COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: OECD convention on combating bribery

CANBERRA

Monday, 6 April 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

Monday, 6 April 1998

Present

Senator Coonan (Chair)

Mr Adams

Mr Laurie Ferguson

Mr Hardgrave

Mr Taylor

Subcommittee met at 9.10 a.m.

Senator Coonan took the chair.

MAIR, Dr Robert Ian, Past President, Institution of Engineers, Australia, 11 National Circuit, Barton, Australian Capital Territory 2600

WEBSTER, Dr John Alexander, Chief Executive, Institution of Engineers, Australia, 11 National Circuit, Barton, Australian Capital Territory 2600

CHAIR—I call the committee to order and declare open this public hearing, which is the third on the OECD Convention to Combat Bribery of Foreign Public Officials in International Business Transactions. Today we will take evidence from the Institution of Engineers, Australia; the Department of Foreign Affairs and Trade; Mr Allan Asher and Mr Robin Brown; Mr Thomas Bartos; and Mr John McFarlane and Dr Sandy Gordon. I welcome Dr Mair and Dr Webster from the Institution of Engineers. Your submission has been published already by the committee. Are there any amendments that you wish to make to your submission?

Dr Mair—No.

CHAIR—I invite each of you in turn, or one of you, however you wish to do it, to make a brief opening statement and then we will proceed to ask you some questions.

Dr Webster—Thank you. Just very briefly, the institution is a professional association with some 67,000 members. The great majority of these are practising engineers, either full members of the institution or graduates in training. In recent years we have had a considerable expansion in the number of members who are either resident and working overseas or delivering services overseas while based in Australia. Our best guess is that anything up to 15,000 of our members are thus engaged at any one time.

The delivery of engineering services overseas is an activity which brings you into contact with the sorts of issues that are being addressed by the committee. We have not sought to do a detailed survey of all our members who in one way or another are associated with overseas engineering practice. But it has become clear through discussions with groups of members that they do have some serious concerns about the issues that can arise in practice overseas and the way in which these issues can interact with a code of ethics which is binding on all our members as individuals.

There are some real problems that need to be addressed in balancing the requirement for sensible commercial practice against one's responsibilities as a professional. These issues came to the fore with particular clarity two or three years ago during the term in which Dr Mair was president. Ian took it as one of the major issues of his presidency to try to develop a more formal response by the institution to the challenges posed by overseas practice. I think it might be better if I allowed him to carry on with some of the background to his work.

Dr Mair—In setting the scene from an engineering perspective, it is important I

think that we place the discussion in the context of world economic change and regional expansion. In that scene, it is the developments within the countries to our north, the South-East Asian region but increasingly the interest from Africa and South American continents, that we have to be alert to.

From a position relatively recently when Australia engaged with the regions just mentioned through the export of primary products, we are now seeing a very significant increase in the export of services, particularly engineering services. Projections for capital expenditure to meet basic infrastructure needs in the countries to our north are counted in trillions of dollars over the next 20 to 25 years, and the expectation is that as much as 25 per cent of Australia's professional engineering work force could be involved in those international activities.

The cultural shift in how engineering should be taught and practised then poses a significant issue for Australian engineers, as for the profession and for the educators, in how we actually prepare people to engage in engineering services in that region. But we have no real commercial choice other than to become involved with the region. It is not one of being able to sit back and simply say, 'We are not comfortable with the way business is done in those regions. We just won't do it.' So the skills and values to be applied to this increasingly important environment will impact on the capacity to compete effectively and determine the conditions under which projects are bid and conducted.

It might be worth while noting here that within the profession in Australia of the order of one-third of the new engineers entering into the engineering work force each year are individuals who have entered through migration from other countries. So they are bringing with them background knowledge, background skills, value systems which are not the same as we would have from our own engineering graduates coming through. Those individuals are frequently engaged by companies operating in the offshore regions as part of their work force for interface in business dealings.

Condemnation of bribery is universally supported by engineers as a professional ethic. It accords with the profession's code of ethics, as Dr Webster has indicated. In general experience few engineers from Australia have encountered corruption, and even fewer are willing to acknowledge any exposure to instances of bribery or ex gratia payments in international business dealings, either to secure work or to facilitate its execution. But many will acknowledge the growing pressure of competition for work in the region and the increasing presence of participants who treat bribery as a normal part of business.

Tight margins in that international business context encourage practices that minimise unavoidable delays in order to remain competitive. Notwithstanding the ethical and practical desire to curb instances of corruption, however, there is within the profession a voice of hesitation that if we do not move in concert with other nations in the condemnation of bribery, then we are raising a set of issues in terms of our capacity to compete

in the delivery of engineering services. That is going to be a challenge for all of us. I throw it open for questions.

CHAIR—Thank you, Dr Mair and Dr Webster. I wanted to start with your code of ethics. Do you have copies of that available that we could see?

Dr Webster—Yes, certainly. I have only brought one copy with me.

CHAIR—At some other stage, if you could let us have a copy, that would be very helpful.

Dr Webster—Certainly.

CHAIR—Obviously it underpins the way in which you approach these issues.

Dr Webster—Absolutely.

CHAIR—For us to understand completely what you are saying to us, I think we could benefit from seeing the code of conduct. You attended a forum session on corruption in international procurement which was held roughly this time last year.

Dr Webster—That is correct.

CHAIR—From that there was a summary of outcomes that you wished to bring forward for us to consider. Is that the position?

Dr Webster—That is correct.

CHAIR—You have identified a number of major issues and summarised them in your outcomes. I am just wondering if we could trouble you to go through those with us and explain. No doubt there will be some questions generated from it. The first was the need for sensitivity training in ethical issues in general and corruption matters in particular for engineers involved in international activities. I think we would all agree with that. How do you actually see that being realised?

Dr Webster—The institution has an active process of continuing professional development. Part of that has been the provision of programs designed to help members adapt their skills and capacities to new professional challenges. There is a great deal of interest in getting advice about working overseas and the issues that can arise. It is probably within that context that this approach will have its most immediate impact. We also believe that it is becoming a sufficiently persuasive activity that ethical issues that arise in engineering practice overseas should find their way into the courses which universities already offer at undergraduate level.

CHAIR—Yes. What about the benefits of promulgating professional engineering values in communication with students? Is there a difference in sensitivity training and actually teaching students?

Dr Mair—The second point, the one in terms of promulgating professional values, is a question of indicating the strong stance of the profession in terms of their high ethical values, as indicated in the code of ethics, and bringing that to the attention of current and prospective engineers in that sense.

The sensitivity training question is a recognition that ethical decisions are not black and white decisions. There is a very strong measure of personal experience in how you balance those issues involved—how you go through a personal judgment process in deciding whether there is an ethical issue or not an ethical issue.

They are not things where when you are faced with a situation you can sit down and say, 'I will get the text book out and I will sit down and work out how to answer this question.' It can only be done by having prior exposure to instances where there are ethical issues involved and being required to work through examples—case studies, if you like—so that when you are faced with a real situation you will at least have some moral foundation on which to say, 'These are the ways I might go about trying to come to a personal judgment on whether I have an ethical issue or not an ethical issue.'

CHAIR—But how do you expose students to that? Do you do some sort of role playing, or scenarios, or what?

Dr Webster—Case studies and role playing would be the common approach. To a lesser extent, exactly the same issues arise in any form of engineering practice. There are temptations—if not towards corruption in a direct financial sense, at least towards the exercise of influence through other services which can arise in any environment of engineering practice. It has always been an important part of the professionalism that we try to ensure that students understand the situation, understand their responsibilities as individual professionals.

CHAIR—The next point that is raised in this summary of outcomes is the cost of delays to projects versus the act of facilitation payments. That must be very, very difficult for engineers in situations that they might find themselves in—to be able to justify something being delayed for a very long time, as opposed to making whatever payment is necessary to grease the wheels and get on with the job. How do you see this balance? Do you think that the proposed legislation that talks about facilitation payments is justified or not justified?

Dr Webster—I think realistically it is justified. The issue, as I understand it from my experience, is that a number of overseas countries simply do not pay the public servants enough to enable them to live in a reasonable manner. There is an unstated but

very real assumption that their salaries will be augmented by facilitation payments which are almost seen as a form of performance based pay. It is very much like the countries in which you will not get service at the table unless you leave a fat tip to the waiter each time you visit.

It is not something that anybody likes. It adds to the cost of doing business in a country. It can be irritating until you know your way through the system, but it is up to the individual countries overseas, I believe, to change that practice. I doubt that there is much that Australia could do.

The plain fact is that, as you have indicated, it will almost always cost you far more to take the moral high ground and refuse to make these payments than it will cost to make them. So the fact that, in essence, small facilitation payments are excluded from the legislation we thought was simply recognising the practicality of the situation.

CHAIR—Do you have a view as to what might be considered small, bearing in mind that what is small in one situation may be very large in another? Is it your view that there may be some utility in adopting the American description of general business payments?

Dr Webster—I think that a more flexible definition is probably preferable. Although it is difficult for it to be put in legislation in any form that can be called unambiguous, it is not too difficult to recognise the difference between a major payment designed to secure a competitive advantage and one which is made as a routine, if regretted, part of getting a project complete.

CHAIR—So you are comfortable from, shall I say, an ethical point of view with the distinction between facilitation and some major facilitation to get business or to continue business?

Dr Webster—I do not know that one can be completely comfortable from an ethical viewpoint, but in a realistic and pragmatic sense it would be hard to sustain the argument that one was competing unfairly or bringing dishonour on the profession by making the routine facilitation payments which anybody would have had to make who had that particular project in hand. I think that is quite different from actually seeking to pervert public decision making by making large payments to individuals who are in a position to determine the outcome of a major tender, for example.

Mr HARDGRAVE—We are back to what I have said a few times, that politicians are bribed but public servants accept gratuities and slings. I just wonder though, from an ethical viewpoint, regardless of the amount of money slung, whether money given or money provided to somebody to influence a particular outcome in a business transaction is still in its raw sense a form of bribery—isn't it?

Dr Webster—I made the point that I did not think that I could sit here and say that we were totally comfortable with it as an ethical issue. But as a pragmatic issue it is not quite in the same category. I do not think I would wish to defend it, but I believe that to attempt to pursue the issue of facilitation payments within this sort of international framework would divert attention very considerably from the much more significant major public ills resulting from grand corruption. What would result from seeking to, as it were, wrap that into the same ambit would be that which very much seems to happen so often in the battle against drugs. You finish up having lots and lots of court cases against very minor players and you never get to the real source of the issue. In this case, I think we would deem a greater ethical good lay in getting to the source of the problem.

Mr HARDGRAVE—If a transaction, sling or whatever was passed, would disclosure, as part of the reporting on that transaction, assist you from an ethical point of view so that people knew that it occurred?

Dr Mair—As a general principle, I think transparency is very much to be encouraged. Corruption can only survive—unethical practice can only survive—in hidden transactions.

Mr HARDGRAVE—So a mechanism to disclose the fact that $100 was given to somebody to make something happen would make good sense from your point of view?

Dr Mair—I think that would potentially increase the reporting and paperwork required if you dropped to that sort of level. If $100 were given to secure a contract by alteration of details or something through the back door, then certainly disclosure. If it were $100 to get your telephone on three days earlier, then it would be hardly worth the effort.

Mr HARDGRAVE—It might be if you want the phone on. So essentially what you are saying is that it still comes back to the individual and their own particular ethics, which means there is probably no law in the world that could ever be passed that will make something go the way we would all like it to go.

Dr Mair—The approach taken by the institution is essentially one of ensuring that individuals entering into any transactions are aware of what their own ethical foundation should be, so it is not a mindless entering into a transaction without any ethical foundation at all. I think the general direction is that everything in our power should be done to move in concert with everybody else to try to stamp out the practices that do exist. They are not good business practices. They are not good professional practices. Whilst that is all happening, commercial activities still have to go on. It is a matter of trying to strike a sensible balance on the way through.

There is no sensible balance in terms of those payments that are out and out bribery in order to procure work for which you might not have otherwise been entitled.

The additional payments that might be made to have the timely execution and completion of a project, which is in all other respects a legal activity, is where the facilitation payment and the practicalities of it start to come into play.

Mr HARDGRAVE—Do you think the proposal before us today meets your expectations in this regard?

Dr Mair—It highlights the very significant distinction between the facilitation and the major bribery areas. It provides an additional backbone to any position that is taken on increasing people's awareness of the condemnation of bribery and practices associated with that as being unethical and therefore provides an extra basis, say, in terms of talking with the profession itself. It is not only a professional issue; it is a whole community issue. The community standards itself are totally opposed to it as demonstrated by the acts that we have in place.

Mr HARDGRAVE—So the bottom line is, yes, it is a good idea?

Dr Mair—It is a good idea.

Dr Webster—The bottom line is, I think—based on the results of our sampling to date, which is not a complete survey of members but has covered a number of those active overseas—that almost all of them would welcome the legislation if it was introduced by all the major countries concerned more or less simultaneously so that it was seen not as a unilateral self-adulation but as a positive decision by the competitors involved in the market to behave more sensibly in the future and commit themselves to it.

Having said that, there will be a range of views within the institution and there will be some concern that if one is to introduce legislation like this it must be applied and pursued and, absent any specific allocation of resources to enable that to happen, that will, presumably, be on the basis of having a whistleblower. Nobody particularly wants to be in the position of being the test case. But, all the same, I think the bottom line that Ian has given is a fair reflection of the general view of our members.

Dr Mair—As the subcommittee's secretary is aware from the meeting held a few weeks ago with Transparency International and the institution as host, the question was raised as to what support mechanisms would be put in place if the legislation were passed—support in the sense of how you provide guidance to people who are going to be conducting international business practices and what the actual act really means? How do we go about conducting our business practices? How do I work my way through what is an acceptable practice and what is not an acceptable practice? In much the same way, some of the corporate representatives at that same meeting indicated that they are putting into place support structures internally to back up their own codes of good conduct.

That is where we start to address the questions of what sensitivity training you

provide for professional engineers as a professional support, as opposed to a national government support or a company support mechanism. They are very grey areas. The only way to work your way through them is to have some way of talking to people about them and understanding the value systems that are there.

CHAIR—What would happen in a scenario where, say, there is a head office in Australia and an engineer in some country—without identifying any particular country—who engages the services of a 'consultant' in that country and who often does not know what happens but things get done? Does the engineer in that situation have some ethical obligation to inform herself or himself of exactly what has to happen to grease the wheels or procure the business or whatever needs to be done in those circumstances? What is their obligation to head office? Do they have only a personal obligation? Where does this actually fit in in a realisable, practical framework?

Dr Mair—The question gets down to the heart of the international business practice and how you can actually address it. Good practice in the corporate scene, in this context that I am familiar with, is moving in a direction of saying that, as an offshore manager, you do not have the autonomy to undertake these types of payments without reference back to your corporate centre. There is a checks and balances action going on there.

CHAIR—You would also put yourself fairly and squarely within the legislation if you refer back to head office if it is in Australia, which brings up the jurisdiction question that we might talk about in a minute.

Dr Mair—Absolutely. That is correct, yes. The risk for organisations has increased where you have delegated authority outside the country. Managers, if they operate overseas for a number of years, can, not unrealistically, become out of tune with the practices of their own head office, the value systems of their own head office.

If I am not stretching the bow too far, it is my understanding that it is part of the practice of the Australian government, in terms of its representatives to Australian government offices, to rotate them so that they do not lose contact with the Australian government's position on issues and become too attuned to that of the country in which they are residing.

In that same way, you need those checks and balances and, therefore, the referral back process. In good conduct is a way of doing it. It only becomes an issue, I think, for companies being brought within the ambit of legislation if they acknowledge internally that they are undertaking practices which are not appropriate practices to be undertaking anyway.

Mr ADAMS—If a company gets the consultant from the other country, or the joint venturer, to do all that stuff, there is no reporting back process. One company can

undertake doing things that way while somebody else that may have better ethics may try to do something in a different way.

Dr Webster—This is where the issue of the whistleblower is almost bound to emerge in a highly competitive environment, frankly. If the legislation exists, to some extent, the market itself is going to police the behaviour, provided it comes into effect and is implemented seriously by most of the main players at the same time. Then you have a reasonable chance of solving the worst of the problem.

Mr ADAMS—Sorry, I interrupted you.

Dr Mair—I was just going to observe, in response to your own comment, that it is perhaps the most common practice, as a way of sidestepping local activities, to engage a partner. In fact, in most overseas projects you are required by the local country to engage a local partner anyway. But I think the act that is proposed highlights the question of third-party dealings as not being a defence in the particular area which it is targeting, which is major bribery. In those areas of facilitation payments, it is a question of: what do I consider to be unethical and what do I consider not to be unethical? Part of addressing that question is selecting your partners appropriately. It is very easy to find a partner who is willing to be very corrupt. Finding a partner who is of a different outlook is more difficult.

Mr ADAMS—Even if there were facilitation payments—and we know that the tax department people write them off now—how transparent can we get that in reality?

Dr Webster—It is hard enough to tie down all the expenditures in a complex project anyway, even though it is good management practice to make every effort to do so. It really depends very much on whether these payments are a structural part of the activity that are actually budgeted for or whether they are seen in the same category as taking visiting people to lunch. Again, if the size of the payments is down in that level then losing them in the general process of support for the project is almost inevitable, I suspect, in the real business of getting work done.

It is very difficult, at the best of times, to accurately account for every last cent spent on a major overseas project. That is just fact. But large sums of money of the sort that are likely to influence the outcome of a tender or the major directions of whether or not a project gets done are much harder to hide. I think it is quite reasonable to require that those payments be individually identified in the records of the project.

CHAIR—Could you comment on your estimate of how effective the jurisdiction is going to be with the way the current legislation is drafted, given that your evidence and the evidence of others has been that much of the activity we are seeking to proscribe is going to take place offshore with perhaps great difficulty in having any territorial or other nexus with Australia which will otherwise mean this legislation is effective?

Dr Webster—That is hard. Neither of us would pretend to have legal expertise, and anything we say has to be treated as speculative. Many of the Australian organisations operating overseas are doing so in structures which have a firm relationship back to companies in Australia. The issue will be that which Ian talked about earlier, which is the extent to which the company itself requires that practices be engaged in which, in effect, provide checks and balances and require a reference of certain categories of major decision back to the head office in Australia.

If they do then the jurisdiction ceases to be an issue. If you are dealing with the operation of a wholly owned subsidiary overseas which operates without reference to the head office back in Australia then obviously it could be very difficult. I do not know whether the proposed legislation would in fact be able to capture that particular situation.

Dr Mair—The core of the legislation and the core of the practices that the Institution of Engineers addresses in its code of ethics is one of increasing the risk of exposure of those people that engage in corrupt practices. The risk is increased by the transparency provisions. So the more transparency the higher the risk of exposure. Working from the principle that in all of the countries that we have made reference to, within their own local practices, it is not seen as an ethical approach to engage in bribery, I think pretty well every country has some act in place that makes it a practice that is not condoned by the community.

The question of reporting the dollar sums is only an aspect of increasing the risk of exposure and introduction of transparency. The other one is the legal exposure which the act aims to address. The third one is simply the professional exposure, by fellow engineers, in our case, that question whether projects could have been conducted or activities procured without some form of payment that was not a normal payment. That questioning then leads to the whistleblowing as a possibility.

The institution in its activities is not constrained by the geographic boundaries of Australia. We are only constrained by where our members happen to be. In that sense, with an increasing proportion of our members operating overseas, we are still looking at the mechanisms of how our code of ethics works in those contexts of increasing that risk. I think it is all part of a matrix of activities of trying to do it, and the act in itself is not going to be the only thing that is going to work.

In its own right it probably will meet so many legal hurdles that it is going to have great difficulty. In practice, it is probably going to be severely constrained in its implementation by the resources available to the police who are going to have to bring it about.

CHAIR—Do you think there is a deterrent value in simply increasing the risk?

Dr Mair—By increasing the risk; by increasing the public awareness that this is not a condoned practice. By all of those things that fit together.

Mr HARDGRAVE—You would suspect that whistleblowing, not just from the failed tenderers for a project after putting in somebody who has been successful but also from within an organisation which is engaged in practices, could be enhanced by this greater perception.

Dr Mair—Yes.

CHAIR—In your summary of topics and discussion of outcomes, there is a reference to current bidding rules, selection processes and process efficiency and whether they contribute to the occurrence of corruption. Could you just elaborate a little on that. Was that the view?

Dr Mair—Yes. I would prefer not to comment on it directly because I am not totally familiar with the thinking of it but I can note that the particular point was raised by Dr Peter Miller, who gave a paper on the subject to that forum. We can arrange to have that paper for you.

CHAIR—Thank you. Was there anything that we have not teased out in questions that you wanted to raise in your submission to us? Do you have any particular comment?

Dr Mair—No.

CHAIR—Was there anything about the actual draft implementing legislation that we have not covered that you wanted to mention?

Dr Mair—No.

Mr LAURIE FERGUSON—One of the aspects at this March 1997 forum was whether current bidding rules, selection processes and process efficiency contributes to corruption. Could you say a few words about that.

Dr Mair—That was the question just raised. We have indicated we will submit the paper that went behind that particular observation.

Mr ADAMS—Because we are doing more overseas—at least, I hope we are—in building companies and everything else, and in our services going into exports, is there an increased pressure coming on your members?

Dr Webster—Certainly many more members are being exposed to the pressures than would have been five or 10 years ago, yes.

Mr ADAMS—Is that as a result of there being more people in the field? That is the point I am trying to make.

Dr Webster—Yes. There are simply more people in a bigger market. In some areas, it is a market which is still operating very much in the same way that it always did, despite the fact that the technologies are improving and the level of activity has been much increased.

Mr ADAMS—I am interested in how those facilitation payments work—getting a phone on is one way; getting energy connected; getting a train or trucks to deliver resources on time are some ways. Can you highlight this issue?

Dr Webster—Yes, those are certainly very common areas where facilitation payments turn out to be necessary, but getting a signature on a document required before some particular activity can legally be done is another issue. It is very hard to cover the whole range of things but, broadly, it covers any payment for an activity which is within the normal duties and responsibilities of typically a public official and where the purpose of the payment is to expedite the completion of those duties rather than to ensure that they get done when they might otherwise might not have been done.

That is a little tortuous but a payment to a public official to do something that in itself is a breach of that public official's responsibility to the public—that is, to agree with a practice which is against the law of the land—is bribery. A facilitation payment to get him or her to move it up to the top of their in-tray and deal with it, when it is something that they would perfectly legally have done several weeks later, is a facilitation payment. That is a rough and ready definition.

Dr Mair—The complexity is perhaps illustrated in instances that are less black and white than those. The complex areas are where a bid has been made against a tender, and there is considerable margin for interpretation as to whether it is a conforming bid or not a conforming bid and what the tender is actually asking for. Payments to help favourable interpretation are the ones that are right on the margin of difficulty. That applies to tendering processes within this country as in any country.

Mr ADAMS—Yes.

CHAIR—I am afraid we have run out of time. We have gone a little over because we were very interested in what you had to say. Thank you for giving the committee assistance. We may need to be in touch with you to clarify anything that comes out of our deliberations.

Dr Mair—Right. Madam Chair, I will hand over the notes I was working from to start with.

CHAIR—Thank you.

[9.53 a.m.]

CLARK, Mr Gary, Manager, Legal and Risk Management, Austrade, R.G. Casey Building, Canberra, Australian Capital Territory 0221

DONAGHUE, Mr Kieran, Acting Director, Governance Group, AusAID, GPO Box 887, Canberra, Australian Capital Territory 2601

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CHAIR—The committee has not received a submission but you have given us a few notes to work from. Would you like to make a brief opening statement before we proceed to some questions?

Mr Potts—I would, and I think there will be a short statement from AusAID as well. Let me say, first of all, that the department is happy to assist you in your inquiries. The rationale for Australia's ratifying the convention on bribery has been outlined in the national interest analysis that has been provided to the committee by the Attorney-General's Department. I just want to underline that the Department of Foreign Affairs and Trade was consulted in that process and endorses the NIA.

As indicated in the NIA, this convention has been developed against a backdrop of growing international concern about bribery and a growing determination to take concrete steps to combat the practice. It is important, I think, to say that concern about bribery is not just confined to the OECD members, but clearly the OECD—as the club, if you like, of industrialised countries—occupies a key role.

More generally, in December 1996, the General Assembly of the UN adopted, by consensus, a declaration against corruption and bribery in international commercial transactions. It also committed member states to deny tax deductibility for bribes. Australia joined the consensus on this declaration. I should note also that diplomatic inquiries of other OECD members indicate that since the end of last year, when the OECD convention was open for signature, most other OECD countries, including the 10 largest OECD exporters, have confirmed that they are indeed moving to implement the convention and that they hope to complete this process by the deadline of 31 December 1998.

DFAT believes it is important to view the convention as a first step in attacking the problem of bribery. The convention is restricted, obviously, to action on the bribery of foreign public officials, rather than all forms of bribery. Evaluation of the operation of the convention through the relevant OECD working group will be important in any subsequent consideration of the possibility of extending the convention scope. I think this is typical of the way the OECD approaches new areas of endeavour. There are also different legal traditions—the civil and common law systems at play—and these have to be harmonised in the way the bribery convention is implemented. It is not possible at this time, I believe, to evaluate with any precision just how effective the convention might be in achieving its objective, but its adoption and its entry into force will send important messages about the commitment of governments to deal with the problem to both those who might be tempted to engage in the practice and those who might be tempted to tolerate it abroad.

There is, I believe, no question that the convention, and its objectives are fully consistent with core Australian values and principles and the abhorrence of practices such as bribery. Australian ratification of the convention will send a clear message to our major trading partners and will be used to support steps they may also take to combat bribery. The convention and its implementation will also be important in underpinning the position taken by most Australian companies in opposing the payment of bribes and in developing their own corporate cultures to reflect this approach.

There is no hard evidence to indicate that Australia's trade might be harmed should there be prosecution under the proposed amendments to the Australian criminal code to combat bribery of foreign public officials. There are many factors which determine the flow of trade between different countries. Sensitivity over the implication of bribery involving senior government officials would only be one of those factors. It would be politically very difficult, in any case, for another government to be seen to be publicly condoning bribery or attempted bribery of its officials should the matter come to light through a prosecution.

The department also believes that use of the amended criminal code to prosecute cases of bribery would significantly strengthen the hands of those in other countries who are keen to improve governance and to stamp out corruption. Raising the temperature on bribery will have an effect too on the ability of corporations from countries who are not party to the convention to gain commercial advantage using this practice. To the extent that corruption can be reduced or eliminated, the competitive environment for business can be improved, not weakened.

Australia is a small to medium sized member of the OECD but continues to play a prominent role in OECD affairs. Any impression that Australia was less than strongly behind the convention and its effective implementation would send messages to the international community that do not reflect Australia's core values nor our preferred approach to international business practice. We would not wish to be seen, at the very time when the rest of the world is toughening its position against bribery, to be equivocal

or less than fully committed to combating the problem.

While Australia has not played a leading role with respect to the negotiation of the convention, ministers have recognised and agreed that we should move in step with a significant number of other OECD members. It is clear that other OECD members intend meeting the recommendation that the convention should enter into force by 31 December 1998 and, in the view of this department, Australia should now move to ratify the convention and to pass implementing legislation as proposed in the exposure draft currently before the committee. Thank you, Madam Chair.

CHAIR—Thank you, Mr Potts. Mr Russell from AusAID is going to speak next.

Mr Russell—The reason I am making a statement is that I understand the ACCI suggested that one thing Australia might do is use technical assistance for anti-corruption measures. I thought if that was on the table I might talk a little bit about that. AusAID sees anti-corruption in terms of an overall package of good governance. Good governance is a term that is used by all aid agencies. Really what it is about is governments making good decisions. The underlying assumptions are that development depends on the proper allocation of resources and good policies by government. So good governance is about the process which promotes good decisions. The OECD, the World Bank, the Asian Development Bank, almost all UN agencies and almost all bilateral agencies would have policies and programs which promote good governance.

Mr Adams interjecting—

Mr Russell—No, not at all. Also, the OECD has recommended that its member countries have anti-corruption clauses in its procurement contracts and we have done that as well. Effectively, that means that AusAID contracts have clauses that require that contractors should not offer or accept bribes and, if they do so, it would be grounds for termination of their contracts.

In terms of actual practical measures that we do through the aid program—the sorts of things we mean when we are talking about good governance—some examples are educating civil servants to work within ethical parameters; encouraging partner countries to remove or reduce administrative mechanisms, such as export licences, import quotas or bank credit allocations which are fertile grounds for corruption; media training, which strengthens the capacity of the media and creates awareness amongst citizens about the impact of corruption on society; technical assistance for public sector reform in South Africa and the South Pacific; support for legal system development in Laos, Vietnam, South Africa and the South Pacific; assistance to improve police forces in PNG; institutional strengthening in finance ministries for budget allocation systems, procurement and so on; promoting democratic institutions through electoral assistance; and institution building outside government—for example, NGOs—to try to build up civil society.

As I said, it is really quite a wide program. We tried to come up with a figure of what AusAID might spend on this but it really depends on how you define these things. We think probably about $100 million a year—which is a bit less than 10 per cent of the program—comes within this broad rubric of good governance. Thank you.

CHAIR—Coming back to DFAT's statement for the moment, would you be able to comment on the extraterritorial coverage in the proposed legislation? There have been some suggestions, as you have been aware, that this is going to be a fairly toothless tiger if everything is offshore and almost impossible to trace. It will be difficult from an evidentiary point of view—even if it does come within the act—but mostly it might not even be caught within the act.

Mr Potts—I would probably have two comments to make. Firstly, I think the approach we have taken on extraterritoriality on this occasion is, essentially, the traditional one the government has taken. Secondly, I would like to reinforce the point I made in my opening statement, which is that the work of OECD conventions tends to be an ongoing thing. This is going to be a long-term exercise; it is difficult to modify behaviour quickly. I think the OECD, through its committee work, will have to see how effective the convention is.

If there is a widespread feeling further down the track that, because of the way various countries have applied their extraterritoriality approaches, the convention is not having the desired effect, I think there will be a re-examination in the OECD context. That will clearly take some time.

CHAIR—I suppose there is an element of suck it and see in this one.

Mr Potts—There is certainly an element of having to wait and see how it is all going to work out.

CHAIR—Yes. You said right at the very beginning of your statement that there is a growing concern about international bribery and corruption. Is there some basis for that? Is it anecdotal or is there any evidence or statistics? On what do we base this growing concern which seems to be pretty much a widespread one?

Mr Potts—Certainly this decade has seen some interesting questioning, as John Russell mentioned earlier, on the whole approach to good governance and, to some extent, the ethical standards that flow from it. There has also been, in the way we have looked at other countries, a greater interest in the consistency of approach on the part of governments to the way they run their own affairs. There is probably less tolerance of maverick states—the worst case scenarios, the basket cases—than was evident in the 1970s and 1980s. I think there is more concern, both with governments like that of Australia and also in public opinion in terms of delivery of services, not just in your own country but in other countries as well. This whole question of bribery and good governance goes hand in

hand with that.

Mr ADAMS—I have been asking this for some weeks now, trying to get some statistics or documentation of bribery in the world. Nobody has been really able to give me anything. I have been offered a book of case studies from America, but it is very difficult to get one's hands on anything here. We are dealing with a piece of legislation that has been proposed along with many other countries, but that does not seem to be documented. I was wondering if you could help out.

Mr Potts—I do not think we can as a department. We would share your view that there is this concern and a sense that this is a problem that has to be confronted. I think it is very difficult to capture this sort of activity in a governmental sense.

Mr ADAMS—Does the Department of Foreign Affairs not pay to get its phones put on quicker when it is getting something changed overseas?

Mr Potts—As a matter of policy, we follow local law. I am not aware of the department going into grey areas such as facilitation payments.

Mr ADAMS—So the Department of Foreign Affairs does not accept facilitation payments in any way?

Mr Potts—I do not believe so.

Mr LAURIE FERGUSON—In regard to AusAID, we have had this provision of anti-corruption in their purchase policy and procurement. I am asking if there is a similar provision in procurement policies in other government departments?

Mr Clark—All government departments and agencies will follow the former Department of Administrative Services guidelines on government procurement that in one form or another would prohibit any sort of influence and conflict of interest. You would find that this would be captured under those headings.

Mr LAURIE FERGUSON—Is this one in AusAID somewhat more specific? Is that why it has been mentioned?

Mr Russell—The one in AusAID came from the Development Assistance Committee of the OECD, so it came down the aid industry within governments and with recommendations to aid agencies. It was not considered in the totality of Australian Commonwealth purchasing. That is why it is there.

Mr ADAMS—Is it fair to say that there might be some difference? When you say they are under headings, is it possible the AusAID one is more specific and more targeted?

Mr Russell—It would be slightly different simply as a result of the source from where it came. You would imagine that, over time, the OECD tends to use the same language in different committees. Its source was from a specialised committee of the DAC.

Mr LAURIE FERGUSON—I am not worried about the OECD; I am worried about Australia. Do you know or not if it is the case that the ones that we have been utilising in other departments in regard to procurement of administration services might not be specific? They might be quite outdated in the kind of new emphasis you are saying is put on these matters.

Mr Russell—I do not know.

Mr Potts—I am not sure that we can answer but I will consult with the Department of Finance and Administration in charge of government procurement and we will see if we can answer that question on notice for you.

Mr LAURIE FERGUSON—Thank you.

Mr TAYLOR—I agree with what DFAT are saying about the need for enhanced governance measures and improvement in prudential control. I think that has been highlighted by the most recent Asian financial crisis. I will have a little more to say on that at 12.30 when I table the Foreign Affairs subcommittee report on ASEAN in which we make quite a lot of comment on that.

In terms of the facilitation payments, in the hearing here last week I raised the question of section 7A to 7C of the draft legislation. Your statement rather reiterates my view at that time which was that we should not be spelling out X dollars in terms of facilitation payments but leaving it to the system to determine. In my view, to put a quantum on it just complicates the scene. Is that what you are saying? Are you saying that 7A to 7C should be omitted from the draft legislation or suitably amended to take out X dollars or whatever? Is that what you are saying?

Mr Potts—Our view certainly is that there are good arguments for leaving the treatment of facilitation payments to the discretion of prosecutors. We see this as allowing each case to be assessed on the facts and also enabling consideration of the relative value of the amount of money to be assessed against the country concerned.

CHAIR—Could I interrupt? As a matter of public policy, are we really looking at turning a blind eye to routine government payments or routine payments that are made by business to just 'grease the wheels'—I think that was the expression used last week—or are we not? What sort of message do we want to send to the community? It seems to me that it is totally unrealistic of us to expect Australian firms to suddenly bite the bullet on this and have a different culture of how they do business, get the phone on, get stuff off

the wharves and all of the things that are absolutely necessary to their operations.

Mr Potts—I think it is fair to say that no-one is comfortable with the question of facilitation payments. I think that was evident also in the evidence you heard previously from the Institution of Engineers. I found myself thinking that there was a lot that rang true in that evidence from practitioners in the field. I think, in an ideal world, you would like to capture every transaction that you personally are not comfortable with and that does not reflect your own values, but we have to strike a balance between a statement which is quite a strong statement on moving against bribery and having an outcome which is going to be workable. I think this is, in a sense, the balance that has had to be struck. I think further down the track, as ethical standards improve and, hopefully, the more egregious elements are captured, the game will move on.

Mr TAYLOR—Could we have that clarified, because I am still not clear? Could we have it very clear on the *Hansard* record that, as far as DFAT is concerned, those articles in the draft legislation are unnecessary?

Mr Potts—Yes, that is certainly our view.

Mr TAYLOR—Thank you.

Mr HARDGRAVE—Without wanting to open a Pandora's box, what sort of facilitation payments or processes does DFAT regularly participate in in various countries around the world? Is it true that being in international diplomacy is one big long lunch or cocktail party and hosting those? Is that seen as a facilitation payment? Is there a suggestion that a carton of cold beer might . . . ? Are those sorts of suggestions offered and made routinely and understood to be a routine process?

Mr Potts—It is very difficult to arrive at a universally agreed definition of what constitutes a facilitation payment. Certainly anything that was described as an out-and-out facilitation payment is something that we would not be prepared to process through our accounts as such.

Mr HARDGRAVE—Why is that?

Mr Potts—Not all of your embassy transactions, for instance, are done by the embassy itself. We use agents, for example, to clear customs. It is possible that they may have their own arrangements with national customs administration.

Mr HARDGRAVE—I suspect it depends on which country you are operating in, too, does it not?

Mr Potts—Some countries are clearly much easier to operate in than others but I should say that, nonetheless, the Australian government tries to have quite high ethical

standards. In one of the countries I served in—I prefer not to say which country—when I was there there was a differential of 10:1 between the official exchange rate and the exchange rate you could get on the market. Yet we ensured that all our transactions went through at the official rate, at a cost of 10 times what we could have achieved by breaking the law of the country. That is standard operating procedure for the Australian government. It is one of our principles and it is enshrined in the code of conduct for departmental officers to respect the law of the country.

Mr HARDGRAVE—What is the penalty within the department for not respecting the law of the country?

Mr Potts—I think there is a range of penalties. The code of conduct itself is quite new. Essentially, it would attract the normal disciplinary procedures under the Public Service Act. The code of conduct is a direction under the act by a chief executive officer.

Mr HARDGRAVE—You said before you do not pass gratuities through the books. Did I hear you correctly?

Mr Potts—No. What I said was that, if a voucher or invoice were presented to us with the term 'facilitation payment', as a matter of policy we would not be prepared to process that.

Mr HARDGRAVE—Okay. That sounds better than what I thought I heard before.

CHAIR—The ACCI raised the suggestion that it thought the draft enabling legislation was deficient in that it made no reference to extortion, which was said by the witness to be a major factor that affects some Australian firms. Mr Clark, is that your spot? Could you comment on that?

Mr Clark—I think it is a different ball game altogether—extortion and bribery. I do not understand how one could put them together. I was not privy to that. Could you elaborate perhaps on how the person brought together extortion and bribery in the commercial context?

CHAIR—Yes. The suggestion was that Australian firms cannot do business because often they are really held to ransom. In effect, in order to secure any kind of contract there is really extortion involved. The statement was made by the witness that the enabling legislation is deficient in that it deals only with bribery one way and it does not really deal with extortion.

Mr Clark—I just do not see how that could be done. Are you saying that—

CHAIR—I am not saying anything. I am just asking you for any comment you might care to make about extortion because there is some reference here in your notes.

Mr Clark—I cannot understand how it being put to an Australian organisation to pay a bribe could be seen in the same way as putting bad cans of goods on the market shelf and saying that unless you want to have them taken off you are going to find your population ill. It is still bribery. It is an attempted bribery and it is being resisted. I think the use of the word was 'loose'.

CHAIR—I suppose you would also say that if extortion were involved it would probably be subject to the domestic laws of the country where it took place in any event.

Mr Clark—Indeed.

Mr Woods—There is a third point. There is a general defence of duress under the criminal code anyway. If there was an obvious case of extortion then that defence could be used.

Mr ADAMS—In relation to the chamber's evidence, they were talking about national interest. They thought that Foreign Affairs might have quite an interest in having some sort of clause in the bill that looked after the national interest in the sense that, if there were allegations being made against a particular family that runs a country somewhere, it may not be in the interests of Australia to have that hit the deck and there be a national interest involvement from the minister having some sort of power to intervene. Do you have any comment on that?

Mr Potts—Yes. I do not think we would share that view. In approaching the convention, we are guided by article 5 which emphasises that parties shall not be influenced by considerations of national economic interest, the potential relations with another state or the identity of the natural or legal persons concerned. Having that text enshrined in the convention already makes it very difficult, I think, to then look at, in effect, a carve out which seeks to undermine that provision. We have entered this convention in good faith and we would not be in favour of a national interest clause.

It is interesting that, in the drafting of the convention, this apparently was not a major issue for other OECD members. I think also that the use of a national interest clause would, if it became public, bring with it the sorts of political difficulties that it might be first thought the use of the clause would avoid.

CHAIR—It might be difficult to argue that there was some national interest in maintaining bribery and corruption!

Mr Potts—Yes, that is the way it would come round, I think, in those circumstances.

Mr ADAMS—The national interest is not an issue, from your point of view? You would not want that in this legislation?

Mr Potts—No, we are content with the text as it is, and that is the basis on which we are recommending its endorsement.

CHAIR—There is one other thing I want to take up in relation to the AusAID contracts before I go to some concluding issues. How does that clause actually work? Does AusAID use agents and joint venture partners in certain projects? If you do, do you or any of the officers on the ground have some duty to try to understand what might go on in getting things done or what might be carried out by the agent or the partner? Do you turn a blind eye to that or just not want to know about it?

Mr Russell—AusAID does not deliver aid; it does it all through contracting out. If we want to build a bridge somewhere, then we would appoint somebody as a managing contractor who, in turn, would appoint subcontractors for different parts of the construction. More often than not, these contracts are outwards contracts. So, if there is something that has to be done and something is done, you pay. It is not as though contractors come with a list of expenses which might include, in theory, bribes, facilitation payments or whatever.

CHAIR—Or commissions?

Mr Russell—Yes. We just get a bill for that particular job. Sorry, was your question what we would do if we—

CHAIR—No. You do not examine how things get done, so in other words, your officers on the ground could be very pure and say, 'Look, we've got an anti-corruption clause and we stick to that. We do not know how it gets done and we do not particularly care.' Do you make it your business to inquire?

Mr Russell—We have a regular audit program for contractors which goes through the accounts of a project. If something is in there that brings it to the attention of the audit, obviously we would be looking for it and looking at it pretty hard. Of course, these sorts of things are not put in books as bribes so much. But, yes, sure.

CHAIR—They are not highlighted and underlined, are they?

Mr Russell—No.

Mr HARDGRAVE—But how expert is that process? With the greatest of respect to the profession, the folklore is that things can very easily be over-engineered. So unless you have got a team of engineers involved in the audit process of a major construction project, you are never going to know whether or not a box of bolts or a box of widgets really did cost X dollars or if in fact the box of bolts or widgets ever arrived.

Mr Russell—There is a lot of truth in what you say. All you can do is go with the

auditing profession and their standard methods of trying to uncover whether an account, as submitted, was actually for the price of the widgets or whatever is claimed.

Mr HARDGRAVE—It comes down to even more serious things than that. It was probably about 15 years ago that there was a major paucity in the quality of concrete in Queensland that was being produced by certain manufacturers. That involved quite a public scandal. The quality of a number of projects was brought into doubt because of the quality of the concrete involved. The supplier was simply, to use a mixed metaphor, short-sheeting the concrete mix.

AusAID is responsible for the expenditure of Australian public moneys on projects and, in good faith, contracting people to do that and acquitting the expenditure of the money—but not necessarily with expert advice involved in the acquittal process?

Mr Russell—There is expert advice in the case of a bridge. There is someone like an owner's engineer who is there to look after our interest and to make sure, as much as possible, that these things are looked at. I think that we are more likely to find out about problems with corruption through whistleblowers or something like that. The force of the contract is not that we can send the auditors in there; it just adds to the awareness of the contractor who does it that the contractor is taking a risk. That is really what it is about, I think.

Mr ADAMS—I have had my own experience. I think, as a country, Australia is pretty well perceived, especially in the Asian area, as achieving the standard it sets out to achieve and making sure it is done. If it is going to be a minimum of four inches thick, then it will be four inches thick. As opposed to some other countries, we usually achieve what we set out to do.

Mr HARDGRAVE—Thank you for that endorsement.

CHAIR—There are a couple of other areas I would like to explore, please. The reference a little earlier to good governance development assistant programs is of particular interest. Would you be able, if not here, to provide the committee with some information about, for example, how many such programs are in operation, in what countries and at what cost? Are these programs likely to be continued or are they subject to severe stress because of budgetary constraints? How would you describe the overall assistance programs and their continued viability?

Mr Donaghue—Good governance has recently been made by the government a specific sectoral focus of the program. That was in response to the independent review of the aid program—the Simons review. So now governance is a sectoral focus alongside agriculture, health, education, and so forth. That does not mean that previously we did not have aid projects in these areas, but they were not grouped together systematically and in a sense conceptualised as part of one sector. We are now doing that. Part of the process

and the background work that we are doing is looking right across the program to identify and set out in reasonable categories the sorts of governance projects that we are doing. That process is ongoing. We have in the order of $400 million worth of projects currently on the books—that is the total value, not the value in any one financial year—in the broad good governance area.

As Mr Russell indicated earlier, I think there is a question about how you define good governance. It is a very broad term and does lend itself to increasing its scope so at one point it becomes the whole of the aid program. We clearly have to avoid that. To give you an example, we might do work with strengthening an education department—and we do do those sorts of programs. Do we characterise that as a governance project or as an education project? Similarly with a health department. So in fact governance in certain respects has more of a cross-cutting characteristic than being a single sector in its own right. They are the sorts of issues that we need to work out. But we have got a compendium of projects that we would be able to provide you with which would be illustrative of the sorts of things that we are doing.

CHAIR—Is it your view that these sorts of programs are likely to be able to be continued or are they subject to review or curtailing because of budgetary constraints?

Mr Donaghue—I think the fact that the government has taken the decision to make this a focus of the program indicates that it is serious about continuing with these efforts.

CHAIR—That is in response to the Simons review?

Mr Donaghue—That is in response to the Simons review, yes.

CHAIR—So you will let us have a copy of the projects?

Mr Donaghue—Yes.

CHAIR—I realise that you cannot be precise about this, just as you cannot be precise by way of definition, but can you give us some sort of rough costing?

Mr Donaghue—The compendium we have at the moment is in the order of $400 million total value, but we do need to go through that with other of our sectoral areas to make sure that we are not double counting—for example, in areas such as health and education.

Mr Russell—That is total value, not per annum.

CHAIR—I understand that; it is the life of a project. Just so that we can get a better picture of that, do the projects say, 'This is a five-year project. It is in its second

year,' or whatever?

Mr Donaghue—Yes.

CHAIR—Thank you. With reference to export market development grant programs, have bribes ever been eligible for inclusion in those grants?

Mr Clark—The Export Market Development Grants Act falls within the scope of the Australian Trade Commission for management. Eligible expenditure is made by Australian organisations in pursuit of overseas markets, and bribes are not eligible expenditure.

Mr HARDGRAVE—Was there expectation in some markets that bribes might be sought?

Mr Clark—Whether there is an expectation or not does not make it eligible expenditure. It is not eligible. We were looking for airline tickets, hotels. Agents, marketing agents, bona fide, are eligible expenditure. I think others have said today that there is anything possible within the scope of an agency which might not be visible to an export market development grants assessor. But the act of bribery, even facilitation payments—

CHAIR—Is facilitation in it too?

Mr Clark—The whole thing is just not on the list of eligible expenditure—narrowly defined eligible expenditure, I might say: airline tickets, hotel bills.

CHAIR—As usual we are pressed for time. Was there anything that anyone at the table wanted to raise that we have not adequately agitated in our session and that you want to bring forward?

Mr Woods—I would like to come back to the issue of how we know about growing international concern about bribery. I would draw your attention to the point about the UN declaration. The declaration represents the views of some 181 member states of the United Nations. I think this is the first UN declaration of its kind. That is an indication that bribery itself has increased its profile, as it were, as something that governments need to move against, and move against in a collective manner. That declaration is not binding, but it does carry some moral weight and is an indication that the situation is changing. That fits also with the evidence we have previously given of our own experience as a department that these issues have been given more prominence in recent years.

Mr Potts—I would like to come back to the question of the department's own attitude to bribery and to questions of facilitation, just to ensure there is no

misunderstanding. I was conscious of Mr Hardgrave's clarification with me and it is for this reason that I again reinforce that the department does not as a matter of policy expend public funds on facilitation payments, at least certainly knowingly. There are obvious possibilities for that being done through agents or through people who are not in direct Commonwealth employ. But, at the same time, clearly it is not departmental policy to make such payments, it never has been and I am sure it never will be.

Mr HARDGRAVE—If you found an agent actually did, with regard to a transaction, what would be the view of the department as to further use of that agent?

Mr Potts—I think we would be looking for another agent.

CHAIR—How does the department actually do business? If there are these concerns that seem to be almost universal, it flies in the face of reality to think, if you use an agent to get something off the wharf, that something has not happened if it happens at all expeditiously. What do you do about that? Do you have a duty to go and find out, or do you just not worry about it—if you use an agent, that is the whole arrangement and that is as far as the department needs to go?

Mr Potts—It is certainly the case that if instances are brought to our attention, then we will take action. But, at the same time, our core business is not seeking out allegations of malfeasance. We are not zealously evangelistic about it. But, at the same time, clearly we do have a moral stance. If breaches of that moral stance are brought to our knowledge, then we will take action.

CHAIR—In effect, the department can be the beneficiary of something and so long as you do not know about it, that is fine.

Mr Potts—No; we are uncomfortable with any grey area. This is a grey area. I think that discomfort will always be a reality.

Mr HARDGRAVE—I do not want to put words into your mouth but I would imagine that because the moral stance is well understood by all personnel, the regular departmental process of cycling personnel back to Canberra and all that sort of thing would enforce this and a whistleblowing concept would be quite alive and well in the department.

Mr Potts—I think our recent history demonstrates that whistleblowing is a factor in our department's operations.

Mr HARDGRAVE—Exactly.

CHAIR—Or loose cannons, or whatever they are called. Was there any comment that anyone at the table wanted to make about the enabling legislation, any specific

aspects of it? Mr Clark, we have not really explored that in any great detail with you. Is there anything that you want to comment on or criticise or bring to our attention?

Mr Clark—Apart from the difficulty in establishing any sort of threshold for facilitation payments, which has been canvassed already, I have nothing further, other than to say that it is a statement of policy—high policy—and, like any audit policy that is set forth, the role is to bring awareness. That is what it is going to be doing—bringing awareness. Beyond that, it is a risk management exercise to ensure that that policy of the federal government of Australia is put into place. It is the first step.

I think the legislation goes as far as it can, from my reading, in stating at a high level that the parliament does not condone bribery and corruption, and does not go any further in trying to bring up the level of internal audit scrutiny than is feasible at this point in time and in allowing the OECD to, as we said before, seek adjustments to the overall level of scrutiny. I think the act goes as far as it can, and it is timely, in its current drafting.

CHAIR—So you see a great deal of utility in having this legislation, and in its present form; you are comfortable that it is about as good as we can get it as a first go?

Mr Clark—Not only is it good from the point of view of expressing policy of the federal government, but I think it is also useful to business to have their government say, 'This is the stance.' Australian organisations can use this to say, 'It is not part of the legal framework from which I emerge that I can do business in this way.' Indeed, if it were to be a competitor who was going to blow the whistle overseas because they failed to get it and said, 'There was bribery,' then you have a statute at home so it is possible to say, 'It's a criminal offence. It is very serious indeed. No, sir, I am not engaged in that form of activity.' It is useful as a defence of the fact that you are not engaged in that because of the high profile that your country puts on this.

CHAIR—Thank you. It only remains to me to thank each of you for coming here today and sharing with us your thoughts about this. We are very grateful for your assistance. We may need to get back to you, as we continue our deliberations, to clarify any aspect of your evidence. Thank you.

Mr Potts—Thank you, Madam Chair.

[10.39 a.m.]

ASHER, Mr Allan, Private citizen

BROWN, Mr Robin, Private citizen

CHAIR—I now welcome Mr Asher and Mr Brown. In what capacity are you appearing before the committee?

Mr Asher—I appear in a personal capacity.

Mr Brown—I also appear in a personal capacity.

CHAIR—Your submission has been published already by the committee. Are there any amendments or corrections to be made to the submission?

Mr Asher—Not amendments or corrections, but we would like to be able to expand on them.

CHAIR—Certainly. I now ask you both, or one of you, depending on how you wish to proceed, to make an opening statement and elaborate and then we will proceed to questions.

Mr Asher—Thank you. We appreciate the severe time constraints so we will try to compress things as much as we can. If there are issues that the committee wishes to take up, we would be happy then to detail them a little more.

CHAIR—Thank you. We are very glad to have you here so do not feel too constrained; just say what you need to say.

Mr Asher—We thought it would be useful to give a bit of an idea of why we are here and who we are. I am the deputy chair of the Australian Competition and Consumer Commission. However, this submission is made in a personal capacity, mainly for time reasons and because the commission just has not had a chance to get around some of these issues. Nevertheless, we felt it important—or I did—to get some views in and then some of them might be followed up formally by the commission at a later time, if it seems appropriate.

In that context, at the commission my role is that I am responsible for all of the commission's enforcement work. That includes investigations of price fixing and bid rigging, monopolisation and all of the consumer protection and product safety offences. I have been at the commission for 10 years. Before that I worked in the consumer movement, including extensively internationally. For five years I was chair of an OECD policy committee.

I am currently involved with several international organisations, including a network of all of the law enforcement agencies. We meet twice a year to look at things like coordinating law enforcement in Internet related offences, and international cooperation. I am currently involved in negotiating for Australia, with the European Commission, cooperation arrangements for consumer protection laws, and with the US a treaty on competition law enforcement. I guess that is a brief background.

For over 20 years I have also been involved extensively in aid programs. I have worked in all the ASEAN countries, in Vietnam, in China, in Africa and in India on AusAID-UN development projects and many others. While one never has strong quantifiable evidence, one gets the very strong impression that a large proportion, especially of aid programs that go to infrastructure and service development, are rendered vastly less efficacious through corruption and inefficiency. They are some of the driving forces that bring me to this committee.

Finally, I was an Australian delegate at the UN Commission on Transnational Corporations in its dying days. The UN commission was attempting to conclude a code of conduct for the conduct of transnational corporations, particularly in the Third World. That was a set of provisions that had a set of conduct rules and then, towards the end, also a set of treatment rules, most of which have now been taken over in the MAI. However, none of the conduct rules transfer. Corrupt conduct was one of the core elements of the code of conduct. One of the great losses when that code failed was that there was no effective multilateral device for implementation of principles on corruption.

I would say to the committee that I am strongly supportive of the implementation of this legislation in Australia, although I would ask the committee to recognise that unilateral action in a multilateral world is of itself futile. As I say, I support it but it is such a tiny first step when the whole global business paradigm and regulatory paradigm now is just totally indifferent to unilateral action.

Increasingly, already the regulatory infrastructure is globalising. The International Standards Organisation, the OECD, the World Trade Organisation and Codex Alimentarius are just four examples—I could give you 40 more—of where effective international rule making is being done by multilateral bodies, not member states. Member states are vital in the implementation of those; however, the rules are no longer made in individual nations and like this one an effort by a single country to take steps of this sort just will not go anywhere. I do not say that this bill is an effort by a single country to do it. After all, the convention does impose obligations on all member nations and then there is a need to extend that to the many non-member nations as well.

Let me get down specifically to the sorts of concerns that Mr Brown and I have with this proposal, starting with the most obvious one of the requirement that the conduct occur partly in Australia and then, secondly, one that does not extend to the conduct of wholly owned subsidiary of an Australian corporation trading abroad, which is, in my

experience, by far the most common way in which Australian business is done abroad. This is partly because of the performance requirements of so many of the regional governments.

For example, China, the Philippines and Malaysia require these sorts of corporate structures which almost automatically cut them off from the jurisdiction of this legislation. It is not as though there is any constitutional impediment to jurisdiction. As with the sex tourism legislation, mercenary legislation and other legislation, Australia has acted in the past to cover such matters. That does not make investigation or enforcement any easier.

That leads to another point that I would make, that there needs to be a strong administrative infrastructure to support this legislation. That means cooperation arrangements with regional governments, cooperation arrangements with the multilateral agencies—the World Bank, the IMF, the OECD aid program, the European Commission aid program and others—so that there is a meeting of minds and there is a capacity to extend the enforcement of such rules in a general way.

I will come to a couple of specific recommendations shortly, but could I take up the principle that was raised recently by the representatives from AusAID about the importance of governance. Again, Australia is now focusing on that. Indeed, the aid program is looking at it but elsewhere the OECD and many others have focused on corporate governance, on national governance and on building up the institutions of civil society as a vital means of making these things work.

The legislation, as it is posited, is totally silent on all of those mechanisms which can give a force and effect to such laws. The inclusion of whistleblower provisions is one such way. Offering support to NGO groups in Australia and elsewhere to investigate and bring forward complaints of this sort is another. I would put those under the general heading of ‘compliance systems’. We raised this issue very briefly in our submission and I would like perhaps to spend 10 seconds expanding on that.

Here is a very solid export Australia can contribute to the global market. Last year Standards Australia introduced an Australian standard for compliance programs. This standard, which deals with how corporations can implement, monitor and act on issues of compliance in their own organisations, has been a smash-hit in Australia. More and more companies are taking the standard up. The Competition and Consumer Commission in its litigation will frequently ask the court for mandatory injunctions calling on corporations to apply these provisions. There are now three or four Federal Court orders that do embody them.

Right now we are hoping that the International Standards Organisation and the OECD will also take this standard up as providing some objective means by which it can be said that a corporation is taking serious action to implement the provisions rather than having just good intentions. We will come in a little while to say that we think AusAID,

in its grant funding and in its funding of Australian businesses and other businesses too and in conducting infrastructure and other aid programs in developing economies, ought to insist on a form of compliance program that is either based on this Australian standard or at least derives from some of the work on its recent code of practice for NGOs taking aid grants.

I sit on one tiny subsidiary committee of the Prime Minister's Supermarket to Asia Council on business competitiveness. In our work on that committee, which is about facilitating greater Australian exports from the grocery sector into Asia, a number of the industry participants complain that, no matter how competitive the Australian economy is and no matter how good their product is and how efficient or inefficient shipment to Asia is, they often face the problem of distribution systems in Asian economies that erect barriers to entry through regulation or unofficial regulation—in other words, market sharing arrangements and unlawful conduct by the precepts of Australian competition law.

Another point I would urge is not mentioned in the submission but has come up again in the Supermarket to Asia Council. That is that the sorts of aid that Australia could provide in controlling corruption would also go to building up the regulatory infrastructure in these key trading partners to help them understand how effective enforced competition laws can be for huge welfare increasing actions in their own economies, as well as having a very beneficial effect in promoting freer global trade. I think they are very much win-win sorts of outcomes and ought to be ones that are an adjunct to programs such as this.

By way of analogy, the OECD competition law committee has just recently published a draft on attacking hard core cartels. Those are the sorts of things that the commission took action against in Queensland in the concrete industry, freight industry and many others. They had sucked away tens of millions of dollars in welfare gains. I would argue that arrangements like this one ought to go along with the Australian adoption of those rules on hard core cartels, corruption and a number of other matters.

We do not say that this bill should try and do those things. We say that we hope that in addition to implementing this in an expanded way, Australia as a package in its negotiations for the Multilateral Agreement on Investment should seek its extension to incorporate, among other things, obligations on corporations and obligations on member states for the implementation of this code. That would also give access to some of the disputes mechanisms proposed under the MAI.

I appreciate I have covered a huge amount of ground there. I would just make a few detailed points as well. I agree with some of the critics of the bill that, if facilitation payments are not covered by this, they will serve to add another big barrier to any effective enforcement. The first, which is almost insurmountable, is needing some local conduct. My experience as a law enforcement officer, even in the domestic environment, tells me that obtaining documents and bringing evidence to the requisite criminal onus is by no means easy. To have this requirement of an Australian leg and, secondly, an

exemption for this species called facilitation payments, will raise huge obstacles. I appreciate the philosophic difference between facilitation payments and the forms of corruption which Transparency International describes as grand corruption. I am a long-term member of TI and support their work.

I believe that that can be dealt with another way. To provide that in relation to what might be described as facilitation payments, the bill could provide a rebuttable presumption that a facilitation payment is covered by the corruption clauses, unless the corporation can show that they are payments that everybody else would make and that they do not fit the other criteria in the schedule.

CHAIR—How would they prove that?

Mr Asher—It would be to show that, if it was at the wharf, some officious or corrupt customs official simply acted to take an extra thousand baht—or whatever it was—from every bill of lading that comes through that port. I take it that is the class of conduct that we are trying to avoid in the bill. My concern is that, if there is that big exemption, they will simply channel things as though they were facilitation payments instead of corrupt payments in terms of the bill.

Mr HARDGRAVE—If it was a sort of standard payment that everyone paid and there was no advantage in it for a particular person, would that then not really be corruption in itself but just the way it has to be?

Mr Asher—Yes, that is right. It is unacceptable, but that is not what you are trying to strike down here. What you are trying to strike down here is where the will of a government official is suborned to do things to favour one person rather than somebody else or, alternatively, the case where an official offers—in exchange for unique information or to gain a large government contract—to take actions which are unlawful.

CHAIR—I understand the distinction, but just on the rebuttable presumption, it would be really difficult to prove that everybody does it, wouldn't it? You are not going to be able to find all sorts of people coming forward and saying, 'Yes, I did it.'

Mr Asher—Except that the way that these things typically work will be through the agent that the person is using at the wharf or airport or custom's office or food safety office. In my view, it will give the prosecutorial authority at least a perspective so that in exercises it is likely on receipt of that sort of information to drop the priority of any enforcement action to the bottom of the list and instead concentrate on those hard-core ones that are damaging trade and skewing the marketplace because there is a huge limit on resources.

CHAIR—Some witnesses to this committee have said that, really, Australian firms need certainty. If you have this kind of rebuttable presumption or try to say, 'We'll

prohibit everything and leave it up to the prosecutors to decide this is too hard or too small, or whatever,' it is a very unsatisfactory situation for firms.

Mr Asher—Sure. I think that certainty granted by giving them clear means of avoiding the law defeats the public policy goal. I think one does have to be conscious of the needs of Australian business, and of course it would be foolish for Australia to so submit its own businesses to rules that they could not do business elsewhere. That is part of the reason that I call for multilateral action. Nonetheless, that multilateral action has to have some chance of being effective, otherwise it is a token and leads us nowhere.

Mr HARDGRAVE—I for one—and I am sure Helen is the same—do not want to see any sort of systemic corruption given the tick and flick by this committee. But I suspect what you are saying is that for one of those sorts of gratuities or payments that are put forward, all we really need is for somebody to be tested. I said in earlier evidence that, when I was at Channel 7 years ago, we were told, 'You give $US100 to a police official and they will let you film around the pyramids at Giza in Cairo.' But that authority only extended for that particular official. Essentially, everybody who came up had to sling them $100 and that was the filming fee. One would suspect that prosecution of one would send a message to all the others, wouldn't it?

Mr Asher—I think that is so. But with the scope of the legislation we are not talking about hundreds or even thousands, but tens of thousands before any prosecutor will invest resources in that. In fact, Robin Brown and I were recently in Egypt working on a project for the UN on implementation of the UN consumer protection guidelines there. One sees across the whole range of government these vast expectations of bribes before they are prepared to implement things. I think that is a tragedy that has partly been allowed to continue to exist through the absence of these multilateral agreements.

Mr HARDGRAVE—It was said earlier today that a lot of public officials in other countries are nowhere near as well paid as some in a country like Australia.

Mr Asher—Some other OECD countries—not Australia.

Mr HARDGRAVE—Yes. I think we will just leave this evidence alone. It is bit like the tipping system in countries like the United States: where wages are poor, there is an expectation that those involved in the transaction will boost them.

Mr Asher—Sure.

Mr HARDGRAVE—That is a question that is perhaps very difficult for Australians—who are not the best tippers in the world—to cope with, don't you think?

Mr Asher—The rule that is in fact applied in enforcement is one that really, I think, covers a lot of those issues: whether one even puts in cut-off figures or something

like that as a way of ensuring that that whole set of arguments about minor fees is dealt with. The risk is that, for every new exception or exemption that you put in, you double the burden on a prosecutor to establish all the elements. I guess what I would be saying is that, in relation to applying the conduct to wholly owned subsidiaries, conduct that occurs outside Australia and to facilitation fees, while that does extend the scope of this substantially, it would also do a whole lot more to actually provide that certainty; the certainty that if you engage in corrupt conduct, you will actually be apprehended.

Mr HARDGRAVE—So you would be urging this committee to look at a recommendation to try to follow the lead already given with regard to the sex tourism legislation—to basically say to Australian citizens, 'Whether you're in Botswana, Kazakhstan, the United States, England, or New Zealand, for that matter, if you engage in these sorts of activities, you've broken your native country's law.

Mr Asher—Indeed, that is quite right. If that is the proper ethical goal, if it is the enforcement goal, then this committee is, I think, faced with the dilemma of forming a view about whether the way it is expressed now is capable of achieving those goals. I fear I would have to say at the moment that it is not.

Mr HARDGRAVE—But then that begs one other question: if we literally are on our own and are making a unilateral statement on this, we will look like the moral mugs of the world, won't we?

Mr Asher—Indeed. That is right. I think there is a very effective set of steps that can be taken to fix that. The OECD has its own policy committee that looks specifically at overseas aid. What I would ask is: what steps has Australia's counsellor at the OECD, Ralph Hillman, taken to get the overseas aid committee of the OECD to impose similar rules through that committee, and what steps has Australia taken to have the compliance systems imposed through AusAID contracts?

We make another suggestion in our submission. The UN consumer protection guidelines, which is a slightly misnamed document—it actually goes well beyond consumer protection; it has provisions on environment, competition policy and rights to essential services—is currently being renegotiated. Another thing that Australia could do is urge in the revision of that document that it too incorporate obligations both on corporations, as it already does, and on member governments to bring in the corruption control provisions. There is the 1990 declaration by the UN. There is no controversy about the principles, there is no controversy about the implementation; there just are no multilateral means of getting there.

So I think you are right: unilateralism is inappropriate and ineffective. But we have a whole lot of low cost, high gain steps that could be taken surrounding this particular bill which give good focus, which would be strongly supported and which could do more not only for Australian business but also for my personal interest in enhancing the welfare of

consumers in developing countries.

Mr HARDGRAVE—Okay. Just to step through this, you are suggesting an amendment to the legislation as it currently exists—

Mr Asher—Yes.

Mr HARDGRAVE—to bring it into concept lines with the sex tourism legislation. You really are, by implication, suggesting that the convention that we have in front of us also needs to be amended or perhaps held up while it is further extended through other means. You are also suggesting an annexure to the MAI, which a subcommittee of the committee on treaties is looking at. Would you be making a submission to that?

Mr Asher—Yes.

Mr HARDGRAVE—So I guess the bottom line on it is that we are looking at a delay in this convention.

Mr Asher—I have a view on that too. My view is that it should be adopted, but with a strong set of review conditions: that it be adopted, perhaps as it is, but with an expression of view by the committee that it is inadequate in the areas that I have mentioned; that over, say, three years certain steps will be taken in addition to work at the OECD to have it extended to foreign subsidiaries; and that work be done through the Australian mission to the OECD on extension to the aid committee, the competition committee, and the consumer policy committee—all the other organs of the OECD that already have a broad multilateral rule making endeavour—but more importantly in any event legislation of this sort, unless it has in it stringent review and assessment provisions so that they report back to this committee in three years time or three years after royal assent with a tough assessment of how effective it has been. That is one way of ensuring that our statute books are not clogged up with high sounding laws of no practical import.

Mr HARDGRAVE—So, in regard to amendment of our domestic legislation to make it apply to nationals as opposed to territory, we would be setting the credibility benchmark, wouldn't we?

Mr Asher—Indeed—I believe we would.

Mr Brown—It would not like to be alone.

Mr Asher—The US, of course, has long since imposed rules of that character. I agree with those who criticise the bill by saying, 'We're just being pressured by the US who feel that they are subjected to an uneven playing field.' I agree with that but I do not say that is a reason not to do it. I say that is a reason to do it because it is having an effect. US businesses are saying, 'We're trying to win contracts, particularly in developing

countries, with one hand tied behind our back because other nationals are bribing with impunity and winning contracts.' What I would say there is that, in the end, the more multilateral agreement there is on that, the less likely that will be and the more likely it is that the old fashioned quality, price and durability is the indicia of winning, rather than financial manipulation.

Indeed, I see it, I must say, as a trade issue. It goes to the effectiveness of Australia's trade policies, especially in our region. I think over the next five years as the region recovers from the economic turmoil that it is in, winning contracts from governments is going to be especially difficult. The available foreign funds in most of the target economies is going to be such that they are going to be vastly more competitive. The risks and challenges of corruption are going to be higher.

Mr Brown—There is nothing that I wanted to talk about that Mr Asher has not already touched. I just wanted to emphasise the importance of something that we actually have not mentioned in the written submission and that is the assistance that we think Australia could provide in terms of developing the institutions of civil society in the countries that we are, I guess, most concerned about. This is important for me particularly because of the experience that we had in Egypt. The job was to try to assist the development of the central Egyptian society for consumer protection under a grant from the United Nations development program. In the event, we found it extremely difficult. We found that—

CHAIR—Because of the culture and the way they do business?

Mr Brown—Yes, because of the sort of internecine warfare amongst different groups that were trying to push themselves forward as new institutions of civil society, and so on. I do not think this particular organisation that we were attempting to assist has got very far. But I do think it is something very much worth doing. I have to emphasise that it is probably one of the hardest areas for aid assistance to be given in. Maybe that is why it is not at the top of AusAID's agenda.

Mr Asher—Could I just point out that one of the conclusions we drew there was the need for these audit arrangements. We are not talking about it being heavy handed and about somebody redoing everything that uses up half of the aid grant, but there are now internationally some very clever means of measuring compliance and ensuring that there are chains of command and systems within corporations that deliver compliance. In the Egypt case study, there is a sort of a semi-government agency that works with international donors that does this and I think AusAID could do a lot more. We are not criticising AusAID, but there are new techniques and technologies available for assuring compliance and that ought to be a routine part of any government funding to such companies.

CHAIR—How would that work when AusAID gave evidence this morning that they really operate by contracting out? They get something in for payment and, unless

something jumps out at them, they are not going to be trawling around and wondering whether commissions had been paid or how things got done. I am just wondering, as a matter of practicality, as a matter of sensible governance, if there are techniques to deal with that.

Mr Brown—It is a prospective thing not a retrospective thing. They have got to be working with the companies that they are using at the various early stages to assist them in developing appropriate compliance programs and they have got to be requiring companies to have compliance programs that meet the standards.

Mr Asher—By analogy, in many of the enforcement actions taken by the ACCC we will want to be sure that there is future compliance. But we do not want to take on the burden of doing it, so part of a settlement with a company will often be that we have to agree up front on a detailed compliance program that they then have to contract with a third party vendor to provide—an accountant, a law firm, a management consultant or something like that—and that they report annually to the commission. With AusAID projects that are in excess, say, of $5 million or some suitable cut-off, part of the project assessment mechanisms ought to be the submission of a compliance statement. Apart from the usual sign-offs—which are easy enough to get—and if the jurisdiction were extended, it would also do some test checking of particular transactions. It would also look at a complaints register, especially if there were encouragement through whistleblower rules and things for any obvious complaints made.

Typically, there will be lots of such suggestions made around any infrastructure project and no doubt maybe 50, 60 or even 90 per cent of them are just sour grapes or bogus. At least if somebody screens those and they become part of a file for Ausaid and the Australian government for the future, then we can export those provisions to other aid granting bodies, for example, to the European Commission, where the commissioner, Emma Bonino, is very concerned with these issues. Australia could effectively export this culture.

CHAIR—The evidence before us seems to suggest overwhelmingly, it is fair to say, that Australia seems to be ranked pretty low in terms of engaging in certainly major bribery and corrupt practices. Are you suggesting that Australia has more of a role to play in terms of education and support for good governments and transparency in the way in which we do business?

Mr Asher—I believe so. From my experience, and I am sure others have told you this, Australia is generally held in very high esteem in our region. I used to work for a telecommunications company and was involved in marketing satellite equipment in China and Thailand. Universally we were seen, generally speaking because we were a relatively small economy, to be not overly threatening, but at the same time a useful source of structural support.

CHAIR—Do you want to put something else to us because you felt shut out a bit because of our time constraints? Please feel free to add anything you wish.

Mr Asher—If I could put that as a question: is this material likely to be of interest to the committee? It might be that you see this as all pretty marginal.

CHAIR—I do not think it is marginal but perhaps we could target a couple of the specific areas that we are going to want to emphasise. I will ask Mr Regan to talk to you and perhaps he can assist with what more you may be able to tell us. If you have any other comment, please make it. Thank you very much for taking the time to come in. It gives a very different focus on the terms of reference.

[11.19 a.m.]

BARTOS, Mr Thomas Garry, Partner, Smith and Bartos, GPO Box 1004, Canberra, Australian Capital Territory 2601

CHAIR—Mr Bartos, what do Smith and Bartos do?

Mr Bartos—Smith and Bartos is a public interest organisation which is firmly committed to developing international standards in matters which go beyond national boundaries. To this end we have conducted extensive research on matters such as Internet and information technology regulation, as well as international trade and business. It is in that capacity that I appear.

CHAIR—Your very detailed submission, if I may say so, has been published already by the committee and I thank you for it and for the obvious care and attention you have given to the very vexed questions that we have got to grapple with. It is very much appreciated that you have taken that kind of trouble and gone into that detail. We will obviously give it careful consideration. Were there any amendments you wanted to make to it, anything to add to it, apart from speaking to it generally, after which we will ask you some questions?

Mr Bartos—I hope I can be of some assistance in clarifying the matters which I have raised. I would just like to pick up, by way of preface, some of the comments made by Mr Allan Asher. I thought there were some very useful comments aimed at the macroscopic level and I would simply like to state that although our submission is really at the other end of the scale, at the technical and microscopic level, we certainly believe that unilateralism is dead and that in order for something like this to really move forward it needs to be tied to other regimes.

I believe, in particular, that tying it to the MAI, which this committee will also be considering now, is a great step forward in ensuring that across the board there is cooperation from other parties and other states, and in particular that there is a culture of compliance developed amongst the players—the corporate bodies which are the main players—in order to give support to this convention. For example, to incorporate something in the dispute settlement procedures under the MAI which would allow whistleblowing mechanisms. We are currently preparing a submission on the MAI, so I will not go into any more detail on that.

CHAIR—We might be able to cross-reference?

Mr Bartos—Certainly. If I may turn then to the technical points. I understand, from sitting and listening to Mr Allan Asher's submission, that there was a question of extending the jurisdiction to nationals without a territorial connection.

CHAIR—And also wholly owned subsidiaries.

Mr Bartos—That is right, yes. That was one of the points of our submission. It was, in fact, point three, so I might turn to that to start with.

CHAIR—Yes, please. That is your point: failure to exercise jurisdiction over Australians abroad may breach article 4.2.

Mr Bartos—Yes. By way of preface, it is always difficult to state categorically whether there is going to be a breach of an international treaty because the way the provisions are framed often leaves some flexibility. However, it does seem that parties are required to take such measures as may be necessary to establish jurisdictions over their nationals abroad. Our reading of the explanatory memorandum suggests that the drafters of the legislation were of the opinion that since Australia does not generally, as a matter of practice, apply its jurisdiction in this way, then we do not need to.

CHAIR—The common law convention, if you like.

Mr Bartos—Yes. However, I would like to point out that there is no constitutional or common law actual restriction on imposing this form of jurisdiction and that in fact a plain reading and interpretation of the treaty's terms would suggest that the jurisdiction should be extended to nationals abroad. It is clear this has been done, as the committee is no doubt aware, in respect of the Crimes (Child Sex Tourism) Amendment Act 1994. The way that works is that a crime is set up. The act in that case is fundamentally outside of Australia and jurisdiction attaches under section 50AD to Australian citizens or permanent residents of Australia.

It would seem that if the goal of implementing this legislation is to combat bribery, and we believe that is the case, then a lot of bribery scenarios would seem to fall outside the terms of the convention, if jurisdiction is not exercised over nationals, because you will have your business representatives in foreign jurisdictions who engage in the conduct and there is no connection of that particular conduct with Australia. To that extent, our recommendation is to apply the provisions of the legislation to Australian citizens and permanent residents as per the sex tourism legislation.

Another significant matter which was just mentioned, and which has been mentioned in a number of submissions and by a number of bodies, as I understand it, is the question of facilitation payments. This is a very serious and tangible difficulty with the legislation as opposed to the more intangible aspects of tying it to other frameworks, regimes and other general processes for development. The problem is drawing the line between facilitation payments and bribery. On the one hand, of course, business needs some certainty. On the other hand, it defeats the purpose to have the law stated so clearly that one can easily circumnavigate it.

The emphasis in the legislation and the EM seems to be on the size of the payments. One of the options is a specific amount and, indeed, the term 'small facilitation payments' is referred to in one of the commentaries to the convention. However, the commentaries also state that bribery can take place regardless of the value of the advantage. Therefore, bribery can take place even if it is a small amount. We would suggest that instead of focusing on the size of the amount that the emphasis should be on the purpose. There is some precedent and authority to suggest that this is a workable and worthwhile approach. In particular, the American Foreign Corruption Act of 1977, which has been in place for over two decades now, makes a distinction in these terms:

Facilitation payment means a small payment made with the purpose of inducing an official to perform a duty and is not made with the purpose of inducing an official to breach a duty or otherwise confer an improper advantage on a person.

The flavour of that is that there needs to be an incentive given to an official to perform a function which the official is simply not motivated to perform. This is something which is particularly prevalent in some forms of political society where officials are very firmly entrenched and have no incentive to perform their functions diligently. In that case, it would be a workable and easily introduced amendment to the legislation to make a distinction on the basis of the purpose. There are two other alternatives which we have outlined in our submission.

CHAIR—Do you mean by that something routine simply to get somebody off their backside to take something off a wharf?

Mr Bartos—Yes, that would be the nature of it.

CHAIR—So that would be permitted, that would be the small facilitation?

Mr Bartos—Yes, exactly. I note the proposal, or suggestion, from Mr Allan Asher about the rebuttable presumption idea and I also note the difficulty that seemed to arise about the questions of proof. That is a matter which obviously needs to be addressed in respect of our suggestion as well. We would suggest that in this situation, in order to get an official to perform a function which the official is supposed to perform, it would be much easier as a matter of proof to establish that. For example, if one were applying for a licence to engage in a particular construction, one would refer to the regulations or the criteria by which the licence is provided. If those were met, and the official was not compliant or did not want to assist, obviously a facilitation payment is directed towards a function which the official is supposed to be performing.

CHAIR—It would be a lawyers' picnic, would it not, deciding whether or not somebody was going to get a facilitation payment or whether they were short-staffed or any number of things? This is going to be so difficult to make sense out of even though the principles are, I think we are all agreed, very worthwhile.

Mr Bartos—I think that will be the case with many of the suggestions and proposals that we have. So with that in mind, we have also put submissions on two other points which do not involve the introduction of a new idea. The first is to make a choice between the 7C and 7A provisions. One is ascribing a fixed sum and the other is leaving it more open. We would suggest that leaving it more open would be more appropriate, particularly in light of the uncertainty which Australia is facing in respect of the response of other parties and other nations and we do not obviously want to be in a compromising position. In that case, the definition of a more vague term of the small value would be easily able to be adapted and evolve as time progresses over the next few years as the convention and legislation are implemented in Australia and other countries.

The other point which we make is that there is the difficult issue of enforcement and the question of resources for enforcement. There is nothing in the legislation which really extends the obligation to enforce to anybody. The assumption seems to be that it will be the DPP that will pick it up. Of course, the DPP is only responsible for prosecution; the AFP is responsible for investigation, by and large, which is not referred to in the national interest analysis.

So the point we are making on that is that prosecution has a discretion as to whether to initiate proceedings. One of the criteria the DPP presently has in its policy is the seriousness, or conversely the triviality, of the alleged offence or being of a technical nature only. That is another step, another possibility, for excluding those sorts of payments which are essential or necessary in order to lubricate the functioning of business overseas in difficult or foreign situations. With that in mind, it would be possible to simply remove the facilitation payments suggestion completely from the legislation.

CHAIR—Do you think there is any problem with the uncertainty that Australian business would face in not knowing whether or not they are likely to be caught, hauled in or whatever the situation is, so it really would make it almost impossible for them to know how to do routine business, as opposed to large scale corruption?

Mr Bartos—That is why we placed that as our third suggested alternative. The uncertainty would be a problem; however, it would also allow flexibility of the prosecution and it would be unlikely in light of the AFP's restrictions on resources in investigations, and we understand that the AFP says it is very expensive to conduct investigations overseas.

CHAIR—I think as a matter of practicality there would not be any problem, but I am just concerned about what message we are sending to the business community if we are saying, 'Hey, guys, you can't even get stuff off the wharf here without huge problems.' I do think we have to try to strike a balance in how we recommend this be framed. There are some problems, I think, in leaving Australian persons open to being charged in circumstances where they really do not know or they are just guessing.

Mr Bartos—That is a point certainly well made. We would like to strongly endorse our first option, which is to insert the distinction of the nature of payment—the purpose behind the payment—and that would make it very clear for business and very clear on questions of proof.

There was another question of jurisdiction. This is a somewhat technical point on complicity based offences. Once again the legislation adopts a particular common law perspective which we are used to in Australia. On our reading of the treaty it looks as though the primary act of bribery and the acts of complicity, such as aiding and abetting and conspiracy, are both regarded as bribery under the terms of the convention. They are both offences under the terms of the convention. As such it would appear that under Article 4 there needs to be some form of connection to Australia in respect of complicity offences. The EM suggests that the connection, with a complicity offence that otherwise does not have one, is that the principal offence has some connection. However, in light of the fact that both the secondary and primary offences are defined as bribery under the terms of the treaty it would seem that both need to have a jurisdictional connection and therefore it would be advisable to only extend the legislation to complicity offences which are connected in the same way that the principal offences are connected to Australia.

CHAIR—What seems to be being said I think is that—and I may be wrong about this—the complicity is by reference, of course, only to an Australian national so therefore you can only have the offence if there is that nexus.

Mr Bartos—Right. If it is the case that complicity only extends to Australian nationals then obviously that complies with article 4 paragraph 2.

CHAIR—I think that is the inference but your point is well worth making.

Mr Bartos—It might be worth simply inserting a subclause simply to make that express that the complicity applies to Australian nationals. That would tie in very neatly. It would dovetail with our earlier point about extending jurisdictions to nationals acting overseas.

The other two points with regard to tying the legislation to enforcement obligations and mutual cooperation are not as significant as the other three issues which I have addressed today and which are in the submission. I am happy to elaborate on the points in there otherwise I believe it is stated in the terms of the charter.

CHAIR—It is a very clear submission. Do you want to take up some points?

Mr HARDGRAVE—I am happy because I have looked through this and I have made a number of assessments about it. I just welcome the clarity and the contribution.

CHAIR—There is just one aspect that I want to take up. There is a lot of

legislation where there is not an express obligation expressed in it on the DPP to investigate and prosecute as required. I just wonder whether or not you really need to go as far as that in this piece of legislation. No doubt it happens in other legislation as well but certainly in this legislation there is going to be a large element of discretion. You may not want to touch it with a barge pole for all sorts of reasons including the fact that it would cost too much or would be just impossible to prove. I just wonder whether there is any utility in putting it in.

Mr Bartos—The only concerns are twofold I suppose. Firstly, there is the issue of certainty for business because as the legislation stands there is no reference to the DPP. There are no parameters set up for when prosecution is to be instituted and leaving it up to the entire discretion of the DPP may reduce the certainty for business. That is one aspect. A second aspect is whether the policy that the DPP has for instituting its proceedings and exercising its discretion is consistent with the terms of the treaty.

There was one provision which we have pointed to in our submission and that is that the treaty states in article 5 that enforcement is not to be influenced by various factors. One of them is national interest and another one is by reference to the identity of the person. That is obviously a reference to particular individuals whom the government may not want to have prosecuted. However, the DPP policy does refer to the criterion of the alleged offender's antecedents and background as a factor. So the identity of the person could be a factor.

This is in principle the problem, but in practice we could rely on the DPP's commitment and integrity to uphold the spirit of the legislation and it would probably not be a great problem. For that reason, I have stated that these two points at the end are minor and not really essential. Whereas the three previous ones really do go to serious issues of legality and consistency.

CHAIR—As to your point about purpose, from recollection—and it is a long time ago now—that came up when we first had the attorney in front of us. Obviously, that goes right to the heart of the issues we are looking at. Mr Bartos, we have run a bit short of time unfortunately, because we did plough down a bit with some of the other witnesses. Your submission is on the face of it pretty clear and it raises some very useful points.

We are very grateful that you have come along and sorry to have kept you. We may be back in touch with you as we start our deliberations, because obviously there will be bits that come up that we may need to clarify with you.

Mr Bartos—Certainly, I would be delighted to be of assistance.

CHAIR—Thank you very much.

Mr Bartos—Thank you giving me the opportunity of contributing to the discussion.

[11.42 a.m.]

GORDON, Dr Alexander Deuchar Donald, Special Adviser, Australian Federal Police, Northbourne Avenue, Canberra, Australian Capital Territory 2601

McFARLANE, Mr Alastair John, Special Adviser, Office of Deputy Commissioner, Australian Federal Police, GPO Box 401, Canberra, Australian Capital Territory 2601

CHAIR—Your submission has already been published by the committee. Was there anything first of all that you wanted to amend, change or add?

Mr McFarlane—The submission was prepared in a bit of a hurry. If you would agree, I would like to make a statement which may enhance that. There is nothing we want to change in that.

CHAIR—Absolutely. The first thing I wanted to do was to apologise for having kept you. Having said that, please do not feel constrained because we do not have any witnesses after you. You may augment your statement as much as you wish.

Mr McFarlane—My position is special adviser in the Office of the Deputy Commissioner. I am presently working full time on transnational crime and its impact on regional security and stability issues, including Australia's bilateral and multilateral relationships in the Asia-Pacific and the South Pacific. To undertake this work without being bogged down in the day-to-day business of the AFP, I have been seconded as AFP Visiting Fellow at the New South Wales University College at the Australian Defence Force Academy.

I am the Australian co-chair of an Asia-Pacific working group on transnational crime, established under the auspices of the Council for Security Cooperation in the Asia-Pacific, known as CSCAP, which is a second track think-tank supporting the ASEAN Regional Forum. This working group has now met twice with representation from 12 countries in the region and 32 people with backgrounds in strategic and political analysis, sociology, international relations, law enforcement, the law itself, military and diplomacy.

We have identified 20 crime types which affect most of the countries in the region. We are committed to quite an extensive research program covering at least the higher priority crime types, including drug production and trafficking, money laundering, fraud, white-collar crime, technology crimes and terrorism. Our research in these areas is ultimately directed at the clarification of the key issues involved and relating these issues to regional stability, security and multilateral relations. We have a further meeting in Manila at the end of May.

In addition to the CSCAP initiatives, we have also taken a greater interest in cross-

border crime in the Torres Strait area and the impact of transnational crime and cross-border crime on the security and stability of our South Pacific neighbours and their relationships with Australia. The first public manifestation of this work was a seminar jointly sponsored by the Australian Defence Study Centre and the AFP titled, Torres Strait: Policing the Open Border, which was attended by some 120 people from mainland Australia, the Torres Strait, PNG, Indonesia and the Philippines.

A further seminar on the impact of transnational and cross-border crime on the relationship between Australia and PNG will be conducted later this year in collaboration with the PNG National Research Institute and the PNG Ombudsman's Office. We will conduct a further seminar relating to the South Pacific next year.

One of the key issues to emerge from our work on transnational crime in all its manifestations is that facilitating and supporting the development of cross-border and transnational crime is corruption, including the bribery of foreign officials. I have always been deeply concerned at the complacency exhibited by so many of our officials and business leaders over the damage done by corruption and bribery. One senior officer in one of our government agencies once accused us of being 'obsessed with corruption; didn't we appreciate that corruption was the lubricant which made Asia work?'

I have often wondered how this complacent attitude may have affected the advice given to government on our political, diplomatic and economic relationships in the region. If it is true, as often claimed, that through corruption some of our regional leaders and their families have acquired multi-billion dollar fortunes while their populations are angry and suffering, this does not in my mind contribute to regional stability and security or to Australia's long-term interests.

The OECD recommendations and proposed Australian legislation in this area will not stop this massive and higher level corruption, nor will it necessarily dissuade the intermediary or bagman seeking a percentage for himself, and above all for others who have the authority at a higher bureaucratic or political level, to approve or reject a contract or to select between competing contracts regardless of their tender price.

I would interpret this behaviour as corruption and the elicitation of bribes as unacceptable, but we have no power to prevent this, particularly if the local jurisdiction is not interested in or fearful of doing so. However, this legislation sends two messages to Australian businesses and businessmen doing business in the region. If you offer or succumb to a request for a bribe to close a deal, you are breaking the Australian law. Secondly, if you do so, do not bother to claim such a bribe as a business expense.

The weakness in our position, as others have mentioned, is that this is a game where all our trading competitors must also play or we will certainly be disadvantaged; not because our proposals lack merit, or our tender price is too high, but because decisions will be made by others over whom we have no control based on criteria which may have

little to do with the merits of the bid. Although many of our trading competitors are members of the OECD, past practice has shown that some of them have little compunction in agreeing to facilitation payments, special commissions and the like, if that is what it takes to secure the deal.

The arguments used by the OECD, the World Bank and NGOs such as Transparency International in pointing out the problems associated with the offering and receiving of bribes are very valid but, unless all our trading competitors adopt or enforce similar legislation, Australia will be disadvantaged in the short term. However, in the longer term, Australia may gain a justifiable reputation for honesty and probity in our business dealings in the region, which could stand us in good stead.

As our colleagues, Federal Agent David Schramm and Ed Tyrie mentioned in their evidence last week, there are some practical difficulties in enforcing any law which has extraterritorial application. We have experienced this in relation to the enforcement of the Crimes (Child Sex Tourism) Act but, in both that case and in the case of this proposed legislation, the effect of the law can be measured not only in its direct applicability but also in the message it sends to Australians who could be tempted to transgress in this area.

This proposal will not stop corruption or bribery, particularly amongst our trading partners, but it is a small and useful step to rein in this practice. As presently drafted, the bill will only apply to foreign public officials, broadly defined, rather than foreign businessmen, and it may not cover the conduct of officials of Australian-owned companies operating entirely abroad.

Finally, I should say something about the possible regional attitudes towards the OECD and its initiatives in this area. I think that many of the leaders, public officials and businessmen in the region share our views on the damage which can be done through corruption and bribery. But they may not necessarily see the OECD as the best vehicle to bring this to a head. The OECD was established in 1961 to stimulate economic progress and world trade. I understand that there are now 29 members of the OECD but, with the exceptions of Turkey and Mexico, none could be described as developing countries, and only one, Japan, is an Asian or South Pacific country.

It would be reasonable to conclude that, like the G8, the OECD is seen by many Asian people as a Euro-centric club which expounds values which they do not necessarily subscribe to. This is another reason why we should not hold unrealistic expectations about the effectiveness of OECD-sponsored legislation in this region. From this perspective, the United Nations Declaration against Corruption and Bribery in International Business Transactions of 16 December 1996, and even the work within the region of NGOs such as Transparency International, may have a greater or equal effect than the OECD recommendations in some of the developing countries.

In relation to the latter, it might be noted that, in the aftermath of the 1997

Sandline crisis in PNG, the establishment of a local chapter of Transparency International appears to have had some impact on the PNG elections, and the commitments made by a number of PNG leaders, including the Prime Minister, to sign the national integrity pledge may have had an impact on the formation of the Skate government. Transparency International either has established or is in the process of setting up national chapters in the Philippines, Singapore, Malaysia, Indonesia, Thailand and Fiji. They also plan to begin efforts to launch chapters in New Zealand and Korea.

It might also be worth mentioning that the ANU's National Centre for Development Studies, in conjunction with the New South Wales Independent Commission Against Corruption, is about to launch a masters level course in corruption and anti-corruption for postgraduate students and officials from developing countries. Similarly, the ANU in conjunction with Murdoch University, will host a new Centre for Democratic Institutions to promote democracy, human rights and good governance in developing countries. This centre will also tackle the problems of corruption and bribery.

There are many ways of addressing the problems of corruption and bribery, of which the OECD approach is but one. The OECD recommendations, although limited in their application, are sound and should be supported. Nevertheless, if we are serious in our intention to expose and discourage corruption in Australia and in our dealings overseas, we should be aware of and support other approaches which can contribute to achieving the same end. Above all, we should send out a clear message that Australia does not tolerate, and will do what it can to eliminate, corruption and bribery, not only in our international business dealings but in all our dealings. Thank you.

Dr Gordon—I have very little to add. I was going to raise some issues about the role of corruption in the region and the current economic difficulties, but I am sure they have been well covered by other people. I just want to make a couple of points, which perhaps have not been raised in the past, to add to what Mr McFarlane said.

One is that I think there is—and this is particularly relevant from the point of view of the AFP—a close connection between corruption in business and corruption relating to crime, corruption as it facilitates other types of crime such as drug trafficking, paedophilia, arms trafficking, money laundering and many other aspects of criminality with which we deal in the AFP. That sort of nexus has become evident when one looks at the roles, I suppose, of some countries proximate to drug producing areas which have become primary sources of trafficking where we have had enormous amounts of money available and that money has suborned, basically, the political systems in those countries and contributed to a general climate of corruption in those countries—without going into detail, obviously. So there is this nexus.

It also works the other way around. When you get high level corruption in business from the top, that makes it more difficult to run regimes in which criminality is properly addressed. That has a direct bearing on Australia because, of course, we are suffering, I

think more and more, from problems of transnational crime, particularly emanating from our broad Asian region. So that is one point which I would like to make.

Another point I would like to make is that, from my experience, it is not necessarily the case that corruption is produced as a result of total lack of transparency in institutions. Again, without going into specific countries, one could nominate a number of democracies in the broad Asia-Pacific region which are very corrupt. So there is a very interesting issue in there. We need to deal with corruption in ways, such as the present initiative, that go well beyond just seeking democratic norms in institutions, although that is, obviously, a fundamental building block. So I would like to just make that point as well. I think this initiative is excellent in that regard.

Finally, in terms of looking at when an actual prosecution might be brought under the present proposed legislation, there are two areas which come to my mind, both of which could be quite messy and difficult, and I guess other people may well have raised these. One is circumstances in which a contract has been lost and a business competitor seeks to raise that issue. That has all sorts of connotations around it.

The other one I want to raise in particular, and this goes back to the point I made earlier about democratic norms, is when there may be a change in government. I think you are going to get at least some political impetus—that is, state-to-state impetus—to bring about charges under this legislation at the time of changes of government because, in some particularly freewheeling democracies, politicians who are corrupt—and there are some, obviously—see it as their main chance in a particular time frame, the life of a government, and I am talking very frankly here, to make as much money as quickly as possible. Then, when a government changes, there is a process of scrutiny and review of contracts which may have been entered into by the predecessor. So we need to be mindful that we might get pressures from new governments to actually bring about prosecutions which could be perceived as having a political flavour about them. That is something that we need to be mindful of. That is all I have to say at this stage.

CHAIR—Do you want to add anything on global regional security and stability? Do you have any comment on that?

Dr Gordon—Certainly.

CHAIR—It was raised by Mr McFarlane, but it is the particular emphasis that your evidence addresses that we would like to hear.

Dr Gordon—Absolutely. In my earlier notes, I had talked a little bit about that. I think issues of corruption and stability are important in two types of states. In the larger states, we have seen just recently that a lack of transparency, if you like, can be a factor in undermining economic performance and therefore in undermining regional stability, which is very important to Australia. The suddenness of loss of confidence in institutions,

particularly monetary and financial institutions which have not had transparency, has been an enormous factor, in my view, in what has happened recently.

It is very hard to win back the confidence of investors, obviously. So, in terms of Asia's stability that we have seen and we have enjoyed as part of this region over the last three or four decades, since the war, it has been built on a continuous economic growth. We are perhaps seeing the effects of that loss of growth, or we will see them increasingly. So there is some role of lack of transparency, corrupt institutions, in that.

The other sort of state that I had in mind—and I am sure Mr McFarlane had in mind—were the small neighbours that we have which are extremely delicate economies, and also ones for which we perceive we have some responsibility because they are our close neighbours. As a medium power, because they are so much smaller than us, we actually can do something about events in that part of the world.

Because these economies are so small and delicate, even one specific act of corruption by a carpetbagger, who may be an Australian, can seriously undermine those economies and therefore have a direct impact on our regional stability in a way in which we may have to be involved in setting right.

Mr HARDGRAVE—Would the idea of changing this proposed legislation that the committee in part is considering and applying it along similar lines to the Crimes (Child Sex Tourism) Act 1994 and really having hard-nosed legislation based on the nationality rather than the territorial implications of an offender actually send a good signal to our region that we are playing tough on this issue?

Dr Gordon—In regard to the latter type of corruption, I think it would. However, in regard to the larger Asian scene, it is our experience—and I am sure Mr McFarlane will bear me out—that it is going to be very difficult to get a direct link through, even with tougher legislation because in most instances, as I am sure you have heard, people do tend to act through agents who are probably not of Australian nationality, whatever their residence.

Mr HARDGRAVE—But wouldn't it make it better than is currently being proposed, if we were to go that extra step and to try to head down the path of this style of legislation?

CHAIR—Just to add to that, and you can answer both questions together, if we were to extend jurisdiction to really go the whole hog, if you like, and say, 'We'll try and rope in businessmen as well as foreign officials and we'll extend the jurisdiction to wholly owned subsidiaries and we'll remove the territorial connection. Off you go, AFP, go get 'em', what would you say to that?

Dr Gordon—I would say probably you are not going to do that because it would

put us way out ahead of our competitors in the OECD, and it would be very difficult for us to do that. As my colleagues have also pointed out, certainly in our written submission, as far as we are concerned, even the legislation as it stands currently, it does have resourcing implications for us.

Mr ADAMS—Do you believe that what our chairman said would be the way to go in the longer term? You said that would put us in front of our competitors because you want everybody to reach these conclusions together.

Dr Gordon—Yes.

Mr ADAMS—You are saying in the longer term we should have our own legislation so we can go on a broader front. Is that correct?

Dr Gordon—No. What I was really saying was that I imagine it would be either in the short term or the longer term difficult for us to get ahead of our competitors. If the legislation is there, there is a chance it would need to be acted upon if an actual case is brought to bear.

Mr ADAMS—Okay, that is the longer-term situation, if we can bring our competitors along with us and we really get fair dinkum about this. But, with this legislation, will you need some more resources to implement it?

Dr Gordon—I would prefer, if I may, not to go down that track—I know I have gone a little way down the track, but only picking up on what the written advice has been from our general manager, Mr Mills—because, as I pointed out in the beginning, my role is specifically in strategic intelligence. The actual administration and management of the AFP is in other hands, so it is probably best if I do not progress down that—

Mr ADAMS—Okay. What about your own area?

Dr Gordon—Within the intelligence area, the resourcing situation is as it is elsewhere in the AFP. We are trying to concentrate our resources on quite severe problems that we and the government perceive we have got in areas such as drug importations and so on at the moment. That is not to say that we do not pursue our intelligence activities on a range of fronts. We have to ensure that all legislation is properly adhered to and administered.

Mr ADAMS—But you could always use more resources?

Dr Gordon—Again, probably it is not my place to comment on that.

Mr McFarlane—Perhaps I could add to that, Mr Adams. The first point is that my preference would be as Mr Hardgrave suggested, to slowly pick up the nationality issue

rather than a territorial issue. I was rather attracted to what Allan Asher said this morning about doing these things incrementally, to let it get in and then test it, and then move up another notch.

CHAIR—The suck it and see approach.

Mr McFarlane—More or less. If the OECD does much the same, if they are serious about trying to address this issue, then it will be picked off incrementally. If you look behind, we have come quite a long way in the last four or five years in actually identifying and now having something to bite onto in terms of international agreements and the legislation at the national level that will follow through. So I am a bit attracted to the idea of trying to make that aspect of it similar to the Crimes (Child Sex Tourism) Act and just gradually and practically dealing with issues as they come up and, as Sandy Gordon said, not getting too far ahead of our other competitors—if that is the word—because I think that will only do national damage.

CHAIR—Your point was that all local competitors must play.

Mr McFarlane—Yes.

CHAIR—Do you have a view about how, apart from being incremental, one might lock in a better multilateral approach than the current draft does?

Mr McFarlane—I think the current draft is fine, but it has got to be enhanced by strong diplomatic and political initiatives as well. It is no use just taking that OECD initiative and then just pushing it through legislation and saying, 'We've done our bit.' I do not think that is really going to solve anything. We have got diplomatic and national strategies and I think this needs to be added to those strategies. We should make it clear, as we do on other issues such as landmines and all that sort of thing, that this is important from the Australian point of view, and then try and encourage that to be adopted.

One thing on the resource implications: clearly, it is very difficult to judge how many cases this might actually involve us in. Again, it is very much like the Crimes (Child Sex Tourism) Act—you have to see what comes out of the woodwork and then see what practical difficulties are involved in actually investigating and prosecuting somebody. I think we would do the same in this area. But probably, having had a couple of cases, the message would be quite strong and it would probably level off.

Mr HARDGRAVE—I am somewhat relieved to get the concession from you that you would be looking at perhaps enhancing some of the basic things that we have had put forward here today. It always strikes me that one of the problems that people involved in law enforcement have is the extent to which they are able to enforce the laws. That is where politicians, people in parliament, make decisions, courts then judge those decisions and enforcement is later. So I would hate to think that we got a message today from the

AFP that notions of looking at enhancing this proposed legislation to run it down the lines of the Crimes (Child Sex Tourism) Act might not be wanted.

Having said that, what about the notion suggested by earlier witnesses of perhaps trying to tie this into the Multilateral Agreement on Investment. Would that be a worthwhile tool as well to try and get other jurisdictions to come on board with this kind of approach?

Mr McFarlane—I am not familiar with that particular matter but—

Mr HARDGRAVE—Let me frame it another way then: a more multilateral approach has been suggested. I do not expect you to be an expert on this MAI because I do not think anybody is, but it is a multilateral agreement, so a multilateral vehicle, if you like.

Mr McFarlane—Very much so. It does not matter if we are out in the front as long as we are not too far out in the front. But the key test is credibility; it is no use having legislation that cannot be credibly enforced. Any concessions we make one way or the other towards enhancing or easing off in prosecution in that area have to be determined by credibility.

CHAIR—One of the issues about credibility—you are quite right to refer to it—is that it is said by some critics of this draft enabling legislation that it has got absolutely no teeth, that everybody knows you are not going to have an Australian connection—you use an agent; you do not know what happens; things get done and there it is—so it is not likely to have much effect other than sending a good message that, all things being equal, Australia does not like its nationals to do business like this.

Mr McFarlane—Absolutely. That is why I said before that we have to be realistic about what we can actually expect out of this. It should not be sold by government or parliament as a panacea for corruption and bribery; it is just not that. But it is the right sort of thing to do, if I could put it that way.

Mr HARDGRAVE—I am very concerned about the nexus that you have painted between the compromise that public officials and business people involving themselves in any bribery activities then find themselves in with regard to crime and other activities. Essentially, once the door is open, once there is the link of money changing hands for this, money could change hands for something else or someone could be put in a compromising position where they have to let something go through. It is all heinous, but one would suspect that the importation of drugs would be regarded as more so by people in Australia.

Mr McFarlane—That is right. Corruption in all its forms, including bribery, is an extremely insidious and nasty business. That is why it rather shattered me when this senior officer from one of our agencies sort of pooh-poohed the whole idea: ‘Don’t you realise

this is just the way Asia works.' Of course it is the way Asia works. It is also the way Australia works in some areas. We should not just lie back and accept that as being something we can do nothing about.

Mr HARDGRAVE—Nor should we generalise. I do not want to editorialise on this, but I can think back to earlier this decade when the Taipei city government in Taiwan found that a major mass transport system that they wanted to implement fell down in a big hole because of bribery allegations. There has been a change of administration there and Mayor Chen has politically sought a lot of mileage, and received it, over his determination to turn his back on that corruption and get some results. There are changes occurring in many different Asian countries and, again, they do look to a near neighbour for a lead on these sorts of things, I would have thought.

Mr McFarlane—That is right. The present economic crisis in Asia demonstrates pretty clearly the nexus. I think I can say this publicly because it is pretty well publicised. The four countries most immediately affected were Thailand, Korea, Japan and Indonesia, and there is ample evidence on the public record of very serious corruption in each of those countries, of very serious banking problems and fraud in the other financial institutions and even, in some countries, evidence of extortion by criminal organisations against governments and business leaders.

It could not be said that crime created the problem, but crime most certainly made it a lot worse and a lot more intractable than it otherwise may have been. There are a whole lot of very good economic reasons why this happened, but this was another little ginger group that sat in behind it and made it much worse, and that is also going to make it a lot worse to try and overcome. That is a situation which, in my opinion at any rate, demonstrates quite clearly how crime, corruption, fraud and all that sort of activity can impact so seriously, not only on regional security but on regional stability issues, economic, military, political, diplomatic—the lot.

Mr HARDGRAVE—Likewise there seems to be ample evidence on the public record about legitimate businesses established by organised crime figures, Yakuza, gangs and those sorts of things.

Mr McFarlane—Exactly.

Mr HARDGRAVE—Do you feel satisfied that this agreement before the committee obviously serves the national interest in Australia's regard and is worthy of support?

Mr McFarlane—It is worthy of support. We should not have unreal expectations as to what it will solve. To my mind, the main thing it sends out is a good clear message. The threat of prosecution is probably less important than the message that it sends out to business. Talk to people in BHP and some of the other bigger international trading organisations that are trying to deal every day with the problems of corruption and bribery

in their business affairs. They are having a lot of trouble doing it, but they are getting credibility because they put forward a firm corporate view that this is not to happen as part of their corporate standards and corporate policy. It just means that in the negotiations that they will have in the future with Callithumpia, the Callithumpian government will realise that if you are dealing with this company, the rules under which they will operate extend this far but no further. I think that is a right message to get out.

CHAIR—If I understand you correctly from your earlier evidence, you extend that also to small facilitation, right across the board.

Mr McFarlane—Facilitation is a terribly difficult issue. The key term is 'undue' as to how you measure it. There is an attempt in the papers relating to the legislation to set some sort of a figure, but a figure that might be applicable in a country in the South Pacific would not even get a sniff in a South-East Asian country. It is very difficult. There has to be another solution, but I cannot really suggest what it could be.

CHAIR—A previous witness suggested that what you really need to do is to encapsulate the purpose, which is really a very different thing to large-scale bribery.

Mr McFarlane—As long as that is not used against you, whereby the defendant comes back and says, 'All I have done is this, that and the other which are within the guidelines'. It could rebound against you. I think Mr Bartos made a pretty good suggestion: to try and lay down some criteria for what is reasonable and what is due as distinct from undue in terms of facilitation payments. That seems to me to be pretty practical.

CHAIR—Do you agree from an enforcement and prosecution point of view that it is inherently undesirable for businessmen, or indeed anybody who may be subject to legislation, to not know whether or not they are going to be prosecuted? Is it better to be up-front with what is an offence?

Mr McFarlane—Absolutely.

CHAIR—Time has defeated us. Was there anything that we have not drawn out that you particularly wanted to raise?

Mr McFarlane—Not on my side.

Dr Gordon—Not on my part.

CHAIR—Feel free to communicate with the secretariat if there is anything further that your want to raise. We hope that we can be back in touch with you when we commence our deliberations if there is some aspect that we need to clarify. Thank you both very much for not only coming today and giving us the benefit of your experience and insight but also for being so understanding with our problems with the time.

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

That this subcommittee authorises publication of evidence given before it today.

Subcommittee adjourned at 12.19 p.m.