

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

TREASURY

Australian Taxation Office

(Budget Estimates 30 May 2006)

Question: **BET 134**

Topic: **FACILITATION PAYMENTS**

Hansard page: **Written Question on Notice:**

Senator **Sherry** asked:

Aim –

To find out if Treasury believes the Tax Act needs to be aligned with the Criminal Code to prevent AWB-type payments claimed as a tax deduction.

You may be aware of the current legislation regarding bribes in the Income Tax Assessment Act 1997 under s26-52(1). That is “You cannot deduct under this Act a loss or outgoing you incur that is a bribe to a foreign public official.” This is echoed under the Criminal Code Act 1995 s 70.4.

You would also be aware of the definition of facilitation in the current legislation in the Income Tax Assessment Act. Just as a facilitation payment is not a bribe for the Crimes Act, similarly a facilitation payment is tax deductible, as distinct from a bribe. Would you say that the definitions of facilitation in both acts are very similar?

You should also be aware about the differences between facilitation payments as described under the respective acts (Attachment A).

Section [26-52\(4\)](#) of the *Income Tax Assessment Act (ITAA)* describes facilitation: “An amount is *not* a bribe to a foreign public official if it is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action...”

In contrast, the *Criminal Code Act* requires not only the same criteria as in the *ITAA* through part (b), but also two further conditions to make out a defence against bribery. It is necessary to show that “as soon as practicable after the conduct occurred, the person made a record of the conduct...” More importantly, it must be proved in (a) “that the **value** of the benefit was of minor nature.”

Surely under this definition, facilitation payments could be “major”, not minor in value, even say hypothetically 300 million dollars. So the payment is not facilitation payment for the purposes of the *Criminal Code Act* is it?

Without referring to any matter before the Cole Inquiry I seek to obtain the Commissioner’s advice as to whether a 300 million dollar payment from an exporter to a transport company, sanctioned and called for by the local authority, in other words a kickback, which I call an “AWB type” payment, is a bribe or a facilitation

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payment for the *Income Tax Assessment Act 1997*. Which is it Commissioner, it must be one or the other?

You may have read the OECD report released on 4 January 2006 'Australia Phase 2 – Report on Implementation of Anti Bribery Convention' criticises Australia's current laws because they do not impose a positive duty on auditors, or public officials, to look for evidence of bribery of foreign government officials. The current provisions of the *Income Tax Assessment Act 1997* may also provide scope for bribe payments made to foreign officials to be tax deductible. That is because, while the Criminal Code Act makes it necessary for the payments to be only of a minor value there is no such section in the ITAA, allowing the payments of large value but minor action such as those made by the AWB, and therefore renders them tax deductible.

FROM OECD REPORT

[Australia - Phase 2: Report on Implementation of the OECD Anti-Bribery Convention](#)

P4 of the report says:

The defence of facilitation payments was also identified for further monitoring because of concerns such as the practical effectiveness of the record-keeping requirement and the prohibition against facilitation payments under some State criminal codes.

Questions to Treasury –

1. Section 26-52(4) of the *Income Tax Assessment Act (ITAA)* describes facilitation: "An amount is *not* a bribe to a foreign public official if it is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature..." In contrast, the *Criminal Code Act* requires not only the same criteria as in the *ITAA* through part (b), but also two further conditions to make out a defence against bribery. It is necessary to show that "as soon as practicable after the conduct occurred, the person made a record of the conduct..." More importantly, it must be proved in (a) "that the **value** of the benefit was of minor nature." Surely under this definition, facilitation payments could be "major", not minor in value, even say hypothetically 300 million dollars. Theoretically is it not possible that a facilitation payment could be minor in nature, like a simple contact, but could be significant in market value?
2. Theoretically could an AWB-type kickback payment, which is essentially minor in nature but major in value, be deemed to be a facilitation payment for the purposes of the Tax Act?

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3. Could it not also be the case that it would be clearly ruled out by the Criminal Code leading to the bizarre situation where something could not be a facilitation payment under Criminal Code but accepted as a facilitation payment under the Tax Act?
4. In light of the OECD report and the AWB scandal, does the Tax Department believe that the Income Tax Assessment Act regarding facilitation should be brought in-line with the reciprocal Criminal Code sections?
5. Would you say that the definitions of facilitation in both acts are very similar?
6. Does the ATO think that there could be any problems with such a variance in the two pieces of legislation?
7. Is a 300 million dollar payment from an exporter to a transport company, sanctioned and called for by the local authority, in other words a kickback, which I call an "AWB type" payment, is a bribe or a facilitation payment for the *Income Tax Assessment Act 1997*. Which is it Commissioner, it must be one or the other?

Answers:

1. In deciding what is "of a minor nature" the Tax Office would consider all factors including the value. The Tax Office will not comment on the affairs of individual tax payers.
2. See 1 above
3. See 1 above. Questions concerning the Criminal Code should be referred to the Attorney-General or his department.
4. The Tax Office does not currently see any legislative impediments to effective tax administration with the current Criminal Code and Tax Act.
5. Yes.
6. No.
7. The value of a payment would be one factor the Tax Office would consider in deciding if a payment fell within the definition in Section 26-52(4) of the *Income Tax Assessment Act 1997*.

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Background –

Federal Justice Minister Chris Ellison has put chief executives of Australia's top 100 listed companies on notice to stamp out kickbacks involving foreign officials, ahead of the government moving to boost personal and corporate penalties for bribery offences.

Questions to ATO –

1. Has the ATO launched a crackdown on corporate tax deductibility claims on facilitation payments made on international contracts?
2. Has this come about after the AWB Iraq wheat kickbacks scandal?
3. Has this crackdown been prompted by corporations, other than the AWB?
4. How will the ATO educate corporations about the crackdown?
5. Is there a need to increase awareness among commonwealth public servants and law enforcement authorities?
6. Will small and medium-sized business be included in this crackdown and if so, any particular sectors?
7. What is the penalty facing companies found guilty of bribing foreign officials?
8. Is the Tax Office aware of particular corporations claiming tax deductibility on facilitation payments made on international contracts?
9. If so, can he name the companies or say how many there are?
10. Will the ATO require extra resources to carry out this crack-down?
11. Brendan Stewart and Paul Ingleby have made recent comments that even if AWB kickback payments are found to be bribes that AWB should on the basis of legal advice, receive no tax penalty?

Answer:

1. The Tax Office has included references to foreign bribery and facilitation payments in its 2006/07 Compliance Program. This means that the risk will be addressed in the context of the Tax Office's total compliance program. The Tax Office is proposing to include a new label on the 2007 company income tax return that will require reporting of facilitation payments.
2. The inclusion of references to foreign bribery and facilitation payments in its 2006/07 Compliance Program was a result of agreement with a recommendation of the Australia Phase 2 Report on Implementation of the OECD Anti-Bribery Convention, which was released on 16 January 2006.

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3. Refer to the answer to question 2.
4. The Tax Office has released its Compliance Program 2006-07 which includes a reference to foreign bribery and facilitation payments. The Tax Office has provided this information on its Internet site.
5. The Tax Office has established internal guidelines to assist Tax Office staff in understanding and dealing with the bribery of Australian and foreign public officials. The issue as it relates to other Commonwealth public servants and law enforcement agencies should be referred to the Attorney General or his department.
6. The Tax Office will be checking businesses with particular international profiles to ascertain if they are maintaining appropriate systems to detect international facilitation payments so that deductions for expenses and input tax credits are properly claimed.
7. The normal penalty provisions of the income tax law would apply as would potentially the provisions of Part III of the *Taxation Administration Act 1953*; the effect of those provisions would depend on the facts of the case.
8. Facilitation payments have not been separately reported to the Tax Office. In response to the OECD report, the Tax Office is proposing to include a new label on the 2007 company income tax return that will require reporting of facilitation payments. One review is currently underway to determine if certain payments comply with the provisions of the Tax Act so that only legitimate expenses are allowed as deductions.
9. No. The Tax Office will not comment on the affairs of individual taxpayers.
10. No.
11. The Tax Office looks at specific cases within the law and on their merits. The Tax Office will not comment on the affairs of an individual taxpayer.