



COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

(Subcommittee)

Reference: OECD convention on combating bribery

MELBOURNE

Thursday, 16 April 1998

OFFICIAL HANSARD REPORT

CANBERRA

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For inquiry into and report on:

OECD Convention on Combating Bribery.

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WITNESSES

BOSCH, Mr Henry, AO, Chairman, Transparency International Australia, PO Box A2327, Sydney South, New South Wales 1235	173
BRITTON, Mr Peter, Director, Program Development and Public Affairs, Overseas Service Bureau, 71 Argyle Street, Fitzroy, Victoria 3065	134
GIBSON, Ms Kathleen Mavis, Chair, Ethics Centre of Excellence, Australian Society of Certified Practising Accountants, 170 Queen Street, Mel- bourne, Victoria	126
HACKETT, Mr Timothy, Training Consultant, Overseas Service Bureau, 71 Argyle Street, Fitzroy, Victoria 3065	134
HURLOCK, Mr Brian John, Convenor, Charter 89 Society, PO Box 6137, Footscray West, Victoria 3012	160
ROOKE, Mr Peter Leslie, Chief Executive, Transparency International Australia, PO Box A2327, Sydney South, New South Wales 1235	173
SUSS, Mr Michael David, Private citizen	193
WALKER, Mr Neil, National Councillor, Australian Society of Certified Practising Accountants, 170 Queen Street, Melbourne, Victoria	126
WILLIS, Mr Peter Gordon, Chair, International Trade and Business Commit- tee, Law Council of Australia, 19 Torrens Street, Braddon, Australian Capital Territory 2612	148

JOINT STANDING COMMITTEE ON TREATIES
(Subcommittee)

OECD convention on combating bribery

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Present

Senator Coonan (Chair)

Mr Adams

Mr Hardgrave

Subcommittee met at 9.25 a.m.

Mr Hardgrave took the chair.

GIBSON, Ms Kathleen Mavis, Chair, Ethics Centre of Excellence, Australian Society of Certified Practising Accountants, 170 Queen Street, Melbourne, Victoria

WALKER, Mr Neil, National Councillor, Australian Society of Certified Practising Accountants, 170 Queen Street, Melbourne, Victoria

ACTING CHAIR (Mr Hardgrave)—I declare open this public hearing, the fourth in this inquiry into the OECD convention on combating bribery. Today we will take evidence from the Australian Society of CPAs, the Law Council of Australia, Transparency International Australia, and, importantly, from two private citizens. I should at the outset acknowledge that Senator Coonan is the subcommittee chairman and she will be here shortly.

I would like to welcome the witnesses from the Australian Society of Certified Practising Accountants. Would you like to make a brief opening statement on the treaty before proceeding to questions?

Ms Gibson—Thank you, Mr Chair. There are really three main points that the society is concerned about. Firstly, a main problem for the accounting profession is that an offence is being created under the criminal code but not under taxation law, which still allows a tax deduction for these payments. This is quite a big issue for accountants because in advising clients on how best to handle their taxation matters there is a conflict here in that we are actually advising on something that may well be illegal. It is a real concern that we have as accountants.

Also, as a related issue, we are concerned that there are no indemnity provisions. If an accountant in perhaps an audit capacity finds information that may relate to bribery—it is not necessarily stated as bribery in the accounts—there is not a lot of protection if that accountant passes on that information. There is no real indemnity offered as there is in the legal profession, and that is a concern of ours as well.

The second issue that we have is the issue of large versus small payments. We are concerned at how large is large, in whose terms is it large or small, because what is small to us may well be large in other situations. We are concerned that there is an issue there that could lead to quite a lot of subjectivity.

Thirdly, we are concerned that the legislation should also include payments that are made outside Australia and not just payments that have this nexus of having to be paid within Australia. We would like to see it extend to all Australian companies, even when payments are made overseas. That is really a summary of what we have to say.

ACTING CHAIR—All right. There is obviously a range of issues that you have raised there, particularly from the point of view of CPAs. What sorts of mechanisms would you suggest would be necessary in order to be sure that, irrespective of the location

of a particular bribery offence, there was obviously action that could be taken from here in Australia, and also the matter of some whistleblowing type indemnity for CPAs who might report something that is untoward?

Mr Walker—The first proposition about making it beyond Australia is that to us it seems very tenuous to have something that relates to international trade requiring to be determined in terms of actions within Australia. In the business world there is transparency beyond borders, and to suggest that something that has international ramifications has to occur in Australia to be affected by this seems to us to lead to confusion, obfuscation and behaviour that simply takes advantage of that situation. We believe that if we are going to legislate on this matter it should be with legislation that applies to behaviour by Australian entities wherever that behaviour occurs. We think that is perfectly feasible.

Ms Gibson—To extend the criminal code.

ACTING CHAIR—Essentially, citizens who conduct these sorts of activities, regardless of where they conduct them, should face the law.

Mr Walker—That is right. That is a pretty important principle from the point of view of accountants or auditors who are dealing with companies in this situation. They are going to see these sorts of transactions regardless of whether they occur in Australia or overseas.

ACTING CHAIR—What about the matter of indemnity for accountants who may become whistleblowers on a client? Is there an ethical difficulty there for an accountant? We all know the concept of clever accounting in theory hiding things—and no offence to your profession is intended by me—but is there an ethical question, rather like that in a doctor-patient relationship?

Mr Walker—Again, our view is that there certainly is an ethical dilemma unless the liability situation of accountants is made clear in a matter like this.

ACTING CHAIR—Are you suggesting that accountants need a very clear-cut mechanism within the law to force them to breach any ethical question that some might throw up?

Mr Walker—That is correct. One principle that applies to our profession, including to the audit elements of our profession, is the principle of confidentiality and not acting against the interests of the company with whom the CPA is involved. That is going to introduce a real dilemma between that ethical obligation on the CPA and the obligation to report criminal behaviour.

ACTING CHAIR—Would that be a problem from the CPA society's point of view?

Mr Walker—Yes.

Mr ADAMS—If there are clauses in this legislation to cover that, by saying that it is the responsibility of anybody within a company—or an auditor or accountant, et cetera—to make that available, would that be the sort of clause that your profession needs to give it coverage?

Ms Gibson—Yes, it would; because that would then give us a legal guideline, rather than have us fall back on ethical guidelines.

Mr ADAMS—I take your point with the overseas payments, et cetera: the world is changing rapidly, and capital just does not always sit in one place, and there is no need for that.

Ms Gibson—Absolutely; and we audit multinational corporations.

Mr ADAMS—Yes.

ACTING CHAIR—There are provisions within the Corporations Law currently for very clear and open records to be kept, though, so that things like bribes could in fact be more transparent. Are those particular provisions of section 289 sufficient?

Ms Gibson—As the Corporations Law stands at the moment, it requires that accounting standards be complied with, but there is not an accounting standard that requires that any payments for bribery or facilitation be reported separately, so they can actually be shown as an expense. That is another issue where we are suggesting that, as part of this exercise, an accounting standard—and preferably an international accounting standard—would be useful.

ACTING CHAIR—An interesting prospect then would be that a facilitation payment—or even, for that matter, a bribe—could then become a legitimate, tax deductible business expense. Is that what you are saying?

Ms Gibson—It is, in Australia.

Mr Walker—Again, that is a conundrum in regard to these proposals. We do not believe that you can leave it as a legitimate tax deduction on the one hand but a criminal activity on the other.

ACTING CHAIR—What about the use of sideways entities, a bit like setting up a subsidiary company to do a range of things and keeping the company directly divorced from certain activities but, once that range of things has been done, things have crashed? That is all possible in theory, and has all been done, I suppose.

Mr Walker—Again, that sort of activity is why we are concerned to make the offence an offence regardless of where it occurs. If you do not, and if you say that it is only an offence if it is seen to occur in Australia or to be connected to Australia, then you do create those sorts of contrivances; whereas, if you have a situation where it is universally an offence, you cannot be a position to use those sorts of devices for evading that legislation.

Mr ADAMS—Say that it does not make any difference between small and large payments: you believe that it all should be accounted for in some way. You mention in your submission that the US legislation outlaws all bribery; it does not have facilitation payments. One small payment to one level is totally the same as \$100,000 to someone else. What \$10 is to one person at one level is what \$100,000 is to another person at another level.

Ms Gibson—Absolutely, and in different countries.

Mr Walker—Particularly given some of the swings and roundabouts of foreign currency.

Mr ADAMS—We had evidence given to us that small bribes are okay to small officials to get the railway moving, to get the goods down to the site, and to get the telephones put into the site five weeks earlier. These things are just the way the world works in some places. In industry, some groups seem to think that that is an acceptable way to do things. I take it that your society does not think that.

Ms Gibson—That is right. We understand it is the OECD's position that these practices be minimised worldwide and we would certainly be strongly supportive of that, yes.

ACTING CHAIR—It would be the job, though, of an accountant—regardless of whether the amount were \$100 or \$100,000—to be able to identify what those payments were for, wouldn't it?

Mr Walker—Yes, it would. Again, to endeavour to put a dollar amount on it creates all sorts of distortions, particularly over time. You make it \$1,000 today but tomorrow, through currency fluctuations and so on, that becomes totally irrelevant or inadequate. There is always, in accounting terms, the question of materiality. It could be the case that as things stand a small payment simply is not identified, basically because it is considered not to be a material amount. I do not think we would want to leave the suggestion that, by legislating in this area in all cases, an accountant is going to be able to identify these sorts of payments. It certainly requires that, where they are identified, the situation be clear and well defined.

ACTING CHAIR—To what extent do you want to take the law? Do you want to

take it to the point where an accountant or an auditor looking at somebody's books is beholden to actually go through and scoop up all the question mark payments and report them, as a duty, to authorities and say, 'Last year, X corporation paid \$20,000 in facilitation payments in total'? To what extent do you believe the provisions need to be beefed up to require accountants to blow the whistle?

Ms Gibson—The society's position is that all such payments ultimately should be outlawed.

ACTING CHAIR—Regardless of size?

Ms Gibson—That is right.

Mr ADAMS—We have had evidence that Australian companies might have a joint venture or take on a consultant in another country which will look after all this sort of stuff and therefore payments are made to them either on a consultancy basis or on that side of the business. But that amount of money would still be audited. If the audit is taking place in Australia, that money would need to be detailed in the accounts, I take it?

Ms Gibson—The audit of a foreign subsidiary can be undertaken in that country, not necessarily in Australia. The Australian auditor would accept the work of an overseas accountant.

Mr ADAMS—As long as they were a qualified accountant?

Ms Gibson—As long as they were satisfied—

Mr ADAMS—So we are saying that that is one way that this legislation could be got around straight away. Taking on a local consultancy firm would be another way. If that is a local consultant in that country, that would just show in Australian companies' terms as 'payment to consultant for a given task'.

Mr Walker—But, again, that is the reason it is so important from our point of view that it is an offence wherever it occurs—

Mr ADAMS—Sure.

Mr Walker—and, secondly, that through the OECD and like organisations there is similar action or legislation taken in as many countries as possible.

CHAIR—Thank you. Ms Gibson, Mr Walker and colleagues, my apologies; Mr Ansett did something very strange with the flights out of Sydney. What I wanted to take up—and I hope it has not been covered; if it has, no doubt somebody will give me a nudge—was your reference to materiality as perhaps the overriding consideration when

you are applying a standard. If there was some international benchmark or accounting standard in this area, I wondered how materiality would actually work, because the circumstances can be so different as to whether it is small or large, whether it is greasing the wheels or it is some major piece of corruption. How would an accountant or an auditor go about judging materiality?

Mr Walker—Firstly, it is a characteristic of the accounting profession to make those sorts of judgments. That is why accountants are professionals and have the extensive training that they do.

CHAIR—It is basically subjective, I suppose, is it?

Mr Walker—Those sorts of judgments are being made all the time within a broad framework of professional practice and standards. An issue of materiality might be about an amount of money and whether that money is material to the financial accounts of that particular company.

CHAIR—Or how often it might occur. How many there were might be—

Mr Walker—Yes, by all means—all those sorts of considerations. But, ultimately, in some ways this sort of legislation would decide that on the basis of it saying that it applied, regardless of the amount, to this sort of transaction. Therefore, by virtue of statutory regulation, rather than professional judgment or interpretation, it would be a requirement to identify these sorts of payments, not only on the external auditor but also on CPAs within the companies themselves who are required, by being members of the society, to perform according to accounting standards.

CHAIR—Are CPAs around the world talking about this sort of problem or has this convention been a catalyst for everyone in a professional sense to start thinking about how professional bodies might take certain parts of it and make it more relevant to their own practice?

Mr Walker—They are certainly talking about it around the world in the context of this particular OECD convention. But a wider issue for the profession which is being not only debated but acted upon around the world is the whole question of international harmonisation of accounting standards. Until now, accounting standards have been essentially nationally based. There is a very strong movement for international harmonisation of accounting standards. That simply reflects the multinational characteristic of modern business. Again, that is why in the submission we are saying that it really needs to be acted upon in accounting standards terms on an international basis. That would be consistent with this wider move to harmonisation of accounting standards across the board.

Ms Gibson—The accounting standard that addresses materiality, which is enforceable under Corporations Law, sees materiality in two ways: one is size, that is, if it is of a

certain magnitude; another is the effect it may have. If a small payment were allowed under the criminal code, and it was a small amount, this would probably not be regarded as material. If that payment were outlawed by the criminal code, my understanding is that the effect of the fact that it is illegal would then make it material, so it would have to be reported.

CHAIR—It would be reported—you would not qualify your audit as such because of something like that? Or would that depend on how material it was?

Ms Gibson—If it were reported, if it were disclosed separately and it was there for all to see, there would probably be no need to qualify the audit report. If it were not disclosed and the auditor considered it to be material, then it could gain a qualified audit report.

Mr ADAMS—So you could set something onto the auditor's report specifically about payments—bribery payments or facilitation payments. We could qualify that in law but that would be a specific task which should be undertaken under some standard.

Ms Gibson—It could be done that way. Alternatively, if there were an accounting standard that required its disclosure, you would not need to address it separately.

Mr ADAMS—I take your point.

CHAIR—I was interested in your mention of the desirability of having an indemnity. Is that really necessary? Auditors always have problems, don't they, when they have to confront a corporation with some aspect of the accounts that might require reporting or some qualification? Why would there need to be an indemnity for this in particular?

Mr Walker—Firstly, you are correct that the question of indemnity is a question for the profession in the wider sense, in both auditing and accounting practice, and one that the society certainly has had plenty of discussions with various governments about in Australia, and limitation of liability and that sort of thing.

The concern here is both a disclosure issue in circumstances where the accountant is required to maintain the confidentiality of commercial information and the fact of the accountant having to act in the interest of the company. It is really those two things that are going to lead to a conflict of interest if it is not made clear that an accountant, acting on the detection of this sort of activity, is in a position to report it to appropriate authorities without contravening their liability or obligation to the company they are dealing with.

CHAIR—I understand your point. I was just really wondering how that is different from, for instance, a situation where you had a deposit taker that did not comply with the liquidity requirements and you had to report that or you should, as an auditor, report that.

How would that be different? That is also, no doubt, very sensitive commercial information to the company and could seriously damage the company and in fact could damage a lot of consumers if there was a run on deposits, just taking an example.

Ms Gibson—It is my understanding that that would be a contravention of accounting standards and that would be a matter for the audit report where you would say that there is a contravention of accounting standards. In this case, you would be suggesting that there is some criminal activity that may or may not be very clear from the accounts. If you are not 100 per cent certain and you have no indemnity whatsoever, it is very difficult to then say, ‘Look, I believe there is a criminal activity occurring here.’ Would that be your understanding?

CHAIR—Yes, I understand the distinction. Thank you. It just remains for me to thank you both very much for coming and I apologise once again that I was not here for the start of your evidence. It is very helpful to have this sort of assistance to the committee and we are grateful to have the views of the Australian Society of CPAs.

Mr Walker—Thank you.

Ms Gibson—Thank you very much.

CHAIR—Could I also ask you to stay for a moment so that Hansard can just make sure that they have got your details correct.

[9.53 a.m.]

BRITTON, Mr Peter, Director, Program Development and Public Affairs, Overseas Service Bureau, 71 Argyle Street, Fitzroy, Victoria 3065

HACKETT, Mr Timothy, Training Consultant, Overseas Service Bureau, 71 Argyle Street, Fitzroy, Victoria 3065

CHAIR—I note that we now have at the table from the Overseas Service Bureau Mr Britton and Mr Hackett. Your submission has already been published by the committee. Are there any amendments you want to make to it? If not, I would ask you to make an opening statement and perhaps then we will proceed to ask some questions.

Mr Britton—As you will see from the submission, it was very brief. The Overseas Service Bureau's biggest program is the Australian Volunteers Abroad program, which has been running for the last 35 years. That has given us experience of operating in 45 developing countries. If you like, that is our primary area of experience. What we can reflect on is not only the experience of the organisation and its staff, but of the volunteers in the field.

One of the things we have noticed is that before they take up their assignments overseas the volunteers, being good ethical Australians, often have quite strong standpoints on issues to do with corruption and fraud and so on and inevitably find that they have to shift their standpoint to some extent as a result of their experience of living and working in these countries. It is a reflection of their contact with daily life in those countries.

While as an organisation, of course, we would support the convention, we would also sound a note of concern that we would find it very difficult to see corruption as a single thing in the range of countries and societies and the range of circumstances that people find themselves living in. It raises a whole lot of quite thorny questions of definition about what is corruption. Is it more corrupt, for example—I am not talking here about the behaviour of foreigners; I am talking about the behaviour of locals—to be at work and be receiving payments in order to facilitate services, or not to be at work, or to be in one of the other jobs or perhaps tending the chicken farm? While on the one hand we can say that corruption adds to the cost of doing business, it can also be essential for feeding the family and educating the children. I guess it is those kinds of concerns that we wanted to air a bit in view of the huge variety of circumstance that we find our people having to confront on a daily basis.

With the volunteer program, before people go away they all have an orientation program and, of course, this is one of the kinds of issues that get raised. It is critical, we think, to be able to put this area of people's behaviour firmly into the social and cultural context of the country concerned, because what is regarded as beyond the pale in one society simply is not in another, and for very good social and cultural reasons. There are

issues here about authority and the way in which authority should be treated in particular countries. Often the sign of respect is to give a gift. Sometimes a gift is given in order to incur a sense of obligation. Other people would call that a bribe. They are very grey areas we would say.

In recent years, as a result of our experience in preparing people to live and work overseas, we have also been offering a service to the business community by way of specific country briefings for executives that are about to relocate for their company. I might ask Tim to talk about some of that work.

Mr Hackett—Invariably when we do a corporate briefing, one of the topics that they are most hot on is bribery and corruption and how they handle that in the country that they are going to. I guess technically the answer to that question is that you do not get involved in it. However, the practicality is that you will not be able to do business in a lot of countries without getting involved in it. Again, drawing the distinction between what is a gift and what is a bribe is a very hard line to draw.

In Japan, for instance, gifts can be very expensive but they are gifts and they facilitate business, but not to the sense where a bribe would. In countries like Cambodia, where people earn \$30-odd a month in salary, they are vital or you will get almost nothing done. It really gets down to where you sort of stop and start with these things. You cannot get goods, such as your personal effects when you first arrive, off the wharf in a lot of countries without facilitating payments to the local customs, et cetera.

Our advice to the corporates invariably is that they should use their own contact in the country to which they are going—their own business partner or their own employees in that country—and work out the social norm there and try to conform with that.

To say that you cannot or shall not be involved in bribery and corruption, if that is the term you want to use, is a very difficult thing to do—almost impossible. Whether it be on the country's statute books or not, you have to look at the practical side as well as the legal side.

CHAIR—Thank you. I suppose really what you are saying is that unless there can be flexibility in the way in which one can look at the prohibitions in this legislation, it is going to be a very blunt instrument. Is that the gravamen of what you are really saying?

Mr Britton—That's right, yes.

CHAIR—And where the flexibility is needed, if I understand you correctly, is in the ability of our people on the ground in whatever capacity they are in to be able to make judgments about the social and cultural context in which they have to operate in deciding the best way to handle how they can conduct their personal affairs and no doubt affairs for whatever organisation they are representing. Is that right?

Mr Britton—We are also saying that to expect Australians to be able to make those judgments requires two things—one, training in Australia before they go, and, two, a depth of relationship with local colleagues or partners that may not always exist.

Mr ADAMS—I did not quite get that last bit.

Mr Britton—I mean the possibility of people blundering in, not quite knowing what the norms really are and how to go about things. To be able to act properly in those situations really depends on having excellent relationships with colleagues and business partners.

Mr ADAMS—Sure.

Mr HARDGRAVE—Would you agree, based on your experience across 45 different countries, that there are probably different rates of gratuities—gifts, payments, bribes—for different states for different mates?

Mr Britton—Absolutely.

Mr HARDGRAVE—So if you are from America, the social norm, to use your term, would be that you pay more than if you were from Botswana or somewhere. The Americans get slugged pretty heavily because they are seen as a wealthy country and people who come from America to a developing country are seen as wealthy; perhaps they might end up having to pay more than somebody from another developing country. Do you agree?

Mr Britton—There is some truth in what you are saying. I have also heard Asian businessmen comparing Australians with Americans and talking about the need to act with cultural sensitivity. The Americans never had to do that because they brought such a weight of business opportunity and money with them. Australians do have to because they are not acting with that same weight.

Mr HARDGRAVE—That is an interesting point. You then would be very reticent to agree with the notion that we need to have a domestic law that perhaps prosecutes Australians regardless of where they might participate in a bribe, rather like the child sex laws operating. Would you agree with that approach? Given that we in Australia have a certain cultural standard—we have minimum wages; we have a whole different raft of standards as far as guaranteed income for people is concerned compared to a lot of developing countries—how could an Australian legal system sufficiently judge an Australian in a developing country making a facilitation payment, if I can put it in those sorts of terms? Would you agree with the concept of prosecuting an Australian who pays over money to get something done in a developing country by prosecuting him here in Australia?

Mr Britton—In general terms I do agree, but it was interesting hearing the previous people talking about the notion of materiality. There is something in that as well.

I would also add that I do not think the threat of that kind of legal action really is going to solve the problem. I am looking more at educating Australians in terms of their own behaviour. In terms of the overseas countries that we are talking about, the long-term solution there lies in the development of a civil society to a higher order than exists at the moment.

Mr HARDGRAVE—Do you think this treaty would help facilitate that? In other words, if all the countries that are members of the OECD signed up to this treaty, and it was not just Australia, would there be a change to the social norms in developing countries? If they knew that they would not be able to hit the people they were hitting any more, they would have to look at other ways to, as you put it, feed the families by having standard awards or minimum wages brought into these countries.

Mr Britton—I would be hesitant because it is not the countries of the OECD or the West in general or anywhere else that have introduced corruption to these societies. They are organically grown responses, if you like, to their own situation, and the major beneficiaries of them are people in those countries.

Mr HARDGRAVE—But if somebody from this country participates knowingly and willingly in that form of corruption then they should be prosecuted for it?

Mr Britton—Yes, particularly when we are talking about the venal end of the scale of corruption rather than of the facilitation payments.

Mr ADAMS—If you are talking about the size of it, we have received evidence that little bribes are okay and you cannot do anything about them but that it is the big bribes like Lockheed and a billion dollars here and there that disrupt trade—that we should nail those politicians but we should let off the little public servants because that is just the way the world works. Do you have any response to that? Are little bribes okay and big bribes out, or do some of us believe that what \$10 is to somebody, \$100,000 is to somebody else? Is it all equal?

Mr Britton—They are different orders of problem, I guess. It is like asking questions about human rights. Does one make abuse of human rights less likely by legislating against it and keeping the international instruments intact and so on? Clearly, they are important, but the abuses still continue, don't they, and the abuses will continue until the civil society has grown to an extent that the people of the country demand proper action.

Mr ADAMS—So you would support educating public officials in programs that go to the heart of that area? I think we have been involved in these in our overseas aid.

Mr Britton—Yes.

Mr ADAMS—AusAID has certainly been in there. I have seen some of those programs in Laos. Would you agree that those programs are a great way of bringing on that civil service? Poorly paid police officers and poorly paid customs officers are keeping their families in whichever way they can. Would you suggest that lifting the standard is the way to get away from bribes?

Mr Britton—Absolutely, in the same way as when economic circumstances enable the growth of a middle class in a developing country you get new sets of pressures for democratisation. I think it is a very parallel argument.

Mr HARDGRAVE—Should cultural imperatives be not just a form of defence but also a reason to let somebody off a charge, give that I would not imagine anybody would go into any particular country without having some understanding of the cultural or social norms?

Mr Britton—I can assure you they do.

Mr HARDGRAVE—They do?

Mr Britton—Including Australian business people.

Mr HARDGRAVE—I think you said ‘blundered in’?

Mr Britton—Yes.

CHAIR—Happily, we are told that Australia has a good reputation as a nation for not being involved at least in large-scale corruption. Earlier witnesses have put to us that the example that Australia puts forward of good governance and attaching certain sorts of codes of ethics to conditions on which people tender for contracts—procurement and the like—have been a very useful way in which to get across a different standard of doing business. How effective has that been? I know that through the organisation both of you have had vast experience over some 35 years. Can you comment on the extent to which those sorts of influences or pressures have an impact on the ground, or is it not very effective unless there is a global movement to do it?

Mr Hackett—In terms of Australia’s reputation, I think that it is of benefit to us, and it is probably seen well and has stood us in good stead, particularly in the countries that we deal in. But the point arises where you have to differentiate between that and the practicality of actually operating in the country that you are going into. Those people can look at us and say, ‘They are wonderful, and we like them very much,’ and all of that. On the other hand, they have their own imperatives in terms of how they have to live. Yes, it stands us in good stead; however, it does not discount certain necessities in doing

business. That is where the companies that we look at training for are very interested in learning about the imperatives of doing business in the countries that they are posting people into, and about the social norms.

CHAIR—From the sorts of programs that you have had experience of, what do you teach people who are going in from the Australian end about how to deal with agents or joint venture partners, or whatever, whom they may use to get the business done? Everybody knows that obviously something happens in order to get the business done. What sort of attitude should Australia take to that? Is it just one of the costs of doing business, or is it something that we should take a more active role in trying to influence?

Mr Hackett—We can certainly take an active role in trying to influence it—and we probably do, in a general sense, with the training that we carry out. As I say, the advice is that you comply with the relevant laws, always. We also do offer advice. Our advice is not prescriptive, but we offer advice based on our own experience and from the feedback we get from our own contacts in these countries. We also advise the company and the executive being placed to develop a relationship as quickly as possible with his own senior people from the country in which he is being placed, so that he can get a picture of the cultural norms that apply for the posting he is going to.

CHAIR—In your submission, I thought there was a very interesting passage that says:

The Overseas Service Bureau has sometimes been inconvenienced by its policy of not acceding to requests for what the Convention calls facilitation payments, especially in the area of gaining visas for Australian Volunteers Abroad.

You then go on to detail the response of the OSB as being to seek to improve relationships with government departments and officials, which is no doubt a very sound way to progress. How does that actually allow anybody to get a visa, in the end? Do you have to, in the end, give in? Is it just a long drawn out process? How does that work?

Mr Britton—Certainly, there have been occasions when it has taken time. But, where we have been finding a level of inconvenience with officials on the spot who are actually dealing with issuing permits, visas and so on, and we have been running into trouble, our response has been to back out of that situation and go into the department at a much higher level. I guess the name of the program enables us to do that. We can get that kind of entry, discuss the problem and often find another way of having visas issued. Sometimes it may involve not dealing with the Department of Immigration and Multicultural Affairs but having other kinds of visas issued by the Department of Foreign Affairs and Trade in a country—things like that. We rely on senior officials that value our program and our work and we ask them to intercede on our behalf. Generally speaking, that has been effective.

CHAIR—So there have been examples where the facilitation payment has been able to be bypassed in order to get something done, such as having a visa issued?

Mr Britton—Yes, we have been able to do that. It is because of the standing of the program in those countries over a number of years. It would be a course of action that others would find more difficult.

CHAIR—I understand your position to be that there is a distinction that can be made in a practical sense between major corruption and graft, and the oiling of the wheels just to do ordinary things. From a practical point of view, do you see the payment of facilitation payments as justified to the extent that we really need to identify them and define them in our legislation? Or is it something we should just leave at large? Obviously, no-one is ever going to be prosecuted for it. Is it not better that we try and nail it on the head?

Mr Britton—That would be difficult, because the way in which it operates is different in each country.

Mr HARDGRAVE—Do you think we should encourage companies and individuals to make the process of facilitation payments transparent, so that there is no misunderstanding about any oiling of the wheels that occurs?

Mr Britton—I would have no problem with that.

Mr HARDGRAVE—Would it in itself be an acknowledgment of the social and cultural norms of the different country, while also accepting that here in Australia we would have an expectation that people would be open and accountable for the payment of these sorts of moneys?

Mr Britton—In some ways, it is an acknowledgment of the social and cultural differences, to approach it in that way. What do you think, Tim?

Mr Hackett—I think it is, as well. It could be something that could be shown. Acknowledging the cultural difference would be of enormous assistance. It also, when I think about it, might well assist some of the corporates that we talk to in defining where they stand on the matter. As I say, it is one of the major things that everybody asks for, whenever you are doing a country briefing or a corporate briefing. They obviously are very at sea themselves, and it is something that they require a lot of advice on and a lot of feedback on from as many sources as possible about how it is going to work.

Mr HARDGRAVE—Would that transparency and disclosure also assist those companies that might in fact overpay their facilitation payments to understand that perhaps they have been taken for a ride? In other words, there could be some advantage in opening the whole thing up and saying, ‘Look, this much money has been paid in this country.’

Consultants could come and say, 'You've paid far too much to get something like that to occur, because the standard seems to be this.' Transparency in fact might well be a form of forgiveness, if you like, from our culture versus another culture's demands for a payment. Would you agree with that?

Mr Britton—It might well work. You can attend meetings or breakfasts, such as the VECCI breakfasts. They have country specific breakfasts about once a month and they have some specialists come along from various countries to talk about doing business in those countries. We always attend as well. They try and get some sort of norm amongst themselves, as businessmen doing business, of what the facilitation payments are and how they work. So, yes, it may assist them to set levels or ballpark figures for themselves.

Mr HARDGRAVE—It has been, I think, an underscore of the treaty and an underscore of discussions we have had that, as Mr Adams said, essentially public servants take 'gratuities' and 'facilitation payments', but politicians take 'bribes'. The \$10 million one in Japan a few years ago, which comes up quite often, would be very obvious in a transparent regime, and likewise the \$100 that the little public official around the pyramids of Giza asked me for 14 years ago when I worked for Channel 7—money which we never paid—for permission to film, which was only good while he was in the vicinity, and then someone else would ask for another \$100. That sort of thing perhaps might be more permissible, although I must say that personally I have difficulty with it.

Mr Britton—Those are the sorts of examples where local advice is absolutely critical. You are right. Foreigners operating by themselves can often get taken to the cleaners. The advice of local staff in those situations is invaluable. The idea of having a process whereby it is possible to declare those kinds of expenses has a lot going for it, in that it brings it out into the open and acknowledges it. It acknowledges that there are differences in doing business and getting things done in different places.

CHAIR—Wouldn't you need then, in this legislation, to tackle the very difficult and thorny task of at least a generic description of what is permissible, if regrettable? Wouldn't you have to do that? At the moment in the exposure draft we have a couple of options: we can call it small, or we can put a dollar amount in, which may have certain flaws. What is your view about whether or not one could describe, in a generic way, small facilitation payments being the purpose for which they are paid or so long as they are to secure something that has to be done anyway, or some routine business type description as in the American legislation? What is your view about that?

Mr Britton—About how to describe it?

CHAIR—Yes. About whether or not one could try and tackle the notion of some generic description which would then encourage people to be transparent about it, because, of itself, the legislation recognises that, whilst corruption is a prohibited thing, there are occasions where we recognise that that is the cost of doing business.

Mr Britton—I am attracted to the notion of what actual description one would use. I would need to think about it.

CHAIR—Does the American—

Mr Britton—How do they describe it?

CHAIR—They describe it as a routine payment in order to secure a service that must be provided anyway—‘routine government action’. To me it sounds as if it could be open to abuse. You would have to try and hedge it about a bit.

Mr Hackett—It is an enormously open-ended term. It is almost not worth putting in, I would have thought.

CHAIR—I think it has its problems, I agree with you. I am trying to tease out with you whether you have any thoughts about how one might approach it in a more effective way.

Mr ADAMS—If it can be recorded, at least as a measuring tool for looking at this issue, it would be helpful. One of the things I have been trying to find from witnesses is whether anybody has written down how this operates, how bad this is, how much is paid, et cetera. Of course, there are not too many statistics about to look at this problem as a global issue. We are looking at something because the Americans have said, ‘We have got legislation and we are getting screwed—everybody else does not have to comply.’ That is what has been driving the situation, and that is why we are here as a committee. The OECD has picked it up.

If we are going to do something, it has to be effective either for the longer term or for the present. I guess what I am asking you is this: if this stuff is recorded within company records, at least we can start to have a look at what is being paid in overseas bribes or facilitation payments. And there is also the stuff that we will never see—that which goes through the consultants and the joint ventures. I would value your comments on that.

Mr Britton—That is what I was thinking. I am thinking of circumstances with really quite low levels—lots of permits and things like that—where, in fact, the easiest way to go about it is to hire a local company whose business it is to secure those permits or services for you. In terms of transparency, what you are doing there is hiring a local company to perform a service for you, and that is concealed already.

Mr ADAMS—Those companies would grow, I would think, if OECD countries have this legislation. An Australian company doing business would just hire somebody. It is not going to go into their books; it will go to one of these facilitation companies that spring up throughout the developing world.

Mr Britton—A service bureau.

Mr ADAMS—There are lots of names, lots of words to be used.

Mr HARDGRAVE—Based on experience over 35 years in 45 different countries, have you had any opportunity to perhaps compile some examples of these facilitation payments? Based on what you have heard or perhaps on what people have produced in evidence to you, do you know what it costs to make something happen faster in another country? I do not need you to produce it now, but would you be able to return some information to us on notice?

Mr Britton—It would be very difficult.

Mr HARDGRAVE—Okay. Transparency is important—seeing we are having a discussion about these matters I will just bounce this off you—but the other side of it is that a business expense is a tax deductible item. If a facilitation payment is recorded, one would submit that it would then be a tax deductible item and the tax office would probably want people to produce receipts. We are hardly likely to see the wharf worker off-load a particular pallet faster and issue a receipt for the facilitation payment along the way, so do you have any views on that aspect? It is perhaps going outside your brief.

Mr Britton—Pass, I think.

Mr HARDGRAVE—That is fair enough. But, either way, you see transparency and a confession, if you like, that certain amounts of money have to be paid for certain things to be done and regular government action as a reasonable proposition?

Mr Britton—I think that is reasonable, and it has the other positive effect of reinforcing the notion that people simply have to learn to behave differently.

CHAIR—Just taking you up on that point, you made the very forceful point in your submission that bribery really requires the agreement, or the consensus, of two parties and that, whilst this legislation is aimed at one side of the transaction, a lot needs to be done at the other end by way of education and what have you. Can Australia really do this by itself, or does there need to be a much bigger, global attack through this kind of education program that you have in mind? Perhaps you could tell us what kinds of training programs and education programs you were referring to in your submission?

Mr Britton—I certainly think it is important that Australians realise that people are obliged to carry out a certain level of this activity that we are talking about for purely domestic economic reasons. I think we can do more to enhance our understanding and awareness of where the person asking for the payment is coming from. We are not talking about the \$10 million bribes here; we are talking about the lower level stuff. People do not have any choice. The wages they are receiving are not enough to live on.

CHAIR—Is that really seen as a bribe in those circumstances by people in that situation, or is it seen as simply a payment for a service?

Mr Britton—In most cases it is, but coming into the country from outside, we tend to think of it as a bribe.

CHAIR—How do you convince people in those situations—by education, persuasion or any other appropriate means—that that is not appropriate when they are getting \$30 a month for a wage? What do they do? How amenable would they be to any education or persuasion?

Mr Britton—I am talking about education for the Australians simply to enable them to empathise with the person at the other end making the request.

CHAIR—I am sorry; I have misunderstood. In your submission I thought you were talking about needing to educate the other side to the transaction as well so that there is some understanding of why an Australian would be reluctant to engage in those practices—in an ideal world.

Mr ADAMS—Good governance in the long term.

Mr Britton—Good governance is the critical thing there, and that is a very long-term process. I go back to the comments I was making earlier about drawing a parallel with human rights abuses. It is when the emerging middle class of a developing country starts to feel that these payments are beyond the pale that you will start to get some changes.

CHAIR—So you think that, while people are really living on the verge of poverty, there is very little prospect that you can do much about this very low level of facilitation payment?

Mr Britton—Not at all.

Mr ADAMS—Any more than the rights of a human being will be protected by a lowly paid prison officer.

Mr Britton—That is right.

Mr HARDGRAVE—I guess, on one last philosophical note, that having trade links and having corporate level links with any of these countries will help influence the sorts of outcomes that we have just been talking about, wouldn't they?

Mr Britton—The more connection and interrelationship there is the better.

CHAIR—You really do give an insight into a certain aspect of this that we have not had before the committee. I realise that there may be some sensitivities with what I am about to say, and if you are unable to answer the question please tell us. Are you able to talk anecdotally about the extent of the difficulty in particular countries? I stress that if you are not able to do it you should say so.

Mr Britton—In terms of comparing countries?

CHAIR—Yes.

Mr ADAMS—Chair, we would not want to know the countries.

CHAIR—No, but one can talk about regions.

Mr Hackett—Only in a very general sense. In certain countries that are perhaps more developed than others you might find that there are facilitation payments to get licences and permits—fairly basic things of that nature—whereas in other countries that are perhaps less developed it might start from the moment of arrival where you start paying off people to get your personal effects off the wharf and that runs all the way through from there.

To speak more specifically or to give specific examples is probably more difficult. I would suggest that you start off at the very bottom of the tree and you start paying out from the minute that you arrive to everybody whom you come up against. You go to the more developed countries and you do not have to do all of that; there are basic living standards in place that probably do not necessitate it.

CHAIR—With your example of the visa problem, how often would that have occurred? To me it is a very graphic example of what we are talking about with facilitation payments. Has it had any lasting consequences? Have programs been held up that have had other bad effects or has it been something that has just been able to be absorbed?

Mr Britton—There have not been many instances and we have been able to overcome them. In saying that, there is a sense, too, in which the Australian Volunteers Abroad program is known to be a program that is supported by the Australian government so it carries a different kind of prestige.

CHAIR—So you would see it perhaps as a very different measure for Australian firms to be going in there without the backing of the Australian government and doing business to business as opposed to Australian government agency to some agency in another country?

Mr Britton—That is right.

CHAIR—So it would be a lot harder for business if you could not bring these persuasions to bear?

Mr Britton—I think that is true. I would also echo what Tim was saying. You can almost draw yourselves a graph in terms of the social and economic development of a country and equate that with the frequency with which you are going to need to make a payment. That also relates very directly to the ability of the public service to actually perform. Sometimes it is not a facilitation payment so much as a payment that can enable an act to be performed.

CHAIR—Can you elaborate on that?

Mr Britton—In very poor countries that have been through periods of civil war and so on, chronically you find that the civil service is simply not performing.

CHAIR—It is almost non-existent, I suppose.

Mr Britton—You might have a minister or a vice-minister and a few senior officials. The other people might be there on the books but they are not there in the office. It is not because anyone is being negligent.

CHAIR—So you are paying to have somebody appointed.

Mr Britton—You are paying for them to be there.

Mr ADAMS—But they understand they do not get paid unless you pay them? Is that what you are saying?

Mr Britton—Yes.

Mr HARDGRAVE—Would it be your view that this treaty is really aimed more at the Lockheed, Japan type incidents?

Mr Britton—I would hope so. We felt that we needed to raise these other issues as well so that the dragnet actually allows for people to keep living and keep body and soul together.

CHAIR—Thanks to your evidence, and that of others, we are well aware of the fact that it is a very multifaceted and complex problem. Would you nonetheless support it as having some useful purpose if we were to implement it, whatever its limitations? Do you support it?

Mr Britton—Yes, we support it, and would support it in the same way as we support the existence of the human rights instruments. It is an important agenda setting

step, I think.

CHAIR—Have we not covered any aspect that you wanted to draw to our attention, or any other aspect of either the exposure draft or the general problem that we have not really covered with you that you wanted to raise?

Mr Britton—No.

CHAIR—We would be grateful if we could get back to you as we commence our deliberations in case there is anything we need to clarify. Apart from that, we are very glad to have had you here. Thank you very much for your assistance.

Mr Britton—Thank you.

Proceedings suspended from 10.18 a.m. to 10.51 a.m.

WILLIS, Mr Peter Gordon, Chair, International Trade and Business Committee, Law Council of Australia, 19 Torrens Street, Braddon, Australian Capital Territory 2612

CHAIR—Welcome. Your submission has been published already by the committee. Are there any amendments you want to make to it? Otherwise, we would be glad if you would make a brief opening statement and then we will proceed to explore some of the issues with you.

Mr Willis—There are no amendments of substance. There may be a couple of typographicals, for which I apologise.

CHAIR—I think we can live with that.

Mr Willis—Thank you. By way of very brief opening comments, the Law Council's International Trade and Business Committee essentially brings a perspective of experienced legal practitioners who, through the advice that they provide to a wide range of clients—large business and also small business—and through their interest in international trade and, more recently, international investment, believe that they have experience with the issues which this convention and the exposure draft bill give rise to. The committee strongly supports Australia acceding to the OECD convention and, as a consequence, supports the introduction and passage of legislation in terms very similar to the terms of the exposure draft bill.

The effectiveness of the OECD convention will be critically dependent on it being implemented and on the terms of the implementing legislation. The commentaries on the convention that were prepared by the OECD make it clear that the objective is what they call functional equivalence between the states parties to the convention, without necessarily requiring uniformity or changes in fundamental legal systems. The Law Council committee believes that, without a close degree of uniformity and a close degree of adherence to the convention, there is a risk that that flexibility could be abused and that the convention could be rendered less effective than it might otherwise be.

One of the most critical elements in Australia moving forward with the OECD convention in conjunction with the other OECD members and additional countries who volunteered already to be party to it is that, unless we all move forward together, there is the risk that someone will feel that they are at a competitive disadvantage. There is already the problem of competitive bribery. People may not necessarily volunteer to pay bribes but may feel that it is necessary, because they fear that their competitor from another country will do so. Really, to remove that risk is one of the most important functions of acceding to the convention and passing legislation.

Those are my introductory remarks. I would hope to discuss with committee members the four or five recommendations which the law council has put in its submis

sion.

CHAIR—Would it be convenient for you to go to your recommendations and outline them?

Mr Willis—Certainly. The first is that Australia should accede to the OECD convention and ratify it. The second is support for the exposure draft bill, which I have mentioned. The third is a matter at paragraph 2.5 of our submission where we recommend that the Income Tax Assessment Act be amended to exclude, in express terms, any deduction for bribes paid to public officials or other corrupt payments, or the reimbursing of such amounts if expended by others. That is a matter which the OECD in its deliberations has also touched upon but it has not been formally included within the convention. But the Law Council believes it is a significant and important matter.

CHAIR—I am sorry to interrupt you but you may be aware that that is actually proceeding in tandem with the examination of this legislation.

Mr Willis—Yes, I appreciate that officials are working on it but it was believed that it is important to—

CHAIR—reinforce it. I interrupted you; sorry.

Mr Willis—That is fine. Our final two recommendations go to the drafting of the bill—the terms in which Australia implements the legislation. The first is that the Law Council committee would strongly support the bill extending to conduct by Australian citizens, including Australian corporations, which takes place entirely outside Australia. As it is presently drafted, there is a requirement in subclause 3 of 14.1 of the draft bill that at least part of the acts occur within Australia. For reasons that I am very happy to discuss with the committee, we would believe that would severely limit the effectiveness of the legislation and would leave very practical situations ungoverned by the legislation and so render it fairly ineffective. I hope to return to that.

The final matter on which we have put forward what we have described as a ‘tentative’ recommendation, in view of the difficulty it poses, is the question of facilitation payments, which, I am aware, was discussed at some length in the previous submission and, no doubt, in others that the committee has had. The Law Council’s recommendation is to adopt the second alternative in the exposure draft bill—that is, clause 7C, which would exclude payments of a small value only, without further definition.

I should say, in elaboration of this submission, that in fact the drafting of the bill is a little more subtle than that; it is not only small payments but it is small payments of a kind calculated to obtain or retain an improper advantage in the conduct of business. We believe that is an appropriate further limitation of facilitation payments.

In concluding my remarks on this point, I will state that we do not believe it is

possible to specify a fixed dollar sum particularly given the vagaries of exchange rates, but, even putting that part aside, we do not think that a fixed single sum is really appropriate or workable. The Law Council committee would not support leaving the matter to the discretion of prosecutors, for the reasons we have set out in our submission and which I am happy to discuss further.

Mr HARDGRAVE—Mr Willis, on the question of tax deductibility of bribes, it was suggested to this committee earlier that obviously local consultants are hired in a foreign country to handle the overall facilitation of certain activities and this might become a growth industry in developing countries. What about the question of tax deductibility of these and all expenses associated with these sorts of consultants? How would you view that?

Mr Willis—Our primary focus, and we believe the appropriate focus to which the convention itself is addressed, is really the other end of the spectrum, the large-scale payments, to what is called ‘grand corruption’. That is an easier case to deal with on the question of tax deductibility. Could I state a position on that and then turn to the specifics, because I think it influences the discussion on the question that you have put.

For grand-scale corruption, we can see no basis for permitting deductibility of those payments. The deductibility of facilitation payments really then flows out of the treatment that you give to facilitation payments under the criminal provisions. If facilitation payments are exempt from a criminal offence—so the payment of a facilitation payment, however defined, is not an offence—there is less basis for precluding tax deductibility of the amount. In other words, they should really go together. The deductibility is probably appropriately governed by the treatment of criminality of the particular payment concerned.

Mr HARDGRAVE—I think you were in the public gallery for a lot of the discussion with the previous witness about the question of transparency. Do you think the question of the small value, contained in clause 7C of the proposed section 14.1, would assist in further defining and quantifying the small value transparency over time and would gather evidence to define perhaps further what a small value seems to be in practice?

Mr Willis—What is not clear to me is quite how that would work.

Mr HARDGRAVE—Maybe I will just give you a rough suggestion. If, over a period of time, because of the transparent approach or disclosure type of approach on facilitation payments, we find that there seems to be a standard amount for getting certain things done in certain countries, and that starts to define what a small value would be, it would then become acceptable that it was a reasonable business deduction and over a period of time that would become the norm. I guess the other side of that is, because we have also talked about the evolution of developing countries through to slightly developed

to more developed to having greater principles such as the ones that we have here in Australia, all forms of facilitation payments would start to disappear. By the same token, I would have thought that, at some stage in the courts—you are a lawyer; I am not—the question of small value would be tested eventually and transparency may actually help in the process of determining what is an acceptable small value.

Mr Willis—I would have a reluctance to have a schedule of acceptable amounts per country developed too readily, partly because it echoes a practice that I understand applies in France where there is a schedule of bribes per country, which the tax authorities there allow, and it becomes essentially just a screen for ‘anything goes’. I am not sure that the tax office or tax commission would necessarily welcome it. They already have an informal limit of \$300, as I understand it, which can be deducted for any amount for certain business expenses.

Mr HARDGRAVE—That is an accumulated amount over a year, isn’t it?

Mr Willis—Yes, it is, and it is not related to bribes; it is just related to small amounts for which you do not need to produce receipts. That has had some notoriety recently where one of my colleagues in the profession came to grief in notorious circumstances in Cambodia. But putting that aside, in a sense there might be benefit for the Taxation Office, if it were so minded, to require businesses in their tax returns to identify amounts paid of this nature. The Taxation Office may on the other hand feel that that is elevating a particular deduction or payment to a higher level of scrutiny for reasons not related to the revenue. So they may be reluctant to—

Mr HARDGRAVE—You have raised the question of the French having some sort of scale, and this in the country that has the terminology ‘laissez faire’ well and truly entrenched across the world, so I suspect that could be the motivation. Do you have access to that? Do you know how to get hold of that information to assist the committee?

Mr Willis—I can certainly make inquiries. I certainly believe that it may be possible to obtain it.

Mr ADAMS—So the Law Council of Australia believes in big bribes but not little ones? Is that correct?

Mr Willis—We are opposed to big bribes more than we are opposed to the little bribes. We take the position that no bribes are good, that all bribes are bad—

Mr ADAMS—I am pleased to hear that.

Mr Willis—but that if we have to take a position, on pragmatic grounds we believe we should deal with little bribes later. Seeing that both the OECD convention and the original United States Foreign Corrupt Practices Act have provision for separating little

bribes into a separate category, we take the position that we should do so too.

Mr ADAMS—You do not have much comment on that. You do not want to leave it to the prosecutors. You do not want a schedule. What was the council's recommendation? What did you recommend there?

Mr Willis—You have two controlling factors. Firstly, call it one of small value, and that is obviously a relative matter but is weighted at the right end. Secondly, the other aspect of the current drafting is to say that it has to be a payment not to actually obtain a business licence or the grant of a contract or a major business opportunity but more in the running of the business, which is the effect of the drafting.

Mr ADAMS—The facilitation. You mean getting the phone on, getting something delivered, getting something past customs, as opposed to getting the licence to run the company.

Mr Willis—Yes, or as opposed to the contract to install a major infrastructure project, to build a new toll road or to build a dam or a bridge.

Mr ADAMS—Are those words written anywhere, where we separate those? What is a term indicating something between getting a contract and facilitating something?

Mr Willis—The distinction is in schedule 1 of the exposure draft bill, in 14.1 subsection 1(c), which says a person is guilty of an offence if the person pays, and then it divides into paragraph (i) and paragraph (ii). Although not in the lay language we have just used, that is the distinction which the legislation draws between obtaining or retaining business—if you like, the primary licence, contract or whatever it might be—and, secondly, obtaining or retaining an improper advantage in the conduct of business. 'Improper advantage' is a defined term and has some special meaning, but if we just focus on the words 'in the conduct of business' that is the operational ancillary part. That distinction flows into clause 7C, which is on page 6 and 7 of the draft legislation. It provides that a person is not guilty of an offence if, under paragraph (a), the benefit has a small value and then, under (b), the operational subparagraph (1)(c)(ii) applies—it is an operational payment—but subparagraph (1)(c)(i) does not apply.

CHAIR—I would like to stick with the facilitation for a moment. Do you see that there is any problem in adopting the second alternative so that we are focusing on 'small'—which no doubt would depend on the circumstances; but assuming one can get over that, do you see any problem with the link to obtaining or retaining an improper advantage in circumstances where what we are really looking at is for a service or something that is actually due to a person and there could be a problem with, for instance, having that link being also characterised as improper? What we are really dealing with are routine services that somebody is entitled to as a matter of course, like getting your stuff off the wharf. Where is it improper?

Mr Willis—I accept that comment. It might be that the improper element is in jumping the queue.

CHAIR—What about in a situation such as the previous witness gave—I do not know whether you heard it—where he said that in certain countries it may be that an official simply does not exist or is not there; there is nothing improper in requiring some service to be done.

Mr ADAMS—Or where he is not getting paid and the only payment he is going to get is by giving you a service.

Mr Willis—I think those sorts of situations go very clearly to the morality of the claimant. You could say that it is a moral thing to ensure that somebody can live or can be paid when the government cannot. But in a coldly technical way, if you wish, the law of that country probably says that the official should be paid by the government, and only the government, and the official should not receive amounts from private citizens or applicants for customs clearance or applicants for drivers licences or whatever.

All these definitions of facilitation payments, even the definitions in the US Foreign Corrupt Practices Act, when you parse them or technically break them up and look at each element, have difficulties because in practice they have a life which is slightly different. People understand them in a way different from the way they are literally written. I suppose, in a policy sense, so long as that understanding does not become too *laissez faire*, is not blown apart too widely, the fact that it is interpreted loosely does not matter so much, so long as we are not catching people for minor or inconsequential matters or things to which they are entitled.

The phrase is often used that you are ‘just paying for something to which you are entitled’. But if you think in the Australian context, if you were queuing to get a drivers licence or if you had come from overseas and brought a UK drivers licence here and you wanted to get it converted to an Australian licence or get an Australian licence issued on the basis of it, it might be that you are entitled absolutely to that or it might be that there is an exercise of discretion which is just so routine that people assume that it is automatic.

Again, in the customs context, we say, ‘We have a right to those goods.’ But presumably you have a right to have your goods cleared through customs only if you have presented the proper paperwork and the customs official judges that it is appropriate and that there is no duty to levy on the goods. Just conventionally we say, ‘You are entitled absolutely. You are entitled to have your goods released,’ but there is in fact some kind of discretion to be exercised by the official.

CHAIR—Or even turning a blind eye in a certain sort of situation.

Mr Willis—Well, yes, and that further—

CHAIR—There is something that concerns me about this linked part of this definition. I know that we are looking here at providing an exemption. But some witnesses have said to us, ‘There should be a blanket outlawing of bribery in any circumstances, and because it is only small we do not need to worry about that because no prosecutor in their right mind would be worried about it.’ Assume, for the purposes of argument, that with a rush of blood to the head, or whatever, some prosecutor goes after some Australian firm or an individual who has paid perhaps a series of facilitation payments in a very poor country simply to get an official to turn up and put stamps on things. It might even be a government agency that has to do this. I would think there could be an arguable defence that that was not an improper advantage.

Mr Willis—That might be so. I do not have a difficulty with the legislation in that context. There is not much guidance to what ‘improper advantage’ means in the proposed bill itself.

CHAIR—If your council has been able to look in any detail at this I would be grateful—and I am certain my colleagues would—for your views about the limitations of trying to have some generic description, as in the American description, of routine government business; if, instead of calling it ‘small’, one tried to characterise it and say what was included as a routine government business that was not the interest of this particular legislation. Would you be able to make a comment?

Mr Willis—We would regard it as helpful if words or concepts similar to those of the United States were picked up, on the principle that if you adopt words which are similar to some other nation’s laws and in a similar context, you can often obtain the benefit of the practice and jurisprudence that has been developed in that country so you do not have to do anything from square one. It still remains for Australian courts to say that they will follow, in this case, US precedents on that meaning.

I learnt this morning that the United States may be introducing amendments to its Foreign Corrupt Practices Act, as part of its own adoption of the OECD convention. Whether in fact that defence in the FCPA is to be amended, I am not aware. I am sure that either my organisation or other witnesses you will hear from later today may be able to obtain that. The committee may already be aware of what the US bill is going to be. Assuming that that provision in the US law is not amended, or is only amended in passing, there could be advantage in adopting a similar expression—although the committee itself believes that it is also worth retaining the smallness aspect, because the US does not actually have a small element in their exemption. The suggestion which we put in our submission was that it might be possible to combine both the smallness element and the routine nature of the function—which is derived from the US practice. It is not very precise in terms of drafting, but I think it a workable concept.

CHAIR—It is helpful; and it has been very interesting to hear you say why you think that the element of smallness actually adds some value to this generic description,

even though there would no doubt be huge problems for a prosecution in working out 'small' to whom.

Mr Willis—Yes. I am conscious that perhaps some prosecutors or others who have made submissions have not seen the need to retain the smallness aspect. Other witnesses have said, 'We'll say it's fine to rely on the prosecutor.' I think that the Law Council feels that corporations and Australian citizens need some guidance, some kind of signpost, and that, even if it is undefined, using the word 'small' is a signpost which is of assistance to them.

CHAIR—Thank you. The other aspect I want to explore—and either of my colleagues may wish to take it up—is the point about jurisdiction, which is an interesting one. As I understand it, the committee is recommending that this exposure draft should be amended to extend the reach to conduct entirely outside Australia. By that, do you mean conduct of any Australian subsidiary or any person, so that there would not need to be a territorial connection for the purposes of attracting this legislation?

Mr Willis—That is correct. As we suggest, it is an accepted and perfectly conventional basis for a nation to exercise jurisdiction over its citizens, wherever its citizens happen to be acting. It is not necessarily the routine basis on which parliament legislates. The courts in fact presume that parliament intends to legislate territorially—that is, for Australia—unless the legislation expressly states otherwise. But that is just a matter of convenience and, as I say, a presumption of interpretation. But, in this context, the subject matter—foreign public officials—necessarily is going to have the main action on the ground somewhere outside Australia.

We really feel that, if Australian citizens—and that includes Australian incorporated companies—are party to payments or proscribed activities in the foreign country and do not refer back to headquarters and do not source the money out of an Australian bank account but use local funds or a US dollar bank account in Singapore, Hong Kong, or wherever, and the money is then sent off to Switzerland so that there is no connection to Australia, that would be a half-hearted implementation of the convention. Not only would it be half-hearted, leaving a large hole, but in fact it would be probably failing to apply the legislation to the most common occurrence or the most common scenario.

Mr HARDGRAVE—What about an Australian company or an Australian national hiring a locally based consultant to grow a business by being expert in 'no questions asked' facilitation? Do you take it to that extent, too?

Mr Willis—The legislation extends to doing an act through another. The draft legislation and the convention already expressly catch the hiring of somebody else, or the paying of a middle person who then passes on the payment.

Mr HARDGRAVE—So an Australian company or Australian national doing that

quite knowingly in order to try to be seen to be at arm's length would in fact still be caught out?

Mr Willis—That is correct. They would still be caught if there were, as currently drafted, some further Australian territorial connection—unless that act of hiring the middle consultant were somehow caught under the conspiracy or aiding and abetting provisions, because those do not have the same territorial connection. They are always much harder provisions to prove.

CHAIR—Sticking with the jurisdiction question for a minute, it is no doubt quite right that, from a jurisdiction point of view, the nationality principle means that you can effectively pass this legislation. But, apart from the recent child sex legislation, it has certainly been conventional practice—no doubt partly due to evidentiary problems—that Australia has not, so far as I am aware, made legislation which has a reach of the kind that is being contended for here. What is your view about how one would really make it workable anyway? Would it be observed more in the breach than in the observance, if you could not really prosecute and could not gather the evidence and Australia then had to cope with the huge logistical difficulties of resourcing the proper enforcement of this kind of legislation?

Mr Willis—I will comment on the introductory proposition and then answer the question directly. Parts of the Corporations Law also apply to any person anywhere in the world, although that is in relation to shareholdings in an Australian company or takeovers of an Australian company—but that might be justified on the territorial connection.

CHAIR—Yes, I was just about to say that there might be a distinction. Assume that I am wrong about that, and that there are examples. Looking specifically at this jurisdiction and what is proposed here, how workable is it? That is really what we would like some assistance on.

Mr Willis—Our impression from our clients and from businesses with which we have contact is that they would broadly welcome legislation which, like their American colleagues, they could then invoke so that, when approached or pressed on these matters, they could say, 'It would be committing an offence under our own country's laws for us to make such a payment.' There is benefit in having a law which extends to those activities.

CHAIR—Commercial benefit?

Mr Willis—Commercial benefit. The effectiveness of the law should not be measured only in terms of the number of prosecutions launched or convictions obtained. It will be necessarily more difficult to obtain all the evidence than it might be in a domestic situation; that just goes with the territory. I do not think that that necessarily needs to guide the question of what the appropriate reach of the legislation is.

The other thing to consider is that another part of the benefit of the legislation is the assurance which it provides, firstly, to legislators of other OECD countries and, secondly, to companies and competitors of our companies from those other countries. To have the maximum reach, we submit, assists in giving the assurance to everybody that there is not going to still be open slather for bribes, because you are removing the defensive element in competition: the need to pay a defensive bribe because your competitor from country X is likely to be in there paying one.

CHAIR—Rather than it being a disadvantage, do you think it would be a competitive advantage to have it?

Mr Willis—We would submit that that is the case.

CHAIR—There was one other aspect or proposition in this that I wanted to put. You mentioned—quite rightly—the aim of functional equivalence. I want to suggest to you that it might be easier for civil law countries and an inquisitorial system to have legislation of this reach than it would be for a country such as Australia, where you have got an adversarial system and a very difficult system of facilitating proof. Is that correct or not?

Mr Willis—I do not know that I am expert to respond to that kind of comparative law concept.

CHAIR—You said that the effectiveness of this legislation will depend on the terms in which it can be enforced in each country. I am interested to know whether that would offend against functional equivalence or assist it.

Mr Willis—The effectiveness with which the convention is carried into force—rephrasing my opening remark or changing the emphasis there—means, as I said a moment ago, that we believe that the benefit is to be measured in terms of providing a signpost, again, to Australian business and providing a reference point for them, rather than having the benefit be measured in terms of how many prosecutions or convictions are obtained. Our sense is that Australian businesses do not like to pay bribes; do not wish to pay bribes; and do not, in fact, pay bribes very often, in comparison with some other OECD country companies—and that is a good thing. This legislation, we feel, will strengthen that instinctive resolve of Australian companies and will be beneficial for that context.

CHAIR—There is one thing I want to get confirmation on. I am sure that the thrust of the submission says that you would see it as inappropriate to simply leave small facilitation payments at large so that there is some discretion in a prosecution, leading to considerable uncertainty, no doubt, for business as to where they had crossed the line and where they had not.

Mr Willis—Yes. Our preference is that there be a statement in the legislation of some kind of facilitation defence. Personally, I have no doubt that prosecutors generally would not pursue minor infractions but I believe that it is—as a desirable policy matter, if on no other basis—a good thing for the legislation to spell out a defence or an exemption where clearly it is understood by all concerned, including the legislators in the parliament, that no-one would wish to prosecute in those cases.

CHAIR—Do you see any value in the legislation being extended not only to foreign public officials but also to foreign public officials' relatives or some other entity?

Mr Willis—Yes. A great deal of our legislation picks up, if you like, the family or associates of individuals. The legislation I am most familiar with in my daily practice is the Corporations Law, wherein a payment to, or dealings with, directors or their immediate family or relatives can very often be treated as being economically equivalent. That would be a loophole worth closing—very much so.

CHAIR—Have you had a chance to look carefully at the definitions? If so, are you comfortable with the definition of 'foreign public official' adequately encompassing people acting in a de facto role or even an ostensible role?

Mr Willis—There were a couple of points about the definition of foreign public official that, as a matter of drafting, we would raise for consideration. One is that there may be benefit in making express the fact that the official could be from any of the arms of government or—

Mr ADAMS—Political parties?

Mr Willis—That is a second matter; yes. But I am thinking here of legislative, administrative and judicial arms, under our notions of separations of power—notions which are not necessarily replicated elsewhere. We should make it clear that judicial organs, as well as administrative and legislation organs, are included. It is in the OECD convention and in the notes to it, but it just does not leap out of the definition.

CHAIR—It doesn't?

Mr Willis—No doubt the drafter would say that it is implicit, but I think it would be helpful to make it explicit.

CHAIR—Which is why I am raising it with you.

Mr Willis—Secondly, there is the matter of someone who represents that they hold power or who—

CHAIR—Holds out?

Mr Willis—Yes: holds themselves out as having the power, ostensibly. In fact, in countries where you have shadow systems of power—as in the ‘Party’ on the one hand, and the nominal or duly constituted government on the other hand—it seems to me that officials who call the shots, colloquially speaking, should be included. That then gives rise to Mr Adams’s point, and it is one which the OECD is, I believe, doing supplementary work on: the question of political parties.

There are systems, not just in one-party states but in many countries—and Europe itself has been a prime example of this in recent years—where there are payments to the party official or the secretary-general or the fund raiser of the party, who then procures, or is alleged to procure, benefits. We believe that that is part and parcel of the problem which the OECD convention is seeking to address, and that Australia should support the extension of the convention and the legislation to cover party officials, where there is a clear link between the payment to the official and government somehow obtaining favours, under the definition of obtaining business or obtaining improper advantage.

CHAIR—Thank you very much Mr, Willis. That has been most helpful. Because we are looking at a specific bill, as we get into our deliberation phase, we would be grateful if we could get back to you if there is something that we need to clarify and need your input on. Thank you very much to you and the committee for assisting us in this way.

Mr Willis—Thank you.

[11.41 a.m.]

HURLOCK, Mr Brian John, Convenor, Charter 89 Society, PO Box 6137, Footscray West, Victoria 3012

Mr Hurlock—I appear as a private citizen.

CHAIR—Your submission, a very thoughtful one if I may say so, has been published already by the committee. Are there any amendments or additions you wanted to make to it? Otherwise we would like to hear an opening statement if you wish to make one and then we will proceed to questions.

Mr Hurlock—I have no amendments at this stage and I would like to make a short opening statement. First may I say how pleased I was to make a submission to the OECD convention and on the Australian government's exposure draft. I am pleased to be involved mainly because of an ongoing desire to be a participant in any campaign against corruption in all of its manifestations, including the abuse of human rights which is almost invariably a direct result of various forms of corruption.

In my submission to your committee I gave you something of my experiences in South-East Asia. It began with a year in Vietnam in 1970-71 but it is more particularly concerned with my eight years living in South-East Asia between 1983 to 1993. I will not repeat that detail in this opening statement. Of course I will be more than pleased to answer any questions you might have about that involvement later.

Turning directly to the government's exposure draft, as a layperson who is not a lawyer, a politician, an academician or a person with a professional interest in these matters, I see bribery as just one component of the overall problem of corruption, corruption often being broken down into the component parts of extortion, bribery and nepotism. I have said for years that the first essential step in any fight against corruption in society is to put a spotlight on it. That is to expose it to public view and attention and to keep fighting it no matter how the particular form of corruption is changed, disguised or temporarily stopped to put people off the scent.

The battles must be fought on two main fronts, that is legislation, legal actions, ombudsman and/or anti-corruption agencies at one end and fostering the work of particular NGOs working amongst the people at the other end. Of course, a free and fair media is an important part of the equation at both ends of the battle fronts.

I see the success of this OECD convention on combating bribery and the complementary government legislation to be as important as any similar legislation in relation to UN human rights conventions. I see it as all part of the one struggle to achieve greater respect for human rights, human dignity and equality before the law.

In relation to the government's exposure draft, I had only one major criticism. It relates to subclause 14.1(3). I do not see why we should treat Australian citizens who bribe foreign officials in any different way from how we now treat Australians who abuse children in foreign lands and that is in terms of being able to prosecute them in Australia even if the alleged crime is committed in its entirety overseas and even if every part of the reward for the Australian's bribery was transacted and stored overseas. Why can we not make a further exception of those people, making them fully liable for their overseas actions? I feel that we would be more in compliance with the spirit and the intent of OECD convention article 4.2 if we were to make such an exception of those Australians who might bribe foreign officials. I really do believe the words contained in the government's own national interest analysis:

Bribery of public officials will ultimately disadvantage both suppliers and customers and at the same time undermines the integrity and, in some cases, the stability of governments. This is a serious international issue and the criminalisation of bribery of foreign officials is an important step in addressing it.

If I might be so bold, I will also quote some of my own words from page 7 of my written submission where I said:

We cannot keep giving in to corruption. If corruption is allowed to run unchecked you know it will destroy many government economies throughout the world, and then eventually destroy our own.

The other major point I made in my submission was in relation to the exposure draft subclauses 14.1(7A), (7B) and (7C), the subject of 'facilitation benefits'—referred to in some places as 'tea money,' 'coffee money' or 'hurry-up money', or as the 'grease or oil of the wheels of bureaucracy'.

I acknowledge the huge dilemma which this area of activity represents. I admitted I had no better suggestions to make than those outlined in your exposure draft, but I sounded a warning that the relative value limits to be included in subclause 14.1(7A)(a) should be the least amount thought practicable, lest it be exploited to the maximum—as it inevitably will be regardless of the value.

As pragmatic as we must be in accepting the reality of this situation, I wondered whether others were struck by the irony of this part of the proposed bill? Here we are drafting a piece of essentially anti-corruption legislation, but contained within it is an exemption for an activity which could be described as just a little bit corrupt—and only if the bribes, or 'coffee money', are small amounts. But I still understand the need for pragmatism, with some caution.

While I really do have some sympathy for the concerns of the Australian Chamber of Commerce and Industry and admit that some business may well be lost to organisations which still bribe, we must cop the short-term losses in pursuit of the long-term gains. I am reminded of our own efforts in the Charter 89 Society, a voluntary organisation, from

1993 onwards to get organisations, sections of the media and the government behind the international campaign to ban landmines.

At first, many people thought we were a bit mad. I was often told, 'You might as well try to legislate against war.' But many of you would now know of the antipersonnel landmines treaty initially signed by 122 countries in Ottawa, Canada, in December 1997, and you would know that Jody Williams and the ICBL were the joint recipients of the Nobel Peace Prize for 1997.

Although these victories are, in reality, quite small in the context of what has to be done, nevertheless I would still like to compare the success so far with the 'it will not work' concept of the ACCI in relation to the OECD convention on combating bribery. In this, I was relying on information I read on page 6 of the government's national interest analysis, so I hope I do not do any injustice to the ACCI.

I would like to finish up, if I may, with a short quote from a very famous man, an ex-secretary-general of the UN, one of their early secretary-generals and a son of South-East Asia, Mr U Thant. I believe this quote has relevance not only to this subject of bribery but also to the overall subject of corruption, and it has much relevance to what has happened with the meltdown of South-East Asian economies now—and possibly to what will happen in the next few years. I quote now from a UN document, *ABC teaching human rights*. It states:

Writing twenty years after the War, for example, in a review of The United Nations and Human Rights, the then Secretary-General, U Thant, declared that: "The establishment of human rights provides the foundation upon which rests the political structure of human freedom; the achievement of human freedom generates the will as well as the capacity for economic and social progress; the attainment of economic and social progress provides the basis for true peace." He saw in the promotion and protection of human rights—in the "ascending spiral", as he called it, of human freedom and progress, prosperity and peace—the "very essence" and the "deepest meaning and motivation" of the United Nations Organisation.

Thank you very much for your audience. I am happy to answer any questions you might have.

Mr HARDGRAVE—I have read through your submission and I echo the words of the chair. It shows careful consideration and it seems to expose, in itself, a great deal of experience in a number of different aspects. Without giving any offence, a lot of it probably goes way beyond the brief of the Joint Standing Committee on Treaties, but I appreciate the background to it. It is in fact compelling reading.

There is one aspect that I just wanted to take up with you. It is where you are reflecting on the national interest analysis on pages 1 and 2 and there is a quote out of page 7 of your submission regarding widespread bribery, et cetera. What about commissions as a mechanism of kickbacks built into the price of legitimate activities? In your

experience, are they something that we see a lot of?

Mr Hurlock—I think you do have legal commissions and then you probably have bribery which is coded as commissions. But, in terms of some of the questions you were asking previously of other people, I think that as long as they are transparent it depends whether they are in fact a legal commission or a cover for a type of bribery. As long as they are transparent, I do not see a big problem in terms of understanding whether it is legal or whether it is a bribe.

Mr HARDGRAVE—That really is the nub of your submission: transparency. I know you have been here in the public gallery through the hearings today. What do you believe qualifies a small value amount, as suggested in clause 7C of proposed section 14.1?

Mr Hurlock—Like others, I would find it very hard to put a definite amount on it. That is a big problem. I think we get some guidance in an American publication—I do not have the name in my mind but I refer to it in my submission; it is a Transparency International produced document—but even there it varies. Of course, you cannot put too low a value on it; otherwise it becomes petty and will always need to be reinterpreted. I favour the concept of trying to put some limit on it; otherwise it just becomes open slather.

Mr HARDGRAVE—Do you suspect that the transparency process, in itself, will quantify over time what that small value amount is?

Mr Hurlock—Once again, I took cognisance of some of your questioning and I have also seen the trend that may have been developing. I think, yes, over a period of time—whereas it is fairly nebulous now because it is not often spoken of or it is not transparent. I think, yes, administrators and governments would tend to get a feel over time for what they thought was a fair sort of limit.

Mr HARDGRAVE—Based on your observations, experiences, et cetera, would you be confident there would be an evolution in countries, particularly given your experiences in South-East Asia, from this developing nation approach—where literally you walk off the plane or off the boat and you have got to pay everybody to get things done—through to something more like ours? Do you see that evolution occurring?

Mr Hurlock—There has to be, but probably none of us here will see, of course, the end result of that or even a stage where we can say that a victory has been achieved or that the battle is over. But we have to begin somewhere; we have to put in place the small steps and we have to continue the struggle. There are people within these countries—NGOs in particular and the burgeoning middle class—who are trying to do something about it, but, of course, they are fighting great forces that are ranged against them, including the fact that they do not usually have a free press. The short answer to your

question is yes, but not soon, and we must keep trying.

Mr HARDGRAVE—And the treaty will assist that process?

Mr Hurlock—This, even if it is the first of these types of steps that I have seen, is still a first step which must be taken on a very long journey. But, again, the short answer is yes.

Mr HARDGRAVE—I do not want a headline in tomorrow's paper, so I will just temper my next question by that.

Mr Hurlock—If you will excuse me, I will probably have to temper my answer too.

Mr HARDGRAVE—Not wanting to restrain you too much, I am probably offering you that hint.

CHAIR—It has never held you back in the past.

Mr HARDGRAVE—Thank you, Senator. I gather from your submission that the role of family structures in various nations in itself is part of the problem in combating corrupt activities and that clan and family structures against social norms in another country prevent exposure of corrupt or bribery based activities. That, in itself, is something that is not going to be easily unpicked, is it?

Mr Hurlock—No, it is not. But in countries like Thailand, Malaysia and Indonesia, to name some of those that are currently in the news, there are efforts to expose these things—no names, no pack drill. There are efforts to expose these things. These efforts are coming from within the country because their morality and their understanding of the abuse and exploitation of people is the same as ours and they know what is causing the problem.

CHAIR—The social upheaval has had a bit to do with it.

Mr Hurlock—It is just that they do not have the freedom to be able to speak out and enact legislation such as we are able to.

Mr HARDGRAVE—This treaty in itself would provide a signal to those in those countries that a nation like Australia, which is seen very well and is highly regarded, is again doing the right thing.

Mr Hurlock—That is a very important point, yes.

Mr ADAMS—Mr Hurlock, from your comments you might not know that this

committee also made a very good recommendation on landmines, so it played its role in achieving the final goals.

Mr Hurlock—I thank you on behalf of many people in South-East Asia.

Mr ADAMS—The secretary will make sure that you get a copy of that report.

Mr Hurlock—Thank you.

Mr HARDGRAVE—Which the government and executive accepted wholly.

Mr Hurlock—With some prompting, Sir.

Mr ADAMS—We now have to get the Americans to sign it. We have heard evidence this morning about good governance. What about AusAID and other programs that we can put in place to lift the standard of officials and of governance or good administration which excludes bribery? How do you see those? Have you had experience in those? Would you like to give us some comments on that? Do you see those as important? Is that a role that we can play?

Mr Hurlock—Yes, I do see them as being important. I did not have a lot of experience myself within organisations like that. I was very much at grassroots level within a Thai organisation operating in refugee camps on the border. But I did observe various organisations at work. Many of them actually made situations worse by throwing money into the scene without auditing the results of their expenditures and without keeping an eye on local staff, who were, of course, subjected to all sorts of pressures. But I do believe it is a very vital role that we should play at this other end that I was talking about. Here we are talking about government legislation. What you are talking about is something I would be very keen to see happen—that is, through AusAID or other big organisations like World Vision and so on—Transparency International is now playing its role in terms of corruption—fostering people and NGOs in those countries, perhaps trying to get those people on visits or scholarships to Australia and trying to influence a certain way of teaching in university courses in Australia for people from those countries in terms of economics, business, law and so on. AusAID and other agencies could have a big role to play in a country but they must be careful they do not make matters worse by throwing money at a problem.

Mr ADAMS—Sure. The non-government organisations sometimes stay outside governments in those countries. Do you think maybe they should be working with the governments in those countries a little more closely? Maybe we can improve some of that governance that way?

Mr Hurlock—I have written along similar lines, I think, in another submission I made to another committee on relations with Thailand but we need to be guided by high-

profile people in the recognised NGOs in those countries. It is not for us to go too soon onto a government to government or even Australian NGO to government basis, because some of those governments will try to get our NGOs involved directly so that they can influence what they are doing.

In the field of endeavour you are talking about, I would suggest that we try to liaise with high-profile people who are recognised as people interested in the democratic processes in those countries and then work with them and be guided by them and later move close to government, because we do hope to influence government, of course, in the long run.

Mr ADAMS—You certainly believe that this legislation needs to be able to cover everybody, whether inside Australia or outside Australia. Do you want to tell us why?

Mr Hurlock—I was addressing particularly the loophole that I see in that they say if there is no link to the actual rewards or the money; then it seems to me by my reading that we cannot proceed. I do not see how we can do that when we were able to amend our legislation to be able to get at these people who take advantage of minors or children in overseas countries. I see it almost, in moral terms, the same as that situation. If you realise it, the things that allow these practices to take place in foreign countries are the bribery and corruption in those countries. I see it as just as important and that is what I was trying to direct your attention to. That was the main thrust of my argument there.

CHAIR—Staying with that point for a moment, if you had a situation where we were able to extend the reach of this legislation so that it extended to Australian firms, Australian individuals, Australian corporations and wholly owned subsidiaries, it still is not going to get over the situation of that individual or corporation having a joint venture partner or hiring a local agent who is on the ground and knows what is necessary to get things done, is it? The Australian side of the operation really does not know, does not want to know and goes along with whatever is necessary. They do their bit and the local operative, whoever it is, does their bit and bribery and corruption could thrive in situations in which you still could not catch the Australian end because they really would not know about it.

Mr Hurlock—If they are truly completely ignorant, what you say I can imagine could well be true. But probably there is nothing that can be done about that right now anyway. I think it is still important to cover what we can, and when it does become apparent, or when people are found, or accused of bribery, et cetera, I think it is important that we do have the legislation in place as a first step. I take the point that if they really do not know what is going on, they would not be liable for any sort of prosecution anyway.

CHAIR—I suppose what you are really saying—and no doubt it is correct—is that, if you have got a head office here in Australia that does not know, that is one thing

but if you have got somebody on the ground, it stretches the bounds of credibility that they would not know the sorts of things that are necessary to get business done.

Mr Hurlock—That is right. Of course, one of the first defences that anyone would make in Australia is, ‘We didn’t know.’ I take that point but I am presuming that, before people got to the stage where they were embarking upon prosecuting people, they would have certain evidence that they could probably counter that argument with. How often is ‘Oh, we didn’t know’ used as a defence in other situations?

CHAIR—In any event, what you are putting to the committee, if I understand your evidence correctly, is that the person on the ground ought to be the one who not only probably knows but ought to be subject to the reach of the legislation even if the whole transaction occurs offshore.

Mr Hurlock—Yes. If it can be proven that they did know and if other people can prove they are culpable, then even if all of the finances are located overseas, as increasingly people would locate their finances and rewards overseas, particularly if this legislation comes into place, then I firmly believe we still should be able to prosecute them in Australia.

CHAIR—What is your view about the effect of this legislation on Australians’ ability to do business in, say, South-East Asia with this legislation in place? It has been put to us by some witnesses that while the legislation has a desirable objective, we as a committee have to be very careful that we do not make conditions so difficult for Australian business that they cannot actually operate in these markets.

Mr Hurlock—If the operation of their business in those countries is so much in danger that they can no longer make a profit if they have to declare their bribes, then what are they doing with their shareholders’ money setting up business in those countries? Haven’t events over the last year or so proven that there are certain risks we should not take? ‘You cannot build an edifice on quicksand’ is something I used to say in relation to the corruption in certain areas of South-East Asia in particular.

Yes, as I said here, I acknowledge that we may well miss out on some business, but with the long-term objective of trying to help the people in those countries, not just thinking of our own profits and our own progress, we are morally obliged to try to take these first limited steps. I repeat: if the business situation is so risky and so tenuous that the paying of bribes, having to declare bribes or not being able to claim it as taxable expenses would negate your profit, then as a shareholder in some companies I would say, ‘What the heck are you doing setting up in those countries?’

CHAIR—What if it meant that you did not get the business?

Mr Hurlock—In some cases it may be that they will not get the business—I

would have to admit that. Again, I would say surely we must draw a line somewhere. Surely we cannot say that we are so profit motivated that we throw all morality out of the window and we are not going to take any steps whatsoever to try to redress this situation. Someone has to start somewhere and we have to take some risks. If it is so risky, do not go in, find somewhere else, somewhere where you can operate where you have the law protecting you rather than as in these countries where the law does not protect you, the law can be bought.

CHAIR—I was interested in your comment earlier about the extent to which you might be able to involve NGOs and other good offices in trying to address these problems rather than governments going head to head with very different cultures and different ways of looking at these sorts of problems. Do you see there being some opportunity for United Nations sponsorship of NGOs in developing codes of conduct and perhaps some benchmark principles along these lines and actually augmenting the efforts of, say, Australia in passing this legislation? The point of my comment is that Australia by itself cannot do much unless it is part of a much broader movement. Do you agree?

Mr Hurlock—Australia can do what it should be doing to satisfy its own morality and its own standards, but I would agree fully that we can do much more if we are part of a worldwide organisation, or efforts, as this OECD convention is trying to do.

We must try to join with other people to defeat this worldwide scourge of growing corruption. But regardless of what we can do with other countries, Australia must do what it should do to satisfy its own standards and its own morality and to help our neighbours in this part of the world in whatever small way we can .

CHAIR—No doubt you have been up close to some situations where you have been quite appalled by some levels of distortion and corruption. Are you able to give us some idea—in a general sense, I do not mean specifically—of the sorts of distorting effects that corruption and bribery have on the economy?

Mr Hurlock—Most of my involvement was at a much lower and grassroots level.

CHAIR—Even at that level, that's fine, we are interested in personal experience.

Mr Hurlock—Take the huge amount of money that was spent on rice to provide the basic food for hundreds of thousands of people in refugee camps. Because of the corruption involved—and it also links in as corruption by way of a type of bribery so that people could conduct their business—untold hundreds of thousands of dollars which were supposed to be going to help refugees actually went into the pockets of the Thai military, the Thai police and merchants.

In fact, the UN got so frightened by what was going on that they were actually buying back the truckloads of rice which they knew were stolen, because they could buy it

at a cheaper price than they would pay at the market. But they were quite happy to foster this corruption so that they did not run foul of the Thai military on the border. That is one example of huge amounts of taxpayers' money—taxpayers from all over the world—that was to be given to refugees going into the pockets of the military.

Mr ADAMS—How do we bring some transparency into that?

Mr Hurlock—It has to come from within the organisations. It has to come from people being able to expose it. We saw this for many years on the border but we could not expose it because the first thing that would happen is that we would be flicked out of the country. If we wanted to stay there and help the people in whatever way we thought we were helping them, we could not expose it. Anyway, it would have been denied and we would have been flicked out of the country before we had any chance to prove it.

CHAIR—Without cutting you off on your answer because I want you to explore it, isn't that the real problem, that often there is an element of expediency in these sorts of payments? For us to sit here in Melbourne, in Australia, and try to imagine the sorts of expediencies that are necessary to get something done in certain countries, we really have not got much idea, have we?

Mr Hurlock—Perhaps not a lot of ideas of what happens at the ground level but you are doing what is within your powers to do, and that is to put in place the legislation, to at least begin the battle to give other people, even NGOs in other countries, some hope that there are governments in the world, and there are people in the world in free societies, who are putting in place, step by step, the legislation and the structures which will eventually flow over into these other countries.

Mr ADAMS—I want to come back to the Thai situation where the only infrastructure is the military trucks. The only way you can shift rice is through military vehicles because there is no other infrastructure. Those are the sorts of issues that we get into, are they?

Mr Hurlock—Not quite, because the UN had its own fleet of trucks, plus they would contract out to local Thai contractors. But it was a martial law area so the military controlled all traffic in and out. The sort of corruption that I could talk to you about for hours, that I observed there, was not necessarily known by all the members of the government in Bangkok. It was like a frontier, a law unto itself. There was the trading in arms and the active support of the Khmer Rouge by the Thai military, including artillery into Cambodia. There were many things. I do not say for one moment it would have been condoned by the government in Bangkok even, but they had no control over what was happening on the border.

Mr ADAMS—Maybe a few other governments around the world! I am interested in that situation, because this is slightly different from what we have been talking about.

There is the big corruption, where politicians and officials corrupt situations to gain contracts, to gain access to building things on a national scale, as opposed to the small type of facilitation payments to get the phone on or get something delivered through customs. We are now talking about slightly different corruption again, aren't we?

Mr Hurlock—Yes.

Mr ADAMS—We are talking about a military corruption here, where martial law has been declared and, just to get something moving, the commander is the commander and as you come down the tree you have got to pay their price.

Mr Hurlock—That is right, plus we are talking about a sort of corruption within organisations such as the UN types of organisations. It is a point I meant to add earlier, when someone mentioned the UN: look to the UN certainly to help coordinate these things, but do not look to the UN to be the pacesetter—they have got to do a lot of putting their own house in order. What we were talking about before was military plus commercial plus international organisations needing to pay more attention to the need to clean up corruption, not turn a blind eye to it, like we witnessed the UN doing.

Mr ADAMS—Should we talk about, say, having a report at the end of that program? This is probably to do with the refugees. Thailand had a lot of pressure on it from refugees. It played a reasonable role, I thought, as a country, but the UN then had to coordinate the refugees campaign in Thailand. I only have a scattery knowledge of that. But at the end of that program isn't there a report written? Are you saying that that is where that should be highlighted?

Mr Hurlock—It should be.

Mr ADAMS—Should we try and get some transparency, even if we do the humanitarian side of it? At the end of a program, shouldn't we then try to put some transparency into this so we highlight the difficulties?

Mr Hurlock—Yes, it would serve a great purpose if you did get truth in revealing those things. But you will not get it in a report by the UN, who only want to say nice things about their efforts and you will not get it in some of the reports of some of the larger NGOs. There were reports that leaked out through Human Rights Watch, Amnesty International and smaller NGOs. But while ever you do not get the larger organisations prepared to allow transparency, prepared to face the facts of the matter and prepared to analyse their own deficiency so they learn from their mistakes, their reports are more to colour their efforts as a success. Because they rely on funding from all sorts of sources they are not about to highlight the deficiencies.

Mr ADAMS—The world is reasonably complex in some of those issues.

Mr Hurlock—Yes.

Mr ADAMS—Where you get into civil war situations, humanitarian aid will sometimes be syphoned off to feed armies. So it is not a simplistic process here.

Mr Hurlock—No, it is not simple. In the short space of this talk, I did not wish to imply that it is a simplistic thing or that I have all the solutions or that I saw it all. But I still say—bringing us back to the point of even this legislation—that there are things we can do; but, more particularly, we should do them because it is within the scope of our democracy, and our power to do them, to satisfy our own standards but also to set examples and to help people in these overseas countries.

Mr ADAMS—What if the argument comes back—and it has been put—‘That is okay for you in Australia setting your morality. We are different; we have our own morality and this is our morality. You used to send kids down coalmines and you got some wealth out of that. Now you are at a certain level and you are saying to us, “You live on our morality.”’ Have you any comment on that?

Mr Hurlock—Yes. I meant to highlight that fact when talking about U Thant’s statement, because nothing has made me more angry in recent years than to see this attempt to lay these red herrings about Asian values, as opposed to Western values, in terms of fundamental human rights and to hear the talk about, ‘We must first have development in our countries before we can have the luxury of the civil, political and cultural rights.’ But it is only the people in power who are saying this.

U Thant’s simple—even if some people say simplistic—formula negates that. He tells the truth. He says that first you must have these standards of human rights protection and so on before you can have proper progress leading to peace. It really is a red herring because these people are the ones in power and they do not want people to have greater freedoms and more access to human rights. What does it have to do with providing food, education and so on, which they try to say we should be concentrating on? If they cannot do that, why don’t they get out of government? In a democratic government they would be tossed out, but there they cannot be tossed out and they try to use these things as red herrings. So, yes, it has a very big bearing on it.

Mr HARDGRAVE—Mr Hurlock, would you then urge the committee to make note of the fact that the standards that are being pushed for in this treaty we are considering perhaps need to be applied in our diplomatic dealings, and also in our dealings with the United Nations, as far as transparency, accountability and not complying with corrupt activities are concerned? Would you urge us to do something like that?

Mr Hurlock—Certainly. Where it comes to our diplomatic staff doing it in country, I said in my submission that we do have to do it with some care. We must not be setting ourselves up as being superior to those people. But if it is done correctly by people

who know how to deal with people in country, it can be effective. Then we can truly say, 'We're doing our bit and we're proud of it. Why are other people not trying to do their bit?'

Mr HARDGRAVE—Plus you would hope, I guess, that the United Nations would in fact set high standards and not simply submit to demands for lower standards.

Mr Hurlock—Yes. I have always been a great supporter of the UN. As I have said, it is our main hope for salvation in many areas in the world, but it does have to put its own house in order in many ways. I agree with what you are saying—yes, we should be working through the UN and the UN agencies, as well as doing what we can in our own country, and I would put in a special plug for trying to get help for particular NGOs who are trying to foster those sorts of things in country, and for being guided by the leaders of these NGOs in country.

CHAIR—Mr Hurlock, we are being defeated by time. Thank you very much for sharing with us your first-hand experience. Often in these sorts of situations that is what we are short on. It has been very useful to have your particular insights. We will be deliberating shortly. If there is something we need to clarify, I hope you do not mind if we get back in touch with you.

Mr Hurlock—It would be a pleasure.

CHAIR—It just remains for me to thank you for coming along.

Proceedings suspended from 12.22 p.m. to 1.46 p.m.

BOSCH, Mr Henry, AO, Chairman, Transparency International Australia, PO Box A2327, Sydney South, New South Wales 1235

ROOKE, Mr Peter Leslie, Chief Executive, Transparency International Australia, PO Box A2327, Sydney South, New South Wales 1235

CHAIR—Thank you both; we appreciate having you here. Your submission has been published already by the committee. Are there any amendments or additions to make to the submission? If there are no changes, I ask both of you to make a brief opening statement before we go to questions.

Mr Bosch—Senator, we wrote the submission over a month ago. Since that time we have had a good deal of feedback from Transparency International's 70 other national chapters on what is happening around the rest of the world. We have also had an opportunity to study the other submissions that have been made to you, which you have published. There are some variations in points of detail as a result. We thought that some of the submissions that you received were of a very high quality and we have been rather persuaded by them on some points of detail and we have modified to that extent.

I had intended to make some five points to you. The first one was that corruption is a bad thing. I was going to set out the economic arguments against it, but when I saw that, in the ACCI submission, they had said that commerce and industry regard corruption in all its forms as a cancer in the global system of trade, I felt there was no need to do that. I have some notes should you wish to ask me about it, but otherwise I will pass straight beyond that.

CHAIR—We have not had many people say that corruption is a good thing, I might tell you.

Mr Bosch—I was proposing to talk about the economic effects. Everybody says that it is ethically bad, and there is hardly any point in having that discussion. There are very significant strictly economic arguments as to why it is damaging—

CHAIR—As to the distortion, and what have you—we will perhaps take that up at some point, because I think it is very useful to have it.

Mr Bosch—Okay, I am prepared to do that if you should wish. My second point is that corruption is very large. The World Bank estimates that US\$80 billion per year is being paid in international bribes. That is a World Bank estimate. Other people say that it is too low; it is probably conservative. Corruption is extending very rapidly. Since the 1960s, a large number of countries that were relatively free of corruption have become very corrupt. In my own personal experience, Papua New Guinea was entirely uncorrupt. Up until 1980, I ran 10 factories there and we never paid a bribe of any sort—and, as far as I know, we were never asked for a bribe. There was none of it.

Peter and I went there in 1996, at the request of the Papua New Guinea business council, to give the keynote speech at their first public conference on business ethics. There was only one issue that they were concerned about and that was the extent of corruption. Everybody there, including all the business and political leaders and many people from the floor who just walked in off the street in hundreds, publicly stated how appalling it was that corruption had reached those heights. This was an example of PNG having swung from being an uncorrupt country to a very badly corrupted one. Since I see that you seem to be interested in that, let me say that, as a result of our visit, a chapter of Transparency International was established there and played a very large part in the last set of elections that—

CHAIR—What was the move that went on there, that changed an uncorrupt country to a very corrupt one.

Mr Bosch—I think it is the same thing that applies to the many other countries that have become corrupt. We have enormous flows of money going from the developed world into the undeveloped world both in the form of aid and in the form of private investment. Many of the decisions that are related to the success of these projects are made by people who have come from villages with a poor background, with very small financial expectations and often very little education. They are suddenly confronted with Westerners who seem to have money in an abundant fashion. There is a tremendous temptation for them. At the same time, the Westerners coming in to seek the projects are under very severe competitive pressures and often they feel that anything that is legal within their own countries is a fair way to compete. Competition and temptation I think are the answers to your question. It does not only apply to PNG. That I think is a universal statement. We have seen a great many countries tip over the scale.

The other thing about the size of competition is the proportion of contract payments that are now involved. Back in the 1960s, five per cent of a total contract price would buy you any contract. Nowadays, it gets you nowhere. People are commonly paying 15 per cent, even up to 20 per cent in some cases, of a total contract price, which may be in the hundreds of millions, so that, both in extent and in depth, it has become a very much more serious problem.

The third point that I wanted to make to you is that the OECD convention represents the best chance ever, certainly the best chance since 1977, of stopping it. Those who have argued against action against bribery in the past have always used as their principal argument that Australia could not afford to stop because the others would go on doing it, and there was a lot of force in that. The other TI branches in developed countries around the world report that everybody else says that too. Nobody will do it alone. Here, as a result of a great deal of work, including a lot of work by our TI international colleagues, we have 34 countries moving together to stop corruption. Five of them are not members of the OECD. That is significant. This coherent action then provides the great opportunity.

Can I say in this connection that in 1994 when Transparency International was founded in Berlin, its roots sprang principally from the World Bank. A group of senior officers of the World Bank had become so disgusted by what they had seen, particularly in Africa, and so disgusted by the World Bank's refusal to take any action to limit the thing, that they resigned from the bank and set up TI. I think a large part of the international campaigning stems from that.

When I joined the thing in 1995, I was making speeches around the country about it and I was saying, 'These terrible things are going on and nobody is doing anything about it.' In the last three years we have seen a huge change. Not only has the United Nations come out against it; the World Bank has gone through a complete change of policy with James Wolfensohn coming to the top, and the IMF has suddenly become active against it, as has the OECD and the Organisation of American States. A whole lot of other people have suddenly said, 'Listen, it has gone too far.' We have got now to grasp that opportunity. If we fail to take it then it will be decades probably before we get another opportunity to do it.

The fourth point that I wanted to make is that Australia's reputation, and particularly our reputation in this region, will be enhanced by resolute action. So far Australia has not really covered itself with glory.

CHAIR—A few people have said we do not do too badly.

Mr Bosch—Then let me be a little bit more precise. I do not think that Australians bribe nearly as much as do Europeans or Asians, Malaysians and so forth. But when I said we have not covered ourselves with glory, I meant that in the negotiations in the OECD, we have not taken a leading role. Indeed, Australia's representatives did not show up for a number of the meetings. I do not think that is great leadership.

If we are seen to be participating resolutely in this affair, I think it will be noticed. My reason for saying that is that TI Australia has taken a very active role in setting up chapters of the organisation in a number of Asian countries, not only in PNG. Peter Rooke has been to Korea, the Philippines, Malaysia, Indonesia, Sri Lanka and Nepal and probably to some other countries. He spends all his time doing it.

CHAIR—Does he do that as Transparency International Australia or as Transparency International?

Mr Bosch—He is a member of the international board as well.

CHAIR—Thank you.

Mr Bosch—There is real mileage, reputation wise, for this country being seen to be leading in the fight against corruption. Particularly since the Asian collapse, one of

whose roots must come back to corruption—not the only one, but one of them—I think there is mileage there. If we fail to be seen to participate resolutely in this I think we will not smell of roses. That will be bad for us.

I conclude therefore that it is in our interests that we pass the legislation and ratify the convention but I would like to say that I do not expect for one moment that that will stop corruption. It is not a matter of turning off a light or turning on a light or whatever. However, it will do three positive things. There is a significant number of Australian companies—BHP, ANZ, Arnotts, Telstra and so on—that are now refusing to pay any bribes at all and they are often disadvantaged in the short term by those decisions.

I saw a quotation from Peter Laver of BHP just recently—certainly he said it privately to us—that BHP was recently held up for 18 months in Kalimantan as a result of BHP's refusal to pay bribes. ANZ Bank put up a new building in Port Moresby last year. It took them 10 months beyond the normal and contracted time because they refused to pay bribes. When Australian companies that wish to be honest are confronted by people who want to take bribes from them, those companies will be reinforced if they can say, 'It is illegal in our country and we can't do it.'

Turning to the other side, to the companies that are ready to acquiesce and have been in the habit of acquiescing, if the legislation includes some elements requiring diligence—and Peter Rooke is going to say a word, if you permit him, about how that might be—then it will make it more difficult for them to acquiesce. It will cause them to build some more due diligence procedures into their system that will make it harder for them to do that.

Mr ADAMS—Can you name some of those companies? You named some of the others.

Mr Bosch—I would rather not, even with parliamentary privilege that may or may not apply to me.

CHAIR—It certainly does apply.

Mr HARDGRAVE—You said they are 'now' not paying bribes. I just want to clarify the point. Are you suggesting that in the past they may have been put in that position?

Mr Bosch—I was not suggesting that. My experience in this field is three years. I have watched it closely since I became aware of what TI was doing. I thought it was a worthwhile thing and so I said, 'I will volunteer some time to help you.'

Mr HARDGRAVE—I just thought it was important to clarify that.

CHAIR—But they are refusing to—

Mr Bosch—They are refusing, yes. The third and perhaps the most important beneficial effect that the thing will have is that it will strengthen the hand of those in the bribe taking countries who are trying to improve the governance systems over there. I said earlier that TI has some 70 national chapters. Most of those are in developing countries. We try a variety of different techniques in those countries to make people aware, to build up resolution that bribe taking is bad, to help them put mechanisms into place that will resist the corrupt atmosphere.

We are continually being told, ‘It is all right for you rich Westerners to come over and do that sort of thing but when your colleagues are coming here with bags of money, it is terribly hard. You cannot put all the responsibilities back on us.’ What the OECD is doing, almost for the first time, is getting the rich countries to play their part as well. I am saying that if we rich countries are seen to do that, then we will greatly assist those in the bribe taking countries to stand up against it.

Those are all the points that I sought to make by way of introduction. Peter Rooke has a number of specific points on which we would like to vary the written evidence that we gave you.

CHAIR—Thank you very much, Mr Bosch. Mr Rooke, would you like to do that by reference to the submission, if we made corrections, or do you just wish to make comments?

Mr Rooke—I do not think we need to correct the submission as such. I think if we just make comments, that will be fine.

CHAIR—Certainly.

Mr Rooke—What I would like to say firstly is that we feel that it is very important—and this is the first recommendation we made in our written submission—that Australia should fully participate in the OECD working group on bribery, which is a vehicle in the OECD through which all these decisions have been developed. There are a number of important areas in the work program of the group. Some were alluded to this morning—for instance, the question of bribery through payment to a political party or party officials. There are a number of other areas where further work has to be done. Australia has a contribution to make there. It should be doing so, maybe more than it has up to this point.

The other role that the working group has is acting as the monitoring organ which will monitor both implementation of the convention and also enforcement once it is implemented. So it is a very important group that, again, Australia has to play a full role in. It is based on the framework developed by the financial action task force in relation to

monitoring the implementation and enforcement of the money laundering legislation, which, as you may know, has several years history and is generally considered to be an effective model. We feel this business of monitoring is absolutely vital.

Also, the other aspect of the convention which is absolutely vital to all OECD members, but specifically to Australia, is the question of outreach. There are, of course, companies in the international marketplace that come from countries that are not within the OECD convention. Some, as Henry Bosch has said, have voluntarily come in—Brazil, Chile and Argentina in South America and some in Eastern Europe. The OECD has said that it particularly wishes to bring in countries in Asia—the key ASEAN economies and Taiwan, countries like that—that are active internationally at making foreign direct investments and in international trade. Australia has a role to play in facilitating that process. So that is really our first recommendation: through the OECD, we want to play the greatest role we can on an ongoing basis.

The second one is to do with implementation and bringing the convention into force. There are complicated mechanisms. As you know, it requires a weighted majority of the 10 largest OECD economies to ratify it before the treaty can come into force, at least during 1998. What we feel Australia can do, without in any way putting itself at any competitive disadvantage, is to help facilitate a process where a large majority—hopefully, virtually all—of the countries in the process can bring it into force together maybe towards the end of this year. That will be a complicated process to help bring them together, but I think some leadership can be shown there.

The third recommendation is one of detail—dealing with facilitation payments. But I would like to mention another issue which is not in our submission but which has been mentioned in quite a number of the other submissions which we have seen. That is the question of jurisdiction, which the Law Council talked about this morning.

We agree absolutely with the argument that to have a jurisdiction base which requires a territorial connection with Australia which could be purely nominal—like, say, a telephone call made from somebody sitting in an office in Sydney whereas, if the person got on a plane and flew to a neighbouring country and the deal was done wholly there, the offence would not have been committed—seems to us totally artificial. There is the issue that Australia should be taking a lead in policing its own nationals and companies that are incorporated here, even if the whole offence is committed outside. It was mentioned this morning that the question of prosecution and collecting evidence is very difficult. If there is a telephone call made from Sydney, it does not really make that exercise much easier so we recognise that it is going to be a very difficult offence to enforce.

CHAIR—I should say that other witnesses have talked about the important role that whistleblowers will have in the enforcement role so you might like to comment about that at some point, too.

Mr Rooke—Whistleblowers, competitors and even the intelligence services of other countries are quite active in this area now. So, although it is not easy, it is not impossible. The other thing, as Henry Bosch says, is that the legislation is important not in order to secure a lot of convictions but because it sets an example, it sets a benchmark, it gives Australian companies a base from which to resist extortion attempts.

I would just like to mention very quickly the experience in the United States, which is the only country that has this legislation on the books. It has been on the books for just over 20 years. In that period there have only been about three dozen prosecutions, which is less than two a year. There have been several hundred companies that have been subject to FCPA investigations; and major companies, including Lockheed, International Harvester and Goodyear, have been convicted and fined and a number of their executives sent to prison.

But the main benefit of the FCPA is that it has actually helped change US business practice. Of course, it does not mean everybody is behaving the way they should, but there is definitely a feeling that US corporations have behaved better because of the Foreign Corrupt Practices Act than they would have done if they had not had it. Indeed, they have introduced codes of conduct and compliance mechanisms because they know that under the US regulations, if they are not seen to have taken those sorts of precautions under US law, the penalties are going to be bigger. That is the only history which is available to us at the moment of a country that has been actually running this sort of legislation and what has happened.

CHAIR—Has TI done any analysis of the actual cases and any kind of breakdown of the sorts of bribes there have been, of the level of the corruption involved and whether there have been convictions or not?

Mr Rooke—No. That sort of information I am sure is available. There is quite an industry in the United States, not surprisingly, surrounding the FCPA. But I am not aware of TI having done that. The chairman of TI USA, who is a lawyer, has written a very good paper on the Foreign Corrupt Practices Act from which the information I have given you has been derived, but it does not go into great detail in individual cases.

A lot of comment has been made about the FCPA being totally ineffective. That is not our impression. It is by no means perfect; it is dealing in a very difficult area; it is dealing in a situation where the US was the only country in the world to have this legislation. Indeed, they did modify it in the late 1980s because American business felt it was at too much of a disadvantage, but that was one country going it alone for 20 years. I am sure that information could be obtained.

Mr ADAMS—That is a paper written by the chairman of the regulatory body for that act?

Mr Rooke—No, the chairman of Transparency International USA. He is also a lawyer with General Electric, so he has professional experience.

Mr ADAMS—Could you let us have the name of that paper?

Mr Rooke—Yes; I will give it to the secretariat.

CHAIR—Thank you.

Mr Rooke—The other issue that I would like to comment on is the question of facilitation payments. It is a difficult issue but it is one which in practice, because we are talking about small facilitation payments, is not, we feel, the main thrust of the international action. Facilitation payments are basically a problem to the country where they occur. They are basically small; they go to basically low-level officials who often are poorly paid. There is a huge problem there, but it is quite different from the other end of the scale, which is the grand corruption which can run into tens or hundreds of millions of dollars and the payments tend to go to people very high up indeed in the political hierarchy and the public sector.

CHAIR—Do you think they are a difference of degree or kind?

Mr Rooke—I think they are a difference of kind because what we are really talking about—and what certainly the US Foreign Corrupt Practices Act makes clear—is that a facilitation payment is, firstly, a small payment that is made to facilitate or expedite routine governmental action to obtain more expeditiously an approval or permit which the payer is entitled to in any event. It is not a payment to obtain or retain business. In almost every case I would say it would not be a payment to exert undue influence either. So in many cases, if not most, I would say it would not even come within the ambit of the exposure draft at all.

There may be some cases which do, and those are the ones which, no doubt, have to be dealt with. One approach which has been mentioned in the submission of the department of foreign affairs perhaps should be considered, and that is not to mention them at all. Their submission says that their canvassing of what is happening in other countries suggests that no other country is contemplating actually mentioning facilitation payments in its implementing legislation.

The US, of course, has it already. I was talking to colleagues in the States this morning, and their legislation to amend the Foreign Corrupt Practices Act is going to Congress next week.

CHAIR—Does it amend routine governmental business?

Mr Rooke—No, that is one thing which is remaining. The facilitation payment

exemption is not being changed. A number of other things are. We all recognise that the FCPA does not mirror exactly, of course, the OECD convention so they are extending it to cover officials of international organisations.

Something I did not realise is that the jurisdiction under the FCPA does require some linkage to the United States. They are removing that to make it on a full nationality basis. They are covering foreign entities which commit any corrupt act in the US—that is, if any part of the process is committed actually on US territory—and also extending the coverage to include the obtaining of improper advantages because, of course, their legislation at the moment covers only obtaining or retaining business. That is in process. It is going forward and next week the draft law will—

CHAIR—Sorry to interrupt you, but this concerns something that came up today: do you see any difficulty with talking about an improper advantage in securing something to which one would be, in the course of a payment of a normal prescribed fee, entitled to? Is there anything improper about that?

Mr Rooke—I find that difficult. I believe that in most cases—if that is the right definition of facilitation payments, which I think it is—it is not securing an improper advantage. The only advantage I can envisage is where you jumped a queue.

CHAIR—That is hardly a hanging offence, is it?

Mr Rooke—So, apart from that, I do believe facilitation payments are outside the ambit of both the OECD convention—of course, they are not mentioned in the convention—and indeed the exposure draft.

Mr HARDGRAVE—As for the moral aspect of the seemingly small payment, I would submit that, if you compare the famous Lockheed case with \$100 slung to somebody to get a telephone on in Thailand or whatever, you will see that \$100 to the telephone worker in Thailand is proportionally as important as the \$10 million in shares given to a couple of politicians in Japan. Do you see that moral sort of question?

Mr Rooke—I think it is arguable that the disparity in the figures is so enormous that it is very difficult to compare. What I do believe is that there is a moral issue where people need some way to supplement their income to survive. There is a real moral issue there. Uganda, which is a country which has tackled this problem, had to increase its public sector pay levels by 250 per cent.

Mr HARDGRAVE—That is to do what—prevent bribery?

Mr Rooke—To make it possible, without feeling that their public officials would not be able to survive, to then clamp down on bribery.

Mr HARDGRAVE—What is a small value?

Mr Rooke—I think it depends on the circumstances. That is why, if indeed the decision is to deal with facilitation payments in the bill—and we think the option of not dealing with them should be considered—we do not advocate putting a figure on it because we think it is impossible to come up with a figure which is sensible in all circumstances. It does, of course, leave an element of uncertainty. Nobody likes that, but we think it is better to do that than to put in, say, \$100 or whatever sort of figure one might put.

Mr HARDGRAVE—The \$80 billion figure that you quoted from the World Bank as an estimate would never include facilitation payments then, would it?

Mr Rooke—The \$80 billion is a fairly round number. Trained economists have come up with the figure but, as Henry Bosch says, other people have other views and the figures are likely to be larger rather than smaller. That, in fact, is not the total flow of bribery; it is the flow between the industrialised countries and the developing countries. So the total flows must be considerably larger because there is plenty of evidence of one industrialised country bribing another. Certainly in Europe it seems to be quite common. Whether it includes facilitation payments or not I do not know.

Many facilitation payments, of course, are a domestic matter: they are not paid by foreign businessmen; they are paid locally by one national to another. We are not condoning them. What we are saying is that they are a different problem; in almost every country they are illegal and they need to be tackled at a domestic level, maybe with help from development aid agencies, both in terms of governance programs and funding support. But they are not really distorting international trade. They are not the issue on which the OECD convention is really focused.

Mr HARDGRAVE—I think we understand that point and I appreciate your making it. Given especially that the name of your organisation is Transparency International, would it then be wise for Australia, seemingly, from what you have said, on its own, to look at making facilitation payments quite transparent—and bringing them out of the closet, as it were—in other words, getting companies to confess, outwardly and openly, ‘We’ve had to do business in this country and this is what we have spent on facilitation payments.’ It is an acknowledgment from Australia that we have a set of values here which suspects that anything from \$100 up, or whatever, is nevertheless a form of influence or bribe, and that we are bringing it out of the closet, laying it on the table and saying, ‘We’ve done it because in this other country in order to do business we have had to pay this.’ So we are keeping respect for the other countries’ social norms, hoping they will change over time, but acknowledging that we have higher standards here and we would expect such disclosure.

Mr Rooke—We are very much in favour of disclosure. Perhaps in this context one

is talking about internal rather than public disclosure, but BHP in their new code of conduct make bribes absolutely prohibited. They do have a facilitation payment exemption, but only on the basis that some quite complicated series of approvals are given and that the payment is recorded for what it is. That is internally within the company, but I think that sort of approach is the right one.

Mr Bosch—We have not talked at all about taxation.

Mr HARDGRAVE—We are heading there.

Mr Bosch—Perhaps this is the point at which it should come in. There has been consideration in the OECD about the disallowance of bribes for tax.

CHAIR—Deductibility.

Mr Bosch—Yes. We would advocate that that be put in place as well as the criminalisation legislation. I think your point could be met if companies were required to declare the bribes that they had paid as part of their normal declarations—

Mr HARDGRAVE—I think you mean facilitation payments like bribes?

Mr Bosch—Yes.

Mr HARDGRAVE—I guess that really was where I was driving this brief line of questioning—that disclosing it, making it transparent, in one sense forgives the transgression of paying it.

Mr Bosch—Yes.

Mr HARDGRAVE—At least it is out in the open a lot more than if it had been done behind closed doors. I just wanted to see where you stood on that.

Mr Bosch—If you made it no longer tax deductible, there would be a certain limited penalty. At the moment, the tax department is taking the attitude that they are not concerned about the morality of payments. We held a round table conference in Canberra last month at which Minister Vanstone and the various public servants who are drafting the legislation were all present. We tackled the tax people on this and they said, ‘Well, you know, we’re not concerned about the morality. We’re quite prepared to tax the earnings on prostitution or SP bookmaking, or whatever. It is none of our business.’

Mr HARDGRAVE—If it is income, it is income. They do not want to know about it.

Mr Bosch—It is income and that is it. If it is expenses incurred, it is expenses

incurred. I think that is a bad attitude and it may be that the committee would like to say something about that.

Mr HARDGRAVE—Because it starts to leave you wondering whether the terminology ‘small value’ will be defined not only by the transparency of acknowledging that certain things are paid—so we will get an idea of what a ‘small value’ actually ends up being—but also because market forces will dictate what people are prepared to pay and, internally, they will audit themselves.

Mr Bosch—That is right.

Mr ADAMS—On the process that we were just talking through, it has been difficult to get actual evidence of what sort of corruption has taken place in the world at the moment. There is not much written and there is not a bureau of statistics saying, ‘This is what is happening in a statistical sense.’ My colleague drew out the point, and you have gone onto it, Mr Bosch, that, if it was a taxation matter, at least we would build up some sort of picture about what our major companies were doing. If it also listed what countries the companies were working from, we would have some sort of statistical base and some sort of evidence that this was occurring. If you then wanted to make an offer to that country of an aid program to clean up some of these areas, it might be a possibility. Would you like to comment on that?

Mr Bosch—I think that might be a possibility. Peter just mentioned that the new BHP code of conduct makes recording and approving of facilitation payments a requirement.

Mr ADAMS—But that evidence, that information, is not going to get outside the company.

Mr Bosch—I do not suppose they would be very anxious to admit that—perhaps it would be unfair to those who were honest enough to go through those procedures—but you might ask for a declaration.

Mr ADAMS—We might make some comments in relation to that. You talked about the social situations. When you talked about the increase in bribery and corruption in the world, you gave some reasons why you thought it was the changing of money from one part of the world to the other. That is certainly occurring. Some would say that the Third World is probably being exploited a lot more than it has been. There are those sorts of comments that come into play as well. Maybe there was a lot of underpayment taking place, and the corruption has come into being to try to rectify some of that.

Mr Bosch—Underpayment?

Mr ADAMS—Underpayment for the exploitation of resources or whatever from—

Mr Bosch—I think you are getting near a point there. I think we have all experienced very bad projects that have been done in developing countries—for instance, new roads that begin to crack almost as soon as they are laid; new buildings that develop cracks; and new airconditioning systems that do not work from almost day one.

One of the economic disadvantages of corruption is that the standard of things falls off very badly because, once people have received bribes, they are in a poor position to demand high standards of work. The same thing applies to environmental issues—for instance, timber licences in PNG, Sabah or wherever. You are right to say that there is a degree of underpayment there. Another way of looking at that, of course, is to say that the total flow of money going from the developed to the undeveloped world may be constant but, if 20 per cent is milked off to the private bank account of somebody else, it does not go through the system.

Mr ADAMS—On the social side of how corruption corrupts the economy and therefore affects the social side of one of those countries—

Mr Bosch—There is a tremendous flow-on effect. The whole of the economy is distorted if decisions are made not on the basis of what is the best product at the cheapest price but on the basis of who has bribed more effectively both in quantity and by selecting the right place to put the bribe. The society just becomes distorted. That is terribly damaging for the developing country; it is also damaging for us, the developed world. We have got an interest in things being done fairly. Both of those were parts of the argument that I suggested I would not mention unless you asked me.

Mr ADAMS—If Bougainville had been done differently, there might not have been these troubles, but that has gone beyond corruption and there are now other troubles there. It all came from what one would say was the payment that was made in royalties to begin with. That was the issue.

Mr Bosch—I do not understand this in very great detail. I am told—and I have visited Bougainville—that there was just a misjudgment about who should receive the payments. I do not think these could be characterised as bribes, but they were payments to the traditional land-holders, if I could use that expression. The older generation got them and spent them and then the younger generation coming up said, ‘We have got rights to this land. Where is our bit?’ It is not quite the same as bribery, but it is apparent.

Mr ADAMS—You were talking about the bribery going on in Europe between European countries. I was just wondering about the opening up of eastern Europe: what is happening there?

Mr Rooke—The experience has been disastrous and corruption in the former Soviet Union and other eastern European countries is a very serious problem indeed. It has been one of the main reasons why Russia in particular has not been able to make the

transition in any satisfactory sort of way to the market economy. It is a huge problem. Nobody is saying that corruption only exists under a certain legal system or a certain economic system. Corruption is a big problem in China, Italy and in many other places. Certainly, the situation of countries in transition is a special one and the record has been very disappointing.

CHAIR—It is going to affect the outreach, is it not?

Mr Rooke—Yes, the thing about the OECD convention is that it is tackling what we call the supply side, the payment of bribes. Basically, it needs to outreach to the countries that are actually out there as foreign investors and as exporters.

The other side, the importing side, which is more relevant in the countries we are talking about, has to be tackled through governance programs, the sorts of programs one would put into a developing country, I suppose—but the two things go together.

Mr Bosch—It might be worth saying that one of the things that TI does is to provide a source book of mechanisms that developing countries can plug into and which have been shown to be successful in resisting corruption. So when we go and try to help a developing country build up its defences against corruption, we have a package, and we say, 'Here, choose from that book the things that will fit you.' It has things in it like auditors-general and things that have been proved to be successful.

CHAIR—All the sorts of good governance aspects?

Mr Bosch—Yes, that is right.

CHAIR—Could we have a copy of that book?

Mr Rooke—Yes. I do not have one with me, but I will provide one later.

CHAIR—Thank you. I am sorry that we really have had to cut across each other. Mr Adams, I am terribly sorry to have interrupted.

Mr ADAMS—You talked about a monitoring process. Do you have a monitoring process in countries; do you have a chapter that has a monitoring role in a country?

Mr Rooke—There are two different aspects. TI is a non-governmental organisation. We build up national coalitions of civil society and private business—everybody concerned about the problem of corruption—and, yes, one of the roles that a lot of TI chapters undertake is to monitor the problem of corruption and the effectiveness of measures against it in their own country. So TI, in many cases, can perform a monitoring role.

What I was talking about was the institutional arrangements under the OECD convention under which OECD members and the other countries participating in the convention monitor one another through peer group review. That is entirely a governmental process.

Mr ADAMS—Like putting a rating on the economy? The OECD puts a rating on the economy, doesn't it? Would it put a rating on the corruption aspect?

Mr Rooke—I am not an expert but, as I say, the model is the financial action task force approach which is used in relation to money laundering. They have a system of peer group review where they send a team of people from several different countries to look at the situation in the country and to review both in terms of implementing the legislation and enforcing the legislation. They have a check list, they analyse the situation and they report back to the committee—the financial action task force, in that case.

Not many countries like to be the subject of a highly critical report, so it seems to be quite effective. I have talked to Tom Sherman, who as a former chairman of the National Crime Authority was also president of the financial action task force, and his view is that it has shown itself to be an effective mechanism.

CHAIR—Mr Rooke, we got so carried away here that I think we interrupted you. You were actually up to telling us what you wanted to put on the record about facilitation payments, and we interrupted you when you were talking about the US amendment that Congress is looking at next week.

You made the point that the linkage, or the territorial nexus, is being removed but that the definition of routine business was remaining. You also mentioned that the DFAT suggestion of taking out the reference to facilitation was something worthy of consideration. That is when we fell upon you, shall I say, and interrupted you. Is there something there that you wanted to continue with? I want you to deal with that, and then we might actually go to your recommendations and try to tease those out a bit.

Mr Rooke—Yes. All I wanted to say is that, if the decision is that something has to be said about facilitation payments in the legislation, firstly there should be a clear definition of what one is talking about. The US model is quite a good one—a number of the submissions have referred to it—and it talks about routine government action. It also gives examples as to what that actually means in practice.

CHAIR—So you would define it by characterising the activity rather than trying to put limits and dollar amounts?

Mr Rooke—Yes, because in the exposure draft of the bill there is a heading for facilitation payments but no other reference anywhere, which, it seems to me, leaves a rather big area to be clarified. People need to know what is being talked about. The first

thing is to define it. Secondly, so far as quantifying what one means by a small facilitation payment is concerned, we do not advocate putting a monetary limit on it, because we think that no limit would be appropriate in all circumstances and it would get out of date, but rather to leave it with the word 'small' and with all the problems that that entails, which we are aware of. We think it is a better option.

CHAIR—Okay. So that we can maximise the time that we have with you, could I ask you to walk us through your recommendations and elaborate a little on those, because, no doubt, there will be some points of clarification and comment.

Mr Rooke—The recommendations are set out on page 1 of our submission.

CHAIR—Yes.

Mr Rooke—There are three recommendations. I briefly described them earlier this afternoon, but I am happy to go through them again. Recommendation A is that:

Australia should participate fully in the OECD working group on bribery with a view to:

1. developing a consensus on the key outstanding issues . . .
2. ensuring an effective followup and monitoring process.
3. bringing into the . . . convention those Asian countries active in international trade and investment which are not OECD members.

We are happy to answer questions, but I think we have probably addressed most of those issues.

Mr ADAMS—You say 'encourage key OECD members'. Whom do you call key members? That is in recommendation B.

Mr Rooke—Recommendation B is:

The commencement provisions in the Bill should stand but Australia should take the initiative to encourage key OECD members to ratify or accede to the Convention as a group . . .

What we are saying is that it is totally impractical to assume all the 34 members of the working party will be able to do this on the same day.

CHAIR—You were going to give us an update.

Mr Rooke—Right. We do not have any actual figures. We do have certain information about what is happening in certain countries but it is so piecemeal that I do not think it would be very useful to you. I described the situation in the US, which, of course, is a very important country. We know that there is draft legislation going forward in Japan, Korea, France, Germany and, no doubt, many other countries.

What we are saying is that, firstly, there is a threshold which the convention itself requires to come into effect, which is a weighted majority of the 10 largest economies to accede. What we are saying is that beyond that, hopefully, we should encourage as large a critical mass of countries as possible to move forward together, and, in some sort of ceremony, for countries to come together, including Australia. At least one knows that then there is a level playing field between those countries.

Mr ADAMS—Within a period of time, I guess?

Mr Rooke—Before the end of this year, yes.

Mr ADAMS—The facilitation payment worries me; I cannot get to grips with this facilitation payment. I really am worried about having two levels. I understand the arguments. But in terms of the public and the perception it is very difficult to sell that a little corruption is okay, but big corruption is—

Mr Bosch—I think that is the wrong way to think about it. I see it as size being incidental. The key distinction is between payments for doing things that would be illegal and payments for doing things which are perfectly legal. If you are paying for getting your telephone put through, we may think that is immoral but it is not very damaging. It happens that the payments that are made to change decisions, to award the contract to X, whose price is not otherwise right, are the damaging ones and the big ones, and we—

CHAIR—One interesting thing: it suddenly occurred to me that we have examples of this in our very own bureaucracy. If you want to get a full copy of a birth certificate, you can wait three weeks. If you need it quickly, because you need your passport tomorrow morning, you can pay an expedited fee.

Mr Bosch—Yes.

Mr HARDGRAVE—But that is an official levy.

CHAIR—Of course; but in terms of its purpose it is the same purpose.

Mr Bosch—Yes. It does not go into the same pocket, though.

CHAIR—No.

Mr Rooke—The other factor is one of supply and demand. I was living in Britain in the late 1980s, during a boom time, and in order to get a telephone connected in the City of London people were employing consultants who were earning money which was disproportionate to any sort of professional service they were giving. Of course, people knew what they were in fact doing, which was bribing. As soon as the supply and demand got back into balance again, they disappeared. I think there would probably be less in the

way of facilitation payments at the moment in a number of Asian countries than there has been, because the economies are not so buoyant and the supply and demand equation changes. So that is one factor. Another is, of course, the question of public sector salary levels, which, again, is an extremely difficult issue.

CHAIR—There is another aspect. A witness this morning said that they had anecdotal evidence of situations where a payment was made to even get somebody to turn up, because the bureaucracy was in such a ramshackle state, almost non-existent. So if you needed a stamp you had to actually go and find somebody who could put the stamp on a document. It seems to me that there are so many shades of grey, even in facilitation payments, that it is really difficult, other than by characterising the purpose.

Mr HARDGRAVE—I would like to ask a question about Transparency International as an organisation. I note in your submission that you talk about national chapters in Asia that are currently operating, and soliciting a number of different countries. I do not think any of them are major trading partners with Australia as such. Are there plans to perhaps look at our top 10 trading partners and try and make sure your organisation has some influence in some of those big-ticket countries? I am thinking primarily of the People's Republic of China and the Republic of China—Taiwan.

Mr Rooke—Because Transparency International is a non-governmental organisation which works through building coalitions of civil society, there are certain countries where it is almost impossible for it to operate. At the moment China is one of them. It does not mean that TI is not unaware that corruption is a problem in China, but at the moment it is very difficult to see how we can employ our particular formula in that environment. Other people, the World Bank and many other people, no doubt can and will help. But there are only a small number of countries where that applies. Otherwise, it is really a question of resources.

TI, as Henry Bosch says, was launched in 1994, in Australia in 1995. Seventy countries in four years is just amazing, and there have been certain growing pains as a result. What we have decided is that the key strategy must be to build viable chapters which can then support one another. Therefore in South-East Asia, the Philippines, Malaysia and Thailand are all working together and they will then be able to support some of their neighbours. This is purely an internal problem of TI being a poor, voluntary organisation which is growing very fast.

But of course we are aware of the problem. We publish the *TI Corruption Perception Index* which last year listed 52 countries on the basis of the level of corruption perceived by the international business community. We have chapters in the vast majority of those countries, including Nigeria, which has the distinction of being number 52—that is, the most corrupt.

Mr ADAMS—That was published somewhere recently.

Mr Rooke—It gets quite a lot of media attention.

Mr HARDGRAVE—Could the committee get a copy of that index, please? I think Nigeria is the place where somebody is constantly writing to people in my electorate offering them half the world for sixpence—the ‘if you send us money, we will give you the world’ sort of thing.

Mr Rooke—I am afraid I get those letters as well.

Mr HARDGRAVE—From Lagos or somewhere in Nigeria.

Mr ADAMS—We had evidence from the association of accountants, et cetera seeking that, to protect their members and honest accountants and people doing audits, the legislation reflect some opportunity for them to use that law to report corrupt practices and payments for corrupt practices either in the audit or in the accounts of the company, preferably in the audit. What are your comments or the organisation’s views in relation to that?

Mr Bosch—First of all, that is news to me—I did not know it before—but I react favourably to it. I think we ought to be looking at that. Both of the two big accounting bodies are members of TI. Now that you have said that, it would be a good thing to take it up with them. I think it just simply means that we have not spent sufficient time on doing that.

Mr ADAMS—The Australian Society of Certified Practising Accountants.

Mr Bosch—That is right; they are active and subscribing members. But since we are all part-time volunteers, we cannot get around the whole thing and do all the things one might like to do.

Mr HARDGRAVE—I have another broad question. I apologise for that, but I would seek your opinion. It seemed to me a suggestion was made earlier with regard to various non-government organisations, United Nations agencies and so forth, having to, perhaps because of desperation, work within these corrupt regimes—for example, a truckload of rice that has been commandeered by army troops at the Thai border then being purchased back by a UN agency just so that its original purpose can be met. Do you think this committee should be suggesting to government that we pursue these kinds of tolerances of corrupt activities by agencies that we subscribe to and are involved in—in other words, ensuring that there is a high standard set by the United Nations and non-government organisations?

Mr Bosch—May I suggest that we should see the convention and the legislation as being an important step along a road, not an attempt to get to the final goal. There are lots and lots of things that are wrong out there. We have made quite amazing progress in the

last four years. This is a particular milestone that it would be very great to gain. But I would not try to heap on a lot of other things—you just make it less likely that we will get this one.

Frankly, I put facilitation payments in that category too. If we were to try to go for facilitation payments now, we would certainly fail. The rest of the world would not be with us. By going for the criminalisation and something on tax, there is a very fair chance that we can actually get everybody in line and go with it and have that success. When that is done, what is going to be the next stage? Maybe you have the right to—

Mr HARDGRAVE—By tax, do you mean the tax treatment of facilitation payments?

Mr Bosch—Maybe.

CHAIR—We will have another opportunity to speak with you when we do a wrap-up. Thank you very much for being here this afternoon and giving your time so generously. It has been of enormous assistance to have your input. We look forward to welcoming you back on the next occasion in Canberra.

Mr Bosch—Thank you for the opportunity.

[2.56 p.m.]

SUSS, Mr Michael David, Private citizen

CHAIR—Welcome. Your submission has been published already by the committee as submission No. 24. Was there anything in it that you wanted to amend or add to? I would be grateful if you would like to make an opening statement. Then we will proceed to some questions.

Mr Suss—What I said in the submission was basically on the main issue that concerned me. Recently I have been working in Indonesia under an Asian Development Bank project.

CHAIR—Was it an infrastructure project?

Mr Suss—It was dealing with vocational education infrastructure. When I arrived there in September the meltdown started, so by the time—

CHAIR—Good timing.

Mr Suss—Wonderful timing. Considering I was being paid in Australian currency, it did not affect me, but it certainly affected many other people around me. This whole issue of corruption became far more prominent than if there was no meltdown. My concern mainly was that there were things I believed were happening which I did not agree with and there was no mechanism where my dissent could be heard. My contract was for 18 months and I was told to go after five months because I was not prepared to agree to proposals which I disagreed to.

CHAIR—You understand that you are covered by privilege and I am not suggesting that you deal with anything that will be sensitive to either yourself or anyone with whom you worked. Could you be a little more specific about the sorts of problems you were having?

Mr Suss—When I started, a number of areas were supposed to be passed onto me and no-one would talk to me about them, yet they were my responsibility. When it came to wastage or some items being not just right and when more items had to be purchased and substituted or a recommendation should have gone in for a system which I felt was wrong and inappropriate, no-one would listen to me. If I did register my complaint I was very quickly told it was none of my business.

CHAIR—Is the inference that we should draw from this that it was being taken care of on some other level and your diligence in trying to pinpoint problems and be efficient was not appreciated?

Mr Suss—That is right. I am quite happy to give you one memo which really sums up that what I pointed out as being recommended was totally inappropriate for Indonesia. It is the sort of thing that should be discussed. Later on, I calculated it would be 36 years before it was paid back. The worst part of it was that I was responsible for earning the money to pay it back. I was involved with the specific part of the project but not in the decision making. The question really is: why?

CHAIR—Were you ever given any satisfactory answer?

Mr Suss—No.

CHAIR—Did you become aware of any other facts or matters relating to you being distanced from this decision making that comes in the category of something improper—improper payments or improper influence?

Mr Suss—I was aware of some people in the organisation on the Indonesian side who were corrupt, which was given to me as confidential information. I have been working with Indonesia for 25 years so it goes back a long time and I have very good friends and relations there. In a way it is difficult that I had to keep this confidence and yet I was aware that things were happening which were not benefiting the overall population.

CHAIR—Were you involved in a joint venture of sorts? It had the bank's participation obviously but how many other parties?

Mr Suss—There was one Australian company and the Indonesian ministry of education and culture.

CHAIR—You have had an opportunity to look at this exposure draft and you are obviously familiar with the convention. Do you think that this legislation will provide any kind of protection that would have assisted you in the situation and, if it does not, can you make any suggestions as to how it might be changed or improved?

Mr Suss—I actually suggest that I have not had a look at that draft. I felt in my particular case it would not help me because no-one wants to talk to me even on the Indonesian side. The previous speaker made a good point that if someone is receiving a benefit, he is hardly going to take the side opposite to those people who are giving the benefit.

In Indonesia there is a quaint little thing called defending one's position. When I was told to leave, I wanted to defend my position and to speak to the person concerned. He was not available, which was the Indonesian way of saying, 'I won't speak to you.' To this very day no-one has actually spoken to me even from the Australian organisation end. There is a process I am going through now through which I will be compensated. The

concern I had was with individual employees when they are faced with this moment of truth. Someone said to me he had not really thought that ethics really came into my way of doing things. I said that by December with this meltdown it really became an issue. I was really bothered that I was earning very good money and people around me were earning \$20 a month or \$7 a month. This became a big issue.

I thought there should be protection of employees who refuse to be involved in corrupt activities. I agree that bribery does not only undermine the stability of governments but also undermines the integrity of all persons involved in the activity.

I felt that if there was some sort of documentation like a statutory declaration by employers, no illegal payments were made, other than of a transactional nature, that would put pressure on the employers to at least be careful and avoid making these payments.

CHAIR—By transactional do you mean what we have been talking about as facilitation payments?

Mr Suss—Yes, facilitation payments.

CHAIR—Small, grease the wheels type of stuff?

Mr Suss—Small payments. But \$100 could be a year's salary in Indonesia. There is a certain reality that if you do not pay you are not going to get it done—particularly as it is hard for me to pass off as an Indonesian. The moment they look at me, the rates go up. You have just got to take that into account.

I thought there should be some sort of reporting system that if one felt that something was wrong—I am not talking about a small bribe but if it is a large bribe that actually affects the outcome of the project—

Mr ADAMS—What is a large bribe?

Mr Suss—Something that affects the outcome of the project. It could be \$5,000; it could be a million. Where I have a lot of anger on this whole process that I have gone through is that over and above my work I was able to develop a project which I felt would benefit a lot of people and that now is up in the air. No-one is doing it and I feel very sad because I have been involved with Indonesia for a long time.

CHAIR—Was it not being monitored if the ADB was involved? Do they not audit and monitor properly?

Mr Suss—I do not know. Another interesting step is going to be to find out how good the monitoring is. We have just had the case of Max Green and we have had the national safety council on how good the monitoring really is.

CHAIR—How are project payments made in this sort of situation? Obviously, there has to be some compliance and a tick before funds flow.

Mr Suss—I do not know. It is interesting that the people before me were from Transparency International. I think there should be more transparency. In Indonesia they talk about having more transparency. At one stage I was told to keep out of the money issue. One of the things I had to do was to reorganise an institute. The money flows were very important. This was an issue I looked at and was told to keep away from—not by the Australian side but by an Indonesian friend of mine. I basically said I could not because 80 per cent of the people were wanting change and 20 per cent did not want the change. I felt that, if I backed off, nothing would ever get the change.

Mr ADAMS—How does that relate to you as an employee on the points you make here about protection? How could something have been done to give you protection?

Mr Suss—If one feels something is improper, logically one should be able to speak to someone, whether it is one's superior or his superior.

CHAIR—Or even if you want to be a whistleblower.

Mr Suss—Otherwise you have to speak up.

Mr ADAMS—Don't normal companies have that sort of mechanism?

Mr Suss—In my case, it did not. The interesting thing was that, when I was told to go, the employer sided with the team leader who was in Indonesia and, to this day, has not heard my side of it, which is in breach of natural justice. The whole thing is quite outrageous. I never thought that I would be pushed out without being able to give my side of it. It is a very interesting situation and it is a significant organisation as well.

Mr HARDGRAVE—No government or organisation is going to leave an employee in that situation because, at the end of the day, the ultimate step is to resign and disassociate yourself from the company. Matters such as them dismissing you and what led up to it are matters that you can best develop in a forum other than this. At the end of the day, as the chairman has said, some protection has to be made available to those who want to whistleblow and exercise ethics and morals that perhaps others within the company will not. The trouble is that the end result is that, after you have blown the whistle, you still do not have your job. There are other forums where you could probably best develop the case for compensation. How standard a practice do you see this kind of activity as being?

Mr Suss—I am not sure if it is relevant to say how standard this activity is.

Mr HARDGRAVE—How widespread do you believe these sorts of intimidation

are?

Mr Suss—I can only talk about my case. I am given a choice to be fired or compromise what I am doing.

Mr HARDGRAVE—Be corrupt or be fired.

Mr Suss—Compromise my advice and compromise the outcome. I think that, if there is one case, there are probably a dozen or thousands of cases. I can only talk about my own case.

Mr HARDGRAVE—From your experience, how are bribes disguised? Are they out-and-out brown paper bags—I am from Queensland—or, in all seriousness, do we see extra levels of commissions for people who grant a contract a certain way? How are they disguised?

Mr Suss—I have not had the pleasure of going through the accounts at the moment—I will be relishing that day—to check up. I actually listed five here, which were the impressions that I had—I could be wrong. Certainly you can employ local staff at very high salaries; they get paid and the money then gets disbursed paying for services like writing of books which—

Mr ADAMS—Just a minute. Are you saying the employees were paid or the money was held back? I did not quite understand what you said.

Mr Suss—I am not sure that this exactly happened.

Mr ADAMS—No, but you think this is what happened: there was a salary set but it was not actually paid to—

Mr Suss—No, you would have local people employed and paid on very high salaries, far beyond what a local person would get.

Mr ADAMS—I see. What is the purpose of doing that?

Mr Suss—The accounts are true. If you show that you have paid seven million rupiah to someone, then the accounts are in order. Where the money then goes—

Mr ADAMS—I see what you mean, but the people never got the money—

Mr Suss—The person gets the money, but then the person distributes the money to the rest of the group.

Mr HARDGRAVE—But that would have huge income tax consequences—

certainly in this country. I do not know whether they have income tax in Indonesia.

Mr Suss—That would be in Indonesia.

Mr HARDGRAVE—Yes but—

Mr Suss—Yes, in Australia it would be a problem. This is one of the difficulties—that it happens in Indonesia. Indonesia is a place where if I needed a document saying it was snowing yesterday, I would find that document.

Mr HARDGRAVE—Do you want to walk through each of these five points that you suspect may have been the case?

Mr Suss—I am sure there are also 100 other methods as well, or more. I mentioned having local personnel working and paying them inflated salaries. You may not see them, or rarely see them; you do not know what they are doing.

Mr HARDGRAVE—They are on the books?

Mr Suss—They are on the books. Maybe that is what they should be doing—turning up rarely, working at home; I do not know. The second is very similar to the first one. There is the having of conferences or seminars, inviting people from Indonesia to come to Australia, for example—in other words, having a trip of some sort. Then there is having a budget which allows for certain items and then finding those items cannot be purchased because of budgetary considerations. The question is: where has the money gone to then; is money being diverted?

The fifth point is that although it is very difficult to nail the Indonesians for corrupt activities, it is much easier to nail Australians—taking the Australian perspective—if they are doing something improper. One device might be to get them to sign off documents, and not just one person but a number of people. So if I am asked to sign a document and I am not satisfied with it, I do not sign it.

Mr HARDGRAVE—So you would support any legislative regime that was not territorially bound? In other words, if an Australian citizen or an Australian company operating in any part of the world was involved in a corrupt practice, then under Australian law it should be prosecuted?

Mr Suss—Generally speaking, yes.

Mr ADAMS—Were you ever offered a bribe?

Mr Suss—Have I been offered a bribe? I do not think so. I sounded disappointed for a moment! No, I do not think I have been offered a bribe. I have bribed people,

though, to get things done.

CHAIR—There was not any suggestion that if you played the game or whatever, things would be better for you over there in the administration of this particular job?

Mr Suss—Yes.

Mr ADAMS—That was made from Australia?

Mr Suss—Not in Australia. That memo I gave really says that I should not be asking questions. I really could not see myself spending another year sitting around and just shuffling papers and making nice reports. I saw myself doing something that was real. It was a very serious moral dilemma that I was in by the time December came.

I should also make the point that I had an Indonesian colleague and he made it quite clear he was not corrupt. He said he was corrupt in time—in other words, he might stay away from work for a week—but he would never accept a bribe. So I was in good company. The moral issue that I was faced with was amplified somewhat more than if I had had someone next to me who was corrupt.

Mr HARDGRAVE—The points you have made about possible methods by which corrupt payments were made included the inviting and paying for nominated persons to attend seminars, overseas trips, conferences et cetera. Wouldn't you also accept that that would be a probable standard facilitation in any big negotiations for contracts with a company based in one country and a company based in another? That would be a pretty standard sort of sweetener and therefore a facilitation payment, rather than a corrupt payment, if it was transparent that that is what it was, if it was out in the open. What I am trying to get at is that it is a bit hard to hide an overseas trip.

Mr Suss—It is hard to hide it. I agree with the previous speaker who said that, in a way, we cannot solve every problem at once. I think we should look at some of them and slowly look at the ethical question. It is very difficult to prove why they are coming over here. It may be just to have a look at our culture; it may be to have a seminar—there are all sorts of reasons. It can be hidden. But in my situation I had basically been asked to compromise what I was doing in my work; as a management consultant, I believed that I was independent, to give the best possible advice to the ministry of education and culture. I feel that is a much stronger problem than if some people went off to Australia for a week or whatever.

Mr ADAMS—They did not want to give that report about changing things?

Mr Suss—There were a number of things I was doing. My report was edited and some things that I thought were important were removed, for whatever reason there was. Some things that I was being pressed to do I felt were very dangerous. I was asked to

make some inquiries and my Indonesian counterpart straight away wondered why and thought that it would not be helping what we were doing; it would probably be helping the Indonesians in facilitating more corruption. So I was being used, in a way, to do things that I was advised were improper.

CHAIR—Who were you reporting to? What was the purpose of the reporting that you were just referring to?

Mr Suss—I would be reporting to the project leader, who would be putting everything together in a quarterly report.

CHAIR—Was the project leader part of the joint venture or was it somebody employed by the—?

Mr Suss—An Australian, from the Australian organisation. In a way one can say that corruption does corrupt everyone and the standards are lowered. The Indonesians said to me very early on, ‘Basically it’s just a holiday for you guys. You potter around Jakarta for a while and then you go touring around Indonesia.’ I was told that all the projects except one were duds—they did not result in anything. It turned out that the only project that was a good one was one my counterpart was involved in. Later on, when I spoke to the tour leader about that, he was not even ashamed. So, really, it is an exercise more in writing good reports and looking busy, but not resulting in anything.

Mr HARDGRAVE—Is that the Indonesian way? What I am saying is that we have heard a lot today about social norms and cultural norms in different countries, where our standards look very odd by comparison to theirs.

Mr Suss—I think if the Indonesian side is bribed enough, then anything would be allowed. If the Indonesians were not bribed and demanded high standards, then they would be looking for results. I tend to think, in fact, that any sort of a report could have been put together. In one of my reports I mentioned how I was connecting with the previous consultancy which I thought was brilliant—being able to do something and making use of a previous consultancy—and after I finished that report I found another consultancy that I could combine as well, so I thought the benefit would be millions of dollars. But that was taken out of the quarterly report; they were not interested.

Mr ADAMS—Why would that be so?

Mr Suss—Maybe it was highlighting that the previous consultancies went nowhere. That is the only reason I could give.

CHAIR—Was this project part of developmental aid? Were there Australian taxpayer dollars in this?

Mr Suss—I understand it is through the Asian Development Bank. They would be making the loan to Indonesia, so Indonesia is saddled with it.

CHAIR—Could pay Australia?

Mr Suss—Yes, half in dollars and half in rupiah.

Mr ADAMS—The Japanese run the Asian Development Bank, don't they? They put more money in than anyone else.

CHAIR—It sounds a bit like the old DIFF scheme.

Mr Suss—A lot of countries belong to the Asian Development Bank. I do not know how many, but a lot belong to it.

CHAIR—It is a bit like the way the DIFF scheme used to work.

Mr Suss—I think so. Mr Hardgrave, you made the point about different cultural norms. The greater pressure I was under was that a lot of young people were against the corruption. People around me were horrified. When I arrived at the airport I came with about 14 pieces of baggage and 300 kilograms. Customs wanted \$5 a kilogram, so I started from the word go. Indonesians I spoke to were ashamed about it. A day or two before I left Indonesia, I was speaking to a lady who is very much from the ruling class. She told me straight-out that they had supported the new order but they do not do it any longer; it is just too corrupt. I think a lot of people are tired of the corruption.

It is probably significant that the countries that were most affected by the Asian meltdown were the most corrupt. Singapore and Hong Kong, which have some good levels of decency, were affected in only a very limited way. The corruption facilitated very bad projects which these countries now have to pay for.

Mr HARDGRAVE—Are you saying the corruption has left those sorts of nations very exposed to financial pressures?

Mr Suss—It finally came to: how do you get a loan for a bad deal? You bribe someone. They now have to pay for all these bad deals. They are not getting money in or receiving receipts to pay for the deals.

CHAIR—Except it is usually a 25-year loan at nil or very low interest.

Mr Suss—Every day going to work, I used to pass a big block of land that had buses on it. I think Peregrine Investments made the loan. We thought the buses were going to be used for the SEA games. In the middle of the games, the buses were still there. When I left, the buses were still there. There were 80 or 90 brand-new buses at how

many hundred thousand dollars? I am sure there are a lot of other examples.

Mr HARDGRAVE—I think Indonesia is having the cleaners put through them. Maybe that will flush a bit more of it out.

Mr ADAMS—I take it you have responded in some way. Were you employed from Australia or by an agency in Australia?

Mr Suss—I will be writing.

Mr ADAMS—Were you employed by somebody in Australia?

Mr Suss—Yes.

Mr ADAMS—I take it you have reported to them?

Mr Suss—I am going through the industrial relations aspect. They will be followed up by a breach of contract. Much to my surprise, they were not interested in hearing my side, which is not a good thing for what is going to happen.

Mr ADAMS—It is against the norm which I have seen overseas in agencies and aid agencies from Australia. I have seen projects which have worked very well and are working. The one that you are talking about certainly has not worked and is not working.

CHAIR—It has been very valuable having a first-hand account of a very unfortunate experience that seems to be connected to the area that we are inquiring into. Thank you for giving us your time.

Mr Suss—Thank you very much.

Resolved (on motion by **Mr Adams**, seconded by **Mr Hardgrave**):

That, pursuant to the power conferred by paragraph 16 of the committee's resolution of appointment, this subcommittee authorises publication of the evidence given before it at public hearing this day.

Subcommittee adjourned at 3.25 p.m.