COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: OECD convention on combating bribery

CANBERRA

Monday, 9 March 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON TREATIES

Members:

Mr Taylor (Chairman)

Mr McClelland (Deputy Chairman)

Senator Abetz	Mr Adams
Senator Bourne	Mr Bartlett
Senator Coonan	Mr Laurie Ferguson
Senator Cooney	Mr Hardgrave
Senator Murphy	Mr Tony Smith
Senator O'Chee	Mr Truss
Senator Reynolds	

For inquiry into and report on:

OECD Convention on Combating Bribery.

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Senator Coonan	Mr Laurie Ferguson
Senator Cooney	Mr Hardgrave
Senator Murphy	Ms Jeanes
Senator Neal	Mr McGauran
Senator O'Chee	Mr Tony Smith

For inquiry into and report on:

Treaties tabled on 3 March 1998.

WITNESSES

JOINT STANDING COMMITTEE ON TREATIES

OECD convention on combating bribery

CANBERRA

Monday, 9 March 1998

Present

Mr Taylor (Chairman)

Senator Coonan	Mr Adams
Senator Murphy	Mr Bartlett
	Mr Laurie Ferguson
	Mr Hardgrave
	Mr McClelland
	Mr Tony Smith

The committee met at 9.08 a.m.

Mr Taylor took the chair.

VANSTONE, Senator Amanda Eloise, Parliament House, Canberra, Australian Capital Territory

CHAIRMAN—Thank you for coming along this morning, and I specifically thank the minister, Senator Vanstone. We plan to invite the minister to make some opening remarks. I have to point out that this morning's hearing on the so-called bribery convention is an initial discussion. We will be having more detailed hearings on the subject, but nevertheless it is a first for this committee, a first in that we have a minister appearing before us. It is not appropriate that the minister be sworn, for a number of reasons, but officials will of course be sworn in the normal manner. We have seven treaties to consider at this morning's hearing, five of which are very straightforward, some of them formatted type agreements, and that should not take too long. We will open with the one on bribery and we will finish with the one on the truce monitoring in Bougainville.

Minister, welcome. I understand, with your busy schedule, you want to make some comments—and perhaps my colleagues might have one or two questions for you—and then you want to go on your way. We will then bring the officials to the table. We would like to wrap up the bribery convention, bearing in mind that it is a preliminary hearing, by no later than 9.45 a.m.; between 9.45 a.m. and 10.15 a.m. we will hopefully cover the other four, with the exception of Bougainville; and then at about 10.15 a.m. we will finish off the hearing with some evidence in terms of the truce monitoring in Bougainville. I invite you to make some comments.

Senator Vanstone—Thank you very much, Mr Chairman, and thank you for the opportunity to speak to the committee. Is this the first time you have considered a convention along with the appropriate legislation at the same time?

CHAIRMAN—Yes, I should have pointed that out.

Senator Vanstone—The Convention on Combating Bribery of Foreign Officials in International Business Transactions, which we are being asked to ratify and implement by the end of this year, is a very significant response by the international community to a growing awareness of a real problem of transnational corruption.

You might be aware that we have not yet signed the convention because we believe that a transparent and consultative approach to treaties is appropriate, and we regard the consideration of the convention by the joint standing committee as a key mechanism in that public scrutiny. While we recognise that legislation is needed to implement the convention, we think it is clearly appropriate that this committee consider both. We believe the Australian community can only benefit from greater openness in the treaty making process, and we can only benefit from constructive input from the business community and from the public.

When we say that it is an OECD convention, we should not underestimate the

significance of the initiative by putting it in such short form and referring no further to it—to the authority, if you like, of the OECD. Those countries make up approximately 80 per cent of global gross domestic product. They include the world's three largest trading nations—the United States, Germany and Japan—and also include all major European countries, South Korea, Canada, Mexico, New Zealand and, of course, ourselves.

In December 1996 the UN General Assembly adopted a declaration against corruption and bribery in international business transactions as an attempt to combat international corruption, indicating it is not limited simply to the OECD. We believe it is important to embrace the OECD's initiative. We want to be seen in the international arena as a nation prepared to take a principled stand against corruption. We recognise that it will not completely solve the problem, but it must do something to reduce it. It will provide a very strong statement about Australia's values and our confidence in the correctness of those values. Some may say, 'Why would you limit yourself simply to the convention? Why not go further and attack bribery of public and private persons, that is, other than foreign officials; and why have an exemption for facilitation benefits?'

These are issues, presumably, that this committee will look at, but I think there is some value in following the strict terms of the convention at this time. We want it to work. Many countries will face a greater cultural change than we will. In some cases, as I am advised, the implementation of the terms of the convention is going to be a difficult process. We are not going to help that process by going even further. An exemption, for small facilitation benefits, is probably one of the most difficult issues to be faced.

First of all, the convention has to be read with the commentaries; and the two documents together, I think, show a clear intention to exclude certain small payments. Just how these are defined, without undermining the required criminal prohibitions, is a matter of some difficulty. In addition, in view of the international character of the offence proposed in the convention, it is worth while recognising that this is the sort of thing that would be expensive to investigate and prosecute, and it follows that the focus of law enforcement, by necessity in these matters, is going to be on very large scale bribes because of the cost involved. In practical terms, a specific exemption for facilitation payments, which is put forward as an option in the exposure draft, simply recognises the reality of how the law will be enforced. At the end of the day small facilitation benefits are matters which might be better left to local authorities to police, rather than the law enforcement authorities of other nations, regardless of whether there is an exemption in the legislation or otherwise.

There is one obvious possible alternative to expressly exempting small facilitation payments: that is, to rely on the prosecutor's discretion not to prosecute such minor matters. Some might argue that that alternative is more consistent with domestic law, in relation to comparable offences. On the other hand, business people can reasonably expect the law to be framed so that they know exactly where they stand, rather than having to rely on an uncertain discretion. Some in the business community have expressed concerns

that the bill may give Australia some sort of competitive disadvantage if other countries do not implement the convention. We obviously appreciate those concerns, but we have our reputation to consider and the competitive benefits of eliminating distortions in trade which are brought about by bribes. Trade that is based on quality—the true price of goods and services—rather than on bribes is obviously going to be to our advantage.

In the aid context, corruption can lead to very poor selection of projects, which in turn leads to diversion of resources away from areas that are of the greatest need. But the government's intention is that the bill will only enter into force where a significant number of OECD countries have enacted counterpart legislation; a sort of moving together is what is envisaged. That will help bring pressure to bear on countries which might be slow in implementing the convention.

Our intention is that Australia should approach the ratification of the convention and its implementation in both an orderly and a carefully considered manner, taking into account the deliberations of this committee.In the meantime, the government is satisfied that, as we are advised, other countries are making similar progress.

This bill will shortly be introduced into parliament, but the results of this committee's deliberations will be important for the timing of its progress after that introduction. The bill will not be enacted until the treaty processes are completed. But by bringing the bill forward we are showing good faith that we are ready to proceed, and doing everything that we reasonably can to respond promptly to international concerns. At the same time, of course, this process will allow Australians the opportunity to consider properly the implications of committing ourselves to these binding obligations.

If the convention is acceptable, then Australia will be well placed to meet its obligations, by the process that we have adopted here, and to do so in an orderly and efficient manner. The government looks forward to receiving the committee's response.

CHAIRMAN—Thank you very much. I know you are busy and it is more appropriate that we direct some more detailed questions to your officials. Can I just say, on behalf of the committee, thank you for doing it the way you have. As I said before, this is a first. It is a first in relation to the minister appearing before the committee. It is a first in relation to the provision of draft legislation. I think that is very helpful to the overall process. It is also a first in terms of having something referred to us prior to the initial signature.

As you would know, and your officials would know, under the joint resolution of both houses this committee normally deals with treaties after the initial signature and prior to the ratification signature; when we are given 15 sitting days. You have referred the draft treaty to us prior to the initial signature, as indeed the foreign minister did on Thursday, in relation to the proposed multilateral agreement on investment—which is in itself going to be quite interesting.

I think you would prefer not to take questions?

Senator Vanstone—I think it would be better if the officials take all of the questions, so I can go and do other things.

CHAIRMAN—Thank you very much for coming this morning. Now, could we call the officials, please.

McDONALD, Mr Geoff, Senior Adviser, Criminal Law Reform, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600

MEANEY, Mr Christopher William, Assistant Secretary, International Branch, Criminal Law Division, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600

HART, Mr Jeffrey Russell, Executive Director, Treaties Secretariat, R.G. Casey Building, Department of Foreign Affairs and Trade, Barton, Australian Capital Territory 0211

WOODS, Mr John, Manager, OECD, Resources and Coordination, Trade Negotiations Division, Department of Foreign Affairs and Trade, R.G. Casey Building, Barton, Australian Capital Territory 0211

CHAIRMAN—Thank you very much. Mr Meaney, did you want to make an opening statement?

Mr Meaney—If I could, Mr Chairman. I am aware that we are very pressed for time, but I thought I might start by giving an overview of the genesis of this particular convention and invite my colleague Mr Geoff McDonald to speak more specifically about the proposed legislation that has been referred to the committee.

As the minister has pointed out, the convention which the committee is examining represents a very significant response by the international community to the problem of transnational corruption. I would like to briefly provide the committee with some background to this initiative.

While the convention itself is very recent—having been drafted and finalised over the course of the last year—the question of combating transnational corruption has been on the international agenda for quite some time. Indeed, the United Nations General Assembly first recommended measures to tackle international corruption some 20 years ago. However, it has taken significant time for this matter to be adequately dealt with at the international level.

Following on the aftermath of the Watergate scandal and following the disclosure of corrupt practices undertaken by various multinational corporations in the United States, the United States Congress enacted the Foreign Corrupt Practices Act 1977. That legislation was the first national legislation enacted specifically to combat transnational corruption. In essence, it imposed criminal liability on US corporations and individuals who bribe foreign officials to obtain or retain business. Following the passage of that law, the US authorities have pushed, in various international fora including the OECD and the United Nations, for multilateral action on this issue so that corporations from all countries

may be placed on a level playing field.

In May 1994 the council of the OECD adopted a recommendation on bribery in international business transactions which recommended that member countries adopt a package of measures to combat bribery of foreign officials. In response to that recommendation, the then government established an interdepartmental working group to review the policy in this area and to examine the measures which Australia should take to implement the OECD recommendation. That interdepartmental group conducted a series of consultations with business and industry groups and with relevant non-government organisations. There were two rounds of meetings held in that consultation process. Business groups were first consulted on 7 March 1995 at a meeting convened by the Attorney-General's Department, and the first formal meeting with NGO representatives was held on 8 March 1995. A second meeting, with both groups together, was held in September 1995. Submissions were received from a number of organisations and were taken into account in the development of government policy.

In May 1997 the OECD Ministerial Council reviewed progress on the implementation of the 1994 recommendations. The council adopted a new recommendation which elaborated more specific commitments with respect to the question of criminalisation. The council recommended that member countries criminalise bribery and that domestic action should be consistent with certain agreed common elements. I believe a copy of these common elements from May last year has been provided to the secretariat of your committee for background for members.

Prior to the May 1997 recommendations, the government had already announced that it was examining the creation of an international bribery offence for inclusion in the model criminal code. In August 1997, government representatives attended a round table meeting on the implementation of OECD recommendations. That meeting was convened by Transparency International Australia, who I am sure will be making submissions to your committee, the Institute of Chartered Accountants, the Law Council and the Society of Certified Public Accountants.

The OECD agreement of May 1997 originally contemplated a dual process. Firstly, member countries would submit by 1 April this year legislative proposals which conform with the agreed common elements. Secondly, negotiations would be opened on an international convention to criminalise bribery in conformity with those elements which will enter into force by the end of 1998.

The dual process was a compromise because of pressure from certain countries within the OECD for urgent action on the basis of the agreed common elements, whereas other countries insisted that a convention was required for their own domestic purposes before they could enact domestic legislation. However, with the finalisation of the convention in December 1997, the dual process has now effectively been merged.

The convention was negotiated over a series of meetings in the latter part of last year. Australia, unfortunately, was not able to participate directly, in the sense of attending, but we monitored developments and provided briefing and input to the OECD and, at the same time, continued discussions with representatives of business and other organisations during this period and subsequently.

In terms of the convention as it now stands, there are some differences with the agreement that was reached in May last year. The most specific one that members might focus on would be that at that time there were, as part of the convention or as part of the agreed common elements, proposals to deal with the tax deductibility of bribes. Those are no longer in the convention. I understand they are being dealt with separately. There is a separate committee in the OECD that deals with taxation matters.

I hasten to assure the committee that that issue is still being progressed by the Taxation Office, albeit it is not now an issue that needs to be considered in the context of this particular convention. Perhaps I could ask Geoff McDonald to just say a few brief words about the legislation that has been provided.

Mr McDonald—As per usual we have given you a lot of paper, and I would just like to set the scene by saying that we have the convention, which is a fairly bare bones document; the commentaries, which go with it and which fill out a lot of the detail in that convention—and really, for the convention to make any sense, you have to read the commentaries with it; and then our bill, which pulls together the substance of the convention and the commentaries that go with it.

A useful guide, or way of approaching it, perhaps is to use our explanatory memorandum to the bill which is at the back here—in fact, I was going to suggest you just rip it out—and it has cross-references between the commentaries, the convention and the bill. The key article is article 1, which provides that:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

You can imagine that if you put that in legislation just like that, there would be all sorts of problems. We have drafted here a very neat offence in section 14.1 of the code which contains the substance of that.

An important aspect of that is that, as opposed to the regular domestic bribery offence, this offence is limited to the situation where the bribe is in order to obtain or retain business and, as a second leg, in order to obtain or retain an improper advantage in the conduct of business. That is in paragraph 14.1(c).

The 'obtain or retain business' leg of that limitation on the offence was in the 1997 agreement, and in particular that was seen to be something where the small facilitation payments would probably be all cut out by that limitation. However, the convention itself adds in the words 'also obtain and retain an improper advantage in the conduct of business.' Because it talks about it simply being an improper advantage in the conduct of business—the conduct of business being a bit broader—the small facilitation benefits issue is a live issue. If you compare the May 1997 agreement to the convention, one of the most marked differences is that the convention mentions the facilitation benefits issue.

There is, of course, more in this than just that issue. In particular, you will notice that jurisdiction is an important part of the convention. The convention gives countries quite a bit of latitude in relation to jurisdiction. The American legislation applies to conduct wherever it occurs in the world, while in Australia—and in Britain and places like that—the more usual approach is to have some territorial connection to Australia.

This particular bill takes the territorial approach which is more akin to the English system. Of particular interest there is the way in which the ancillary offences work, like attempt, conspiracy and complicity. They are in subsections 9 to 12 of the act. It is quite clear that the convention envisages that these will be covered. They are already covered in the criminal code, so you will not find the ancillary offences actually in this bill. However, there are provisions there relating to jurisdiction in relation to those ancillary offences. The territorial connection to Australia in relation to them is in the proposed principal offence. This is explained in greater detail in the explanatory memorandum. That is a key part to it.

The other thing you will notice about the bill is that we have got some quite long definitions in the middle of it which take up about three or four pages. I assure you that these are all necessary. They are brought about by the fact that government is just so different in different countries and to define what a public official or a public enterprise is—and then we bring in international organisations who are also covered by this in terms of people who can be bribed—it is necessary for us to be precise because of the seriousness of this offence which has a maximum of 10 years imprisonment. That is why that is like that.

With facilitation benefits, you will find that we have put in two options in subsection 7A and subsection 7C. There are actually three options and the minister mentioned the third one which is that we simply not have a provision and rely on prosecutorial discretion. I reiterate what she said about that. Subsection 7A would be a very precise provision. It would actually nominate an amount of money. This would provide the greatest certainty of all. The difficulty for us—and for everyone and your committee—is trying to work out what would be appropriate. That is something that we will be talking to people about in relation to international trade, and I am sure you will be doing the same.

The second option is to leave it wide open. That is, a person is not guilty of an offence against this section if the benefit has a small value, and then simply leave the determination of what is small to a jury of 12 ordinary Australians to determine. That is fairly imprecise and, as I mentioned, there is the prosecutorial discretion. I think I have covered the main points. I wish you the very best with your deliberations on this, and particularly offer my assistance and the assistance of others in the department whenever you require it.

CHAIRMAN—Thank you. Before I invite Mr McClelland and one or two of my colleagues to ask a few questions, could I ask Chris and Geoff a question about consultation. This committee, as you know, predictably makes comments about consultation. This is a bit unusual in that that consultation needs to continue. I am referring specifically to SCOT, the Standing Committee on Treaties. So that the left hand knows what the right hand is doing, can we just have confirmation that the SCOT processes will continue? For example, just off the top of my head as a result of what you have said this morning, it seems to me that we are going to have to write to premiers and chief ministers in relation to this, because it gets into the criminal code which is a state matter. Can we just have confirmation, firstly, that the SCOT process will continue and, secondly, that there will be the appropriate consultation between SCOT officials and this committee, so that we do not have a left hand, right hand situation developing in the process of this inquiry?

My second question is related to the introduction of the legislation. The minister made general reference to it. Can we have some sort of feel as to when the legislation is likely to be introduced? Will it be introduced into both houses? Will it be introduced into the Senate, and when?

Mr McDonald—Answering the last question first concerning the legislation, we have not fixed a particular time for introducing it. However, 1 April was a target date set by the OECD. We will be aiming towards that target date. As you know, there is one important clause in this bill in relation to facilitation payments. We would certainly want to monitor progress in terms of how people react to that clause before we introduce the bill.

The other thing that is relevant to the introduction of the bill, of course, is that the government has said in its announcements concerning this bill that it will not be proceeding with the bill until a substantial number of OECD countries are proceeding with it as well. There are a few factors in there which affect the timing of the bill. I cannot give you a precise date, but 1 April is the sort of target that we are thinking of. As the minister said, there is no way in which the government would be proceeding with the bill further without first getting the results of your deliberations.

Mr Meaney—I support what Geoff has said. The idea would be essentially to introduce it as quickly as possible, but as an exposure draft. We are in the position—as you, Mr Chairman, have pointed out—that this is a somewhat novel approach to the

coalescence of treaties and domestic implementing legislation. Procedurally, we might want to make sure we do not get any wires crossed, but I think it would be appropriate for the government to formally introduce the bill as quickly as possible as an exposure draft, probably in the Senate, to answer another point that you were talking about. The Minister for Justice would be keen to introduce it, but then it would lie as a discussion draft pending the receipt of the committee's report.

In terms of consultations, as I mentioned briefly in my overview, we had departmentally a series of consultations in 1995 prior to the election. The election in 1996 slowed that up. To make sure that everything is coordinated, I am more than happy to provide the list of organisations that we consulted with to the secretariat of your committee so that you are aware of who has been approached in the past.

CHAIRMAN—That would be helpful, because already it is pretty clear that the ACCI and Transparency International have a basic disagreement with what is being proposed. We need to know, particularly, what other NGOs have been consulted.

Mr Meaney—Absolutely. I have the lists here and I can provide those to the secretariat. In terms of ongoing consultations, having got to the stage of introducing the legislation, we considered at the departmental level whether we should go through a departmental process of consultation prior to coming to the committee. However, it seemed to us that, if we were going to do that in close proximity to the consultations the committee was going to undertake, we would then be going through the process twice and, clearly, you would be receiving the same submissions as we would be receiving. We saw some advantage in only going through that process once. We would certainly see that it would be coordinated from here on in. We are more than happy to touch base with the secretary of the committee from time to time, if we can be of any assistance to the committee in whatever capacity.

Mr McDonald—There is just one other small point in that there is an expectation from the business community from time to time that we go to seminars and explain what the exposure draft is about. You will see a couple of meetings where we will be involved in that.

Mr Meaney—The committee may not be aware that a meeting, another one, has been organised for tomorrow by Transparency International at the Institute of Engineers which the minister proposes to address on this very topic. I think there is a general seminar being organised towards the end of April in Sydney on the same topic.

CHAIRMAN—We have a representative of the secretariat attending that tomorrow. The main point here is that you will obviously have to be the link with the committee to make sure that we do not have this left hand, right hand situation develop. This one is unusual and we need to know what is going on and you need to know what we are doing. We have the remit in terms of this issue and we need to make sure that we have all

the facts.

Mr Hart—Yes. I certainly will play my part from the point of view of the secretariat. We are certainly seized of the critical nature of the consultation process and of the committee's concerns that this be a substantive process.

Mr Meaney—Mr Chairman, might it help if at some of these seminars we let people know, as a rule of thumb, about the reference to the committee? We could say that, as a rule of thumb, submissions should, in the first instance, be submitted to the committee and that we will ensure that anything that comes to us independently comes to the committee and vice versa. We are happy to take on board anything.

CHAIRMAN—We advertised this particular inquiry last weekend. So out there in the general community they should be aware of what we are doing but, yes, it would help to reinforce that in any of the seminars into the secretariat in accordance with that ad.

Mr Meaney—Absolutely.

Mr McCLELLAND—To what extent do you think the concerns of ACCI are justified, if the facilitative payments provisions enable too broad a latitude of our competitor nations—in other words, not to enforce corrupt payments?

Mr McDonald—I tend to think we have to keep in mind that convention talks about small facilitation payments. I tend to think that the problem in terms of law enforcement resources, and not wanting to spend oodles of money chasing a $100 payment, will operate all over the world as a factor in this. My view is that, in terms of competitiveness, it should not be of major impact at all because this is really about what they call grand bribery. It is really about the big stuff. As far as the big stuff is concerned this convention catches it and the bill does too.

Mr Meaney—Briefly on that, Mr Chairman, I think earlier you made reference to ACCI and Transparency International having some difficulties with the legislation. My understanding is they do not have the same concerns about the legislation. There is no common ground between them.

CHAIRMAN—That is right.

Mr Meaney—Perhaps we could say that they are polarised. I think the committee will no doubt become seized of the sorts of arguments that surround this debate as they get the submissions in.

Mr HARDGRAVE—Given that the Americans enacted something 20 years ago, how does this match in or marry in with the American domestic legislation? Does it match to the point where the Americans will, as a matter of course, sign this treaty?

Mr McDonald—It is very similar to the American legislation. The concept of obtaining and retaining that limitation is in it. One difference is that the American legislation refers to facilitation benefits and has quite a complex description of that exemption while the convention refers to small facilitation benefits. There is a slight difference there. But, generally speaking, there is quite a lot of similarity in terms of the substance. They draft their legislation in a peculiar way and you will see the way it is drafted is quite different.

Mr HARDGRAVE—There has been a suggestion that small payments are not going to get caught because it is basically going to be too expensive, from a paying lawyer's point of view, to chase small payments. I just declare a little bit of concern about the small slings versus the wholesale bribes thing because the small slings are a reality in various ways.

When I went to Egypt in 1984 with the Seven Network, I was advised by the Egyptian Embassy here that there may be a fee that I would have to pay a local official in order to film in and around Cairo and the pyramids of Giza. In fact, I was assured that the payment of $US100 to an official would facilitate this. When I arrived in Egypt I found that the fee was only good for that official and that, literally, a queue of officials lined up to collect their $100 to allow filming around that particular part of the world to continue. I think that is bribery in its rawest form and the Americans happily pay it. This is post the 1977 American domestic legislation. The Americans happily pay this. But the Seven Network Australia said, 'Forget it,' and we just proceeded to film illegally around Egypt. Those sorts of things occur in plenty of more important and bigger industries than just commercial television.

Mr McDonald—The sad thing about it is that the payment probably, and almost certainly, would have been illegal in Egypt. The other thing about it is that the thing to remember about this is that it is a bribe. Even if it is a small payment, you cannot take away the fact that it is a bribe. However, this treaty is aimed at the business side of things—large-scale bribes which are going to interfere with business.

In relation to the small payments, the minister would have mentioned that the small payments, in a sense, do not warrant a law with an international reach. There are local laws which deal with bribery. In relation to the small fry, that has been left to the local authorities to enforce. That is the concept that is in the convention.

Mr HARDGRAVE—I will not hold the committee any longer on this subject. Can I remind everybody of the immortal words of Jack Herbert at the Fitzgerald inquiry where I sat as a journalist, 'Little fish are sweet.'

Mr McDonald—Yes.

Mr Woods—Chairman, I might just comment also that the United States have

signed this convention.

Mr Meaney—I think the US view would be that their domestic legislation fits them to ratify this convention.

Senator MURPHY—Is the domestic legislation satisfactory?

Mr McDonald—I was reading a law report the other day from the US. It is certainly the case that people are quite regularly prosecuted under their legislation. Of course, prosecution is not really the measure of success with criminal legislation. The real measure of success with criminal legislation is to basically change the behaviour of people. It is always very hard to judge that. However, the fact that the US have been so firmly of the view that this legislation should apply and other countries should adopt it might be an indication that they think it is successful. If it was not successful, then it would be making no difference to them.

CHAIRMAN—We will have two more quick questions. This is a once over lightly session this morning. We will come back.

Senator MURPHY—With this facilitation thing, what if there was a bribe offered by way of a series of small payments over a period of time?

Mr Meaney—The concept of the facilitation payment is that it has a fundamentally different premise. The US talks about grease payments, that is, you need to get a one-off permit, you need to incite some sort of motivation in the person you are dealing with to do what you would expect they would do in due course but you get it a bit quicker. That is a fact of life in many economies in the world. For example, if you want to get your telephone connected you can wait forever or you can pay the extra $100 or whatever it might be and it happens to get done overnight. These are facilitations.

We do not say in any way that they are desirable or that the government condones them but we do not see them as being distorting of significant economic decisions that impact on trade to the same extent as, for example, the bribing of certain parliamentarians in Japan over the Lockheed scandal where, fundamentally, the whole nature of the contract changes and the business changes because you can line somebody's pocket with large sums.

Those are the sorts of distorting occurrences in economic activity that the gravamen of the convention is designed to deal with. It does not purport to deal with evil, if I can put it that way. You have to draw the line somewhere as to why, logically, we should be extending an extraterritorial operation of our law, which is not usual for Australia. As my colleague pointed out, common law countries traditionally work on a territorial basis. You have your laws in relation to a territorial connection. Civil code jurisdictions often use nationality as the basis of exercising jurisdiction. The US law is a nationality based

jurisdiction, which is odd to sit with the common law system.

Senator MURPHY—Can I interrupt. I do not think you are answering the question I asked. You referred before to facilitation benefits of a small nature, whatever that is. You could mean small on the basis that you would not want to expend a huge amount of money. Lawyers would say, 'Look, you do not want to expend that for cost purposes.' So one could say, 'What does it cost?' You could say, 'Is $1,000 small?' You could probably say that it is on the basis of what your argument is for not pursuing it. Let us say $1,000 is small. If someone offers somebody a bribe of 50 payments of $1,000 over a period of time, how do you pursue that?

Mr Meaney—That highlights the point that we will come to later, the question of: how do you find out it is a bribe if it is called a commission? We are not suggesting this is a complete solution. The realities are that you can work your way around it, but in terms of our national interests—

Senator MURPHY—I think the working around it is going to be done by the other side.

CHAIRMAN—Obviously, at subsequent hearings the balance between facilitation and bribery as defined is going to come up, so perhaps we can just leave that until we—

Mr ADAMS—I have got one question that I would like to take up and it goes to the whole heart of this legislation. What is on the record? What report exists for this legislation coming into being? What record is there that corruption exists, that people pay bribes? Where is it written? Where is the report that substantiates all this work that has been done?

Mr McDonald—There is a thick textbook of case studies which deals with cases from all over the world, virtually in every continent in the world, of people who have been caught out with major bribery. As for Australia, I do not have much to point to, but the fact is there are oodles of cases from just about everywhere in the world where this is happening. I can give you the reference to that, but I have not got it here with me at the moment.

Mr ADAMS—I have not read it in the daily press; I am not aware of it. It does not seem to be a very transparent attack on bribery in the world, because I have not read about it. I have some real problems with small bribes being okay, but big bribes being no good because they disrupt business.

Mr McDonald—I can assure you that what you read in the press does not always reflect what is actually happening. What we can do is supply you with some details of some of the things that have happened in various countries in the world. Australia, as a trading nation, is out there—

Mr ADAMS—What was the brief for the OECD to start this process? They must have had a brief saying, 'Bribery is disrupting business in the world.' Is there a brief from there?

Mr Meaney—If you want to get down to the fundamental politics of it, the fundamental politics were that the US had their legislation, and their business community said, 'We are at a commercial disadvantage by having this law in place; we want you, the US government, to make sure everybody follows the same rules.' That is the short answer to how it comes up in the OECD. There is no such thing as an empirical study of whether this is a good thing that should be taken on. However, in terms of your particular inquiries, as I understand it, Transparency International will be making submissions to this committee. I am absolutely confident that they will be able to assist the committee with examples of where this had occurred, from case studies; they have an enormous amount of research in this area.

The other thing I would point out that might also be worth while for the committee to address with Transparency International is the fact that their studies also point out that, if there were such a thing as a national bribing index, Australia would be very low on it. We are not one of the nations that do business by way of making payments under the counter. In terms of balancing this against the so-called competitive disadvantage that our firms might be under—and this is a matter that you may wish to pursue with Transparency International—they say that their research shows that Australia's business really does not depend or rely on bribing. By virtue of that, you would have to say that whatever competitive disadvantage is perceived to take place would be less than might be portrayed—

CHAIRMAN—It is obvious that some of this information is potentially quite sensitive, maybe in the area of commercial intelligence. I would be interested in your reaction. This committee may well have to have some sort of in camera hearing, just to gauge it at the domestic level. Do you have any objection to that?

Mr Meaney—No. We are not aware of any large scale cases domestically in Australia but, certainly, the committee may wish to pursue that.

Senator COONAN—Just very quickly, because I know we will have other opportunities, I am very interested in the notion of there being no regard for the value of the benefit, because I would have thought that that might have been the index here, rather than the size of the payment. One might have a degree of sympathy for an 'expedition fee' to get a phone connected. But, for instance, what if an amount were paid to some officials to hold up traffic all around a city because of access to a construction site, with huge on-costs and other holding costs, in order to allow a building to be erected? They are the sorts of conceptual difficulties of looking not at the outcome but at the initiated process.

Mr McDonald—The provision which relates to the value of the payment is

basically to focus the prosecution, or the people that are reading the legislation, on the fact that the main thing is whether the bribe has an influence in terms of obtaining or retaining business. If it has that effect, then the offence applies. Apart from the exemption in relation to facilitation payments, value is of no consequence in this offence. The focus is the actual influence it has. That is a fairly standard approach. Another standard clause in it relates to custom and the fact that you cannot take into account custom: that is in all our domestic bribery offences at the moment.

Just one thing on the series of facilitation payments: you can produce evidence to point out that it is not really individual payments but in fact one big payment paid in instalments. That is the sort of answer to Senator Murphy's comment.

Senator COONAN—The other area obviously will develop. In terms of territorial connection, how are you going to deal with bribes on the Internet and e-mail and other jurisdictions that have not got a territory?

Mr McDonald—When I mentioned the ancillary offences, like complicity, which is aiding and abetting, attempt, conspiracy, the actual complicity itself does not have to be in a particular territory. The territorial connection in relation to that is where the proposed offence, or how the proposed principal offence, would be carried out. And if part of the principal offence was intended, or if part of the conduct of that offence occurred in Australia, then it would be caught. But I feel that there should be no problems in that area. Once you start using the Internet, it is basically a means of communication. With those ancillary offences, they are fairly effective in dealing with that.

Senator COONAN—I am surprised to hear that.

Mr McDonald—It remains to be seen whether everyone agrees with me on that. Our criminal law is probably a lot more effective in this area than a lot of people realise.

Mr BARTLETT—Is there any estimate, however vague, of the cost of lost Australian business because of the incidence of international bribery?

Mr McDonald—I do not think anyone would have any idea.

Mr BARTLETT—Presumably very significant, though?

Mr McDonald—I would imagine so.

Mr Meaney—We would have to rely on industry groups to bring that forward. We have not had any significant cases drawn to our attention.

Mr BARTLETT—Has there been any approach from industry groups with requests for this sort of legislation because they fear they are losing a lot of business?

Mr Meaney—In terms of the constituency of the Transparency International side of the debate, BHP, CSR and other major corporations, for example, are very strongly behind this. They see that as a significant factor that they need to deal with and they would prefer to have this legislation in place.

CHAIRMAN—Gentlemen, you have whetted the committee's appetite on this one. We look forward to the next hearings in which of course we will get into some of these issues in a lot more detail. Thank you very much for the opening comments on this interesting subject.

Mr Meaney—Thank you, Mr Chairman. I will just place on record that we would be more than happy to come back at a later stage, once the committee has received submissions and might have particular questions or something. We would be more than happy to appear before the committee.

CHAIRMAN—Sure. Thank you very much.

Resolved (on motion by **Mr Hardgrave**):

That this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 10.03 a.m.