

AAMIG Participation in the OECD Review of the Application of the OECD Anti-Bribery Convention in Australia

The Organisation for Economic Cooperation and Development (“OECD”) conducts periodic reviews of the application of its Convention on Combating Bribery of Foreign Public Officials (“Convention”) (www.oecd.org/topics/). The last OECD review on Australia¹ was conducted in 2005.

On 31 May 2012, AAMIG (Jeff Hart, AAMIG Special Adviser) appeared in Sydney before the OECD’s Australian Anti-bribery Review Panel comprising officials from Japan and Canada and from the OECD Secretariat in Paris. AAMIG participated in Session 15 (Business Associations and Professional Organisations), which included The Australian Institute of Company Directors, the Australian Compliance Institute, Australian Industry Group and (the) International Trade Advisors (group).

Officials of the Australian Attorney-General’s Department are responsible for facilitating the review process, which in reality amounts to an examination of the application of Australia’s anti-bribery legislation. The review panel asked participants to comment on a number of issues ranging from business awareness of the foreign bribery offence (in Australia), corporate programs to detect and combat foreign bribery, whistleblower protection and facilitation payments.

With respect to the Facilitation Payment Defence issue, five OECD countries currently have this defence, including Canada, Australia and the USA. This approach is consistent with the OECD Convention² which also acknowledges the use of facilitation payments. Australia however requires that companies have a more stringent reporting procedure than other countries, in accounting for Facilitation Payments.

¹ OECD Working Group, Australia Phase 2 Report on Bribery in International Business Transactions dated 4 January 2006 available at: <http://www.oecd.org/dataoecd/57/42/35937659.pdf> See pages 44-47 for comments on the Facilitation Payments Defence.

² OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions and Related Documents dated 21 November 1997 available at: <http://www.oecd.org/dataoecd/4/18/38028044.pdf> See p. 15 para 8 (Definition), page 17 para 29 (Accounting), and page 22, para VI (Recommendations).

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We were able to emphasize AAMIG's awareness and concern about the issue pointing to the anti-bribery material forming part of AAMIG's guiding documentation including the Summary of Australian Anti-Bribery and Compliance Obligations prepared by Clayton Utz.

Other participants suggested that while there might be a growing awareness of the issue since the recent changes to the UK legislation, and the advent of the Secrecy and Australian Wheat Board cases in Australia, prevention of foreign bribery was still not a major business priority, and there had been little government effort to promote awareness. Where there was an awareness it tended to be more "at the big end of town"; coming to grips with the bribery issue, particularly in terms of establishing appropriate in-house systems and processes remained a major problem for Small and Medium Business Enterprises ("SME's").

We said that the AAMIG membership largely comprised SME's. AAMIG's support of its membership in being better prepared to deal with the social and political challenges and complexities associated with doing business in Africa included bribery and related issues. AAMIG's (Clayton Utz) summary provided detailed comment on what processes companies needed to have in place to implement an effective anti-bribery and anti-corruption regime.

As was the case during the last (2005) OECD review of Australia's application of the anti-bribery Convention there was discussion on the facilitation payments issue. The Chair of the meeting set the tone for the subsequent discussion when, during his opening remarks, he described facilitation payments as "complicated". We said we did not agree with that view and said that facilitation payments could be clearly distinguished from bribery. Drawing on AAMIG's December 2011 submission to the Attorney-General's Department we provided a detailed recounting on the issue in the African context and drew on examples. The Chair of the OECD Panel said that only five Convention jurisdictions now provided for a facilitation payments defence. We noted the five included Canada (who were present on the review panel).

Of the other organizations represented, none supported the need to make facilitation payments. International Trade Advisors said that her members had reported an increase in the requirement to make facilitation payments within ASEAN countries following the conclusion of the ASEAN/ANZ Free Trade Agreement. The Australian Compliance Institute argued that it was better for governments to take a stand against such payments; inferring that when that happened, they were less likely to be demanded. It was further commented that transparency of facilitation payments was a doubled edged sword since it added to operating costs, which were then passed on to consumers. The representative of the Australian Institute of Company Directors said that his organization had no position on the use of facilitation payments, but speaking personally, he was opposed to them.

We said that much of the discussion seemed to be on trade related facilitation payments, which were only a small element of a much broader issue. In the African context, they were often necessary to have essential services provided since often governments did not have the necessary resources to provide the routine services required for business to function properly. Any move against facilitation payments would only advantage those countries not parties to the OECD Convention.

What this session of the OECD Review Panel demonstrated was firstly that AAMIG is an Australian leader in the provision of advice on anti-bribery and corruption issues to SME's, and secondly that the facilitation payments issue is not well understood beyond a broad brush approach which may yet unfortunately see "the baby thrown out with the bath water".

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