the Treaties Committee Report).

47. In order to avoid imposing unnecessary administrative obligations on business the legislation does not impose a mandatory requirement that such payments be disclosed and that there be a penalty for non-disclosure. However the essence of the Treaties Committee recommendation has been achieved by way of restricting the availability of the defence to situations where a record of the payment was made as soon as possible after the conduct occurred and was identified in those records as a facilitation payment.

Subclause 70.4(2) - Routine government action

48. Subclause 70.4(2) defines 'routine government action' in very similar terms to the definition in the US FCPA thereby achieving the important objective that Australian legislation be on a par with US legislation. This is important because Australian business which issues stock in the US is already bound to comply with the US legislation and has built up familiarity with the US requirements including development of internal codes of conduct. It is preferable that similar requirements also apply to the same businesses where they are operating in Australia. The Canadian Government has come to the same conclusion and included much the same terminology in their implementing legislation.

49. Subclause 70.4(2) prescribes that it only applies to routine government actions ordinarily or commonly performed by the foreign public official and which do not involve decisions to award, or encourage a decision to award, new business or to continue existing business or encourage decisions to continue existing business with a

particular person or involve (or encourage) a decision about the terms of new business or existing business. These conditions will enable a court to decide in a particular case whether the payment was a genuine facilitation payment or a discretionary payment. Paragraph 70.4(2)(b) lists 7 specific classes of actions including granting of permits, processing papers such as visas, police protection, mail collection, the scheduling of inspections, the provision of telephone services, the handling of cargo and other activities similar to those listed. The list is the same as in the FCPA.

Subclause 70.4(3) - Contents of records

50. This subclause sets out the details that the record must include thereby ensuring that the defence is only available where the person has made a full and comprehensive record at the time of a payment which clearly shows that the payment was always intended to be a facilitation payment for the purpose of securing or expediting a routine government action. This is intended to ensure that the defence will only be available to payments which were, at the time they were made, genuine facilitation payments to secure or expedite non-discretionary routine government action of a minor nature.

51. The combination of subclauses 70.4(1), 70.4(2) and 70.4(3) gives a court assistance in its decision about whether the particular facilitation payment was merely for the purpose of securing or expediting a non-discretionary routine government action which is of a minor nature.

Clause 70.5 - Territorial and nationality requirements

52. Subclause 70.5(1) provides that jurisdiction will be available not only where our traditional territory based jurisdiction requirements are satisfied (namely that the conduct occurs wholly or partly in Australia - subparagraph 70.5(1)(a)(i) - or wholly or partly on board an Australian aircraft or ship - subparagraph 70.5(1)(a)(ii)) but also where the conduct constituting the alleged offence occurs wholly outside Australia and at the time the person is an Australian citizen (subparagraph 70.5(1)(b)(i)) or the person is a body corporate incorporated by or under the law of the Commonwealth, State or Territory (subparagraph 70.5(1)(b)(ii)).

53. The Exposure Draft Bill limited jurisdiction for the offence by requiring some territorial connection to Australia. The Treaties Committee recommendation that jurisdiction be nationality based arose out of its concern that if the provision on jurisdiction required at least some of the conduct to have occurred in Australia it would be too easy for people to avoid the proposed legislation. The Treaties Committee considered jurisdiction was the central issue on which the effectiveness of the Bill

would be judged. Most of those who gave evidence to the Committee favoured extending jurisdiction to all Australian nationals. The Treaties Committee concluded that the conduct sought to be proscribed is essentially international criminal activity likely to take place wholly outside Australia and that the objectives and intent of the OECD Convention will not be met unless jurisdiction for the offence is broader (see paragraphs 7.53 and 7.54 and the recommendation at paragraph 7.57 of the Treaties Committee Report).

54. Subclause 70.5(2) contains definitions of certain terms used in subclause 70.5(1): “Australian aircraft”, “Australian ship”, “defence aircraft”, “defence ship”. These definitions give the widest possible meaning to the terms ‘Australian aircraft’ and ‘Australian ship’ which appear in subparagraph 70.5(1)(a)(ii) thereby ensuring that conduct committed in such places is committed within Australian territory.

55. Under section 11.6 of the *Criminal Code* the ancillary offences (attempt, aiding and abetting, incitement and conspiracy) will apply in the same terms as the principal offence at clause 70.2. The jurisdiction restrictions on the principal offence set out in clause 70.5 will thereby also apply to the ancillary offences.

Clause 70.6 - Saving of other laws

56. This clause is intended to ensure that the Commonwealth legislation will operate alongside any other relevant Commonwealth, State or Territory laws and does not override any such laws.

Item 3 of the Schedule - The Dictionary of the Criminal Code

57. This item makes an insertion in the Dictionary of the *Criminal Code*. It provides that “Australia” includes the external Territories. This is necessary because the *Acts Interpretation Act 1901* provides that “Australia”, when used in any Commonwealth Act, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands but does not include any other external Territory. This insertion in the Dictionary of the *Criminal Code* ensures that the *Criminal Code* applies to all external Territories.

