COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: OECD convention on combating bribery

CANBERRA

Monday, 30 March 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON TREATIES

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	Ms Jeanes*
Senator O'Chee	Mr McGauran
Senator Reynolds	Mr Tony Smith*

* Member of the OECD Convention on Combating Bribery Subcommittee
** Chair of subcommittee

For inquiry into and report on:

OECD Convention on Combating Bribery.

WITNESSES

JOINT STANDING COMMITTEE ON TREATIES

(Subcommittee)

OECD convention on combating bribery

CANBERRA

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Present

Senator Coonan (Chair)

Mr Adams

Mr Laurie Ferguson

Mr Hardgrave

Mr Taylor

Subcommittee met at 9.04 a.m.

Senator Coonan took the chair.

CHAIR—I declare open this public hearing, the second on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. We took evidence on this convention on 9 March 1998 from the Minister for Justice, Senator Vanstone, and from officials of the Attorney-General's Department. That was an introduction to the convention and its approach. Today we will take further evidence from the Attorney-General's Department, concentrating on the draft implementing legislation. We will then hear from representatives of the Australian Chamber of Commerce and Industry, the Australian Federal Police and the Australian Taxation Office.

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

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

CHAIR—The committee has not received a submission as such from you. However, as I said, you have given evidence previously to our preliminary hearing. Would you like to make a brief opening statement before proceeding to questions?

Mr Meaney—I understand that we are going to focus principally on the proposed legislation and the form of the offence and some of the technicalities that might arise out of that.

CHAIR—What I have in mind is that, because we are looking at the enabling legislation, we will not be looking at the convention. We would appreciate it if you would take us through the legislation in some detail, focusing on the objectives of each section, and take us through the definitions. Perhaps you could enlighten us as to the rationale behind how each section has been framed and why it has been framed in that way.

Mr Meaney—Certainly. Geoff McDonald, as senior adviser, criminal law, has been very much preoccupied with preparing this legislation. I will just say a few preparatory words perhaps and give the main exposition to him.

An issue has been running around in at least a couple of the conferences we have had that have been organised by TI and about the approach that we have taken. Perhaps I could go back to some first principles to explain the approach to extraterritoriality under a common law system. The two key differences between civil code jurisdictions and common law jurisdictions are the way they exercise their jurisdiction. Traditionally, common law jurisdictions in Australia, the UK, Canada, the US, New Zealand, South Africa and so forth take the approach that jurisdiction should be exercised on a territorial basis and there needs to be some nexus with the territory of the country. This interacts a little with the way in which the common law countries approach extradition. Common law jurisdictions, as a matter of principle, do not object to surrendering their own nationals. So if you have a territorial connection and a crime is committed outside that jurisdiction, common law jurisdictions are prepared to surrender their nationals to face the criminal justice system in the country where the offence was perpetrated. In civil code jurisdictions, however, while there are some variations, the basic principle is that they do not surrender nationals. But as a corollary of this, they will exercise jurisdiction on a nationality basis. That is, the particular crime does not have to have a territorial connection with the jurisdiction, it merely has to have the fact that the person who is committing the offence is a national of that country.

CHAIR—Wherever the national might be.

Mr Meaney—Wherever the national might be. So if the national commits a criminal offence outside their own country, then returns to their country under the nationality principle, they would not be surrendered for extradition. But their own country can exercise jurisdiction over them and try them in that country for an offence against their own national law, even though it did not occur within their territory. So these are fundamental differences in the approach to territoriality. The approach that has been taken in relation to this piece of legislation in relation to extraterritoriality has been to stick with the common law approach of needing to have some nexus or connection with the territory of Australia, so that there must be some connections. Geoffrey will take you through the technicalities of that.

I just highlight that because there has been in the press—at least in the Financial Review; I have not seen the article—some interviews with the minister and so forth, in which some critics of the legislation have said, 'You should be exercising jurisdiction on a nationality basis', which would be broader than exercising it on a territorial basis. The only precedent that we could really point to in Australian law to do that is the child sex tourism legislation. That was done that way for a number of reasons. We do not really believe that that approach is appropriate to take in this particular circumstance, apart from fundamental reasons of principle and how it fits with our national legal system.

I think there is also the question that experience has proved that trying to exercise jurisdiction on a nationality basis, as we have done under the child sex tourism legislation, creates inordinate problems in logistics and investigation and makes things very expensive. The rules of evidence are such that you really are making life very difficult for yourself to try to prove an offence on that basis under our system of law. Whilst the civil code jurisdictions might do that, they are not hampered, shall we say, by the technicalities of the rules of evidence under a common law system, because they have an inquisitorial as distinct from an adversarial system. So I think it is important for the committee to understand that trying to mix the principles of taking, for example, a nationality approach and a territorial approach for a common law system might have some superficial appeal, but there are a large number of practical difficulties that would mitigate the practical enforcement of the laws from our point of view.

We are hoping to have the legislation introduced in the next couple of weeks, subject to approvals. One of the preconditions to approval is, as we said in our opening address on the previous occasion, that sufficient progress has been made within the OECD of other countries taking steps to implement this convention. We have done a bit of a scout around for that purpose and done a survey of how things are going. I might table a couple of documents. There are a few copies of each, but there might not be enough to go around.

The first document is a list of countries, giving an overview of the results of our

survey on how things are progressing. As to the second document, I think that many people assume that because the United States had the Foreign Corrupt Practices Act in place, they would automatically qualify for the purposes of having sufficient laws in place with a convention. That appears not to be the case. Here is an article, which we could also table, to say where the US needs to improve their laws to be able to be said to comply. So that is more by way of background information. We are happy to discuss that at a later point, but we do not want to distract the committee from the task at hand.

CHAIR—So the table indicates that quite a number of countries are up to—

Mr Meaney—Various stages of the draft, or are looking forward in the near future to having something put before their parliaments and so forth. Interestingly, the UK asserts that it does not require any legislation. It would not be up to us to advise the UK, but that seems to be a broad statement, and we will be making further inquiries of the UK to see how exactly they can come to that conclusion.

CHAIR—And interestingly, France seems to be absent.

Mr McDonald—We have not heard anything from them yet.

Mr Meaney—Unless anybody wants to ask any questions on the general stuff I have spoken about—

CHAIR—Does anybody want to ask a question about the nationality as opposed to the territorial approach to the legislation?

Mr Meaney—Perhaps I could pass you to Geoff McDonald, who has been intimately involved in the preparation of the legislation. He can go through the detail.

Mr McDonald—I will get straight into it. There is even something to be said about clause 1. This clause points out that this amendment will go into the Criminal Code. I should say that the Criminal Code is the Commonwealth's new vehicle for criminal law reform. This will be one of the first offences that go into it. Basically, as packages of reform are developed over the next few years, they will all go in the Criminal Code, including our domestic Commonwealth bribery offences. This will fit in with that; that is why it is there.

In relation to the commencement provision, clause 2, we have linked the commencement to the time at which the convention enters into force in Australia so that we do not put the cart before the horse. There is also a flexibility to enable the government to implement it, say, three or four months or even six months after the convention enters into force so that people can be informed of what is happening and be certain about when it will commence. Of course, in accordance with the usual practice, if it has not been proclaimed within six months, it will automatically commence in that time.

The Criminal Code amendments are always in its schedule. If you are wondering why it is in the schedule, it is because the code itself is in the schedule. For simplicity we have called this chapter 3 and put the first offence in there. Section 14.1 is the main offence provision and I shall read it out. Subsection (1) says:

A person is guilty of an offence if:

(a) the person:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person.

In terms of showing whether the person is guilty of an offence in relation to that first leg, you have to just show one of those. The one that is probably the broadest is 'causes a benefit to be provided to another person or causes an offer of the provision of a benefit'. Those provisions can, of course, have quite significant reach; if that causing activity occurs in Australia it can relate to quite a bit of activity that is occurring overseas.

CHAIR—For the purposes of assisting anyone who might read the transcript, 'benefit' is defined as including any advantage and is not limited to property.

Mr McDonald—Absolutely.

CHAIR—So that could be influence or something like that?

Mr McDonald—Yes, that is right. Because, as everyone knows, it is not just money that talks with people; people have all different sorts of motivation. Having a wider definition of 'benefit' is completely consistent with what has been done in the Criminal Code in many domestic bribery offences and is also consistent with the convention itself, which makes it clear that it needs to go beyond pecuniary benefit. So you have one of those.

The next segment is that the benefit is an undue benefit, and 'undue benefit' is defined on the next page in subsection 14.1(4). It provides:

. . . in working out if a benefit is an "undue benefit" 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 clause 1 of the OECD convention and the type of provision is also consistent with domestic bribery type offences. They do it in different ways, but usually they will have provisions which expand the definitions to cover

that.

The next segment is very important. Let us just work through them. In an imaginary offence, the person provides the benefit to the other person; that is the first part. The second part is that the benefit is an undue benefit and the third part is that the person does so with the intention of influencing a foreign public official who may be the other person. So you could do it through an intermediary.

CHAIR—Or it might be for a third person.

Mr McDonald—Yes, that is right—in the exercise of the official's duty as a foreign public official. 'Foreign public official' is defined—let us talk about that later—in order to firstly obtain or retain business, which you will recall from last time was all that was there in the initial negotiations, and then the second leg states: to obtain or retain an improper advantage in the conduct of the business. Let us just move from the obtain or retain business and have a look at this second leg which talks about improper advantage.

CHAIR—Would it not be better to have 'undue' so that you have got consistency there?

Mr McDonald—I guess it is different in terms of the sort of thing that we are talking about here. 'Undue' is focusing on whether there is a legitimate expectation for receiving the benefit, while, to look at the commentaries, it is really looking at situations in which, say, there might be some statutory requirement to which a blind eye might be turned. So it is treated in the convention as a different concept—just to draw that out. The indication of that is, I think, in paragraph 5 of the commentaries.

CHAIR—Page 36 of our papers.

Mr McDonald—'Other improper advantage' refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet statutory requirements. The convention singled it out and the government decided that it was certainly worth while isolating this. Another reason for isolating it is that, as I explained last time, if it is the facilitation benefits issue, it is really relevant only to this particular leg of the offence. In our view, the obtain or retain business leg of the offence is such that, to have an influence on obtaining or retaining business, it is unlikely to be one of these small payments. In fact, it would just be unlikely to exist. We just do not believe it would happen.

CHAIR—It is bigger than—

Mr McDonald—Yes, as soon as it gets to the point where it is obtaining or retaining the business, then we feel it falls out. That is why that—

Mr Meaney—It is a different purpose, if you like.

Mr McDonald—Yes. We have mentioned the penalty previously. It is consistent with the penalty for theft and what we propose to have for our domestic bribery offence. It means that, whenever you see 10 years, you may also fine a person as an alternative or give them imprisonment and a fine. The fine for an individual would be $66,000 and $330,000 for a corporation as an alternative.

CHAIR—Would it not be better to put it in?

Mr Meaney—There are automatic provisions in the Crimes Act itself.

CHAIR—I am just wondering whether or not it would be of any—

Mr Meaney—One of the problems, particularly with the updating of the fines, is that they go out of date so much. So it is easier to have them in one central place and then you just have them operating.

Mr McDonald—You see that there is a note there, and these notes are fantastic. There is clear indication there that there are some fines, and I think people's suggestion is that that alerts a person. I will keep moving. Obviously there might be something in there you would like to come back to.

Subsection 2 makes sure that this section extends to every external territory. That just makes sure that we do not treat some of our external territories like foreign countries. It is pretty standard. Then of course we get into the jurisdictional provision, which Mr Meaney spoke about. The section applies to conduct both within and outside Australia unless the conduct referred to in paragraph (1)(a)—(1)(a) is all those conduct provisions: provides, causes, offers to provide, causes an offer—occurs wholly outside Australia. In addition to that, we would add for this purpose such conduct is taken not to occur wholly outside Australia in a case where the first segment of conduct occurs, where the benefit was received in Australia, or in a case of the second lot which is causal, where it is a little bit more distant, and the benefit would have been received in Australia.

The convention asks that we not be ridiculous in terms of requiring a physical connection to Australia. This provision really relates more to a situation where someone puts a bribe in the mail to Australia to an overseas official—from an Australian overseas—and for some reason it just does not get to the person. It would be crazy if that person could get off on a technicality when if it had arrived it would be okay, or if it was happening the other way around—the person was sending it from Australia to a foreign official overseas. So that is all that provision means.

Where it talks about the benefit, it is only talking about the bribe. Some people have misunderstood that to think that there is some suggestion that it might cover some indirect benefit to the company when in fact that refers back to subsections (1)(a)(i) and (ii), so it is only referring to the bribe.

CHAIR—So what you are really looking at is the conduct.

Mr McDonald—Yes. We will move on now. We have spoken about undue benefit and improper advantage. Let us move on to subsection 6, which is the defence if conduct is lawful in the foreign official's country. We thought, 'This is easy enough.' Of course, it was not. You can see we have got a table there that shows why it was not.

This defence was placed in the legislation by the OECD convention just to assure people that if there is a country—and we are not really aware of any—that does not prohibit these payments to foreign officials then this legislation would not cover them in that situation. I guess the philosophy behind that is that if it is not at all illegal in that country then it is most inappropriate that we should be making it illegal back here, where there is connection to Australia.

Mr Meaney—Could I interpose there? The politics of the OECD, as we mentioned, was that this initiative was very much driven by the United States. In seeking to have extraterritorial offences in relation to bribery, jurisdictions that were affected where bribes were being paid—and there were certain jurisdictions in mind, let me say, when that occurred—were concerned that this in fact was an invasion of their sovereignty.

I think what you have got here is a fairly transparent preservation of sovereignty, if you like. Whilst it might not have any legal effect in the sense that, to the best of our understanding, there are no jurisdictions that do not prohibit bribes, it is part of the negotiated political settlement to say that this does not seek to encroach on the sovereignty of other countries. So if it looks like it is a nonsense, it could well be, I guess is my point.

CHAIR—What is very interesting, of course, is that if you have got the defence in respect of any legislation where it is not an offence, then you have got that it is an infringement—and you cannot take into account official tolerance.

Mr McDonald—I think the real problem in terms of this is less so that it is not legal and more so a question of enforcement. I think in terms of the real practical impact of the legislation that is actually probably set fairly well. Official tolerance is probably the problem in some cases. You will go through the statute books and you will find that, sure, they have got a bribery offence, but—

Mr Meaney—Everybody knows it is not enforced.

CHAIR—It is observed more in the breach than by observance.

Mr McDonald—Just referring to the table, one of the reasons that table looks a bit more complicated than what I would like to see—it was unavoidable—is that we are covering such a range of different bodies, including international organisations. With an international organisation, the officials and so on have travel arrangements such that they

could basically pick the jurisdiction where they wanted to be involved in corruption. So what we have done is source it back to the international headquarters of the international organisation.

Where there is that possibility, in terms of simplifying what the law of a particular country would be for the purposes of that provision, we have outlined a central administration post. It is necessary to do that, notwithstanding the fact that we think the section is probably very unlikely to be used, because it is a serious criminal offence. You can go to jail for up to 10 years and you have just got to be precise. You will see that we have even put in military and police, because we have got an argument that the military and police are not technically in the Public Service and things like that. So that is why that is like that.

We go to subsection 7A. I will just keep firing along. This gets to the facilitation benefits issue. I spoke at great length about this provision on the last occasion. I just mention that if the government introduces the bill in the next week or couple of weeks the chances are that it will not have this provision and there would be a statement to the effect that 'we are awaiting the outcome of the deliberations of this committee before we make a decision on that', because obviously we cannot introduce the bill that has got optional provisions. So if the government was to do that, it would be in no way pre-empting what your findings would be. I might point out, though, of course: the legislation could work without it. What would happen in relation to the small payments is that you would rely on prosecutorial discretion.

One other country that I have been speaking to put out an exposure draft which did not have it. They wanted to rely on inquisitorial discretion and they have had requests from business to the effect that they would prefer to have the specific defence. We have elected to put those provisions out because we feel that it is more constructive to be talking about real provisions.

Mr HARDGRAVE—What is the range of value of benefit in countries that are further down the track than we are?

Mr McDonald—There is no country that has bitten the bullet yet on that. In fact, I suspect that in the country that I was talking about it was probably the main reason why they wanted to rely on prosecutorial discretion. I do not know what their motivations were, but there is no country yet that has really bitten that bullet. The US, of course, talks about routine benefit and routine payments, but that is a lot different from what the convention is saying.

The convention is saying that it should be a small facilitation benefit. Routine payment in, say—I can think of one example—a North American country which was being requested at the wharves was very large. It could be $50,000 or something like that. I am not certain that that is what the OECD had in mind. The US, in that paper that Mr

Meaney tabled to the committee, accepts that it has a number of amendments to make to its legislation, but it has not mentioned amongst those amendments this particular issue. I tend to think that it is a problem which no-one has really resolved yet. We are examining other legislation. A lot of it, we have been told, has been drafted, but we cannot get copies of it yet. In fact, as soon as we get copies we will forward them on to this committee.

CHAIR—If one at least looks at maybe putting in $50 or $100 or whatever the value is, a previous member of the committee—I think it might have been Senator Murphy—raised the point that if you have several payments, because of the way in which this is framed you probably would not catch them where you could look at the overall cumulative benefits, for instance. Is that something that the drafters are looking at?

Mr McDonald—Last time I think I said that the answer to Senator Murphy's question about that was that the prosecutor and court will look at the overall transaction. What the prosecutor will say, if it is 50 small payments—just to get around this—is that it is not 50 payments, it is in fact one payment. They will look at the total conduct, which has been paid by instalments.

CHAIR—They might have a good defence, though.

Mr McDonald—That is something that could be taken into account in setting the amount of money. Maybe that is an argument in favour of making it a very small amount. If you made it $100 then, of course, 50 would be 5,000. If you made that a large amount, then you might become a bit more concerned. However, I believe that where people are being ridiculous—say, with 50 payments of $100 over a period—and the prosecution has got to the stage where they are prosecuting someone, they will be able to show a pattern there which would suggest that—

Mr Meaney—I think the other thing to bear in mind is that, having regard to the differences in the purposes for which the payments are made, the facilitation payments go only to the second and not the first limb, which is for the purposes of obtaining or retaining business. It is going to be very difficult, I think, to disguise not only a series of transactions that have been payments by instalment, if you wanted to call it that, but then also to disguise the purpose. Clearly, the larger the amount the more likely it is to be for that purpose rather than—

CHAIR—Greasing the wheels?

Mr Meaney—Yes.

Mr HARDGRAVE—This still comes down to an overwhelming philosophy that it seems to me that politicians accept bribes but public servants accept gratuities. There seems to be a defence built into this thing. The preamble says that bribery is a widespread phenomenon in international business transactions and that it raises serious moral and

political concerns, undermines good governments and economic development and distorts international competitive conditions. I would submit to you that a sling of $50 to get something off—and I am not picking on wharfies for my Labor colleagues' sake—but a sling of $50, which would be impossibly cheap, to get something off a wharf faster than a competitor is just as bad, given the aims of this convention, as a $5,000 more sexy kind of lump sum or instalment plan bribe.

Mr Meaney—If you examine it as a point of principle, that is absolutely right. The question then becomes: it is unusual for Australia to be exercising this extraterritorial jurisdiction. Are we trying to exercise extraterritorial jurisdiction to cover all the conduct, or are we trying to focus on the gravamen—the stuff that is really starting to distort economic decisions? To suggest that we have the law enforcement resources, for example, to send overseas to investigate payments of $50 flies in the face of reality. It is not going to be the sort of thing that is going to be enforced. And if it is not going to be enforced, it seems to me that it is a bit of a nonsense to have something on the books that you know is not going to be—

Mr HARDGRAVE—So at the end of the day, the $50 greasing of the wheel gratuity tip—'Thanks for getting that off faster. Here is $100'—all of those sorts of things are basically just part and parcel of international trade, so you start to wonder what is the point of having this convention full stop.

Mr Meaney—If you look at the Lockheed scam in Japan, where you are getting payments of tens of millions of dollars, that is really starting to distort your economic considerations, and that is starting to impact significantly on international trade. Whether you pay $50 to facilitate something probably at the end of the day does not distort that much in terms of international trade.

Mr HARDGRAVE—In the end it is probably part and parcel of international trade.

Mr ADAMS—This connection is about trade. It is not about bribery.

Mr McDonald—If I might intervene here, the convention itself very much recognises that there are local laws in relation to bribery in virtually all the different countries.

CHAIR—Local laws for public tolerance and official tolerance?

Mr McDonald—Yes. The thing is that it is not as if that bribery is not covered by some law. It is covered by the local law. What we are talking about here is an offence with international reach, with all the complications associated with that, including the difficulties of putting together a case involving that. Now, that is the reason the OECD give for putting this in there. That is indicated in the convention itself. At the end of the

day, all we can say is, 'The government has put it in there for discussion. The government is looking forward to your recommendations on it.' And it is perfectly open to not have one of these provisions in line with prosecutorial discretion.

Mr TAYLOR—Can I just make a comment rather than a suggestion? It seems to me that including 7A to 7C in the legislation is perhaps making an unnecessary legislative weight which is not really required. I mean, why not leave the whole thing out? Facilitation benefits—the extent of those benefits—are going to be a matter of some conjecture . Can we not just delete it and leave it to be drawn under (1)(a), (b) and (c)?

Mr McDonald—You can leave it out. In fact, for the purposes of getting a bill introduced, it may be that the government will introduce a bill with that out pending the outcome of the work of this committee and consultation. The legislation will work without it because the prosecutor has a discretion. If you leave it to prosecutorial discretion, you have none of these complications. But you need to remember that prosecutorial discretion is a lot less certain option than this as far as the statute law reader. Of course, in practical terms, as I have said previously, I think it would be very unlikely. However, the prosecutor looks at each case individually and makes a decision on it.

Mr TAYLOR—On that point of introducing legislation, I have to say as one member of this committee that I wonder about the logicality of that if this committee and subcommittee are looking at this legislation in some detail. It seems to me that that is what the minister has done—given us the legislation. I think it would be imprudent in many ways if, in fact, the legislation were to be introduced with or without bits and pieces, particularly this—

Mr Meaney—Could I explain? What we proposed was that the legislation would be introduced into the Senate and it would then be formally referred to this committee. At the moment you have it, if you like, other than by way of resolution of the parliament. It would just be referred so that the two processes would coalesce.

Mr TAYLOR—We do not need the resolution. We just need a ministerial reference which has taken place via the letter. As a procedural thing, it would be my view, on that subject anyhow, that it would be covered by the clerk. It would seem that that has already been covered. Yes, reference to this committee is done under the terms of the joint resolution, but that can happen, as has happened with the MAI, in terms of a ministerial reference; and that has happened. I do not think you can argue for bureaucratic or legislative reasons that it needs to be introduced into the Senate. That would be my view. I do not know if others feel the same way.

Mr McDonald—We will take that on board.

CHAIR—Just getting back to whether or not there needs to be any provision for the facilitation benefit, from the point of view of somebody who is likely to infringe, do

you really want to exempt them? It is up to them to take the risk, is it not, as to whether or not they are prosecuted?

Mr McDonald—I think the answer to that is that it is really a policy decision for the government on which I cannot expand. However, I can point out that in the original agreement in May 1997 there was no mention of facilitation payments, and I have a copy of that here. The US has a provision, and I understand you have a copy of that. When they expanded the definition beyond obtain or retain to cover improper advantage, I guess the argument that this would be relevant increased because they expanded the scope of the legislation and, therefore, they were persuaded to put it in the commentaries to the convention.

I might add, though, that there is nothing in the convention to say, 'You have to have this version.' In fact, using the sorts of arguments that I mentioned about prosecutorial discretion, you can certainly say that what was mentioned in the commentaries is achieved through prosecutorial discretion. So it is completely open to this committee to go whatever way it likes on this issue. The only thing that is made clear is that it is expected that only small payments would be exempted, while the American system is a little bit more open ended than that.

CHAIR—But if you took it out, would you not have to worry about the multiple 'smalls' and whatever they were intended to do?

Mr ADAMS—There is a fundamental principle here. A $100 bribe for a small-business person may be worth what $10,000 is to a bigger businessman.

Mr McDonald—I absolutely recognise that.

Mr ADAMS—That is the reality.

Mr McDonald—To some people 'small' means $200,000, while $200,000 to me is like two lifetimes of saving. People's concept of what small and large are in terms of money is quite remarkable—and different countries, too. I think I mentioned last time that it would vary enormously between countries. That is certainly why this issue was left open and that is why the government sees that a consultation process is very important.

Mr Meaney—We have to say that, as we have said before—it was not just window dressing—the government really is very much looking for the advice of this committee on which way to jump on this because it is a vexed question. From a policy point of view we do not have any vested interest, but I am sure that other colleagues who will appear before the committee will be very strongly of the view that there should be one.

Mr TAYLOR—It is up to you as subcommittee chair, but I would be suggesting

that, in the light of what I have heard, albeit briefly, here this morning, you really need to go to the minister with a letter saying, 'It has been suggested in initial evidence that this needs to be introduced with or without 7A, 7B and 7C. We would advise against that in that facilitation payments are going to be a sticking point anyhow. It is a matter of judgment. And please can we have your agreement that legislation not be formally introduced until such time as this subcommittee'—or committee as it will be—'reports to you in line with your reference.'

Mr HARDGRAVE—Could I reverse the logic just slightly on what I said before? In the event that someone in a public sector job does such a good job that a business person then says, 'Look, we think you have been terrific; Here is a case of Hardys Sir James for you and your crew or $100 worth of champagne' or something like that, if we were to specify too small an amount, someone could theoretically dob somebody in to a prosecutor and that person would potentially be facing charges.

Mr McDonald—That is the situation where the rest of the elements of the offence would not be established.

CHAIR—Because you are not trying to secure an outcome, you are rewarding a well performing entity.

Mr McDonald—So that would be okay. If, as a prosecutor, someone said something to you like, 'I will give you a car' or something like that, you would start investigating to see whether there was—

Mr HARDGRAVE—It is the old joke: you give everybody in the office a car and no-one talks about it.

Mr McDonald—I will say just one other thing about this, too, just to clear it up. Earlier on you mentioned politicians and public servants. This applies to both.

CHAIR—Because of the definition, which we will get to?

Mr McDonald—Yes.

CHAIR—I just want to clear something up, and we do not want to run out of time and no doubt a few people want to ask questions. Do you want to make any comment about the evidentiary burden just in case the view is that we should retain facilitation benefits?

Mr McDonald—Certainly wherever there is a defence—any of the defences in this work on the basis of the general principles, that is, the burden of proof in the Criminal Code which, generally speaking, follow common law. If you want to establish a defence, it is up to the accused to be able to point to evidence that suggests that they have a

defence. If they have done that to the satisfaction of the court, it is then for the prosecution to prove that that is not the case beyond reasonable doubt. That is just normal procedure for such a serious offence. Some corruption statutes fiddle with this, but when you start reversing or changing burdens of proof, you really cannot justify such a high penalty; you are bound to two years imprisonment or one year imprisonment. So it is certainly very consistent with the general principles of criminal responsibility, which have the burden of proof set like this.

In relation to the facilitation benefits, it would be just like a normal defence which would mean that it would be for the accused to be able to point to some evidence that this was a facilitation benefit. Of course, if it specifies a specific sum, it is very easy. If it just says 'small', it becomes more difficult.

Mr Meaney—Could we just focus on one thing briefly? In addition to the principal offences that are here—of course, we spoke a bit about the operation of the Crimes Act in relation to the penalties and whatever—there is also the operation of—

Mr McDonald—Ancillary offences.

Mr Meaney—ancillary offences so that aiding, abetting and inciting—

CHAIR—Over in subclause (9).

Mr Meaney—would all apply here as well. When you are looking at the scope of the offence, I think you need to keep that in mind.

Mr McDonald—In fact, if you want to go to subclause (9)—

CHAIR—Page 28.

Mr McDonald—Let us deal with that and if you want to talk about these definitions there is not much there. Subclause (9) to (12) just explains how those ancillary offences, which are already in the Criminal Code, such as conspiracy, incitement and complicity, will work in the extraterritorial context. Of course, those sorts of offences can be made completely useless unless the territorial connection simply relates to the offence they are attempting to do or conspiring to do, and so that is what those provisions simply do.

I have got some examples here. I will come out with some credible examples. I will not read them out, but I might table them. I think the examples really show just how important these ancillary offences are. One of the examples—I will go into them quickly—is that you could quietly go and have a cup of coffee. You have this travelling employee and you just say, 'Look, as you travel around, just tell them it is okay.' Little wink and a nod and, bang, you're gone under this. People say, 'How do you prove it?' It

can be a lot easier than people think; that is, you have such a thing as disgruntled employees, competitors. With these payments, especially payments of cash, there is often a trail. These examples I give you I think are reasonably credible. Would you like me to table that?

Mr ADAMS—This is a cash trail, is it?

Mr McDonald—I think these examples just point out that these offences probably have a bit more teeth than what some might suggest. It can be a simple e-mail message—that sort of activity. I just thought I would table those. I had better finish; we are running out of time.

One last thing is the definition of 'foreign public enterprise'. It is getting harder and harder to define these because of part government ownership and the like. You will see in the explanatory memorandum that we follow the convention there. 'Foreign public official' includes everyone from military to employees of international organisations and of course—

CHAIR—And it includes ostensible authorities, does it not?

Mr McDonald—Yes. I will leave it there. I have still talked on too long. I tried to be quick, but there you go.

CHAIR—How difficult has it been to prosecute under the sexual offences legislation that you mentioned a little earlier?

Mr Meaney—We have no convictions yet.

Mr McDonald—I think there have been some guilty pleas. We have not had a successful big trial. I think it does not happen that often, either. The situation is that there have been, I think—again, we do not actually look after this legislation—several guilty pleas and, as far as I am aware, one major contested case.

Mr Meaney—In the context of the contested case, there were a number of issues. I understand the legislation is being looked at now, particularly in relation to the treatment of underage witnesses and evidentiary issues arising out of that. First I would say that they are clearly very resource intensive for law enforcement agencies, to actually have to travel overseas. To undertake the investigation in another country is very, very difficult.

CHAIR—So would this be, no doubt.

Mr Meaney—Exactly. The same sorts of—

Mr McDonald—The good thing about this is where you have actually got some

conduct in Australia, once you establish that, you are well on the way to establishing the offence. It would certainly be easier than a case where the conduct was completely outside of Australia.

CHAIR—In example one it would be almost impossible, would it not—a company based employee wandering around outside Australia. The proof for that would be almost—

Mr McDonald—I would say in relation to that: it would be easier than the child sex situation, because you have got the additional assistance and the fact that you have got to have informants and that sort of thing. However, it would be expensive. There is no doubt about that.

Mr Meaney—Not to be too optimistic or too pessimistic about it, my colleague has talked about the connection with Australia. Merely because there is a connection with Australia in a legal sense does not necessarily mean the evidence is going to be in Australia and you would still need to go overseas to get the necessary proof.

CHAIR—If no-one has got any further questions, we have covered the points we wanted to raise with you. Thank you very much for your attendance and for the assistance you have given to the committee. I might just say that as we take evidence it may be necessary for us to refer matters back to you and we would appreciate if we could stay in contact and seek a further submission if necessary.

Mr Meaney—We are absolutely delighted to assist the committee in any way we can.

[10.01 a.m.]

DAVIS, Mr Brent, Director, Trade and Policy Research, Australian Chamber of Commerce and Industry, 23 Brisbane Avenue, Barton, Australian Capital Territory 2600

CHAIR—We have received a submission from the ACCI. It has already been published by the committee. Are there any amendments you would like to make?

Mr Davis—No.

CHAIR—Would you like to make a brief opening statement before the committee will proceed to questions?

Mr Davis—Of course, we always welcome the opportunity to meet with these committees. We find them very valuable and very insightful in monitoring the development of the many treaties our governments are entering into. We have been calling for many years for more transparency, and this committee forms a valuable part of that effort.

Our appearance today is not to defend the practice of corruption in any of its forms—bribery, extortion or anything else. Like others, we regard it as a cancer in the international business system and we would like to see it reduced, if not eliminated. We do not share the view that it is widespread. We recognise there are problem areas. There are some pockets, somewhat like malaria. It is not endemic around the world, but in some places one has to be mindful that it is a very real problem. So we do not dispute the objective of what the convention and the legislation are trying to achieve.

What we do dispute greatly is the means by which we are going about it. We think the convention and the legislation will be ineffectual, as has been shown by the platform on which it was originally based—the United States Foreign Corrupt Practices Act. As a colleague of mine says, the Americans shot their foot off in the mid-70s. They have now had 29 other silly buggers decide they want to shoot their toes off, too. If the Foreign Corrupt Practices Act was ineffectual, why is the convention going to be any more so?

We have been involved in this for about three years now. We are a member of the International Chamber of Commerce and the Business and Industry Advisory Council, which represents the voice of commerce and industry into the OECD, and we have had very good rapport with agencies of the Australian government, including A-G's, the Treasury, and Foreign Affairs and Trade.

We have got a range of concerns. They are outlined. We have great disdain for the idea of the extraterritorial application of laws, both in principle and in practice, and I can

go into that if you like. There is a serious deficiency that the convention and the legislation do not cover extortion. The mindset is that there are all these multinational firms racing around the world corrupting these poor little government officials from Third World countries. Reality tells us otherwise.

There is no mention of our national interest in there at all. We could find our national interests greatly compromised by some prosecutions. I will give you a simple example, hypothetical, of an archipelagic nation nearby. The first family have been in power for many years. Say there are allegations of rampant corruption amongst the first family, amongst their close friends and allies—this is very hypothetical—that someone bribed a member of the first family for $2,000 or $3,000, and someone dobbed them in. Under this law, our government would be compelled to launch a prosecution.

Think about our trade interests, our investment interests and our national security interests—all because somebody decided to set up the Australian government for a modest bribe to a member of a first family in a hypothetical country. There could be billions of dollars in trade, education, investment and tourism tossed out the window. We are astounded that our foreign ministry does not have an exemption for a national interest in there. Indeed, it is somewhat incongruous that the Australian government's policy is only to sign treaties where there is national interest. So we are a bit perplexed on that. We do not see how loss of exports, investments, tourism and education can really be in our national interests.

There are positive elements in there. The Australian connection is useful for facilitation payments, and we are somewhat disturbed by Mr Taylor's observations about how to carve out facilitation payments from the draft legislation. That just creates additional jeopardy for business, because we do not know what they are. As Mr Adams asked the Attorney-General—or alluded to—$100 in the Cook Islands could be a mountain of money to extend a wharf 50 metres, whereas $5 million in Beijing for a bit of action in the Three Gorges Dam is peanuts. So facilitation payments can be a nominal dollar amount. They can be a proportional amount. We accept that Attorney-General's is genuinely wrestling with the problem. We think they are earnest in their efforts. We would like to see what the other 29 OECD countries come up with. Prosecutorial discretion may be a very simple legal and legislative approach but, for business, it just raises the jeopardy of the whole exercise. We have a preferred approach, which we outlined: economic and technical cooperation; that is, get in there at root cause and start to deal with it. The world did not eradicate polio and deal with malaria by legislating it away in developed countries. They got out there on the ground and did it. We have to treat these things a bit like malaria and polio; we need the people in the field.

We outlined a program of action. As has been observed, this is a convention which normally is not binding but we have managed to make it binding on ourselves. Many of the questions to the Attorney-General's Department were about what others were doing. We would like the committee, as we outlined in our paper, to go through their normal

processes but then defer final recommendation on the matter until we have had a chance to examine the actions of the other members of the OECD. Ultimately, however, we have to recognise that there are only 30 countries in this convention. There are 190-odd countries, at last count, around the world. That leaves 160 outside who will not be captured. Some would say that some of the biggest givers and recipients of bribes and participants in the extortion process are outside our coverage. So in effect all we are going to do is hamper our competitiveness on the global stage. It is a worthwhile effort, but we should be marking time. If there is a millennium round under the OECD, it should be brought into that. That would assuage many of our concerns. Extraterritoriality would still be a problem, but if this thing is going to be worth while, it has to go over into the WTO. The OECD has done some preliminary thinking, but that is all it should be.

CHAIR—Before I call for questions, can you clarify for our records what the ACCI's membership is and its coverage in the commercial industrial sphere?

Mr Davis—Sure. We represent 350,000 businesses through the state chambers of commerce and industry around Australia, and there are 1,100 country and suburban chambers within Australia, spread across all industries—services, manufacturing, not so much agriculture, primary commodities or minerals. We have extensive international connections: 224 sister national chambers around the world. We directly belong to about four or five regional groupings of chambers of commerce—South-East Asia, Asia-Pacific, Indian Ocean and so on—and, of course, the powerful ICC in Europe, which they tell me has about 24 million firms affiliated.

CHAIR—Have you consulted your membership as you normally would in relation to this?

Mr Davis—Yes.

CHAIR—How did you do it and what sort of results did you get?

Mr Davis—We have a trade and international affairs committee, on which I serve as the secretary. This item has been a semi-regular reporting item and discussion item since 1996, possibly even earlier. It has been a standing item. We meet three times a year. This has been to our governing board a number of times.

CHAIR—So it is a subcommittee?

Mr Davis—It is one of our committees. We have a number of them—small business, taxation, international labour market, economics and so on.

Mr LAURIE FERGUSON—Could I put up the proposition that it might be against our national interests. In nations where it is fairly rampant and endemic, can you describe how these people in the field in these kinds of cultures, societies and systems are

essentially going to overcome this?

Mr Davis—The experience that has been relayed to me is that it is primarily demand driven, and that is extortion; that if you want to do business, this is the way it is done. Pay up or you are out. It is as simple as that. It is very rare that Australian business goes over there with the intention of gaining leverage by bribing someone. It is the way it is done. There are a couple of examples—I will not name the countries, obviously, but Transparency International's index is a pretty good barometer. It picks the main miscreants. I have two examples. In military procurement, in some parts of the world officers buy their commissions or their promotions. Therefore, they have to claw back their investments. So they sell preferment behind them. A colonel buys his brigadiership and, therefore, he sells a promotion to a captain, and so on. And it is the same with military procurement. That is the way it happens. A magic wand will not change that. That is what they have done with the Foreign Corrupt Practices Act. You can wave the magic wand, but someone else is willing to run in. As they found, if the Americans were not going to sell them weaponry, then the Russians would walk in and do it, or the Chinese would walk in and do it. That is what we will find in this exercise. If Australian companies do not sell them X, Y or Z—coffee beans, biscuits, glasses, whatever you like—someone else will step into the breach. We will be more virtuous, but we will be the poorer for it. And corruption will still be practised. There will be someone willing to jump into that market.

Mr LAURIE FERGUSON—No-one is disputing that. No-one is disputing the problem. That is why this committee is trying to do something about it. In your attempt to counter this suggestion, you said on the way through that the only way to solve it is by putting people in the field. I want practical examples of how we are going to solve it in the field.

Mr Davis—It is a cultural thing, ultimately, in many countries, and there is no simple magic wand. Our proposal is that we move towards what we call legal technical cooperation. In many countries there is probably legislation on the books, but it is largely ineffectual. That has been acknowledged. It is honoured more in the breech than in the observance. However, in some places there is not legislation on the books, and we think that the best approach is to deal with that.

CHAIR—Where are those places?

Mr Davis—I think a lot of the island nations do not have those. A lot of the least developed countries do not have those. What you would call the mid range group probably have it but do not observe it. Part of the solution is to give them draft model legislation through our AusAid programs—train their judiciary, train their prosecutors and train their investigators who want to do something about it. It is not a magic wand, either. It will not fix problems where it is endemic. In some parts of Latin America and the Middle East nothing will solve the problem that we can readily see.

CHAIR—Has the ACCI costed any of those programs?

Mr Davis—Again it depends on the level or your ambition. We would not see us doing it alone on our own. It is something that a number of other countries could engage in with us. The ADB, the Latin America group under the UN system, could come to the party. We may wish to play Big Brother in the Pacific islands and help them, if you like, get into the cleanest countries first and solve the problem before it emerges, rather than tackling head on the most difficult countries. To use the Transparency International index, Pakistan, Nigeria and China would be beyond our capabilities, but we could do some worthwhile things in our own neighbourhood.

Mr LAURIE FERGUSON—We understand where you are coming from in the criticism of this, but that sounds to me like pie in the sky, quite frankly. It does not really sound as though you are putting something up as an alternative that is going to be effective.

Mr Davis—I think it is an alternative in preventing a problem where it does not already exist. I think where it already exists you have to come at it slightly differently. We have no great bolts from the blue on what that could be in some of the most serious problems. In cases like Nigeria and Pakistan it is almost insoluble. Short of economic sanctions under the United Nations system—and that has strengths and weaknesses as well—a lot of countries simply will not come at it. Even if you went down that sanctions line, a lot of countries would rebel anyway for reasons of national sovereignty.

Mr LAURIE FERGUSON—You have explained about the national interest. You have also quite rightly raised the question of situations where governments, regimes and societies choose not to prosecute anyway, and that it is just a legal expression. Could I put to you that in Australia's national interests we are peanuts in the situation, quite frankly, internationally and in relation to the enforcement of standards that are in our interests. We are never going to win out in a lot of these countries with regard to the level of corruption and the amount of money that our government is going to put in there. So why is it not in the national interest to basically try to make it transparent, to make it open to prosecution and to actually try to do something about it nationally? I see that as in our national interest.

Mr Davis—Again, we just do not see how losing export and investment opportunities and compromising our capacity to win tourism is in our national interest.

Mr LAURIE FERGUSON—That is all true; I accept that. If we look at the foreign aid programs, we can see the Japanese essentially looking towards the foreign aid program which is often related to taking up their technology. We are never going to be a major player in those leagues whether it is in the level of bribery or in the level of connecting trade with foreign aid. You might say that the 30 countries in here are not where it is most endemic. The 30 companies that we are competing with to get into those

markets are the 30 that we are probably competing with in the level of corruption. I think it is in our national interest to basically try to decrease this.

Mr Davis—I would not see any of those countries as some of our major competitors in some markets. There are probably some competitors in some places, but again 30 out of 190 is not the totality. There are some significant competitors who are not in the OECD grouping: Taiwan, Japan.

Mr LAURIE FERGUSON—But there are a significant number here who do matter to us. You are talking about corruption internationally and bribery. There are some countries that will compete with us in this region in Asia.

Mr Davis—Yes.

Mr LAURIE FERGUSON—In general, our companies are never going to be on the same level to be able to compete with the level of corruption that is providing bribery, are they?

Mr Davis—Again, at the bigger end of the market, probably not; at the smaller end of the market I think it is probably more open in so far as bribery is practised. Again, if you are talking about $100 million to get a slice of the action against, say, General Electric and the three gorges no, we are not in that market. However, in a lot of the smaller markets we are significant players, which comes back to this question of facilitation payments in the same way.

Mr LAURIE FERGUSON—I have a final point. You said that there are philosophical problems with extraterritoriality and you would develop them more if you were asked. Could you go into a lot more of your objections?

Mr Davis—We just do not believe governments have an entitlement to impinge upon the national sovereignty of others, which is what extraterritoriality means to us. There are also practical problems. D'Amato legislation in the United States about investments in the Middles East and Helms-Burton in Cuba captures the affairs of business, but of course the most simple example that was put to me was: imagine if a Canadian company has an office in Perth and they are doing some business through a subsidiary in Johannesburg but they are doing it in Angola. Whose law will apply to the business person? Will it be Canadian law, Australian law, South African law or Angolan law? Is one a partial defence over the other?

The business person sits there and says, 'What do I have to comply with? I do not know.' That gives us a great deal of uncertainty. It increases the costs and, all other things being equal, if the investment decision is just too complex, they will go somewhere else. We simply do not know. Of course, it gives us multiple jeopardies around the world. We have a very simple view of these things. Sovereign nations are just that: they are nations

that are sovereign, and they should be so. We think it is a very undesirable and creeping tendency around the world for governments to have an extraterritorial reach.

CHAIR—Do you think that people have trouble doing business with the United States because of this legislation?

Mr Davis—D'Amato and Helms-Burton are showing it and our foreign ministry has been very active around Washington. We are aware from Washington sources and from talking to our foreign service that there are concerns, especially about Helms-Burton. It is a growing tendency to apply one's own values to the rest of the world. We are aware of one company looking at Cuba which had to reconsider its decision. We do not know the outcome of that.

Mr LAURIE FERGUSON—I hope I understand the convention. Helms-Burton is an attempt by the United States to essentially exercise each foreign policy consideration through interference with other countries' companies, right?

Mr Davis—Correct.

Mr LAURIE FERGUSON—This is a convention where we are agreeing with other countries to basically be part of a pattern of control.

Mr Davis—It is also about the capacity to follow one's own laws for their conduct abroad.

Mr LAURIE FERGUSON—Of our citizens?

Mr Davis—Of our citizens, but Helms-Burton is wider than that.

Mr LAURIE FERGUSON—That is what I am saying.

Mr Davis—It goes one step further.

Mr LAURIE FERGUSON—Exactly. That is the point I am making. I do not think we can parallel it. I am not defending Helms-Burton.

Mr Davis—No, but the question is not one of extent, it is a question of just the first step. Extraterritoriality is about capturing conduct abroad of one's own citizens. Helms-Burton goes one step further and perhaps covers the conduct abroad of other people's citizens as well. One can roll it out further. It is a question of whether you are going out two centimetres or three centimetres. The point is whether you have gone out at all.

Mr TAYLOR—I have a couple of questions. First of all, in terms of national

interest—and I agree with what you said about national interest—my question really relates to a couple of things. First of all, to what extent has the ACCI been consulted in terms of the national interest through the officials mechanism or outside this committee, bearing in mind that as you know we normally do not get involved until such time as that first signature is applied and an NIA is produced. So my question to you is: to what extent has the ACCI been consulted in terms of the national interest; and, secondly, in terms of the national interest in relation to this draft legislation, do you see something being able to be inserted into the legislation which, for example, would spell out a defence if it is actioned in accordance with the national interest?

Mr Davis—The easiest way to answer that is that you have got no option to put in a national interest provision because the convention laws are there. As was said in some of the papers accompanying the legislation, your capacity to amend the bill is very limited. If we wanted to put in a national interest exception, it would be knocked out as being inconsistent with the convention. So we have given that one away already.

In terms of consultation, it is a matter that we have relayed to the Department of Foreign Affairs and Trade and Attorney-General's on a number of cases. Both parties took it into account. I cannot answer how that proceeded within their internal decision making processes. Perhaps I would observe that the convention says that national interest is not a course for excluding or accepting conduct. So we have given up our opportunities on that one. Of course, we have not signed yet, so we still have the option of not signing.

Mr TAYLOR—That is what this committee has been getting some advice on. In relation to your comment about concerns about facilitation benefits and what I had to say earlier on, are you saying that the ACCI would like to see a quantification of the facilitation benefit; all I am suggesting is that, by leaving it out, you are avoiding legislative complication of the whole thing.

Mr Davis—What we are basically seeing with facilitation payments is bringing an exception into the statute. If one leaves it out, it becomes an uncertain, vague or discretionary hurdle. In criminal law that is probably a bit undesirable from our constituency. It is like saying, 'We know the hurdle is there; it is just invisible.' You do not know what it is. I would be astonished to see an athlete in the Olympics being told that they have to jump over a hurdle but are not going to be told what it is. So, as I say, it is vague and uncertain for us.

There are several ways to proceed. One is to put in a dollar amount, but again what is significant in the Cook Islands may be infinitesimal elsewhere, and of course what may be infinitesimal in China could be monstrously large somewhere else. It is very difficult; there is no simple answer. We welcome the fact that the Attorney-General's Department is looking to see what others are going to do on this. I do not think there is any wisdom. We have been watching the convention's development through BEAC. They did not have a magic answer, either. I guess what we have put in our paper is something

of significance. Is it significant within the scheme of things? A significance test is not unknown in statute or the common law. That would be a useful test. It would return some discretion back to the prosecutor. As the Attorney-General has pointed out preceding me, ultimately, it is a cost benefit analysis for them in prosecuting. No-one expects that even the most zealous prosecutor would chase down a $500 bribe or extortion anywhere. If it is $25 million, they might think it is worth while, but again even in coming to that view I guess they will probably impute our national interest in coming to a decision to prosecute.

I guess if we had to look at an option, we would probably make three observations about facilitation: one, something has to be in there; two, we would like to see what everyone else does. Maybe there is some wisdom in Paris or Bonn on this that we have not identified and they have an answer that we can all embrace. Third, our suggestion for consideration is a significance test.

CHAIR—Would it be the payee or the payer? Where would the significance lie?

Mr Davis—In fact, you have touched on one of these issues that has intrigued us in all of this. Benefit is mentioned to be measured against the recipient, not the payer. It is quite plausible under this legislation to give a benefit to the recipient of, say, hypothetically $5,000. That could be quite modest to the recipient, but the benefit could be many tens of millions of dollars to the payer. So in effect it is rather curious that the legislation is about benefit to the recipient. It has to be so because that is the way the convention is drafted, and it is about the bribery of an official. It is one of the issues we would like to have a look at in other legislation.

CHAIR—The whole thrust of it is 'done with an intent to influence a foreign public official'.

Mr Davis—It is a benefit to the recipient—no benefit to the provider of the bribe. Again, we then start to drift into questions about extortion, too.

Mr TAYLOR—If I can persevere on the issue of facilitation, it seems to me that if in fact you include a quantification in there what it does is signal formally that Australia is going to turn a blind eye to facilitation X in an individual case or facilitation Y in terms of cumulative, rather than just leaving it not specified and letting the administrative judgment be the factor.

Mr Davis—Again, in one respect it is the parliament, to our mind, walking away from a difficult issue and absolving itself of the responsibility for a very important indicator for business. We need to know what is a facilitation. Is it small? We could take cognisance from a convention, and under our common law system our treaties have weight in the judicial process. We would like the parliament to give some guidance to it. A significance test does provide some degree of quantification. It is proximate. There is no simple answer. As was observed, $100 in the Cook Islands might be a lot of money

compared to $5 million in China. We do not know.

This, to our mind, underpins one of our arguments for the committee taking only a temporary or provisional view on this, then reconvening when they have got the full set of all legislations, to compare the Australian government's initiative and what has been done by other governments and then possibly observing whether other governments have broken through some of these problems.

Ultimately, one of the spin-offs of extraterritoriality, to pick up Mr Ferguson's view, is that it is about comparability, too. It is about comparability of what we do against others. We have undertaken a collective commitment, so for that reason we would think collective action requires an understanding of the other parties to this convention. For the want of six months, we do not think that is an onerous request.

CHAIR—How difficult is it to do business without facilitation payments?

Mr Davis—It again depends on the type of business you want to do. If it is a small activity—getting something off the airport tarmac a little bit quicker—then a few bob here and there does not make a great amount of difference to the cost, and it can be helpful. It really is case by case, as the Transparency International index indicated. There are some countries where it is rampant and you cannot get around it. You have to be there. You do not want it to be there, but you just have to wear it, my people tell me.

In some parts you just cannot get around it. In other parts it is avoidable and if you threaten to dob someone in to their superior then they quickly back off. There is always the adventurous person who will have a bit of a go but, again, the ex post gratuity, which would probably be acceptable under this draft legislation, is often a way around it.

CHAIR—If I understand you correctly, what you are saying is that, really, to make life bearable for people—your members, for instance—trying to do business overseas, we have to, as a matter of policy, decide on some amount or some method of allowing this kind of business to take place without being caught.

Mr Davis—I like the phrase which I think Attorney-General's uses: greasing the wheel. It happens, and that's that. It is the way it is done. We wish it were different, but it is not.

Mr ADAMS—I am just trying to get some knowledge. I think I have got a book on studies, but we have not received any briefing that 'this is what occurs, here are some statistics, this is the amount of money that is paid', or whatever. Are there any surveys being done by business organisations?

Mr Davis—You might get some more information from the Australian Taxation Office, because they have actually traditionally allowed it as a deductible expense under

section 51. We are aware that they are now bringing that to an end and that is as a logical sequence to the legislation. We are aware that there is probably academic work done, but we have not done anything. The anecdotal evidence that comes back to us is that it is patchy. There are a few known problem areas. The second group is, 'I do not know what my joint venture partner gets up to and I do not think I want to know what he gets up to, either.' So in some respects it is black boxed by business, being very frank about it.

Mr ADAMS—I appreciate that.

CHAIR—I wanted to come back to extortion. In an ideal world where you could draft legislation that would suit you, how would you see this legislation as addressing the problem of extortion?

Mr Davis—I think we would not expect to see extortion being a total defence, but it should be a factor to take into account as a partial defence. From our observations it is very unusual for an Australian firm—most others that we are aware of—to go out and actually take the initiative. The initiative tends to come from the other side. From the few people I have spoken to who are troubled by this, they say they resist it as much as possible but, ultimately, they come to an end point where the payment of a bribe is in fact part of an investment decision. It is an investment they have to make in getting an outcome, but they rarely take the initiative.

In a great majority of cases that I have been informed of through our constituency, the matter is put to them. If it is very small, they just write it off as a lunch expense or a breakfast expense or whatever, but where it is significant they wrestle with it, they anguish about it and they either walk away saying, 'We do not want a bar of this', or else they say, 'The reality is that we have to do it this way.' They succumb reluctantly, but it is very rare for them to race in throwing bags of used US $20 bills around the place. So we would ask just that it be taken into account as a partial defence.

In Nigeria you would be very hard-pressed to find someone in the governmental process who is pristine pure. Given that it is endemic probably in that one country, then doing business in that country could be taken into account as a partial defence.

CHAIR—So what you are saying is that there are certain places where your back is against the wall and you just do not do business unless you make these sorts of payments.

Mr Davis—That is it in a nutshell. Correct.

CHAIR—In looking at the draft legislation, you have levelled the main criticisms. Do you see any other loopholes that you think we should address, and how we should deal with them?

Mr Davis—Telling you the loopholes in legislation?

CHAIR—It is a serious question.

Mr Davis—I understand that. Asking us to tell Attorney-General's where there are flaws in their legislation could possibly prejudice business. It is a curious question. I will give you one example of where we can see an interesting anomaly; that is, that conduct has to have a connection with Australia. That is the most obvious, and some of the examples in the notes to clauses talk about some of the money being deposited in a bank in Australia.

The most obvious one is where the conduct is completely outside of Australia and there is no connection. The simple possible example is of a joint venture partnership in Burma. You have a joint venture partner to build X—a big factory, for example—and his job is to make sure that the whole process goes smoothly. You do not know what he does; you do not know what happens, but the power turns up on time, the road is good, the bridge is completed.

CHAIR—But the conduct is entirely outside Australia.

Mr Davis—You have no idea what happens. It is totally black boxed to business. They have no knowledge of what happens, how it happens, whether it was the golf club, the Masonic Lodge or anything else, or it was a bucket load of US dollars under a tree at 3 in the morning. They do not know and that is obvious. The Australian firm has no comprehension of or engagement in all of that.

CHAIR—What you are really saying is that this might not have much utility anyway?

Mr Davis—In those cases where the conduct is entirely outside Australia I find it curious where a corporate chief executive authorises a senior officer to load up his or her bags with US dollars, fly to the backblocks of Islamabad, pay someone, get a receipt, come back, and then the person in Islamabad deposits it with the Commonwealth Bank in Perth. I find that a very curious example. The most obvious case that we would imagine is where a joint venture partner or some lowly agent, well distant from the centre of corporate power, takes an initiative by themselves to do something. They may well get a kickback from the bribe themselves, so it would be part of the bribery process.

CHAIR—But you are not really suggesting, are you, that it should be extended to conduct wholly outside Australia, because your original proposition was that that would not be?

Mr Davis—That is correct. We have the problem of territoriality. The evidentiary burden would be just about impossible.

Mr ADAMS—Do you know if we have set any aid programs in an endeavour to improve aspects of skilling and training in areas where Australian companies have said, 'This is a hot spot for us. It is difficult to do business because of bribery and corruption'? Have we ever targeted any areas like that by trying to improve the training and trying to improve the—

Mr Davis—I am not aware of anything in particular. I know our aid agencies deal with corruption in their own way. I do not know whether they are appearing before this committee under the legislation. In one respect a lot of them are incorporated bodies as well, so they are vulnerable to being captured. We do appreciate the fact that AusAid, for example, has a good governance theme running through most of its programs. I guess they would probably tell you that they cannot avoid corruption entirely either, but they do their best to ameliorate it.

Mr ADAMS—I agree with what you said about training and lifting the standard. I have seen that in Asia when I have looked at police forces and judiciaries and other things. To lift standards, training, wages, income or whatever, there is nothing that you know of that we have done along that line?

Mr Davis—I am not aware of any judicial training programs.

CHAIR—We are about to run out of time. If there are any other points that you would like to make that we have not raised in the discussion this morning, would you like to deal with it now or put it in writing?

Mr Davis—There is just one last observation. Our view is that the committee should proceed. I think we have outlined in our submission that it should complete its current round of inquiries, consider the matter, come to a preliminary view, and then effectively adjourn and then reconvene when they can see the legislative efforts of the other OECD countries, because it is about comparability and collective action. Comparability is important to us, especially where there is extraterritoriality. There may be answers to be found in some of that legislation to many of the problems that the chamber of commerce, our colleagues in business and the government are wrestling with .

CHAIR—Thank you very much for your attendance and your assistance. Should anything further occur to you that you want to bring to the committee's attention, please feel free to do so.

Mr Davis—Thank you.

[10.30 a.m.]

SCHRAMM, Mr David Jeffrey, Director International, Australian Federal Police, 68 Northbourne Avenue, Australian Capital Territory 2600

TYRIE, Mr Edwin, Director National, Australian Federal Police, 68 Northbourne Avenue, Australian Capital Territory 2600

CHAIR—Your submission has already been published by the committee. Are there any amendments or additions to make to your written submission?

Mr Schramm—No.

CHAIR—Would you like to make a brief opening statement before we proceed to explore some of the matters that you have raised?

Mr Schramm—I think not. As you will observe, our submission was relatively brief. Having looked through the government's intentions, we believe that the areas that we have covered in our submission are generally the ones that we would want to bring to the notice of the committee.

CHAIR—It seems to me that one of the issues that you raise is whether or not there is really much utility in this legislation anyway.

Mr Schramm—It is not so much whether or not there is utility in it. When going into this sort of legislation, I believe that we need to go into it with our eyes open in acknowledging that, from an investigative point of view, there will inevitably be a range of challenges which will face any particular prosecutions which may be contemplated, given that much of the activity that one could expect will occur overseas and much of it will occur under conditions which are dissimilar in many ways to what would happen in Australia. Avenues for investigation will, depending on the country, vary greatly. All of these are potential impediments to a successful prosecution. One would imagine that if the legislation is enacted with a purpose the government would wish there to be the capability of ensuring that people can be prosecuted if they are in breach of it.

CHAIR—Do you have a view, then, about whether or not the territoriality aspect should be extended so that it relates to conduct of nationals overseas if the conduct is wholly outside Australia, or do you see difficulties with that?

Mr Schramm—It is largely a matter for government to decide how they want the scope of the legislation. From the Australian Federal Police viewpoint, our interest is primarily in ensuring that we can provide the support that the government would be looking for in terms of prosecutions. I do not think the question of territoriality is perhaps the central issue. The central issue is one over which we have no real control, and that is

the fact that we will be operating in an international arena where, again depending on the country, we may or may not have mutual assistance arrangements with the country. Their rule of law may be different from ours. Even access to areas of potential evidence may not be open to us.

If the government of another country decides, 'No, we will not allow an investigation to be undertaken in our country,' then what does one do? The short answer is not a lot, and it will not really matter how the legislation is phrased. It will be a case of the practicality of being able to investigate it. That is not to say that we are not for this legislation. Indeed, we are. We believe that certainly it sends a message. It is a deterrent. Like other similar legislation that has been enacted, I think it is important that people realise that because they are operating outside the shores of Australia they can do so with impunity. In that regard, of course, we are totally supportive.

CHAIR—In countries where there is official tolerance of bribery, or even extortion for that matter, would it be in your experience unlikely that you would get the sort of cooperation that you would need to carry out an investigation?

Mr Schramm—There is no yes or no answer to that question, unfortunately, because it depends on a whole range of factors. But it is a reality that in some countries the payment of bribery, for want of a better word, is part of the infrastructure. In some countries the machinery of business, and in some instances government, does not run very well without it. Of course, it then becomes difficult to interpret what is a bribe. It does tend somewhat to be in the eyes of the beholder.

Mr ADAMS—The customs of a country?

Mr Schramm—I take a simple example of a company hiring a consultant, which is not abnormal in an international arena because they know the local conditions, and that is why they hire consultants. If a consultant sees a way through a business dealing that he or she believes is the right way to go, and if that involves paying someone, it is then often the case of interpretation of whether that is a bribe or whether it is to facilitate. That depends. Again, is it made directly to a government employee or is it made to a secondary person who in turn may have contact with a government official? In many instances it will be difficult, from an investigative point of view, to be able to determine that type of thing. So it may be difficult to in fact determine the elements of proof that would be needed to successfully prosecute.

Mr ADAMS—That would come back to a money trail out of Australia?

Mr Schramm—It would come back to a money trail. It would also come back to establishing what the benefit was and what type of benefit it was.

Mr ADAMS—And we have already had evidence this morning saying that joint

venturing is all about, basically, the other side doing it—black boxing your investment out of Australia. What is your experience in this field in Australia? There must have been cases over the years where we have followed some of this.

Mr Tyrie—Following a money trail overseas?

Mr ADAMS—Overseas bribery, of our companies bribing people. Have we chased any of those up?

Mr Schramm—That has not been a matter that, as a general rule, we would find ourselves involved in. If there was no criminal offence involved in it, then we would not have a reason to investigate. So this is, to a degree, uncharted territory that we are contemplating moving into. I think that is all that, from an AFP point of view, we would sound: the quiet word of warning that passing of legislation is one step in the chain, enforcing it is another, and we will not know until we try. We are not suggesting that there is an alternative to this. We are merely saying that if we do go forward with this legislation, let us do so with our eyes wide open.

It may not be easy to do some of the things that we may want to do. From our perspective it may well be expensive in terms of the sorts of resources which are needed to send people overseas for maybe extended periods of time, maybe having to utilise services of overseas agencies. I mean, all of these are cost factors which, when you are running an agency such as the AFP, we need to be considering.

CHAIR—From the prosecutor's point of view, what opinion do you have as to the provisions relating to facilitation payments? Do you see it as something that would be of assistance to the overall conduct of prosecutions to have some definition for facilitation payments? Would it be better to have an amount or would it be better to try and have a description of a facilitation payment so that there is an element of discretion as to whether or not there would be an offence committed?

Mr Schramm—My immediate reaction is that we do not have a strong view one way or another because, again, it could depend very much on the country that you were speaking of. What may apply in one country may not apply in another. Within the legislation we talk about a benefit being an undue benefit. Again, that is a matter of interpretation as to what is undue. That would be a matter for a prosecutor to be looking to prove and, indeed, for a defence counsel to be arguing against. I can see that even a simple thing like that would be open to considerable legal argument but, again, that is perhaps something which goes beyond the competence of the AFP to discuss. Our interest would be in the investigation side of it.

CHAIR—But in terms of prosecutorial discretion, would it be better to try and nail down a specific amount rather than leave it open to interpretation? I imagine it would be better if you have got some amount so that you know exactly what you are dealing with,

from a prosecutorial point of view.

Mr Schramm—Certainly from a police point of view, if we had to prove that it was $10,000 or $5,000 then obviously that would be our aim, to prove exactly that. So I think the answer to your question would, of course, be yes.

CHAIR—Some earlier evidence suggested that if you had a term like 'significant benefit', bitter experience tells you that something that is significant to one person is not significant to another, and it is a recipe for disaster, I would think, from an investigative point of view.

Mr Schramm—Certainly for any police investigation we would prefer to see the legal definitions being fairly tight but, of course, that then becomes a case of what the government wishes in terms of the purpose of the legislation and the extent to which it would wish to take it.

CHAIR—How would you go about collecting evidence and then presenting it in court when most of it is overseas? Would you have to bring people from overseas to give evidence in a criminal prosecution, or would you be able to use some of the provisions of the act and also some provisions via documentary evidence whereby you could prove things without bringing in people?

Mr ADAMS—Video evidence, an interview with someone.

Mr Tyrie—Video overseas?

Mr ADAMS—Yes.

Mr Tyrie—The fact is that you have to go overseas and make sufficient inquiries to collect the evidence, if it is warranted, and then bring it back to Australia and put it before the DPP, because it is their decision as to whether the prosecution will be undertaken. The AFP will collect the evidence generally to a point where they believe they have established a prima facie case, and then put the brief to the DPP. The DPP may well ask for more investigation to be undertaken. Should that be the case, as we have had in other cases we have done overseas, then back overseas we go again to undertake it again.

If you can use video and tape recording in the countries you are going to—we carry equipment like that ourselves—there can be problems with language and interpretation and, depending on the jurisdiction you go into, whether you need a rogatory commission before you can do that kind of thing. It is a fairly rocky road to go on when you undertake one of these investigations overseas.

CHAIR—I am framing this question in a generic way rather than asking you about specific cases, but can you give some idea about the sorts of costs involved in conducting

an overseas prosecution or collecting evidence from overseas? I know it will vary enormously, but can you give me some ballpark figure of what it would cost to chase something overseas?

Mr Tyrie—Could I take that on notice and come back to you with some information regarding an average? We have had quotes on some that we have refused to undertake which have been over half a million dollars. In other cases we have done ones where perhaps the cost is only an airfare and accommodation, so I would like to take it on notice, if I may.

CHAIR—How are you off in terms of the sorts of resources that the AFP has to devote to this sort of activity? Obviously we have to consider budgetary impact and what other financial impact this might have.

Mr Schramm—Again, an investigation of this nature would obviously be given a high priority, I would imagine, given the sort of matters that are involved. So I would think that the answer is, yes, we would of course find the resources for it. But resources for everything have to be matched against competing priorities, so we would put something else aside in order to do this. Again, it depends on the nature of the inquiry as to the number of resources that you would put onto it. It is probably a matter that would normally require at least two people, perhaps more. Again, it depends on the duration. There is a whole range of imponderables that could come into play in this sort of investigation.

Mr ADAMS—And what sort of level of officer would you put to it? What sort of training would that officer have had?

Mr Schramm—The level of experience is what we would be talking about there. Again, you would expect that an investigation of this nature would have a fairly experienced investigator put on to it—any of our officers who we would send overseas to make inquiries where they are basically having to operate independently. They do not have the same recourse to supervisors that they would perhaps have in Australia, so you would be sending your better people.

Mr ADAMS—I was going to ask how many you have got, but I take it they are all good. I was just trying to get to the level of training. How many people have got degrees at that level that we are talking about, the officer level?

Mr Schramm—Let me just give you a reflection. Our current recruiting practices are such that we are attracting people with degrees, so most of the people who are joining the AFP these days have degrees before they enter—in various disciplines, though, and not necessarily criminology. Even putting that to one side, you would expect that the people you would be sending overseas would have, I imagine, in excess of 10 years experience.

Mr ADAMS—You still have the structure of where you have gone away from the sort of sergeant structure?

Mr Schramm—We have in the last two years moved towards a team based organisation. We have also dispensed with the traditional police ranks and we are having our officers tasked on the basis of the best people to do the job.

Mr ADAMS—Skilled in one area.

Mr Schramm—If we are looking for accountancy skills—they would be needed in a job like this—we would be ensuring that you look towards a team that had those sorts of skills on them. So, yes, we do try and tailor the team for the job. In this sort of investigation we would be in most instances probably leaning towards fraud experience, that sort of area.

Mr ADAMS—But there would need to be a government commitment to resourcing this sort of activity. If government undertook this sort of convention and put this into law, government would really need to fund that, wouldn't it? It would need to put the resources up there.

Mr Schramm—We have identified in our submission that we see that there will be potential resource impact for the AFP. The extent of it of course we cannot quantify, because we do not know whether this type of legislation will be used once in the first five years or 50 times in the first five years. Clearly, if it was once in the first two or three years resources would not be a huge issue, but if it became a source of considerable resource drain on the AFP, then it would have real financial implications for us, yes.

Mr ADAMS—You would have to have someone to do the ministerials.

Mr Schramm—I think we can handle the ministerials all right. It is the people to do the foot slogging that we need most. But, yes, it does have the potential for that, as we mentioned in our submission, primarily because we would anticipate that a fairly high degree of it would have to be undertaken overseas, and it is going to cost you more to have an investigator overseas than if you were doing it in Australia, because you have to put them into hotels and pay them allowances and all those things that go with it.

CHAIR—I just want to come back to a couple of other points. An earlier witness has said that, in his view, this legislation would be pretty useless because experience suggests that this activity really goes on offshore, goes on wholly outside Australia, and trying to get any territorial connection is almost impossible. What is your view about that?

Mr Schramm—Well, the usefulness of any legislation, I suppose, is very much a matter of what its intentions are. As I read it, the intentions here are, clearly, to bring Australia into line with the rest of the world, to provide a disincentive for businesses to

engage in activity which could be considered to be encouraging corruption. This type of legislation, I suppose, is as much about perception as it is about many other things.

I think, from an AFP point of view, our view is not one of whether it is good or not good. It is whether or not it can be effectively administered and whether we can properly and thoroughly investigate matters within the legislation. Whilst there will always be areas where one can debate whether it should be more tightly worded or more loosely worded, I think that is a matter for legislators, not for the police to interpret.

CHAIR—But you would see it as having a useful social purpose, simply because it sends a strong message as to what at least Australia regards as acceptable conduct and not acceptable conduct?

Mr Schramm—Certainly. From an AFP perspective, we would strongly favour anything that causes members of the public, business or individuals to abide by the law and to use practices which are indeed fair and to try and keep the playing field level.

CHAIR—An earlier witness also said that, from a business point of view, there are situations known to his membership where it has been almost impossible to do business overseas without payment to facilitate or to bring about a business opportunity and that, really, has amounted to extortion the other way around and that there ought to be at least some cognisance in the legislation of the fact that that is the way it is played overseas. Do you have a view about that?

Mr Schramm—About how it is played or about how it should be addressed?

CHAIR—About whether or not there should be some cognisance in the legislation about extortion.

Mr Schramm—Here I would offer a personal view and that is, of course, that the reality of life is that, yes, of course in some countries overseas there is an expectation of this type of activity taking place, but whether or not that means that everybody has to engage in it is, at the end of the day, either a personal or a business decision. If people are aware that such activity is indeed against the law, clearly they will have to make judgments based on the knowledge that such legislation does exist. Whether or not that is affecting the level of the playing field is perhaps a judgment for others to make, but, from a pure policing point of view, we are in favour of anything that discourages activity which is at least, if not unlawful, unsavoury.

CHAIR—Does that extend to facilitation payments, which have been exempted in the bill?

Mr Schramm—I really do not think that I would personally want to make a judgment on that. It depends on what the intention is in all of these things. Unless you

have full knowledge of what was the purpose of it, I think it will be hard to make a judgment. As I mentioned earlier, the taking on of a consultant in an overseas capacity or going into a joint partnership involves acknowledgment that you need local knowledge in order to be successful from a commercial point of view. Once you are acknowledging that, you are acknowledging that things are different. Otherwise you would not need a consultant; you would go and do it yourself. So if you have acknowledged that, then you must expect that the norms are going to be different. The extent to which one is prepared to accept differences of those norms is, as I said, a matter for either personal or business judgment.

CHAIR—Just looking at the specific legislation, are there any parts of it that you would like to particularly focus on or bring our attention to—aspects that you see either as particularly unworkable or with difficulties from the point of view of how you would collect evidence and interpret the section?

Mr Schramm—I do not think we have any particular view—without having a philosophical debate on the legislation generally—

CHAIR—We would be here all day doing that.

Mr Schramm—Exactly. We note that the government has chosen to adopt the OECD approach to the legislation, and that is reflected in the bill. As such, I think that picks it up. I do not think we have any particular views as to whether it should be strengthened or otherwise.

CHAIR—You have covered the points that you wished to cover this morning in this inquiry. However, if there is anything that you have not been asked specifically about that you would like to bring up as a result of the discussion or anything else you have heard, please feel free to tell us now. And if you want to drop a note to us, feel free also. Because this is very much a first for us, where we are looking at a piece of enabling legislation ahead of the event, it may be necessary for us to get back to you if there is any particular point that we need to clarify as we explore it.

Mr Schramm—Okay, and we will come back to you with some figures.

CHAIR—Thank you very much.

[11.05 a.m.]

KOVIC, Mr Stefan John, Executive Officer, Australian Taxation Office, 2 Constitution Avenue, Canberra, Australian Capital Territory

CHAIR—Your submission from the ATO has already been published. Are there any amendments that you wish to make to that?

Mr Kovic—No.

CHAIR—Would you like to make an opening statement before we ask a few questions?

Mr KOVIC—My understanding is that the committee is really looking at the bill that has been put forward by the Attorney-General's Department on the criminalisation of bribery of foreign officials. Our concern from the tax office is with our own particular piece of legislation, being the amendment to the taxation law. As pointed out in the submission, they are related insofar as we are trying to model our legislation on the OECD convention.

CHAIR—Coming back to the bill, do you have a copy of it in front of you?

Mr Kovic—No, I do not.

CHAIR—I will just get you a copy, because it may be necessary for us to look at a few aspects of it. The obvious aspect that concerns the ATO, of course, is the tax deductibility provision. Can you outline for us how you see the role of the ATO in relation to that particular aspect?

Mr Kovic—As pointed out in the submission, currently tax deductions can be claimed for bribes paid to foreign officials so long as those tax deductions satisfy the requirements in section 8 (1) of the act and also that the payments are not on capital accounts. As long as they are revenue expenses, they can be claimed by companies.

Mr ADAMS—To keep a business going?

Mr Kovic—If it is an expense necessarily incurred in carrying on your business, and the nexus exists between the earning of the income in that business and the expense, it is deductible.

Mr ADAMS—Can you expand on how that occurs?

Mr Kovic—In relation to the payment of a bribe?

Mr ADAMS—Yes.

Mr Kovic—If a taxpayer is operating overseas and finds that part of the business practice—

Mr ADAMS—I understand that, but how do they prove to the tax office that this is an ongoing part of keeping the business going? Do they have a receipt? They would not get to that level, would they? It would just be put in as a deduction.

Mr Kovic—Generally it would be reflected in the accounts of the company as an expense. I do not know whether it would be reflected as a bribe. It usually would be reflected as something else, like a commission or a payment—maybe not a facilitation payment, but maybe a consultancy fee or a commission or something like that.

Mr ADAMS—What sort of figures are we talking about presently?

Mr Kovic—As part of the process of preparing information for the OECD working party, the ATO could not find any information on the payments of bribes by Australian resident taxpayers.

Mr ADAMS—So what does that actually mean? You are looking at changing the legislation. What does that mean then?

Mr Kovic—The OECD has made a recommendation to try to combat bribery in foreign transactions. They would like a two-pronged approach, one being criminalisation and the other one being the denying of tax deductions for those countries that do not currently have such a provision.

Mr ADAMS—So you will be looking at putting a line in the taxation law to say that you cannot claim what you presently can claim?

Mr Kovic—Yes. There is a provision in the tax law at present which deals with items that you cannot claim as expenses, and we would be expanding that to include bribes to foreign officials.

Mr ADAMS—Or facilitation payments or payments to consultants that may incur some costs?

Mr Kovic—We will be trying to capture any sort of a bribe.

CHAIR—How do you define a bribe for tax purposes?

Mr Kovic—At this stage we are looking at the words that have been used in the convention. We are waiting for the Office of Parliamentary Counsel to come back with

some appropriate words.

Mr ADAMS—Have you had a look at the United States? They have had this stuff around for a long time.

Mr Kovic—Yes, we have had a look at theirs, and it is quite a good model. It has been tested. It has been around for over 20 years now.

Mr ADAMS—That is in prosecutions?

Mr Kovic—Yes.

CHAIR—There is quite a lot of case law on it.

Mr Kovic—That is right. It is already there, it is in existence, and it seems to be working quite well.

Mr ADAMS—It must be working quite well. That is why this is before us, by the sound of it.

Mr Kovic—Yes. That is my understanding as well.

CHAIR—If you pay somebody a bribe to establish a new business, that is probably capital; and if you pay a bribe to retain some business, that is probably an allowable deduction at the moment. What would happen if you were an existing business but you were trying to get a new contract, for instance? How would that be characterised?

Mr Kovic—If the new contract was in a different area from the current business activities of the taxpayer, we would probably characterise that as new business.

CHAIR—As you have said, the Australian tax office is developing these amendments to make bribes to foreign officials non-deductible. A significant number of OECD countries have moved to deny deductibility. What have been the main features of the legislation—just simply to extend payments that will not be allowed? How does it actually work?

Mr Kovic—The main feature of our legislation will be basically a blanket statement saying that all bribes to foreign officials will not be allowable. But then, in scoping that, we will be referring to facilitation payments.

CHAIR—What about things like extortion, where people say they really had absolutely no choice; they either lost the business or, even as part of retaining it, they had to—

Mr Kovic—If the extortion payment comes under the definition of 'bribe', it does not matter. Unlike the criminal law, things like intention do not come into tax law; it is either you incurred the expense or you did not. As soon as they incur the expense, it is not deductible. And more than that, it is even the promise or the obligation to pay that amount. Under the accrual system we have to cater for that as well, so we cannot have people having an obligation to pay a bribe and then claiming that in the current year.

Mr ADAMS—If I paid $10,000 and I did not get my licence and I was bankrupt—I think that is what the senator was talking about—that would become outlawed under—

Mr Kovic—Yes, that is outlawed. Any payment in relation to a bribe, no matter what it is, is just not deductible.

CHAIR—What is your view about facilitation payments—the size of them, whether they should be in or whether they should be out? How is the ATO developing its view in relation to facilitation?

Mr Kovic—We looked at the commentary on the convention, and that did allow small facilitation payments. We note that the US revenue laws do allow for facilitation payments. However, they now have the dilemma that the convention is referring to 'small'. I imagine that a small payment to a large US company would be huge. It is very difficult for us to put a monetary limit on the amount that can be claimed. At the same time, it is also extremely difficult for us to refer to the payment as being 'small'. It is difficult to put a figure on such a subjective amount as 'small'. So we would prefer to use the current US model and just refer to facilitation payments that are made to expedite routine government business. We have also noted that the US defines what routine government business is. It extends to activities such as the installation of phones and power.

CHAIR—A greasing the wheel type of aspect?

Mr Kovic—Yes, which I understand is a practice that does go on in a lot of Third World countries.

CHAIR—So the current view then is that you would not favour trying to grapple with what 'small' is in terms of any monetary amount, but rather you would characterise what a facilitation payment is or what it is directed to?

Mr Kovic—Yes, characterise the nature of that payment.

CHAIR—Characterise the activity, rather than trying to push the amount into some definition?

Mr Kovic—That is correct.

Mr ADAMS—And a donation to a political party would not be tax deductible?

Mr Kovic—To a political party overseas? No. That would not be covered by the definition of a bribe but, if the purpose of making that payment was clearly in the nature of a bribe, it would be covered. It is a question of fact as to whether or not the payment—

Mr ADAMS—What about the tax deductibility? Does it have any tax deductibility about it? Can someone claim that?

Mr Kovic—I am not sure about that, but I would not think that the intention of our legislation would be to allow for that sort of a payment.

CHAIR—If multiple facilitation payments were made, what view would the ATO take? For instance, would it just be considered that that was a very high cost of doing business or would you be suspicious that it might otherwise be a bribe? Would the ATO take any view of that sort of thing?

Mr Kovic—As long as it came under the purpose of the scope of a routine.

CHAIR—Even if there were dozens of them, you would not?

Mr Kovic—We may start questioning them as to why they were actually being made. For instance, if we noticed that every week a payment was being made to expedite the installation of a telephone where there was only one office, that would raise our suspicions.

CHAIR—I realise this obviously is outside your bailiwick and the reason why you are here, but other witnesses have expressed the view—and I will just put it to you—that, if in fact we are too hard on citizens doing business overseas in terms of facilitation payments or whatever, we really would place Australian firms at a considerable competitive disadvantage. Do you have any views about that?

Mr Kovic—We are keen to see that our Australian businesses are not disadvantaged. So we are using the US model as a benchmark because it was the US that was pushing this change. We would not want our revenue laws to take a harder line than what will apply to US businesses.

Mr ADAMS—And other countries?

Mr Kovic—We have looked at the other countries' changes. Currently they seem to be grouped in two different types of rules. Some countries allow bribes so long as you identify who is being bribed, and there can be consequences from identifying the party.

Other countries just say, 'Yes, they are legitimate business expenses', and I am not sure of what those countries are doing to amend their revenue laws. This is just a recommendation from the OECD and it is not binding in the same nature that the convention is.

Mr ADAMS—I will just follow up with this question. This committee will be very keen not to put our business at a disadvantage. As you said, you are following the United States, but the United States believes that there are disadvantages which nobody has in their legislation. I am very keen to see what other countries are doing and we might want to follow up on that later on.

Mr Kovic—For instance, I note that Germany has to nominate who is paying the bribe and who is receiving it. They cannot claim a tax deduction if those parties have been prosecuted. If they are going to change their offence provisions to bring in a model similar to the OECD convention, those tax deductions would become disallowable.

Mr ADAMS—So there is nothing in the European Union that is uniform; it is all individual?

Mr Kovic—Not to my knowledge; they are all individual revenue laws at this stage.

Mr ADAMS—But you will be monitoring it?

Mr Kovic—Yes, we are always monitoring. Actually, there is a meeting going on at the OECD this week looking at the issues and the progress that countries are making towards changing their laws to deny tax deductions.

Mr ADAMS—Is there a time span in here for Australia or a time line?

Mr Kovic—We are proposing to have the amendment introduced in the Taxation Laws Amendment Bill (No. 5) 1998, which is due to go into parliament in May. We propose at this stage that the amendments would probably be applied to the year 1999-2000 and later years of income. There are already Australian businesses who are on substituted accounting periods who are in the 1998-99 year of income. We would not want to make that legislation retrospective.

CHAIR—Would you see it as a process to proceed with your amendments prior to this committee reporting? For instance, our report is unlikely to be tabled by May, which is when it is estimated that your bill would go before parliament.

Mr Kovic—I would have to say that I had not given consideration to that.

CHAIR—Would you just do that? We are very much operating in a consultative sort of way on this inquiry simply because it is an unusual way in which we are proceed-

ing. We are looking at enabling legislation whereas normally we would be looking at the convention. We are asking all of the people who are assisting us in this inquiry to come back to us with viewpoints about this, and that is certainly one that I would ask you to take on notice and consider it as appropriate.

Mr Kovic—I will take that on board and I will also let the minister's office know.

CHAIR—Is there anything that we have not covered? This is a very specialist piece of information that you are giving, of course, representing the ATO. Are there any more general comments you want to make about the draft bill or were there any questions where we did not really draw out any aspects that you wanted to address or tell us about?

Mr Kovic—No, apart from the fact that drafting criminal offence provisions is something probably best left to the expertise of the Attorney-General's Department. We do not really have that expertise within the tax office and I do not think we should be commenting on its legislation, apart from saying that I notice that it is also grappling with the problem of facilitation payments and that it has done it in two ways: either to put a monetary limit on the amount or to just refer to the amount as 'small'.

CHAIR—Yes, but we have also sought from you your considered approach, which is to classify by an amount or to call it 'small'.

Mr Kovic—The approach that we are looking at could possibly work for their legislation as well and would give it greater consistency. However, intention is a big issue when you are simply looking at offences and it is not relevant to taxation law.

Mr ADAMS—Can you just answer a question for me? If a company could not make a claim on taxation as an expense but it made a payment, it would then have to reflect that in its books somewhere for its shareholders, wouldn't it?

Mr Kovic—Yes. That would just be a reconciliation item from its accounting and financial statements back to its taxation records.

Mr ADAMS—The tax office would not have any interest in that at all, would it?

Mr Kovic—No, we would not have any interest in it. However, if the payment of bribes were illegal and we came across this type of a payment, we may have obligations to notify the Australian Federal Police. Our compliance people are out there; they are always looking at items.

CHAIR—I said before it seems like cash transactions—

Mr Kovic—That is the problem. If bribes are going on at present in the cash economy, people are not claiming the deduction for it.

CHAIR—That is right.

Mr Kovic—Or we are not aware that they are.

Mr ADAMS—There might be some other way—some other expense.

Mr Kovic—If that is what would generally be going on, they would be disguised. Take, for example, a lot of large businesses that are operating off shore. Their regional managers would probably have delegations to access certain amounts of money and there may be instances where even the head office is not aware that the payment is being made for a bribe, so they may never be reflected in the books of a company as such.

Mr ADAMS—They could be PR and advertising type expenses, I guess.

CHAIR—It is probably better for all concerned that head office does not know.

Mr Kovic—And once that bill does go through, it is highly unlikely that any business is going to be trying to make a claim, because they are creating evidence that can be used against them.

CHAIR—I think the real issue is going to be, at least from the evidence we have heard so far, just how we treat facilitation payments. It is very difficult. Mr Kovic, thank you very much for your assistance and for coming along today. That completes the program for today's hearing. Next Monday, from 9 a.m. until 12 noon, we will take evidence from, among others, the Institute of Engineers Australia and the Department of Foreign Affairs and Trade.

Resolved (on motion by Mr Adams):

That this subcommittee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Subcommittee adjourned at 11.25 a.m.