COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: OECD convention on combating bribery

SYDNEY

Friday, 17 April 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON TREATIES

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Senator Murphy	Ms Jeanes*
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Senator Reynolds	Mr Tony Smith*

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

For inquiry into and report on:

OECD Convention on Combating Bribery.

WITNESSES

JOINT STANDING COMMITTEE ON TREATIES

(Subcommittee)

OECD convention on combating bribery

SYDNEY

Friday, 17 April 1998

Present

Senator Coonan (Chair)

Senator Bourne	Mr Laurie Ferguson
	Mr Hardgrave
	Ms Jeanes

Subcommittee met at 9.03 a.m.

Senator Coonan took the chair.

AHRENS, Mr Michael Clifton, Senior Partner, Baker and McKenzie, AMP Centre, 50 Bridge Street, Sydney, New South Wales 2000

BRAZIL, Mr Patrick, Consultant, Allen Allen and Hemsley, Box 1530, Canberra City, Australian Capital Territory 2601

DUNSTAN, Mr James Anthony, Partner, Allen Allen and Hemsley, Chifley Tower, 2 Chifley Square, Sydney, New South Wales

CHAIR—Welcome. This is the fifth public hearing of the treaties subcommittee into the OECD convention on combating bribery. In Melbourne yesterday we took some valuable evidence from a range of organisations and individuals. Today we will hear from a similar range of representatives of legal firms, academia, state and Commonwealth agencies and, most importantly, from private citizens—they do get a look-in occasionally.

We have received submissions from both Allen Allen and Hemsley and Baker and McKenzie. The submissions have been published in a separate volume by the committee. Would the witnesses like to make any amendments or additions to the submissions? If not, would you like to speak to your submissions or make an opening statement?

Mr Brazil—As a representative of Allens, I would like to make a very short opening statement. As the chair has noted, we have made a written submission to the committee which also contains a brief summary. Therefore, we propose in this statement to be very brief indeed. Firstly, in the submission we expressed strong support in principle for the convention and for the proposed legislation contained in the exposure draft. Bribery hinders competition, distorts trade and harms consumers, taxpayers and efficient honest traders who lose contracts and projects.

However, effective measures to deter, prevent and combat the bribery of foreign public officials, to the extent that it requires criminalisation, also requires that this be achieved in an effective and coordinated manner and in conformity with agreed common elements. We make three points in that regard. Firstly, only a broad based coordinated approach can successfully combat corruption in international business transactions. Secondly, this will require multilateral cooperation, monitoring and following up. Thirdly, Australia should only become bound by the convention after a critical mass of significant countries have committed themselves to the convention.

Both the convention itself and the exposure draft on the table permits this kind of approach. Paragraph 1 of article 15 of the convention, dealing with the commencement of the convention, states that it shall enter into force on the 60th day following the date on which five of the 10 largest exporting countries, which represent by themselves at least 60 per cent of the combined total export of those 10 countries, have deposited their instruments of acceptance, approval or ratification .

The top 10 countries are the United States, Germany, Japan, France, United Kingdom, Italy, Canada, Korea, the Netherlands and Belgium-Luxembourg. Early acceptance by Australia of the convention as binding would therefore not count towards any early entry into force as contemplated by paragraph 1 of article 15. It seems to us that Australia is therefore in a position to be able to delay the entry into force for it of the convention until it is established that a sufficient number of significant other countries have definitively indicated that they will be implementing the OECD convention. As has been said in another submission that is before the committee and has been released, Australia should be taking the initiative to encourage key OECD members to ratify or accede to the convention as soon as possible.

In this regard we note that 33 OECD and other countries—but not, as it happens, including Australia—signed the convention on 17 December 1997. However, these are signatures only and they require ratification before the convention becomes binding for the countries concerned. The committee no doubt will be seeking—and probably is already seeking—information on progress made by the signatories in legislating for the convention. We have some information ourselves obtained by my colleague Mr Dunstan about the position in the United Kingdom that may be of some small assistance in that regard. A private member's bill to create offences of international bribery and corruption was introduced into the House of Commons on 25 February. We have not got a copy of the bill itself, as a print will only be produced we are told, prior to the—

CHAIR—I think we have it.

Mr Brazil—You have a copy of the private member's bill?

CHAIR—The Attorney-General's Department have it, anyway.

Mr Brazil—Good. Well, we passed this information on to the Attorney-General so they moved very quickly. That is good. I make the final comment that, with all due respect to the worthiness of private members, it is only a private member's bill.

Certainly, our assessment, for what it is worth, is that there seems very little chance that there will be United Kingdom legislation before the end of the year. That is something upon which our colleague from Baker and McKenzie may have further information as well.

Another point we make in our submission is that criminalisation in Australia, or bribery of foreign officials, is only one of a number of steps that have to be addressed. For example, there should be endeavours to reduce bribery at the source in the foreign countries concerned, and action in other fields such as taxation, accounting, audit, procurement guidelines and requirements—both public and aid related procurement. Civil and commercial law are also important, as is encouraging and assisting companies to develop and enforce codes of conduct.

Another matter to which we have drawn attention is that the implementation of the convention would involve the imposition of, as the committee well knows, vicarious corporate criminal responsibility upon Australian companies for offences under the implementing legislation. A cautionary note we have made in that regard is that a number of jurisdictions oblige foreign companies to operate as joint ventures, sometimes with government owned organisations. Further, some of the senior executive roles are held by people who are nominated by the local shareholder and who are not accountable to the foreign shareholder. We believe that care is needed to ensure that Australian directors of such local joint ventures are not inadvertently caught by actions of their local counterparts within the joint ventures. That is something my colleague Mr Dunstan will be happy to talk further about if the committee so desires.

Another very important point we stress is that it is important—as indeed the exposure draft seeks to do—to legalise what are called facilitation payments. The need to do this is acknowledged in the commentaries on the OECD convention. The reality is that such payments are paid routinely by many businesses operating in Asia. However, as we pointed out in the submission, we are not convinced that the approach adopted in the drafting of this point in the exposure draft is ideal. We have given our reasons for this in the submission itself. All I want to say at this stage is that it comes down, as far as we are concerned, to commending to the committee for its consideration the United States approach in its Foreign Corrupt Practices Act 1977, which excludes facilitation payments in a different way than that contained in the exposure draft. The wording in the American legislation strikes at the purpose rather than the quantum and excludes from criminality acts which officials should do in any event.

We also have a number of quick comments to make on another point, and I think this may have been on the mind of the Attorney-General's Department in putting it in the exposure draft—I am referring to the reference to 'small' payments et cetera in the commentary. One is that the word 'small' does not appear in the convention itself. Secondly, we think that the American approach, and in particular one aspect of it, really makes it unnecessary to actually put the word 'small' in the legislation. I am referring to a proviso that appears in the American legislation, in the definitions part, in dealing with the definition of 'routine governmental action'. I refer in particular to the proviso in the copy of the act I have where (b) says:

The term 'routine governmental action' does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award—

and I emphasise these words—

to award new business to or continue business with a particular party.

It seems to me that proviso makes the American approach completely acceptable as far as

our implementing legislation is concerned. We would suggest for consideration that it removes the need to undertake what really is an unrewarding task of trying to define what 'small' is since it is really so difficult.

To my mind, that proviso would make the American approach—the fact that there is that proviso in there—completely consistent with the convention itself because it is the obtaining or the retaining of business that is the mystery of what the whole exercise is all about and there is the fact that, indeed, the payments or other benefits that would be made under this routine governmental action approach would be of the nature they have to be to enjoy the benefit of it. It would mean that, relatively speaking, they would be smaller payments rather than the larger payments. But it does seem to us that the committee is entitled to take the view that we do not have to put that word, small, in the enabling legislation.

CHAIR—Does 'obtaining' or 'retaining' cover all situations? What about if you want to end a contract where there is some great bribery involved and you might be sued?

Mr Brazil—That is a very interesting question. 'Retaining' obviously does not cover that.

CHAIR—No. It just occurred to me at this moment as you were speaking.

Mr Brazil—That is a very percipient comment. It is a comment that might be made about the text of the convention itself.

CHAIR—Yes. We have had a few of those.

Mr Brazil—There is another aspect of the American legislation to which we would like to direct the attention of the committee. Once again, it is something that you have probably looked at already. That is whether or not there ought to be scope recognised in the legislation—and, in fact, positive authority given—for the sort of thing that is covered in the American legislation; that is, rulings by the Attorney-General. The three of us have had a little discussion this morning on this particular matter and I think I can say we are all agreed that is something that ought to be looked at seriously.

CHAIR—On the lines of the ACCC type of approach?

Mr Brazil—The ACCC approach and the ATO approach as well with tax rulings and that sort of thing. If I can just speak personally, my initial reaction was to say no, that has not been the Australian way. But, on reflection, I think that—having regard to the sorts of things we are trying to do here and what have you, and are trying to do in a way that does not cause unnecessary disruption and gives people proper guidance and that sort of thing—there is a great deal to be said for that.

Another matter Mr Dunstan would like to talk to you about is in relation to another technical issue. I have moved on to what I might call the 'technical suggestions' we made in our submission, and we commend those to you and we are happy to talk about those but I do not want to say anything more about them at this stage. Mr Dunstan would like to raise with you at the appropriate time the issue of the application of the definition of 'foreign public enterprise' in the convention and in the exposure draft. Thank you very much.

CHAIR—Just before you get off definitions, do you want to make any comment about 'foreign public official'?

Mr Brazil—Not as such. Would now be the time for Mr Dunstan to speak to you on the foreign enterprise one? That may—

CHAIR—Yes, of course. Because we will obviously be pressed for time, and you have got a lot of very good points to make, we would like to be able to get back in touch with you as we commence our deliberations to clarify any points.

Mr Brazil—We would be only too pleased to give what help we can.

CHAIR—Thank you.

Mr Dunstan—The point is a small one. I think it is perhaps a little drafting matter, but the definition of foreign public enterprise, which then works its way back into the definition of a foreign public official, talks in terms of a company owned more than 50 per cent by the government and so on, which is no particular difficulty in itself. But paragraph (c) of the definition of foreign public enterprise then attempts, I think, to exclude foreign companies owned by governments which are in fact normal commercial entities, by excluding from that definition a body or association which enjoys special legal rights or a special legal status under the law of a foreign country, or enjoys special benefits or privileges under a law of a foreign country.

My difficulty with that is that when we actually applied that definition to a couple of jurisdictions, we came up with, for example in China, something in the order of three million companies which could possibly fall within the definition. In fact, the definition has departed slightly from what was intended by the convention, in that paragraph 15 of the commentary to the OECD convention, which is set out on page 12 in paragraph 35 of the explanatory memorandum, talks about:

An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e. on a basis which is substantially equivalent to that of a private enterprise . . .

We would like, if possible, for the draftsman to look again at the definition that

has been used to encapsulate that concept and maybe broaden it to make it a little clearer that we are not looking at every Chinese company that has some special status in China. Our difficulty was really: what are 'special legal rights' or a 'special legal status'? In the sense of a moral thing, we can understand why you might want to catch all these companies—bribery of any employee is something that is not desirable—but in that the intent of the legislation is to catch only public officials, we think that the drafting may need a little tightening up in that area.

CHAIR—Thank you very much for that point.

Mr Ahrens—I am very happy to have the opportunity to come along and supplement what we put in our letter of 3 April. Attached to that letter is a paper from one of the Baker and McKenzie partners in Chicago talking about the convention. It particularly gives a nice little comparison between the convention and the Foreign Corrupt Practices Act. The second appendix is a set of examples of the type of enforcement operations which have happened in the US recently.

I should, of course, make clear that, as you will notice when you look down those examples in appendix B—there is a slightly modified version of that appendix I have just handed to the secretary of the committee with just minor changes to it—it is based on papers which have been produced by US lawyers, not my own work, which I hasten to add as proper acknowledgment. But it is very interesting that the Foreign Corrupt Practices Act is only a small part of the armoury; what they are really after is bribery in connection with government procurement.

Notwithstanding that the Foreign Corrupt Practices Act has been in operation for 20 years, it is only in recent years that the US enforcement of it has gathered pace. The scale of penalties exacted from people who have either been found guilty or who have entered into plea bargaining has multiplied in recent years—not triple damages, but something along those lines—because of the seriousness and the scale of the problems that have been uncovered.

The enforcement agencies that are used in the US have devoted a lot more resources to it, partly, I think, motivated by the fact that the US feels fairly lonely in relation to its legislation. With respect to this level playing field so much vaunted, what do they say?—that it is a golden winding road that leads to the level playing field. A point that has been made publicly by others is that maybe there is a degree of arm twisting. If that is true, and I have no evidence whatsoever about that, one can see that the point that Mr Brazil very rightly makes is valid—that it is only by multilateral effort that anything is going to be accomplished. If that is valid, and I believe that it is absolutely right, then there is an obligation on this country to do its small bit to join in that effort. So I think that one would counteract the other.

CHAIR—You are quite right. Some witnesses have said to us that this is terribly

important—a symbolic step—even though it will have some problems and it will not go as far as a lot of people might say it should. It is very important for that reason that we do join in this, knowing that as an isolated country you cannot do very much, but if you have a multilateral approach and the key countries join, at least it is making a statement.

Mr Ahrens—Absolutely. I think it is more than making a statement. I think that there is a lot of pressure on the Europeans now to join in this. They have been very slow coming to the party, but the Council of Europe has promoted these protocols and various things. Particularly, up to this stage it has been devoted to trying to stamp out the problem between member states of the bribing of officials in other member states. They got that one rolling last year. I think the OECD convention will take it this extra step further which will benefit all of us if we can get the Europeans to join in. I have no idea at all about the statistics of corruption—I do not know that anybody has—but the rumour is that the scale of it magnified enormously during the nineties.

CHAIR—TI estimated yesterday that it was in the order of about $80 billion.

Mr HARDGRAVE—$80 billion worldwide, more or less.

Mr Ahrens—Who would know—that is the whole problem. Certainly, in talking around the traps privately you come across it from all sides, but the scale of it is very worrying.

CHAIR—And very distorting.

Mr Ahrens—Yes. We made that point in our submission. In the time available, I would like to supplement what Mr Brazil and Mr Dunstan said. I agree with almost everything they said except for this one point about necessarily waiting until everyone else has got aboard the bandwagon. I am not sure I would agree fully with that point. I think that taking a bit of a lead is worthwhile. So far as I know, apart from Korea, we are one of the first out of the blocks to at least get something published which, even as an exposure draft, gets people thinking.

In the time available, I would like to take an example on page 6 of our commentary. I have a small diagram to illustrate the point. I threw up a scenario which is designed to test out the point that Mr Brazil made about the need for a safe haven with examples given in a practical context as to what might be still legal, either outside the offence or under the exception, because of the very important point about corporate compliance programs.

I would like simply as a primary point to say this: we ought to be concentrating time and attention on the cost and the complexity of having a compliance program so that, when Australian companies do business abroad, they know what is legal and what is not. That, I think, would be the vast majority of companies. It is not just the BHPs of this

world; almost every one of them would be very concerned to take action and have a compliance program which, in terms of the statement I made about that on page 4, goes beyond simply publishing a booklet. It has to.

Our experience with the Trade Practices Act as such is that it is almost a catch-22 situation. If your employees at any level are caught out, then your compliance program is deemed to be ineffective. No matter how much effort you put into it, you will still get penalised. It may be that your penalties are less, but you have to go to quite extraordinary lengths sometimes to make sure the people at the coalface are playing it correctly, knowing what is right and what is wrong and then acting accordingly. It is very difficult.

CHAIR—One thing that arises from that is whether you have any comment or view about the exposure draft's reference to a territorial nexus with Australia. A lot of people have said to us that this is going to be a toothless act anyway because you will find that Australian firms are going to have joint venture partners or local agents and they are not really, as a matter of practice, going to know much detail about how it gets done. Then things happen and that is why you have local agents or you will have a local, wholly owned subsidiary that might not otherwise attract the act. That is one aspect that we are struggling with.

Mr Ahrens—That is true in a jurisdictional point but, from my viewpoint, I cannot say that we should go any further—as Senator Vanstone made some public statement that we should stick to our territorial nexus. In terms of compliance, I think all we need to know is what that nexus is really going to mean. I think the easy point has been made in the draft bill—payments made into Australia are not going to happen; payments made from Australia are not going to happen. The question focuses on things—such as Mr Brazil said in his commentary—about authorisations from Australia, awareness by Australian directors, because of the very wide definition of corporate intent under the criminal code.

CHAIR—You are worried about the net extending inadvertently?

Mr Ahrens—Yes, inadvertently and whether that is going to be not simply the imputed intent but used to give added reach on the territorial side. They are the sorts of issues that come up, where we will get a risk of overlapping enforcement.

Mr HARDGRAVE—In both the Allen Allen and Hemsley and the Baker and McKenzie presentations this morning, perhaps an unintended implication of what they had to say is that Australians are actually involved quite actively in activities that would constitute a bribe. You realise that you are preparing scenarios as though a whole bunch of Australian companies are about to go under as a result of this sort of legislation. That is the feeling I have got from you this morning.

Mr Ahrens—I think unintentionally.

Mr Brazil—Can I quickly respond to you. If we have made that impression, it is most certainly unintentional. Indeed, I go back to our opening statement both in the submission and this morning—that is, we have strong support in principle for this legislation. What we are concerned about, however, is to have Australia contributing to an effective approach of dealing with this subject. Perhaps it is this aspect that created the impression to which reference has been made. No, we think it is right. If this is going to be effective, it has to be a multilateral approach. There has got to be a critical mass of support from the people who really matter, and that includes ourselves, and we ought to play our particular role in that regard.

Mr HARDGRAVE—With regard to this territorial nexus matter that has been raised today, that could be removed and actually made rather like the child sex crimes act. In that case, if you are an Australian citizen engaging in nefarious activities—such as engaging the sexual services of a minor in another country—you can still be charged here in Australia. It has been suggested that perhaps we should make a similar conceptual application to this particular law—in other words, if you are an Australian citizen who engages in the bribing of a public official no matter where you are, it will be dealt with by the Australian authorities.

Mr Brazil—To us, that raises the question of whether or not this is a situation which requires that exceptional step to be taken.

Mr HARDGRAVE—In a lot of evidence it has been suggested to us that it is distorting trade and having an impact on people's wellbeing in other countries. Yesterday, we even heard a suggestion that the countries that are perhaps engaged in some of the more corrupt practices—as in nations developing in an economic sense but nevertheless having linkages between family members and corporations, where corruption and the payment of public officials is a way of life—are the countries in our near north which have crashed the hardest of all.

In other words, the implications of the bribing of public officials in this particular regime is obviously one of those very big ticket moral issues, just as the Crimes (Child Sex Tourism) Act was a big ticket moral issue. The child sex crimes matter was something that Australia took a real lead on. It has been suggested to us that we should be taking a strong lead on this matter as well.

Mr Brazil—We have not expressed a view one way or the other in our submissions on this matter, but I think we would say—and I will ask my colleague Mr Dunstan to also comment—that what you have put is well worth having a look at. I would note in this regard—and I must say that it is a thought that occurred to me yesterday when doing a little bit of reading for our appearance here today—that I have already commended one aspect of the American approach, but shouldn't we also follow the American approach in terms of, to some significant extent, using nationality as the basis for our legislation?

How you would do that needs a bit of thought. I have not thought it through, but the committee itself will be very much aware of the fact that in the convention, when it comes into jurisdiction, if I remember rightly the first paragraph talks about the territorial connection and, in effect, says that that is enough. But the very next paragraph refers to those countries that use nationality—traditionally we have not—as constituting a link. That is something that is well worth looking it. I will ask my colleague Mr Dunstan to comment.

Mr Dunstan—The difficulty will probably come in the detail if you move to a nationality basis, in the sense that you can immediately envisage a situation where there are tens of thousands of Australian executives operating throughout Asia and large numbers of them work for non-Australian corporates. For example, if a senior executive who is an Australian is working for a Malaysian company, you would put him into an almost impossible position in terms of committing a crime under his own country law where it may well not be a crime under the laws of Malaysia if his company were to bribe somebody in Indonesia.

From that aspect, while I understand the driving force behind the concept, the difficulty is that because there is such an intermingling of nationalities within corporates, especially throughout our region, and there are so many Australians operating for non-Australian companies, it puts them in a very invidious position in the sense that it will make them almost unemployable by a number of Asian companies. That is the harsh reality.

Mr HARDGRAVE—So we are just really accepting that there is a cultural or social norm that exists in other countries and that here in Australia we have to accept that as being a way of life there. We are talking about the bribing of public officials. There is a one-liner—and it is not a bad one-liner—that bureaucrats receive gratuities while politicians receive bribes. That used to be an analogy used in this whole thing—and I find it offensive, but nevertheless I am just cautioning what you are saying. I accept that routine government action facilitation payments may be a way of life in a variety of countries—and, in fact, a six pack probably gets your phone connected faster in some parts of Australia too—but at the same time that is completely different from the bribing of public officials. Are you talking about the bribing of public officials?

Mr Dunstan—Yes.

Mr HARDGRAVE—So you are saying that the bribing of public officials is a pretty constant theme in a number of countries where Australians are employed?

Mr Dunstan—I do not know about Australians being employed. If you look at the figure of $80 billion, if that is correct, you do not have to work out that that is split a large number of ways and a lot of it is spent in Asia. No-one would be surprised to hear that bribery is endemic in almost all major contracts in a number of countries.

Mr HARDGRAVE—But should we accept that, from our standpoint?

Mr Dunstan—I am not suggesting for a moment that we accept that. I think the thrust of our submission is that we ought to be leading against it, but I think we should lead only in respect of companies and individuals operating out of Australia. My concern with the nationality concept is more one of putting individual Australians in an untenable position. How does one deal with the large number of Chinese who have come to Australia, obtained Australian nationality and gone back to their own countries? It really puts them out of the game in most corporates in Asia. That is the sort of area we would have real difficulty dealing with.

Mr HARDGRAVE—That is a good retort. I want to ask a question on a slightly different aspect. On the question of small facilitation payments to grease the wheels of routine government action, there was a suggestion also made yesterday in Melbourne that if we were to perhaps make it a requirement for Australian companies to declare them, in other words, bring them out in the open, it would be not only an acknowledgment of our moral standards—that is, our belief in transparency and honesty, in theory anyway—but also an acknowledgment that there are different social norms in other countries. Would you agree that making those sorts of facilitation payments transparent in a reporting sense would be a reasonable concept?

Mr Dunstan—At the Australian end, absolutely no difficulty whatsoever. I think it would acknowledge the reality that those payments go on every day of the week and are just a part of life, and that there is nothing you can do about it if you want to survive in these jurisdictions. It would expose each of the Australian companies concerned to the rather invidious position of having committed offences in the individual countries. I suspect it would be very hard for BHP to list out those public officials to whom payments had been made as an annexure to its annual report because it would then open its officers in each jurisdiction to immediate imprisonment.

Mr HARDGRAVE—I have never automatically jumped to the defence of the big Australian before, but they tell me that they have an official policy that there are no payments made anywhere in the world.

Mr Dunstan—I meant only the telephone connection fees, in a sense. I know nothing of BHP, so I probably should not have picked them as an example. But let us say that we know from having had branches in each of these jurisdictions for over 15 years that you just cannot survive from week to week without ensuring that your telephone is connected and that you do not get burgled. There are fees paid by almost every expatriate in Jakarta to ensure they are not burgled. That is the sort of thing that everyone has to pay, and there is nothing you can do about it.

Mr HARDGRAVE—Do you think this treaty will put pressure on jurisdictions like Indonesia to perhaps get their houses in a little more order?

Mr Dunstan—Only if we can bring the Europeans into it in a substantial way. If we can bring the European Union countries into this then, yes.

CHAIR—Do you see any serious disadvantage to Australian firms and businesses in the current draft? Apart from the drafting problems and some of the points you have made, if we were to move down the track of signing the convention, admittedly with a lot of other countries—we take the point about moving in concert—and pass this bill, do you see any real disadvantage? We obviously have to be concerned for Australian firms. Knowing all of the moral arguments about why we should do it, that is a consideration of course, we have to understand the commercial realities under which people operate.

Mr Ahrens—I think the key point is 'act in concert'. People are going to be very worried if we move too far ahead and we find that there is too much competitive disadvantage. There always will be some but if more is created, both because of the way we drafted it—out of sync maybe, or ahead of other people—and, secondly, if we are taking it much more seriously than other people. The treaty talks about effective laws and that is a big question mark to my mind. How effective will this be? Even if laws are on the statute books, how seriously are certain countries going to take them?

CHAIR—There are going to be huge problems with enforcement, of course—other witnesses have dealt with that issue.

Mr Ahrens—Yes.

Mr Brazil—Australia has already taken a lead. Here is a powerful committee of our national parliament looking very seriously at a bill that has been got ready by the government. We are already out there in front and we do not see any difficulty in working further on the bill and see no difficulty at all in introducing it into parliament. But I come back to the point we tried to make in our submission that the convention itself recognises that having a critical mass of support of the countries that really dominate this scene is important. The convention itself recognises that and, in effect, makes it an aim. I think it would be proper for us to take the position of improving the bill and introducing it into the parliament. That to me would demonstrate Australia's good faith and support for this proposition. But just for the time being, wait and see what other people are doing before we take the definitive step of being bound by the treaty. I think that is a very defensible position and in many ways I think it is a very sensible one.

Senator BOURNE—And that is mostly, of those 10 top nations, over half of whom—

Mr Brazil—Yes, as Mr Dunstan said.

Mr Ahrens—Yes, and that point we made is very much along the same lines: harmonising—especially the exception for small payments—and enabling compliance

programs to operate fairly uniformly so that everyone knows what the rules of the game are will be greatly enhanced by more and more examples. The Allen's submission has got some very nice ones set out; we in ours have tried to put some more. The devil is in the detail, especially on what is called in America 'a bright line' between what is corrupt, illegal and you can go to jail on, or even be threatened with it and publicised—

CHAIR—And what just oils the wheels.

Mr Ahrens—Yes, and what just oils the wheels. That, it seems to me, is the key question—whether we can get that safe haven, or spell out by examples what is legitimate and what is not. We have an explanatory memorandum which has been circulated for this as well as other legislation. To me the word 'explanatory' is really a misnomer. I do not find any explanation in this explanatory memorandum.

Mr HARDGRAVE—We see heaps of them and we feel the same way.

Mr Ahrens—So it is about time we set in and used the time to try to spell out, from the examples we have given, what we are really saying here about what is illegal and what is not—even in advance of the drafting of that new clause.

Mr Dunstan—If I can just endorse Michael Ahrens's comment on that front. Our concern in this is that while we would love to create a cottage industry in compliance in this area for the legal profession, I think it does not serve Australian business well with the legislation in the form it is at at the moment. I think the legislation is fine and I do not think Australian corporates will have much difficulty with it as long as they can interpret exactly where the government thinks the line should be.

CHAIR—They need certainty.

Mr Dunstan—They need more guidance. But, really, to reduce the number of hours that the lawyers will spend thinking up bizarre examples—as we have already—we are really looking for guidance. Again, I endorse the concept of rulings, guidelines and the creation of safe harbours so that responsible corporates can say quickly, 'Does this, or does this not, fall within the legislation?' At the moment it is a little bit difficult.

CHAIR—I think it is reasonable to assume that Australian corporates want to comply and want to do the right thing, rather than assume they do not and try to make this as workable as possible. Thank you very much to each of you. We have found it very valuable. I know I have and I am sure I speak for my colleagues. As I say, it is really just an opening gambit and we hope to be back in touch with you when we start our deliberations.

[9.55 a.m.]

GRAY, Miss Robyn Lesley, Deputy Solicitor (Legal), New South Wales Director of Public Prosecutions, 265 Castlereagh Street, Sydney, New South Wales 2000

CHAIR—Welcome, Miss Gray. Your submission has already been published by the committee. Have you any amendments or additions to make to your submission? If not, would you like to make an opening statement or speak to your submission before we move to questions?

Miss Gray—I do not have any amendments or additions to the submission. The only brief opening remark I wish to make is that the views that I express here today are my personal views. They are not the views of the NSW Director of Public Prosecutions, Mr Cowdery, although Mr Cowdery is very supportive of your invitation to have views from a wide range of organisations. That is why he has agreed to have me come along to do what I can to assist.

CHAIR—The committee understands that sometimes it is difficult for organisations to be able to respond in time so we are very glad to have you here in your personal capacity. Is there something in your paper that you want to comment on? Is there any opening statement you want to make?

Miss Gray—The only matter is that, since the submission was submitted, I have done a small amount of additional research on the US analogous legislation. I note that the US legislation has a specific provision for grease payments. My question was whether you had considered adoption of that US provision, which is quite a narrow and specific provision and which, for that reason, would perhaps find greater public acceptance amongst the business community here and would certainly, from a prosecution point of view, be a more certain—

CHAIR—We are still trying to decide what 'small' is.

Miss Gray—Exactly. Yes, it seems to me that would provide certainty for all concerned in the process. My only query about the US provision is whether it is, in fact, in step with the convention provisions. But, as the US is obviously a major mover in the convention, I assume that its legislation could provide a model on which this committee could work.

CHAIR—We have a deal of evidence and the committee will obviously be giving very careful consideration to whether or not it is a better approach to characterise the purpose of a payment and to look perhaps at the routine business nature of that purpose along the lines of the US model rather than perhaps either of the options suggested in the draft.

Miss Gray—It certainly seems to me that the US provision is an easier and more specific provision to interpret—

CHAIR—And to prosecute.

Miss Gray—Yes, and is therefore preferable for all parties.

CHAIR—Yes.

Senator BOURNE—Miss Gray, you have mentioned the problems between New South Wales and the Commonwealth and whether to prosecute under one or the other. One of the things that you have mentioned is whether discretionary factors should dictate that a matter should not proceed in the public interest. What sorts of discretionary factors would you be looking at there?

Miss Gray—I have brought along for the committee a copy of the director's published policy and guidelines. I have flagged the section on the decision to prosecute. It is a short section of about three pages.

There are 22 factors listed. Of those, I would like to mention the ones that appear to be relevant to this particular area. The first discretionary factor that would be relevant is the seriousness or, conversely, the triviality of the alleged offence, or that it is of a technical nature only. The second is whether or not the prosecution would be perceived as counterproductive; for example, by bringing a law into disrepute. The third factor would be whether or not the alleged offence is of considerable public concern. A fourth relevant one is the likely expense and length of a trial, and the final factor is the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court. Those five discretionary factors, out of the 22 listed in the policy, appear to be directly relevant to this area. Then there is a final, overriding comment made at the end, which says:

It is recognised that the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases.

Mr HARDGRAVE—Is that really part of the answer to defining the small value question: essentially what is worth pursuing, from a prosecutor's point of view?

Miss Gray—Yes, it is directly relevant to that issue.

Mr HARDGRAVE—I know you were in the room in the public gallery when we were discussing the territorial nexus question as to whether or not Australian citizenry should be the basis by which the law is pursued. It is rather like the child sex crimes act—I think you would be vaguely aware of that one—which means that an Australian citizen in another country committing the heinous offence of using an underage person for

sexual purposes can be charged under Australian law regardless of whether they are in Australian territory or not. Are you vaguely aware of that?

Miss Gray—I am very generally aware of that. Because it is a Commonwealth matter, I do not claim to have any particular expertise on it.

Mr HARDGRAVE—I accept that, and I do not want to be testing you on your expert knowledge of it, but I thought you would probably be vaguely aware of it. It has been suggested that a similar thing could be applied to the question of combating bribery by having the citizenry nexus rather than the territorial nexus. It has also been suggested that it could become a rather fruitless exercise, given that some people take out Australian citizenship and head off and live in another country where they might commit an offence, and would we pursue them. I guess the question of whether it would be worth pursuing somebody would be down to the prosecutor.

Miss Gray—The question of pursuing is actually a question for the investigatory agencies. I think that is the initial question: do the AFP, or the New South Wales police, expend the resources in putting together the brief of evidence? As you would no doubt be aware, there is a distinct difference in function—investigation being a police or analogous agencies' function and prosecuting being a Director of Public Prosecutions function. We do no investigating, and we therefore do no prosecuting, in the absence of a brief of evidence.

Mr HARDGRAVE—As somebody who is involved in the area of prosecution, in a general sense, resources is always part and parcel of any of these processes, isn't it?

Miss Gray—That is certainly true, and the policy specifically recognises that in the small section I quoted, where it says that the resources available for prosecuting are finite and they will not be expended needlessly on inappropriate cases.

Mr HARDGRAVE—Could I ask you one question, from a New South Wales perspective, directly based on your experiences. I note that in your submission you have some tabulation of some of the penalties for offenders in various corrupt practices. How could you classify the acceptance or proliferation of corrupt 'practices'? Would you say that facilitation payments—literally a six-pack to a state government official to get something done fast—is the norm, or are we seeing something a little more blatant or a little more exciting, if you like, than that?

Miss Gray—You will have noted from the statistics provided that the incidence of prosecution of this type of offence is not very high; for example, 15 cases in the local courts under 249B(1) between November 1992 and October 1997. Therefore, I would expect that the 15 cases prosecuted would have been cases involving a significant bribe and certainly were not minor cases involving a six-pack, as you suggested. I draw that inference also by looking at the penalties, because you will see that no-one was given a

556A dismissal, roughly 27 per cent of the people went to prison—which suggests the matters were considered serious—and 40 per cent of the people were dealt with by way of community service order. That, to me, enables you to draw the inference that the 15 cases of that type that went to court were pretty serious cases.

Mr HARDGRAVE—So you would be satisfied by those 15 cases over that five-year period amongst, I imagine, the tens of thousands of public sector workers in New South Wales. It means that corruption as such is a fairly low incident offence in New South Wales.

Miss Gray—It is certainly infrequently prosecuted. That is not quite the same.

Mr HARDGRAVE—Yes. I accept your terminology. You would not chase the six-pack scenario at all?

Miss Gray—The answer, I think accurately, is that the investigatory agencies would not chase the six-pack scenario, so the prosecutors would generally not be faced with that prospect. Were we faced with the six-pack scenario, then I think prosecutorial discretion would be exercised in accordance with the guidelines that I have enumerated.

Mr HARDGRAVE—Do you have good protection for whistleblowers in New South Wales—people in the public sector who might see their boss receiving a case of scotch from somebody, that sort of thing?

Miss Gray—Yes. New South Wales has the Protected Disclosures Act 1994, which came into operation in about September 1995, from memory. That is applicable to all public sector agencies and provides very strong protection for whistleblowers. In New South Wales, the Premier and the head of the Premier's Department have been particularly proactive in encouraging public agencies to put in place proper internal reporting mechanisms. I notice you are hearing later on from Commissioner O'Keefe from the Independent Commission Against Corruption. I know that Commissioner O'Keefe has expressed concern at a lack of compliance amongst public sector agencies with bringing proper internal reporting systems into place. However, that is a slightly different issue. Certainly, the legislation is in force, has been for some years and is quite strong. What agencies such as the ICAC are working on is compliance of public sector agencies with the legislation and awareness amongst agencies and agency staff.

Mr LAURIE FERGUSON—Because you use the terminology in point 3 of your submission, 'includes any advantage', could you give us a few instances of practical examples of what benefits would not be covered or are covered in the three strands of legislation mentioned in point 3?

Miss Gray—I am sorry, I do not understand the question.

Mr LAURIE FERGUSON—In definitions, point 3, you refer to the Commonwealth bill, MCCOC and the New South Wales Crimes Act. Because you have used the word 'includes', it does not quite cover the full gamut so could you give me a few examples of what is covered and what is not covered?

Miss Gray—The point that the office is seeking to make in point 3 is that it would be preferable if there were consistency of definition. That is really the point of mentioning the three different definitions. It seems to me that each of the definitions seeks to cover the whole field of anything possible that one could imagine.

Mr LAURIE FERGUSON—Therefore, if they seek to cover the impossible, why is there a conflict? I thought you were trying to make a point here that there is some substantial difference in regard to benefits definition. I am wondering whether you have some instances of what is in conflict.

Miss Gray—No. The point that is being made is that it would be preferable if there were consistency of expression in the definition. Then there could be no possible argument about something being covered or not covered.

Mr LAURIE FERGUSON—So when you use the expression 'varies' it does not necessarily imply that there is conflict?

Miss Gray—Not necessarily, although it provides the possibility of argument by an inventive defence lawyer about something that may or may not be covered.

Mr LAURIE FERGUSON—Could you clarify this for a non-lawyer like myself? When the MCCOC comes into place, it has no impact on 'benefit' and definitions like that; it has impact only on things like sentence times.

Miss Gray—When the code comes into effect—

Mr LAURIE FERGUSON—You said earlier that it would overcome the conflict in regard to sentence periods.

Miss Gray—Yes.

Mr LAURIE FERGUSON—It has no impact on definitions of things like benefits.

Miss Gray—The code definitions will apply; the code provisions will apply.

Mr LAURIE FERGUSON—Right, but in this particular instance of the word 'benefit', the difficulty will not be rectified.

Miss Gray—It will mean that, once New South Wales adopts the code, the code definition and the code offence will apply in New South Wales.

Mr LAURIE FERGUSON—Do you know whether in the case of this instance 'benefit' is covered?

Miss Gray—'Benefit' is defined in the code.

Mr LAURIE FERGUSON—I see. Thank you.

Miss Gray—The code creates a regime for bribery and secret commissions; it does not apply in New South Wales yet. I understand that the government is committed to adopting it at some time in the future and when it does the code will become the law in New South Wales.

CHAIR—There is just one point I wanted to clarify. Will there be any other areas of potential overlap or conflict between Commonwealth and state jurisdictions when the code is implemented?

Miss Gray—I am not qualified to answer that question. I do not purport to be an expert on the code, which is a Commonwealth initiative being coordinated by a very learned committee involving Commonwealth and state representatives. The code is being progressively developed by that committee. As the committee comes forth with a chapter of the code, the chapter is circulated amongst all the jurisdictions for comment. That is the process that has been going on for a number of years already. It is a gradual process. So the code is incomplete and I do not really feel qualified to answer that question because I do not have a detailed enough knowledge of the whole code as it stands and what the committee is proposing in the future parts of the code which are in the course of production.

CHAIR—You have referred to the penalty provisions. It is potentially possible that you can have people being liable under two different acts if this is implemented.

Miss Gray—If the proposed legislation is implemented and the New South Wales legislation remains as it currently is, then the position will be as I have noted in the submission. There is the potential to use either the Commonwealth legislation or the state legislation in respect of an accused person.

CHAIR—I was interested in your answer about resources and the use of discretion. What rationalisation of resources is there between investigation and prosecution? Does the AFP, for instance, or the police liaise with the DPP about a particular investigation or do they go off on a frolic of their own and finally come to you with a brief when they think they have a prosecution? Is there any rationalisation of resources? If you have said 'Yes, all of this evidence exists; that is a good case and we

are likely to proceed with it,' how are the resources between the two agencies used?

Miss Gray—There is a difference in the relationship between the Commonwealth DPP and the Australian Federal Police from that existing between the New South Wales DPP and the New South Wales police. As you would be aware, I am representing the New South Wales DPP and my knowledge of the Commonwealth DPP is based upon having worked for the Commonwealth DPP some 10 years ago. My general comment is that the Australian Federal Police tends to seek more actively advice from the Commonwealth DPP about its investigations and therefore potential prosecutions. There are fewer AFP officers; the Commonwealth DPP officers also tend to be fewer, and the number of offences prosecuted would be fewer. So in the Commonwealth environment I think there is a closer and more constant seeking of advice and consultation between the investigation and the prosecution pre commencement of the prosecution. That would be particularly the case in complex fraud matters such as those involving the Australian Securities Commission, or in any other complex drug conspiracy or so on you would expect that to occur.

CHAIR—So, for instance, if this bill were passed, maybe with a few amendments here and there but substantially as it is, would you see any great difficulties in having some liaison as to whether, if there were an investigation made, a prosecution would follow, or are we likely to see the AFP resources being expended on running around trying to prove things that the DPP might not consider worth moving on?

Miss Gray—From my knowledge of the Commonwealth DPP and the AFP, I would expect that they will liaise about significant potential prosecutions.

CHAIR—That is fine.

Miss Gray—Perhaps I could just complete my answer. I did not mention the situation with the New South Wales DPP and the New South Wales police. There is consultation, particularly in major investigations prior to the laying of charges but, because of the huge number of offences prosecuted and the large number of New South Wales police officers, there is just not the opportunity for that more close consultation to occur in New South Wales.

CHAIR—One point that you make in your submission that we should take up and clarify is where you point out that there is no provision in the Commonwealth legislation for an offence by a foreign public official in Australia. Is it possible for an official to be liable for prosecution under New South Wales law for receipt of a benefit in New South Wales?

Miss Gray—Provided that there is the appropriate territorial nexus under 3A of the New South Wales Crimes Act, yes.

CHAIR—Should there then be a provision in the Commonwealth legislation to cover the possibility of foreign public officials taking a bribe in Australia?

Miss Gray—Personally, I would have thought that desirable. I do not speak for the office, but it seems to me to be an evident omission. If there were such a provision in the Commonwealth legislation, then both parties to the bribe transaction would be able to be prosecuted under the same legislation, with a similar penalty regime and by the same prosecution agency. There is provision for New South Wales to prosecute Commonwealth offences and vice versa, and that occurs quite harmoniously and smoothly, but it would seem to me to be simpler to have one piece of Commonwealth legislation covering both parties to the criminal transaction.

CHAIR—There is one other point that I want to clarify. Would you like to elaborate a little on whether you think there are any other provisions in the United States legislation—bearing in mind that it is about to be submitted to Congress for some further amendments—that might assist our deliberations as to what we should be doing with the Commonwealth legislation? You have already made some comment about the facilitation payments or the grease payment. Are there any other aspects of the way the US legislation operates its reach, its territoriality or any other aspect that you want to bring to our attention?

Miss Gray—The committee is very likely already aware that the US Department of Justice provides advisory opinions to US business on whether or not the proposed conduct of the business will infringe the US act. That opinion, once provided, creates a rebuttable presumption protecting the firm from future prosecution when it engages in the conduct. From business's point of view, that ability to obtain an advisory opinion would seem to be very desirable.

CHAIR—A bit like getting a tax ruling or getting the ACCC to tick off an arrangement perhaps.

Miss Gray—Yes, exactly.

CHAIR—Do you know if that is actually used?

Miss Gray—Yes, I understand it is. I have got a short spiel which talks about the policy of the Department of Justice in dealing with giving these advisory opinions, and it specifically sets out who is to give them and who is not to give them. That seems to suggest that they are actively given.

CHAIR—I was really interested in what would guide such opinions. Given that just as motherhood is a good thing, bribery is a bad thing; if you start from that proposition, I wonder in what circumstances bribes are okay. If some corporation turned up and said, 'We really need to pay this otherwise we are not going to get this big

contract,' what would inform you? There must be guidelines, one would think.

Miss Gray—There must be guidelines formulated by the Department of Justice which guide the officials giving these opinions.

CHAIR—Do you have any of those guidelines?

Miss Gray—No, I am not able to assist you on the specifics of that, although my past dealings with US agencies suggest that they are very forthcoming with their internal manuals. They refer in this literature to their *Criminal Resource Manual of the US Department of Justice*, which has a section on the FCPA opinion procedure. If you contacted the Department of Justice, I am sure you would find them very ready to assist you with what they do have in terms of internal manuals and guidelines.

CHAIR—I am sure the States would be very happy to assist any country that is going to be looking at this convention.

Miss Gray—Yes.

CHAIR—Because we got a bit truncated with your time, is there anything that you particularly wanted to bring to our attention that we have not teased out with you or you think we have not addressed?

Miss Gray—Just that I have found the US legislation to be quite helpful myself and I suggest it should be looked at as some model.

CHAIR—Thank you for bringing that to our attention. When we get into the deliberative stages, we may need to get back to you. Apart from that, it just remains for me to thank you very much for taking the time and trouble in your personal capacity to come and share these insights with us.

Miss Gray—Thank you.

Proceedings suspended from 10.23 a.m. to 10.41 a.m.

[10.41 a.m.]

PREMOLI, Dr Camillo, 16/5 St Neot Avenue, Potts Point, New South Wales 2011

CHAIR—Do you have any comments to make on the capacity in which you appear?

Dr Premoli—I have been in Australia as a permanent resident for 30 years and I am an Australian citizen. I am appearing here in a strictly private capacity, even if I am a member of several professional mining organisations or institutions. My comments today focus strictly on the mining sector, which is very important for Australia because we are one of the big four with Canada, the US and South Africa. Australia now is at a bit of a crossroad because, for the first time ever in its history, it is moving massively overseas. Just to conclude briefly my presentation—

CHAIR—I should just note that your submission has been published already by the committee.

Dr Premoli—Correct, so there is no point in me elaborating on those points. I would like to point out that I have worked in at least 70 or 75 developing countries, either for a major mining group or for the United Nations in various agencies. In that capacity you are an adviser to the government at a general administrative level, which is totally different from the business operation.

CHAIR—Certainly, there is no point in repeating your paper, but is there anything in your submission that you would like to bring to our attention before we move on to questions? We all have areas of interest, but is there anything that you want to emphasise?

Dr Premoli—Not really, Madam Chairman. My submission, which was really made up of off-the-cuff remarks, stands but I would like to make some additional points that have come out of reading a few submissions that have been faxed to me and that have been made by Mr Hardgrave and my colleague from Allen Allen and Hemsley this morning. I am no lawyer, so my remarks are made from the point of view of an exploration and mining operator—nothing else.

One of the first things that impressed me is that there seems to be a bit of doubt about what we are talking about. In one of the submissions that I received—I think it was from the Australian Chamber of Commerce—it said, 'We should aim at complete eradication of the cancer of corruption in all its forms from the global system.' That is not achievable and, quite frankly, it is ridiculous to put it in words. They are very lofty words but totally deprived of sense. We are talking about bribery here. Bribery is the lowest, simplest form of corruption. It is so pedestrian, so elementary, that major people could not choose it any longer. It is the hallmark of the poor operator or the short-term dealer.

In mining we are talking of massive investment overseas for a minimum duration of a mine of 30 years. Let us suppose you bribe one mine minister, if you are lucky enough to get as high as that. The average life of a mine minister in Australia or overseas is two years, so what are you going to do? Bribe 15 different people, each one with escalating demands or whatever? Or, inevitably, are you going to wait for a change of government when Mr Clean happens to be the minister and kicks you out? That has happened in a lot of countries in Africa and Latin America. Then there is very little that you can do because your investment is already frozen in that country. So you have got absolutely no reaction, you just have to cop that. If you are silly enough to end up in that position, you deserve what you get. That is my thinking.

Mining, where we are strong, is totally different from getting business overseas in, for instance, the arms sale or a construction contract where the other people are strong. It is just a matter of shaking hands to make a deal, making a financial arrangement and the thing is done. Mining is a little more tricky. I am not suggesting that there is no corruption going on in mining—only God knows how much there is. Somebody mentioned Indonesia as being one of the biggest scams ever in the mining industry. The Bre X thing we all know about. I do not remember the figures—there are at least two books that will be published—but about $3 billion that evaporated just like that.

On bribery, I doubt that there was such a thing as a fat envelope changing hands with the mining executive. What certainly took place—and you can quote me on this—is that there is a fat $1 million a month retaining fee for a company owned by one of the Suharto children. On top of that there is 10 per cent free interest in the mining venture. That is perfectly legal. It is not a bribe; it is a scandal and a scam, of course. But that is the reality of the mining industry.

We in Australia are no better. I will give you another case. With a minimum of research you can find immediately the culprit. A junior company wanted to move into Bolivia. What do I know about Bolivia? Nothing. It is a brilliant idea. We get the minister for mines or the second in command of the minister for mines in Sydney. We wine and dine him and all that sort of thing. It is not bribery. No money is changing hands. Conclusion: first, that mining company has lost every single penny that it put into Bolivia and, second, it is almost broke now.

I have a third and last case. I mention those because they are relevant to the fact of national interest that somebody mentioned in their submission—'We do that as a sacrifice for Australia and all this sort of thing'. That is not quite true. The French now have been gently bulldozed out of all francophone Africa. Australia and Canada come in—not so much South Africa because they are much more cautious in these things. Not that they are clean, but they do the thing in a more sophisticated way.

What does the junior Australian company do? The very first thing it does is puts on the board a powerful local politician, an ex-politician, the chairman of the investment

commission, an ex-prosecutor general or whatever. That is perfectly legal. Then they float the company and raise $5 million out of the Australian Stock Exchange. What is behind it? Nothing at all. Who is going to lose? Firstly, the silly people who put money into that company that is probably uncheckable. What in the hell do you know is going on in a central African republic or that kind of thing?

The second thing, and this is far more serious, is the reputation of Australian industry. If you lose once, you never recover. We are still more or less Mr Clean even now—maybe because we are naive or whatever; or because we just do not have the same exposure that a lot of OECD countries have in that particular part of the world. Take the French: the French can sign these conventions blindfolded; they always go over or under the thing. Their intelligence, particularly in Africa or wherever, is superb—something with which we can never compete.

CHAIR—Can I just interrupt, because you are right on the point that I wanted to ask about. I am interested in your view about the usefulness of the convention on two levels—the symbolic and the practical. Given that there really are a small number of OECD members who are probably going to sign up and given the almost complete absence of Asian and Latin-American countries—from what you are saying, signing up probably does not matter anyway, if you take the French example. But nevertheless, as a committee, we would be interested to receive your views about the usefulness of the convention on those levels and also whether you see the proposed legislation as useful.

Dr Premoli—I did not go into the fine points of the legislation for the very good reason that I am not a lawyer. How this convention will affect the global community is a topic that can be easily researched. It is just a matter of sitting in front of a computer and adding up the figures. You can see that the OECD partners for Australia are summing up to a reasonable slice of our overseas activity. Latin America is not part of the OECD but there are at least four countries that I know of—Chile, Brazil, Argentina and someone else—that want to sign the convention, regardless. I got this information from Transparency International and I suspect it is accurate.

To answer your first question on how Australia sits on that, I would say that on a scale from 10 to zero Australia is the one that has got most to benefit from that legislation. We have got absolutely nothing to lose. It will protect us from costly mistakes.

Mr HARDGRAVE—Will the convention work if others from OECD countries, and other nations for that matter, are not going to sign up or are not part of it and are not enacting their own legislation.

CHAIR—Or even undermine it.

Mr HARDGRAVE—Or even, as the Chairman has suggested, undermine it.

Dr Premoli—You used the term 'strong lead' for Australia, and that is exactly what Australia should do. We are clean now, we want to keep that way, and that law as it is—or if you wish, you can make it more stringent, and that is up to the lawyers and I am a bit of a generalist—should be Australia's cri de coeur. That is what you want. It would not stop corruption and it would not stop bribery but it would make it marginally more difficult, and that would make the whole difference.

There was a seminar here about some Indonesian mining sponsored by some Australian organisation. There were five big companies operating—Phelps Dodge was one, and three Australian ones—in Indonesia. We grilled them, 'Did you have any problems with bribery or that sort of thing? How do you cope.' And the unanimous response, which I suspect was sincere as two of them are my clients, said, 'No. It takes us a little longer to get there but we can operate without bribery.'

The interesting point is that Phelps Dodge, represented by the vice-president, said that the best thing we have is this American legislation because immediately we can thump them on the back as soon as they put the squeeze on us and say, 'Mr Minister or Mr Whatever, I cannot do that because I would be breaking the law.' So you have more of a symbolic rather than a legal stringency that helps the investor in good faith.

Mr HARDGRAVE—Do you think that perhaps we should take the lead to the point of having what we have loosely termed a nationality nexus? In that case, an Australian citizen committing the offence of offering a bribe to a public official, no matter where they are—whether they are working for an Australian company or whatever—would come under part of our law here in Australia, regardless of where the offence takes place, so that if they engage in those activities they could be prosecuted? Do you think that in itself would enhance Australian's reputations across the world?

Dr Premoli—Why not? I agree with you. You mentioned the case of a sexual offence in Thailand that can be punished in Australia but not according to local Thai law. It is always better to take the moral high ground. I know that some people will resent the fact that they cannot put the practical consideration over the moral one. I try to be complementary to the moral issue. We can afford to be quite stringent in these things.

Mr HARDGRAVE—In your submission you talk about the fact that the citizenry of developing countries dislike bribery deep down—perhaps the higher ranking officials live off it, but the citizenry do not like it. I do not expect you to be an expert on political developments in countries, but from your experience do you think that over time countries also develop democracy as well as economic prowess and so, from Australia's point of view, it is a good investment to be seen to be taking, as you have suggested, the high moral ground now? As those countries develop, will their citizens appreciate Australia's early lead on this?

Dr Premoli—Absolutely, and on several grounds. Do not think that a developing

country will ask the Australian 'mining industry' to come only because of our unquestioned technical expertise and investment capital—two things they do not have. They would also like—and sometimes in total good faith—just to have our standards in the measure that they are applicable to that country. There is an opinion, a consensus, that if you go to Africa you have to do as the Africans do and all that sort of thing. The Africans of Mobutu, a country where I have worked on occasions, coexist with countries like Eritrea or Namibia, and those people are not only squeaky clean, but they would like to retain that image.

Somebody—I think the representatives of Allen Allen and Hemsley—said that we have to curb the corruption at the source. The first thing is that you cannot curb the corruption at the source. You can never tell a country what they should or should not do. The more you try to do that, the more corrupt the country becomes. I can give you an example of a country that has become less corrupt. Paraguay was a dictatorship for 35 years and it is now trying honestly to get a decent mining code and investment code, with transparency in the deal and whatever.

Remember Uganda under Idi Amin or Okello or Obote or whatever; but now it is one of the best and most transparent countries in Africa. They did the job themselves entirely. They would not like recognition but rather some dialogue with people who come there so that they do not ask, 'Who is bribable in the cabinet or whatever?', but say, 'Let's try to do business.' The advice that I give to the mining companies all the time when they go overseas—and I was in Zaire six months ago—is, 'With that money that you have this urgency to stuff in a brown envelope and give to the minister for mines, keep it in your office and spend it on the field—do your homework.' At that stage little by little a dialogue becomes possible. You have something in your hands and there is no way in the world that they can prevent you working in that country—it does not matter how corrupt it is. Then you have to make up your mind whether or not you can operate in that country.

But, for heaven's sake, I disagree entirely with the gentlemen from Allen Allen and Hemsley who say that you can survive in this country if you do not do like everybody else does. I have never worked in a country where that was possible. For the reason that I mentioned, to try to eradicate global corruption is a totally empty sentence because, out of 10 men, there is always one who is corrupt or willing to be corrupt. In exactly the same way, you can reverse the argument: among 10 corrupt people—that is always the guide and partially answers your question—there is always one who either is honest or wants to be honest.

In Mobutu, Zaire, I knew a secretary of mining—Luango is the name; he is still there—who was incorruptible. It did not matter how much pressure there was from Belgium's Union Miniere or the Societe Generale—the French—he would say, 'No, I'm sorry. I cannot do that.' They threw him in gaol. They went to get him out, and he is still there. There is this anomaly, this idea that says, 'When I am in Thailand I have to do

what the Thais do.' It is a fallacy. It is too deterministic a point. You lose the initiative. Corruption very often is not only about corruption per se; it is about power—who calls the shots.

CHAIR—Thank you, Dr Premoli. We are getting a bit of time pressure as we always do on these committees. We hear from so many interesting people that we tend to let time run on a bit. Is there anything in particular that you feel that we have not dealt with that you wanted to bring to our attention? Other than that, we might move on.

Dr Premoli—Not in particular, unless there is a question from the floor. The points are very general, and I would like to keep it that way.

CHAIR—You have imparted a very particular experience which is valuable. We rely on people such as yourself coming forward and assisting us with a different point of view—a point of view informed by long experience, which can be helpful. On behalf of all my colleagues, I thank you very much for your time.

[11.05 a.m.]

CHAIKIN, Dr David, c/- Frederick Jordan Chambers, 53 Martin Place, Sydney, New South Wales 2000

CHAIR—Dr Chaikin, would you please state the capacity in which you appear before the committee.

Dr Chaikin—I am appearing as a private individual. I am an Australian based barrister. I am also a member of the New South Wales State Council of Transparency International. My comments are my own private views.

CHAIR—Your submission has been published. Is there anything that you wish to add it or are there any amendments you wish to make to your submission? If not, would you like to make an opening statement before we move to questions?

Dr Chaikin—Yes. My background and experience has been that, for about the last 15 years, particularly back in the 1980s, I worked for an international organisation, the Commonwealth Secretariat, which had a special unit created in a legal division to combat economic abuse. The role that we played was not only that of lawyers but also in terms of intelligence and investigatory work. Most of our clients were developing countries, so I had a wide range of experience in dealing with many Commonwealth countries in Africa, Asia and the Caribbean where the problem of corruption often reared its ugly head, particularly where it involved high level or grand corruption.

It is that experience which has really influenced my views as to the problems of corruption. Later, I came back to Australia and worked for the Australian government at the national level in the area of International Cooperation in the Attorney-General's Department. For the last four years I have been working with a number of clients as well as with a number of governments that are seeking to recover the proceeds of the corruption of former leaders or parts of the political elite.

I think it is important to emphasise that, when we are talking about corruption, the serious problem is grand corruption. It is really the abuse of power for private ends by persons who hold public trust.

CHAIR—Are you happy with that definition?

Dr Chaikin—Yes—people such as heads of state and other high ranking leaders. There has always been grand corruption, but what is new about the problem and why it is more serious today than it was 100 or 1,000 years ago is threefold. One is the mobility of wealth. The money that is stolen does not stay in the developing countries; it is deposited in secret havens offshore. It does not come back to the country. That has all sorts of devastating effects in terms of the economic and political stability of the country.

The second aspect of what is new about grand corruption is the size of the theft. If we look at recent examples, whether it is the Shah of Iran, who is alleged to have taken $35 billion, or Marcos—

CHAIR—The fabled Marcos gold.

Dr Chaikin—That was between $5 billion and $15 billion, and there was also Duvalier of Haiti. One can go through a whole list of various nations, in this case, presidents or rulers of the country. When the corruption is at that level, it feeds its way right down; everybody is taking something. Of course, the economic effects include that corruption can bankrupt a country. The World Bank has said that it can be the most important obstacle to economic development.

The corruption of foreign officials by Australians or people in Australia is only part of the problem. Obviously corruption in the country concerned, local corruption, is also a serious problem. It really adds to it. Certainly, if you take the Philippines, the effect of the Marcos regime was that, before Marcos came to power, the Philippines was one of the wealthier countries in South-East Asia—it was far ahead of Thailand, Malaysia and even Singapore—but at the end of his rule in 1986, it had the highest per capita external debt. What happens is that the country is left with a public debt that it has to pay interest on.

It is not only that they steal the money; what happens is that they impose a burden. If you look at various countries in Africa, the amount of money that is spent on paying interest payments on debt is far greater than their health and education budgets. In many cases, it is largely the result of proceeds of corruption being externalised and taken outside the country. I should add that the history of recovery of illicit assets is abysmal. It is not just Marcos; one go through most of those leaders. All sorts of legal problems are involved which I have not actually discussed in my submission.

The country is penalised again because they do not get anything back and they are devastated and affected by that and, of course, the population realises that corruption does pay. When I look at this problem I look at it, not just as a question of bribing a particular individual; I look at it in terms of the political long-term effects on those countries. It will continue to be a problem, particularly with the globalisation of business, as it becomes more important that the problem is dealt with.

CHAIR—It was put to us yesterday that some countries moved from being really clean countries—an example which was cited was Papua New Guinea, which perhaps 15 years ago was a very clean country—when they really got corrupted by a lot of aid flowing in, plus a lot of capital and that the movement of capital has really been one of the causes. Do you agree with that or not?

Dr Chaikin—I do not know whether it is a cause, but there is a question about

why one would give aid to a country and see it being siphoned off and misused for political purposes. It is completely counterproductive. If the purpose of aid is economic development of that country, it would be better not to give anything.

CHAIR—It certainly does not secure a good developmental outcome if it is siphoned off and used in other ways—

Dr Chaikin—It does not secure it and, of course, it just consolidates the power of the corrupt political elite. It does not help if we wish to help countries, in terms of transition to democracy, good corporate behaviour, and their development both nationally and internationally. So that would tend to be my focus. I have had another opportunity of looking at the bill. Unfortunately, I have been overseas quite recently, and there are a couple of other aspects of the bill that I want to look at.

Of course one of the points I made was that the nationality principle should be the basis. The problem with the bill as constructed is jurisdictional nexus. For example, it is stated that there is jurisdiction if the benefit was received or, in certain circumstances, would have been received, in Australia. The scenario that is being created is not typical. In fact it is quite unusual that an Australian company trying to bribe somebody overseas would put the money in an Australian bank account. This would be extraordinary.

We are not a bank secrecy haven. We do not have bank secrecy laws. We would be one of the few countries where they would put that money. They might put it in Switzerland or in Austria or in other markets but why would they put it in the country of the briber? So the territorial nexus scenario that they have given is really not just not typical, but would be a very unusual one. For that reason, we are creating a law which is not really going to bite at all, even in theory.

Mr HARDGRAVE—Are you suggesting that we are being naive in this legislation?

CHAIR—We are being minimalist I think.

Dr Chaikin—We are being minimalist—it is always difficult to say whether we are being naive or not, but I will come to that in a moment. We certainly have decided that under the OECD convention, under the compromise that was obviously negotiated, common law countries are allowed to create a criminal offence with this very minimal territorial connection. Of course, all the European civil law countries—because Britain is not civil law but I mean the European countries which have civil law backgrounds—will be required to adopt the nationality principle. And indeed, I have not been through the list of OECD countries to see which of those countries would adhere to the nationality principle; but certainly, a large number of them would. I cannot see why we shouldn't do the same. The other aspect of it is—

CHAIR—While you are at that point: it has been put to us that it really is a more conventional basis on which Australia enacts its laws that it has a territorial nexus. There is the odd isolated example where it does not, such as the child sex legislation, but in terms of difficulty of proof and all of the other aspects that go with having a law that is difficult to enforce, the territorial connection seems to be something that Australian legislators are comfortable with.

Dr Chaikin—Yes, of course. But this is an international problem. We create criminal laws essentially on a territorial basis because the crime occurs within the territory. We are dealing here with an international problem concerning international trade and international business, and therefore the traditional rationale for creating a criminal offence, namely that it should be a territorial basis for all those reasons—in terms of the gathering of evidence—does not really apply. The scenario, of course, would be that the bribees would be outside Australia. The briber, even if it is an Australian company, would be through a subsidiary. In fact, the person who would do it would be a subsidiary or other party located offshore, the money would be sourced offshore, and it would be salted offshore. In those circumstances, our law would have no operation at all.

Mr HARDGRAVE—The Crimes (Child Sex Tourism) Act 1994 created a range of offences. Even tour operators have the possibility of facing some charges. You are suggesting then that if an Australian company were to hire a local consultant in a country, basically to facilitate a project, then perhaps if there was a series of offences, that Australian company would be culpable if that local consultant embarked, as part of its progress of that job, on the bribing of officials?

Dr Chaikan—It is always possible in the law of conspiracy—because that is an ever expanding area of the law; that is what the history has been—that perhaps it would.

Mr HARDGRAVE—If I could pursue that one tad further, using a nationality nexus or however you may like to call it, it is really the Australian government on behalf of the Australian people saying that turning a blind eye to conduct of another person on your behalf is just not good enough.

Dr Chaikan—Yes. Look at the international conventions we have entered into—whether they are OECD or whether they are UN or whatever—the area essentially involved what is perceived to be international criminal activity and, under most of those conventions, the idea is to create the widest possible jurisdiction. If you take, for example, the terrorist type conventions, the idea is to create the widest possible jurisdiction so that you can either go on nationality, on territory or on some other basis. If all countries do that then there are not really many loopholes. But why, in this area, we should go back to the old common law territorial principle, I cannot understand, if we are dealing with something that is perceived to be an international criminal problem.

Of course, it has knock-on effects. I notice in the OECD convention that it says in

clause 4 that states which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials. If we do not prosecute them, but it is a criminal offence—let us say it is an Australian company that does it, if we do not have jurisdiction—then we should allow that person to be extradited. Essentially, that is what they are trying to say. But that has got a gaping hole in it because you cannot extradite people unless there is dual criminality; it has got to be a criminal offence both in Australia and in the other country. So even the assumption of the OECD convention is flawed as well in that respect.

Mr HARDGRAVE—Does it not also come back to one of those basic philosophical statements that with nationality and citizenship come rights and also responsibilities. So an Australian citizen bribing a foreign official really is a matter that all Australians would have some concern about. I am sure, the last thing that anybody in this country would like to see is a headline saying 'Australian bribes public official'. I think there would be a sense of national shame that an Australian would be the perpetrator of a crime like a terrorist act or a mass murder. Australians going to the Philippines or to Thailand and having sex with minors was a source of great national shame to most Australians, likewise the bribing of a public official and all of the connections that you and others have already outlined. The effect on another country's wellbeing and on its citizens' wellbeing would be, in itself, a sense of national shame. For that reason and that principle alone, it makes sense, does it not?

Dr Chaikin—I agree with you that we are talking about national interest and public interest when we pass laws. With the nationality principle, our concern is to protect Australia's reputation. Even at the symbolic level—if we assume it is going to be so difficult to prosecute because corruption, obviously, is secret and hidden and is very difficult to uncover—surely we should be saying our citizens, nationals of Australia and Australian corporations should have these obligations if they are going to have the advantage of our nationality.

CHAIR—If you are looking at grand corruption—and I make the distinction between all sorts of other corruption and less significant, perhaps, forms of persuasion, the sort of distinction that a former witness was making—you wonder whether there would be many Australians involved in it anyway and just who would be impeded if the legislation had a greater reach. A previous witness said that every Australian wandering around who is of Chinese descent, who has become an Australian citizen and has gone back to work in China, would be potentially caught by this. The mind boggles if that is correct because, if we are looking at grand corruption, you wonder just how many people can be involved in it—the bribery of heads of state and significant public officials—as opposed to greasing the wheels and the stuff that we all know about and understand.

Dr Chaikin—That tends to happen in major arms deals—it depends on the area. We are talking about huge sums of money; we are not talking about the petty cash.

CHAIR—You wonder how many Australians of Chinese descent would be wandering around doing that.

Dr Chaikin—I know of one recent example where a state provincial official in China was bribed in order to get a particular deal done, and it was done by an Australian citizen. They in fact disguised it by way of manipulating the foreign exchange prices in the contracts. So it does happen, and that particular province has 120 million people.

CHAIR—I am not saying it does not happen. I am saying one would think that one is not really looking at a huge occurrence of Australian citizens being involved in it.

Dr Chaikin—In grand corruption, at that level, probably not, which leads me to another point concerning legislation, that is, the definition of 'foreign public official'.

CHAIR—That is one of the things that I wanted to come to. It is something that is worrying me.

Dr Chaikin—I looked for legislation that I would normally read if I was giving some advice, but when I had a look at 'foreign public official' this morning, it talks about an employee of a foreign government body and it talks about a member of the legislature of a foreign country. This has been drafted without knowing how foreign public officials in other countries are defined. For example, in many countries where the legislature is separate from the executive, a member of the executive—a president, a vice-president or member of the cabinet—would not be caught by this legislation. So certainly that provision should be widened, in my view, to include a member of the legislature or executive of a country.

CHAIR—And also, perhaps, the judiciary.

Dr Chaikin—And the judiciary. Also, if we look at the word 'employee', why is it just employee? This morning I dug out the definition of a public official in the Philippine penal code, and that covers:

> . . . any person who, by the direct provision of the law, popular election or appointment by a competent authority, shall take part in the performance of public functions in the Government of the Philippine Islands, or shall perform in the said Government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class, shall be deemed to be a public officer.

CHAIR—Or even holding out.

Dr Chaikin—Or holding out. What happens if one is a consultant? There are many different ways in which one can essentially have the power of a public official, which is what we are dealing with.

CHAIR—We almost get round to trying to characterise the function that is performed more than trying to call it by a name. You miss people that way.

Dr Chaikin—The legislation is constructed to try and give an exhaustive definition and miss out the principle as to whom we should cover. I see that in that definition of 'foreign public official'.

CHAIR—Do you have any comment on foreign public enterprise?

Dr Chaikin—I must say that I have not really looked at it.

CHAIR—Don't be concerned now; you will obviously have an opportunity to bring forward anything else that you wish to.

Dr Chaikin—That also leads to the question, with privatisation now taking place in developing countries and not only our own, as to whether this legislation should apply to commercial bribery as well. I know that is on the OECD agenda, and I have written a paper on that question but I have not submitted it to the committee. That is another area which needs to be focused on. So this, in my view, is only step one. We will have to come back and look at this question of commercial bribery.

CHAIR—I think it is a fair summary to say that a lot of witnesses have said it is a useful first step, and it has been called a useful first step. I think we are all very concerned to make sure that the first step is as useful as possible.

Dr Chaikin—Yes.

Mr HARDGRAVE—While you are considering those definitions, what about the family based structures that tend to exist in a lot of countries, with linkages of families running governments, departments and so forth? Do you think they are adequately covered by the legislation?

Dr Chaikin—They are not really, but this is a much wider problem. I can set up a system in a country, if I have the power, whereby you either have to pay me a bribe or I just take monopoly rights and abuse those monopoly rights. That has happened with one of our neighbours and with many other countries. So is that theft? If I set up a situation whereby I have got the monopoly on a public good, and I am not paying proper consideration for it, the effect is similar to looting. But how one would characterise a law would be very difficult, because we then get into criminal anti-trust concepts and so forth. I suppose our law is defective in that respect and, in terms of recovery of assets, it is even more so. In the case of the Philippines, some of that money was deposited by the cronies of Marcos in our own country. But in terms of what is the criminal offence, even in terms of civil liability—which is often the way to go—one has great problems in that respect.

Mr HARDGRAVE—So you have to take the first step, and I suspect the first step is basing it on our own morality—accepting that there might be other community or social values in other countries—and applying our own morality for our own laws. That would be a reasonable first step.

Dr Chaikin—It is not just our morality. I think this has become a new international business morality: that you no longer can strut the stage, bribe willy-nilly and get away with it. If you get your headline in the *New York Times*, there is the effect on your share price; the institutional investors do not want to invest in a company that is engaged in bribery.

CHAIR—There is a global movement towards some high regard for good governance. Do you agree with that?

Dr Chaikin—I think so. If one is not engaged in that conduct—in other words, if, in structuring one's business, one does not engage in that conduct, one is more likely to engage in good corporate behaviour for the interests of one's own shareholders and the interests of creditors and other persons interested in the company.

Mr HARDGRAVE—So just as somebody taking a bribe for one thing might take a bribe for something else—in the drug trade and all sorts of things that could come up as well—it would be a fair thing to say that a company prepared to bribe in one instance might also be prepared to bribe in another?

Dr Chaikin—Of course, it can be an infectious problem. It has happened in a number of other countries, including Germany.

Mr HARDGRAVE—I know that in your opening comments you were talking more about the big ticket stuff. Could I ask you your view on these facilitation payments and on government action on the routine facilitation payment matter. There has been a suggestion that transparency of routine payments by Australian companies in itself would be a very positive step—that it would be a statement by Australian companies that, in order to do business in certain countries to make certain routine things occur, they had to pay some money and here is what they paid because that is just the way life is. Do you think that would be a reasonable thing as well?

Dr Chaikin—We are not covering the big picture, are we? I am at the airport in Dhaka and I want to catch my plane. I give $20 to a guy because he is delaying stamping my passport. Do we want to cover that? Is that the sort of behaviour that we really want to cover in this type of law? The problem is that, once you start concentrating on that and you make it an offence, it will be the trivial that we start prosecuting.

Mr HARDGRAVE—Perhaps you have misinterpreted my comment. I was not suggesting that we make it an offence but, rather, that Australian companies at least

confess that it has occurred because I submit to you that—applying our morality, our standards, here—if I arrived in Brisbane from overseas and I gave a customs official $20, I would probably get arrested. I am saying that, if that were to occur in Dhaka and you could get away with it, that is a case of their particular social values being applied but, nevertheless, we should at least acknowledge in Australia that it has occurred for no reason other than its just simply being an accounting process, a transaction. We should not be afraid to hide that because I suspect that, if you are being less than transparent on those matters, the opportunity to perhaps give somebody $20,000 to make something more important occur faster is always there. That temptation is always there.

Dr Chaikin—In terms of having a specific disclosure obligation, for what purpose?

CHAIR—It is very interesting and I will pick up your comment on that. I think there is a real problem with the concept of an improper advantage; the improper advantage in your example being for the recipient in that you are wanting to get on the plane. To me it is a due advantage—you are entitled to have your passport stamped even if the end result is that somebody on the other end does something improper with the money. Expediting something is something that we understand very well in our culture. For instance, if you want to get a birth certificate in 24 hours, as opposed to three weeks, you can pay a fee. The only difference is that it is all in public—it is all part of public revenue—but that does not affect the legitimacy of wanting it and needing it if you are the one who is obtaining it. It is a due benefit. It is not, to my way of thinking, securing an improper advantage.

Dr Chaikin—No, and who would you disclose it to? The ATO, the Australian Securities Commission or the Australian Federal Police? My real concern about having a criminal provision—and this is why I agree with the US defence—is, because the difficulty of prosecuting is significant because of the difficulty of finding evidence on those, it will trivialise the legislation. With facilitation payments for example, say I am the secretary and I go with by boss and see him make a facilitation payment. There is a falling out and I make a complaint. It is going to trivialise the legislation if that is what we should be focused on. It is better not to have any prosecutions at all than for us to focus on the trivial.

It does not assist the developing country, it does not assist Australia, and it does not affect our reputation. What is the interest in having a disclosure law? I am very sceptical about having laws for disclosing all this. Who is it going to be disclosed to? To the government? It has to be for a particular purpose. What are they going to use it for?

Mr HARDGRAVE—One reason why you might want to disclose it is because some of these things get written off against the expenditure of money for business purposes under the tax act. I have to tell you that, as a taxpayer, I would find it offensive if people who earned far more money than me are flying all around the world on a constant basis and flipping out $100 here and $50 there to make things happen faster for

them because they might be inconvenienced by a delay and they are then writing it off under the tax act and creating a benefit for their company's profit, their personal profit or whatever. So for those sorts of reasons a number of witnesses yesterday saw absolutely no problems at all about being quite upfront and transparent and saying that these things are happening. I do not think they are something that, for instance, should be written off as a legitimate business expense because, quite frankly, in a moral sense they are quite illegitimate by Australian standards.

Dr Chaikin—I take your point, but this is not for the criminal code. This might be something to be dealt with in taxation requirements in terms of disclosure.

Mr HARDGRAVE—But it still has to be disclosed?

Dr Chaikin—Yes. Maybe in the context of the taxation law they might want to widen the disclosure law in order to prevent tax deductibility of bribes. Maybe it could be dealt with in that context, but I do not think it should be in the criminal code.

Mr HARDGRAVE—I note that a witness later this afternoon, Commissioner Barry O'Keefe from the Independent Commission Against Corruption, has nominated a small value of, say, $100 as being a reasonable definition of what 'small' is. What is a 'small value payment'?

Dr Chaikin—Are we talking about facilitation benefits?

Mr HARDGRAVE—I guess that is what we are talking about.

Dr Chaikin—Having such a law in place makes us a laughing stock. We will become a laughing stock if we put some nominal value as to what is criminal or not criminal in terms of facilitation benefits. Are we going to index it to inflation?

Ms JEANES—In terms of assisting us to draw some sort of line between the broader picture issues that you believe we should be pursuing and the smaller facilitation sums that somehow we have to expose, where would you draw the line? If you did not use a figure, would you use a purpose?

Dr Chaikin—The US Foreign Corrupt Practices Act provides a defence in the case of any 'payment made in order to expedite or to secure the performance of a routine government action'. So it is purpose there. If you paid $100,000 in order to get your passport stamped, it would not as a matter of law in terms of evidence stand up to any examination if it were a significant payment. What a significant payment is depends upon who the official is and what needs to be done. The importance is in the 'performance of a routine government action', such as processing passports or getting a drivers licence.

CHAIR—Something to which you would be entitled as a matter of course?

Dr Chaikin—Yes, therefore it has a very limited operation. That provision has not created any problems in the United States, so I do not see why it would create any problems for us. But I really think that, if we start talking about criminalising something on the basis of some value—

Mr HARDGRAVE—Do you think we should leave it up to prosecutors to decide what should be pursued? In other words, should we simply say any amount?

Dr Chaikin—I take the view that there should be a defence, as in the United States position, if one does make a facilitation payment—if it is a facilitation payment.

Mr HARDGRAVE—How are we going to know unless it is transparent? We are back to my line of questioning again.

Dr Chaikin—If the ATO find out, why are they going to tell anybody else? That is another problem. I do not think that that is a real problem. You are thinking about how you find out about corrupt activity. You find out about it either through whistleblowers who are the employees or you have an undercover or sting operation. These are traditional ways that you find out about major corrupt activity—not from voluntary disclosure. People may confess in confession but not normally to the ATO.

Ms JEANES—There is a difficulty for us in that we do have to draw a line somewhere. Disclosing the payment of a $20 fee that is required for someone to have their passport stamped at the airport obviously is something that we should not have to worry about legislatively but it is part of doing business in some countries. Once again I go back to where we have to draw the line.

Dr Chaikin—We do not need to draw a line if we take the view that this should not be covered. Certainly the OECD convention and the US Foreign Corrupt Practices Act says that this is not what we are about, this is not what the focus of our attention should be; if it is, we will trivialise the whole process. So I do not believe that we have to draw any line, any limit. I do not think that it is a problem. It is only a problem if the facilitation payments defence is used in order to avoid detection or successful prosecution for bribery and corruption. That is a problem. But it has not been a problem in the US government's experience at all. That provision has been no problem at all. Of course, the United States is a little different because you can actually go to the Department of Justice—their laws are much more detailed and complex—and put a proposal to them and ask them whether it offends their legislation in terms of payments, who is being paid, how it is being paid and so forth. They get clearance in advance for some major transactions, which gives legal certainty to the firms concerned.

Ms JEANES—Would that be useful for us?

Dr Chaikin—Yes, I cannot see any reason why not. I am not an expert in the US

Foreign Corrupt Practices Act but if one was engaged in a major business deal which could have potential criminal implications then it would be useful if there were some safe harbour—if one could get advice that it is not criminal if one performs that particular transaction in that particular way. There may be many instances where there is a fine line between whether it breaches the legislation or not. That would be useful for Australian businesses.

CHAIR—It is certainly a model that has worked well with, say, the ACCC and some tax rulings for instance. Particularly when there is major investment involved, it can be very important that you have a clear idea about whether you are going to transgress or not.

Dr Chaikin—That is right. It also allows another party to come in and have an independent look at what you are going to do. Sometimes when you are very close to the action—it happens with in-house legal advisers—your judgment may not be sufficiently independent and objective. Sometimes it is useful to get somebody from outside to approve it, if you like. We talk about abusive monopolies; in certain circumstances they may be considered to be criminal offences. There may be a number of circumstances where advance clearance by a body that was experienced in dealing with this is helpful. In the US Department of Justice the people who do that are very experienced in international business transactions and what is bribery under their law. So I think that that might be useful.

CHAIR—Could I just pick up on something in your submission: you said at (B), where you are dealing with the draft bill—and you make the point that you have made orally—that it is a pretty conservative go, not only in terms of the territorial nexus but some other aspects. You talk about protecting Australian business from any competitive disadvantage arising from the legislation. A couple of people who have come before us have said that this law is really going to assist Australian businesses rather than impose any competitive disadvantage on them anyway, because it reinforces our national expectation of people doing business. Do you agree with that comment, or do you see it as a disadvantage?

Dr Chaikin—I do not see it as a disadvantage. When I studied economics we had the law of comparative advantage; and I suppose if one is good at bribing and is experienced and knows who to hire and if your particular embassy is advising what the going rates are, and who you have to bribe so you do not pay the wrong guy and then somebody else comes along and you have to pay twice over—

CHAIR—So if your intelligence is perfect, as a previous witness said—

Dr Chaikin—And let me say that some embassies of some countries have done that in various jurisdictions. If you do not have a comparative advantage, which I do not believe we do, then it is not really a competitive disadvantage if we have such a law—in

fact, it would be rather the opposite because it would allow us to have a more even playing field. That is not the way we have done business internationally. We do not have the experience of some of the great colonial countries in terms of the way they would manipulate the local people, in terms of corrupting the local leaders and so forth. We just do not have the history or experience of doing business internationally. In my view, it would not be a competitive disadvantage. It may be in some circumstances and some companies. We cannot discount that. But that may be just a short-term disadvantage to that particular company, which for me does not outweigh the reasons why we should not have such a law.

CHAIR—Thank you for clarifying that; that leads me to the next point to clarify. You said that the draft ignores the most common methods of bribing foreign officials and allows them to be more easily evaded by any Australian business which engages in international trade. Apart from the nationality principle, are there any other suggestions you have as to how we might address that more effectively in the draft without frightening the horses or overreaching to such an extent that we are going to be out of step with the rest of the world?

Dr Chaikin—I do not think so. I think we could just use the models that we have used in other areas of the law as appropriately adapted. I do not know whether one should include residents of Australia. The United States law is based on giving the Securities Exchange Commission jurisdiction. Obviously, our law has been drawn up to comply with our constitutional requirements. Reading from the American legislation on extraterritoriality and the criminality of foreign bribes, one of the bases is:

> . . . individuals who are citizens, nationals or residents of the United States, and corporations, partnerships, associations, joint-stock companies, business trusts, unincorporated organizations, or sole proprietorship having their principal business in the United States or organized under the laws of a state, territory or commonwealth of the United States . . .

Of course, in the United States the companies are registered on a state by state basis, unlike Australia. So there they are capturing all the forms of business associations in the United States. There is no reason why we should not have a similar type of provision. Again, it is companies which can be associated with Australia—national companies as well as companies that are headquartered here. If a company is registered overseas but its principal place of business is Australia and that company is caught bribing foreign officials, the stain will be on us. I think the rationale would apply also to that example.

CHAIR—Presumably, you would also want to include in this provision to catch a wholly owned subsidiary operating in another country.

Dr Chaikin—Yes. Of course, one of the big questions under US law has been to what extent are the sins of the subsidiary—the sins of the children—visited on the parents. Often, when one sets up an overseas business, we set up under a corporate structure, which requires registration in another jurisdiction.

CHAIR—And, indeed, that company might have a joint venture partner that does all this nasty business anyway and does not necessarily involve the other partner, or do you think that is unrealistic?

Dr Chaikin—The simplest way of bribing is just to make a commission payment to an agent. You give them the money and you are using their services, but you pay excessively and the excess is used to make the various payments—that is straightforward. The problem is that tends to be traceable, if one sees the size of the commission payment.

CHAIR—Or the frequency, perhaps.

Dr Chaikin—Yes. There are many other techniques of disguising bribery and there always will be. There are as many ways of concealing bribes as there are of laundering money. It is just a question of finding some business technique and adapting that to making a payment, whether it is phoney consultancy fees, inflating prices of products or barter deals—there are all sorts of ways. The important thing is that if there is that Australian connection, not just territorial but nationality or principal place of business, then that is what the principle in terms of coverage should be.

CHAIR—I do not know whether you were in the public gallery when an earlier witness today was concerned on behalf of Australian directors of corporations who might inadvertently be caught in this web, not knowing about this at all because it is taking place offshore and perhaps in the hands of a subsidiary in circumstances where there is no authorisation coming back from head office. Do you see that as a real danger, particularly because it is dealing with criminal behaviour and criminal consequences?

Dr Chaikin—Of course, it is a risk to the director, but I think it ignores—

CHAIR—As a matter of public policy, is that something you should leave open to possibility?

Dr Chaikin—Yes, but I think it ignores that companies should set up compliance systems. Whether it is bribery of foreign public officials, whether they are engaged in environmental pollution breaching the other country's laws or our own laws, whether it is adhering to corporate law responsibilities in our country and in other jurisdictions in which they are operating, they have to set up compliance systems. If they set up a compliance system in a way whereby they have acted responsibly, then perhaps that should be a defence. I am just thinking about that now because we have that in other areas of the law.

CHAIR—That is right. I am just exploring it with you because I am thinking as you are thinking.

Dr Chaikin—Off the cuff, perhaps there should be some safe harbour. Depending on how wide one stretches in terms of whether we are talking about subsidiaries or even

subsidiaries of subsidiaries, if we are going to expand the law to cover that wider field, one is then much further distanced from a policy viewpoint in terms of control—we are talking about directors. In those circumstances, if we were thinking of extending that law much wider then there should be some defence.

CHAIR—Clearly, yes.

Dr Chaikin—If one does put in proper compliance systems that should be sufficient responsibility. You cannot expect any more if you are that distant from where the action is. That is what company directors are supposed to be doing more and more in order to adhere to Australian law. It is no use just saying, 'I don't know what is going on.'

CHAIR—Yes, you cannot leave it to happenstance as to whether somebody is engaged in this sort of behaviour, either inadvertently or otherwise. It just seemed to me that there would need to be some defence if a director had been taking whatever action was reasonable in all the circumstances to ensure compliance and good behaviour of a subsidiary—or anyone else for that matter—for whom that director might be responsible.

Dr Chaikin—Particularly in view of the way that we make directors more and more strictly liable in one sense—

CHAIR—We are moving a little bit away from it at the moment.

Dr Chaikin—We are. I think there is a section in the Trade Practices Act, which is like a safe harbour section, dealing with the situation where one does do all the right things, which is all that one wants. One does not want to visit crimes on directors who are acting responsibly. But, at the same time, we do not want to allow directors to wipe their hands of it by not putting any systems in place and just saying, 'The dirty business is done by somebody else whom I am not responsible for, even though ultimately I can exercise control through our nominee directors and through our other means.' But that is something I am sure the committee will look at.

Ms JEANES—What penalty would be seen as appropriate for a director who had not put in the appropriate systems to avoid that sort of behaviour?

Dr Chaikin—I was thinking that would be a defence, and the penalty that would be applicable would be the actual offence.

Ms JEANES—If that defence was not available because it had not been done, what sort of penalty would then be appropriate for a director who had allowed that sort of behaviour to go on because those systems were not there?

Dr Chaikin—I do not know whether I can think of any number. I know that the

Attorney-General's Department does try to be consistent between various pieces of legislation in terms of the appropriate penalty. I really do not have any view about that, except that it is in keeping with other similar types of laws. The penalty is always the maximum penalty—no-one ever gets them. But as long as it is consistent with other laws of what we consider to be similar gravity.

CHAIR—A very valuable point you have made is that we need to treat this in a serious fashion instead of in a minimalist fashion. That is the theme I get from what you have said this morning.

Dr Chaikin—Yes.

CHAIR—Thank you very much for coming this morning and spending time with us. We have run out of time as we usually do. It has been very valuable for the committee to have the benefit of your particular experience and expertise. This inquiry is in its deliberative phase, so we may get back to you if we need to clarify anything or to ask you for further assistance.

Dr Chaikin—Thank you very much.

[12.01 p.m.]

HILL, Professor Jennifer Gae, Associate Professor, Sydney Law School, and Corporate Counsel, Corrs Chambers Westgarth, 173-175 Phillip Street, Sydney, New South Wales 2000

CHAIR—I welcome Professor Hill. Your submission has been published already by the committee. First of all, are there any amendments or additions you wish to make to the submission? And assuming there are not, would you like to speak to your submission before we move to some questions?

Prof. Hill—I do not have any additional points at this time and at the end I might just make one other point on a different matter. But it is probably better if I restrict myself to the focus of this paper which I think links in very well to David Chaikin's discussion. In a sense, I am going one step further and looking beyond the directors to corporate criminal liability which may flow from the introduction of an anti-bribery offence.

By way of background, there were two matters that prompted me to write this submission. Firstly, when I went through the accompanying memoranda to the draft legislation, I was struck by the fact that, while there was quite a good deal of discussion on the primary offence per se under section 14.1 of the draft bill, there was not a great deal of discussion about flow-on liability for the corporation itself.

Secondly, at the workshop that was held recently in Canberra on this draft legislation, I was also struck by the fact that a number of senior management people from very large Australian companies seemed very unsure of how their companies could protect themselves from criminal liability and whether what those companies were doing now was adequate by way of protection. I felt it was quite important that if this legislation does go through and the primary bribery offence is implemented there should be a very clear understanding of the background principles concerning when the corporation will also bear criminal responsibility.

It was particularly important that those principles be brought out by virtue of the fact that in Australia we have had a significant change to the principles of corporate criminal responsibility by the introduction of the Criminal Code Act in 1995. That act is a bit odd in the sense that it will not apply to old offences until March 2000 but it is now applying to new criminal offences that are created. Therefore, I am assured by the Attorney-General's Department that the Criminal Code Act will apply to this particular bribery offence, if it is introduced. It is very important for companies to be aware of the implications of that act for them.

It is also important for the committee to be aware, when you are trying to match the Australian legislation with the OECD convention, that there will be a differential effect between article 1.1 of the convention and article 2 of the convention. Article 1.1 of the

OECD convention stipulates in fairly good detail what they want for that primary bribery offence. The effect of that will be that any countries that are signatories to this convention will end up putting in place fairly similar primary bribery offences.

When we get to article 2 of the convention, it says that basically each country's own background principles of corporate criminal liability will subsist. That means that corporations in these different countries may or may not have criminal liability attaching and that very different principles will apply to that attachment. Many countries just do not recognise that corporations are capable of committing crimes. My submission was based on the fact that I felt that these were important background issues but, nonetheless, corporate criminal liability is something that every company, if the offence goes in, will need to be very conscious of and will need to know how they can protect themselves.

In the central part of the submission, I point out the shift that occurred with the introduction of the Criminal Code Act. Prior to that, the primary method of applying corporate criminal responsibility came from the Tesco decision. Early in the century, we had rather stricter cases in Australia. There was a case, Morgan and Babcock, which was a bribery case where the court applied vicarious responsibility to the company and said, 'Well, if one of your employees does it, then, as a matter of policy, you ought to be criminally liable as well.' But we saw a shift away from that through the Tesco decision. The Tesco decision radically narrowed the circumstances in which companies could be criminally liable for the acts of their employees. Basically, under Tesco, the companies got off scot-free unless the offence was either committed or authorised by the very heart of the company—by management.

In the bribery context, that old approach to corporate criminal responsibility would mean that companies in Australia would be criminally liable only if you were able to prove that someone in Singapore had phoned and said, 'Look, I need authorisation to spend an extra $15 million on this. They won't give us the contract. Can you get it through to me tonight?' and you can prove that there was a board meeting that actually authorised that payment. I would not have thought that most bribes occurred in that way, although at the workshop in Canberra I was assured that this happens quite regularly as well. So that was the old position.

The new position under part 2.5 of the Criminal Code Act, which was very strongly drafted on my old colleague Brett Fisse's writings over the years, took a completely different approach to corporate criminal responsibility. It took the approach that corporations can do organisationally wrong things which actually contribute to the commission of offences.

CHAIR—It could be inadvertently.

Prof. Hill—Yes. It took the view that this old Tesco test was particularly inappropriate for large, diverse companies where you have middle to lower management

with quite a lot of authority. It is an old 19th century notion that the board is in touch and in charge of everything. Under the Criminal Code Act, the really meaty provisions that radically extend the potential for corporate criminal responsibility are under section 12.3(c) and (d). They are the ones that say that the corporation will be deemed to have authorised the commission of the criminal act if you can prove that there was a corporate culture which either encouraged, tolerated or failed to promote compliance.

When we were at that Canberra workshop, one of the directors from a large Australian company said, 'We have a 24-hour hotline where any employee who is in an ethical dilemma anywhere in the world can phone and ask advice.' He asked, 'Is that going to cover the company?' I said, 'Well, you're in a good position under this corporate culture provision as long as you actually enforce it—as long as they don't get a voice-mail message saying "No-one here. Do what you think's a good thing."'

Mr HARDGRAVE—But don't get caught.

Prof. Hill—Yes. Part of the rationale for the introduction of these new provisions was to enable the courts to look beneath the rhetoric in the company's documentation—all those motherhood statements of 'Yes, we're leaders in the ethics of the world'—to the subterranean messages that are really going out through the company. This, potentially, radically expands companies' criminal liability, but it does have safe harbours. It means that the company can be protected from criminal liability if you as a director, or you as the board, can show that you had genuine compliance systems which were enforced—that when you found out that something was wrong, the person was hauled in and investigation occurred—courts can look ex post facto to see whether companies allow it to ride or whether they do investigate. If companies can show that they have these types of compliance systems, they will have a strong defence under the Criminal Code Act.

It is important for them to understand that this is a new provision applying to the anti-bribery offence, and that they have to be on their mettle in regard to that. It is important for two reasons: firstly, for their own protection; but, secondly, because once you do actually trigger those sorts of internal compliance mechanisms within the companies, then in a sense you are taking the heat off your regulators to enforce this new law. You are actually doing what the OECD said that they wanted countries to do, which was to try to actually get the companies to be monitoring these practices themselves. So I think it is important for those dual reasons.

CHAIR—Thank you very much for that. What assistance can Australian corporations get in setting up compliance systems that are going to resonate appropriately with the new look? What set of circumstances or codes of conduct or means of monitoring or training or encouraging, or whatever, are really going to be looked at favourably, or is this one of these sorts of situations where you have to 'suck it and see' and we will learn?

Prof. Hill—I suppose they have already been setting up compliance systems in

relation to things like trade practices, environmental issues and sexual harassment. These types of offences are already triggering internal mechanisms within companies, so I would imagine that they will have very different responses to it in the way that the company is set up and its internal hierarchy. So in a sense it is probably better not to have any really rigid rules on what they have to do, but to have a background principle like this, saying that you have to have something that addresses the issues and at least has a chance of working, and you have to jump on it if it is not working.

CHAIR—Hypothetically, I wonder what would happen, looking at compliance and looking at whether the safe harbour provisions might be triggered, in a situation where you have an Australian head office in the old way, whether knowingly or not knowingly, blissfully unaware of what its wholly owned subsidiary is doing in a South-East Asian country where it is engaged in a large infrastructure project with a joint venturer involving loans from other places, so there is a multinational input into this structure. How could the Australian head office have compliance systems that will keep an eye on what its joint venture partner is doing, the circumstances in which ticks are being given for money to flow, and all of the things that no doubt happen on these large projects?

Prof. Hill—This ties in with the last point that I was going to make, which was on the jurisdictional issue. I think in the type of scenario that you are bringing up, under the current jurisdictional basis for this offence, once you have got a separate legal entity, the parent is responsible only for its employees under the Criminal Code Act so, in a sense, subsidiaries will provide a buffer and a protection under this legislation which I know a lot of people feel is very wrong.

The other side of the coin, though, is of course the one you are saying. That is, if we do have a wider jurisdictional basis—such as under the sex tourism act or whatever, where as long as you are an Australian, it does not matter whether you can link the offence back to Australia—then there is the problem that we don't want to catch every Australian company so that it is very difficult for them to oversee. I think that is built into this idea of whether you have created a corporate culture that encourages, tolerates or whatever. If you are creating a culture that says, 'We adhere to these ethical standards. We expect a yearly report and that must be complied with,' I would have thought it would be difficult to get a company with a head office based in Australia that has done that.

Mr HARDGRAVE—What about the sheer transparency aspect of things like facilitation payments and the routine government action that occurs? I know those sorts of suggestions are all very small beer stuff compared to the big licks like you have heard in the Canberra conference. Nevertheless, it is in itself a form of bribing of public officials. Is there value in having a compliance system which in fact makes transparent, brings out into the open, those sorts of payments? A company could make the simple statement, 'To do business in a country overseas, it is a fact of life that I have to pay $50 to that person to make something happen and $100 to another person.' At least it could be brought out into the open.

Prof. Hill—I think that is a good point when you have a defence in the primary act for facilitation payments. I am a great believer in transparency. I am trying very hard to get greater transparency for director and executive remuneration, but it is a bit of an uphill battle. I think transparency is generally a very good thing. When you have this, in a sense, very difficult provision to draft which says, 'Some things we think are seriously unethical but, in respect of other things, we are real people in the real world and we know you are going to have to pay those,' then I think it is a good idea to have that disclosure so that a company can at least say, 'We consider we are within the exception for these particular types of payments and we are not covering that up.'

Mr HARDGRAVE—It is an acknowledgment also that Australia has certain moral, social and community standards or whatever that are different from perhaps a country in which an Australian company or its subsidiary may be operating.

Prof. Hill—I feel not particularly well-qualified to talk on this difference between facilitation payments, because I know the people who are doing business at the coalface are the ones who are much more familiar with the way it operates. Certainly, when I have spoken to some of them about the background to this draft legislation, the first question they always ask is, 'Is there some sort of exception for those little $50 payments that you just have to pay to get anything done?' I do think that, while it is slightly troubling in principle to say, 'Some we don't accept but some we do accept,' certainly the commercial reality seems to be that you have to make that distinction.

Mr HARDGRAVE—Commissioner Barry O'Keefe, from the Independent Commission Against Corruption, suggested that the small value should be $100 and less. Do you have a view on what a small value payment would be?

Prof. Hill—I just do not know, because of that ivory tower up the road. I am not out there in Singapore, Indonesia or Japan knowing what a small value is. I think that is where the evidence from the people who have actually worked there is vital.

Mr HARDGRAVE—Does transparency and looking at them also allow us to perhaps over time gather what a small value payment is? It would, wouldn't it?

Prof. Hill—I would assume so.

Ms JEANES—What methods of disclosure would you consider appropriate?

Prof. Hill—I do not know. I do not know whether it should be in a company's annual report. Companies may really baulk at that and feel that in some way it looks tainted.

Ms JEANES—I wonder if you explored the hotline model, where those sorts of payments were reported to the company's legal advisers. The advisers could then be

available if the company found itself in any sort of trouble and they could say, 'These are the sorts of payments we make and this is the sort of advice we have given in response to requests.'

Prof. Hill—Yes, I think that that sort of transparency is a good thing. I think, though, that the appropriate people to answer the question of how a company can best achieve that sort of transparency would be management in companies. Perhaps if you have got more of them lined up as witnesses, that would be an important question to ask them—'What could you live with in terms of this type of disclosure?'

Mr HARDGRAVE—At the end of the day those internal mechanisms themselves would dictate what a small payment would be anyway, wouldn't they?

Prof. Hill—Yes.

Mr HARDGRAVE—If a manager of a business based in Singapore, for instance, wrote back the monthly report and said, 'Facilitation payment to local telephone technician $1,000,' I would have thought head office would have said, 'Hang on, a moment,' because you are not likely to get a receipt from somebody you have given $20 to.

Prof. Hill—That is an interesting point because you are presuming it comes after the event. I guess it depends how you draft your primary offence. If you say anything under $100 is a facilitation payment, then you would not expect a person paying that amount to have to check first with the company. But if you do still keep the primary exception to the primary offence of facilitation, a rather vaguer notion of small payment to propel business rather than to gain it or to gain an unfair advantage, then there might be an argument that really on every occasion in order to satisfy these corporate compliance principles you ought to be asking the employee to come back to the company to check if they can pay that.

CHAIR—Assuming you had $100 and it does not cover what it takes to get the stuff off the wharf and your company's business is to continually export stuff and get it off a wharf in some other country, you would have a series of multiple payments of very small amounts.

Prof. Hill—Which would ultimately add up well beyond that.

CHAIR—It would, and then you would have all sorts of problems with compliance as to whether it is each offence or whether there is some cumulative effect. What concerns me is that when you really start playing with examples and start looking from a purely legal point of view—I readily concede that—at how you would actually make this work, it is a prosecutor's nightmare.

Prof. Hill—Which I think is why, if you can push the enforcement of it into

companies themselves, you are going to be a lot better off.

Mr HARDGRAVE—If the company seems to have made 100 payments of $100 to one official by its own internal audit procedures, then one would suspect that the $10,000 is going to jump out of the books. There is also then the element of the prosecutor having the discretion to decide whether or not they are going to pursue something at some stage.

Prof. Hill—Yes, and whether they pursue it against the person who paid it or against the corporation.

Mr HARDGRAVE—That is where whistleblowers would come in as well I would imagine to alert an authority to the fact that this company had been making a regular payment—small fish, but they were sweet nevertheless.

CHAIR—Can I ask you about one philosophical thing—at least I think it is philosophical; it is moral really. This is my personal view; no doubt there will be a range of views across the committee. If there is a overarching moral principle about bribery, I do see, for the purposes of practical implementation, a real difference in kind between grand corruption—the major stuff, the major corruption of economies and payments of head of state, other officials, heads of provinces and what have you—and the petty grease the wheel stuff to get things done because there is a prevailing culture in that country that does not allow business to effectively operate unless you do it that way. Do you agree with that or do you think we are really stuck with the immorality of bribery on any view and we cannot really get our heads around defining the purpose of the small stuff and distinguishing it from the major corruption, which is really what the convention seems to be directed to?

Prof. Hill—No. I do think different policy aspects come into the grand larceny or the grand fraud because that is the type of situation where you get lots of flow-on effects, such as the shonky builder gets the contract and the bridge falls down for the Australian-Jewish athletes. I do not know whether there was anything like that behind it. It is where you get world pollution, for instance—these are very big major issues in that grand fraud.

CHAIR—The social and economic upheaval in Indonesia is another example.

Prof. Hill—Exactly. So it is the type of situation that really does ring global alarm bells. Whenever I speak to business people they say, 'Well, if they're not going to let you out of the country unless you give them $50, what are you going to do?', so I do think there are different policy aspects to them, so you can differentiate them on a philosophical basis. But on a legal basis, obviously there are going to be situations where they blur.

In terms of actual prosecution, you probably will find that because it is a discretionary matter and because prosecutors do not want to bring cases that they are

going to lose and because they do not want to bring cases that are petty, they will go for a few large bribery cases. For the ones further down that sliding scale, I think you will have to depend upon companies getting a little tougher and more serious about this because they are worried about their own reputations and their own criminal liability.

CHAIR—I suppose there is also an argument that tells you, through bitter experience, that prosecutors might hit a couple of easy marks rather than really tackling the major stuff. It is really difficult to know where it will pan out.

Prof. Hill—Yes. And, as you say, to actually send a message to society without that necessarily being the most appropriate case to have prosecuted.

Mr HARDGRAVE—There also is the extended argument that failure to disclose an amount, regardless of what it is, is in itself probably an action saying, 'We're doing something that's wrong.' The fact that you would hide an amount of money, bundled up somewhere else, to cover up a bribe would obviously in itself be a deliberate, illegal and immoral act compared with saying, 'Well, it cost us $100 to do this and there it is, it's on paper, we've done it.'

Prof. Hill—Yes. In that first situation, are you saying that it is only $100 or that it is a larger sum?

Mr HARDGRAVE—We are hung up a bit on this facilitation payment and I do not want to delay the committee any longer. I was simply trying to explore the fact that transparency—openness—in itself is an admission of acting in a more legal way, or a perceived more legal way, than non-transparency.

Prof. Hill—I think that perhaps the lack of transparency would be able to link in legally with the creation of the corporate culture. If you say, 'We regularly hide these payments,' then you are going to be hardpressed to show that you have a corporate culture which does not tolerate those types of payments. So I think it will feed into those provisions in section 12.

The other aspect that I referred to briefly in the paper was the Caltex decision in the High Court which said that corporations cannot claim the privilege against self-incrimination with regard to internal documentation. I would assume that that is good news for prosecutors in these types of cases, too.

CHAIR—Yes. It has been a while in coming, but it is good that it has arrived. Professor Hill, we are very grateful to have had this particular insight because I think we as a committee are coming to the view that it is certainly very important to take into account the flow-on effects of what we are looking at here and to at least refer to them in our report.

It has been said by some witnesses that the value of this exposure draft, if it is implemented, is really going to be a first step, together with signing the convention, in what is hoped to be some sort of global effort, not just Australia by itself, to deal with this. You have provided some very valuable insights as to how corporations themselves can self-help, if you like, and be part of this effort. I personally have benefited, and I am sure my colleagues have. Thank you very much for making your time available. If there is anything else that occurs to you that you want to bring to our attention, please feel free to do so. We would also very much value the opportunity to get back in touch with you if we need to when we commence our deliberations.

Prof. Hill—Thank you.

Proceedings suspended from 12.30 p.m. to 1.48 p.m.

SAMPFORD, Professor Charles, Director, National Institute for Law, Ethics and Public Affairs, Griffith University, Nathan, Queensland 4111

CHAIR—Welcome. We are particularly grateful to you for coming at this difficult time. Your submission has already been published by the committee. Are there any amendments or additions you want to make to the submission? If not, would you like to make an opening statement?

Prof. Sampford—I do not wish to make any amendments. I tried to make it quite clear that, in my view, although the legislation is a very valuable and important first step, one needs to take a broad overview of the legislation and its supporting measures because legislation by itself will very rarely achieve improvements in conduct. This does not mean that one should ignore it but one should see it as part of a package of measures. I think this is true: if you look at attempts to improve conduct in business, government, churches or universities, laws by themselves will not be effective unless supported by culture.

Ethics by itself becomes a knave's charter and even the best ethics and legal regulation will not be successful if you do not look at the institutions within which people must operate. You need to look at a package of ethical standard setting, legal regulation, institutional reform and economic incentives in order to significantly affect behaviour. Therefore, the legislation by itself probably would do very little; but as part of a package it could achieve a great deal. That is the first point.

I want to emphasise the importance of ethical standard setting. I think in this area it is best for ethical standard setting to lead because, firstly, it helps us to work out what values we are really trying to further. Secondly, it helps later in that it can provide the principles that underlie the legislation and can help in its interpretation. This is another point in terms of education: it is very hard to educate a businessman about an act which is not really drafted for businessmen to read—it is drafted for lawyers and judges to read. But, on the other hand, you can communicate principles. My father, who died on Monday, was always trying to communicate principles such as, if you tell the truth, you do not have to remember the different lies you have told to different people—and things like that.

CHAIR—It is an efficiency mechanism, I suppose.

Prof. Sampford—Yes. The thing is that I think that he was not dishonest but a bit disingenuous because he believed that you should tell the truth even if it did not benefit you. But the important thing is that you do not enter into these cost-benefit analyses of truth. In making a point like that you say that it may well be in your long-term interest to be ethical, but you do not think about it. You can communicate principles. There is a lot to be said for trying to build strong links between the principles built into ethical standard setting and the principles built into legislation.

A number of us in the institute have discussed these matters, and we think an ideal

way to develop legislation which you expect to affect the conduct of particular people—say businessmen—is to get the intelligent representatives of those who are supposed to be affected, who will change their behaviour, to sit down with the drafters and public officials and think through what the common principles affecting the ethics and the legislation should be.

Although it might seem an abrogation of sovereignty, in fact it is terribly useful if you sit down and talk, and then the same principles can be the first part of the ethical code which is developed by the professional or business body, and they can also be chapter 1 of the legislation. You should try to bring the two together. I say it is important that ethical standards set in legal regulation and institutional reform should be in sync; the question is how you do it. One way of doing it is thinking through what the goals are, what the values are that you are trying to further.

By getting together the people who are going to develop the codes for corporations and the legislation—and each makes the same decision, so you are not really abrogating sovereignty—if you can get them to think it through then in that case the same thinking can go through the legislation and, in a sense, be communicated in a way that often legislation does not communicate to lawyers and judges, and also provide the basis of what is communicated to business. I think that is important.

That is why I think that ethical standard setting in this sort of area should lead, and then it can influence both the development of ethical codes—which I think some businesses are trying to do—and also the legislation. Then they are in sync rather than pointing in different directions.

CHAIR—Have we got out of sync with this inquiry, do you think, or with this exposure draft?

Prof. Sampford—This is legislative driven, although in one sense the TI was pushing it for the OECD, but what I am talking about is virtually never done. We came terribly close to achieving it with the redrafting of the Corporate Law a few years ago when the Australian Institute of Company Directors and ourselves were talking about this very idea, but for one reason or another it did not quite come. There is a lot of territoriality, both by businessmen in developing their ethical codes and by drafters and legislators who say, 'This is part of a sovereign parliament. We decide what we want to do.' If what you are trying to do is change behaviour, this is a general change and so I would not be critical of this process because this follows the same process it always does.

Somebody thinks it would be a good idea to have a law. Somebody says, 'Wouldn't it be good to change people's conduct in this particular way. Let's have a law,' and then a whole legislative process starts rather than seeing it as tied into the process of the target groups in developing their own ethical standards. I would make no criticism of this because it is the same thing that happens all the time; it is just that it could be done

better. Where you are dealing with what is very much a matter of ethics and conduct of business overseas where the reach of the law is going to be limited, there is even more reason for starting off a better process. The other thing that is part of this is that I am very keen on the idea of legislation incorporating the principles behind it within the legislation. That is again something that is not common in the drafting style of the Commonwealth parliament.

CHAIR—Do you mean as a preamble or something?

Prof. Sampford—No. My favoured thing is not in the preamble but to have very early, in the statement of principles, the principles which can guide the interpretation of the legislation. Obviously, the Acts Interpretation Act will encourage judges to look for the principles behind the legislation. If the Acts Interpretation Act tells them to do that, I do not see any reason why parliament should not say, 'Actually, these are the principles.'

CHAIR—Would you have problems though with trying to be exhaustive about that? Would you end up where you get a situation that does not seem to quite fall within the stated principles but clearly should have been there but is missing? Whenever you try to put that in, it is hard.

Prof. Sampford—The only thing that is going to be operative is the sections of the act. The principles themselves are too broad to be directly acting. The idea is that the rest of the act is actually what sets out specific obligations, specific requirements or specific funding provisions.

CHAIR—I was really meaning more as an aid to interpretation. Are you going to perhaps limit what people can look at rather than expand on it?

Prof. Sampford—I would not say this is a hobbyhorse of mine but it is a view I have about the way legislation should seek to communicate and should seek to be coherent. The problem really is not that you might miss some alternative principles but that the principles are not clearly stated. It is a very useful discipline for the drafters and for the parliament to look at the principles and say, 'Do the operative provisions actually further these principles or not?' I think that the statement of principles is useful where judges have to work out complex meanings.

It is actually helpful that the principles have been provided for them. It is also useful in the drafting process as a form of checking back to see if this is really achieving the sorts of goals set out. If you miss a couple of principles, you could always amend the act, but you are normally amending the act because you have not worked out what you are trying to do and there are some conflicting provisions and then you have to fix them up. I actually think that this would help. The Queensland parliamentary draftsman is starting to move towards this style. I have tried to have friendly influence because I am a legal adviser to the Scrutiny of Legislation Committee, and they are starting to do it—

Queensland is not always behind the rest of Australia. It is something to look at, because I think it is useful especially in this kind of ethical area.

The other thing I want to emphasise, and I put the headings down for what I want to emphasise, is that I want to contest the minimalist approach. That is probably the biggest message I want to make. Apart from the necessity of packaging this and having mutually supportive ways of improving conduct, I got a very strong sense that some people thought that we had to be very careful not to disadvantage Australian business by making them more ethical than the rest and therefore they would lose a competitive advantage. There was, as I indicated, very strong anecdotal evidence that we are actually not very good at this, so maybe we should try to have a competitive advantage in integrity.

Although this might seem to be ludicrous to some, I gave an actual example of a large Australian company that was dealing overseas. Initially, they went with the flow and started bribing everywhere. They moved to another country and they decided to have really highly principled behaviour. First, they got no contracts at all. Then there was a government crackdown, and all of a sudden they all rushed along because, if you were dealing with that particular company, then you could not be a bribe taker.

I am not suggesting that we do this in isolation. I suggest that we should use other elements. Quite seriously, if Australia is taking part in an aid package to a country, I think it should insist on integrity provisions, firstly and obviously to save the money—that is why TI was set up in the first place by Peter Eigen—by putting conditions on it. They might be much better conditions than some that have been put on in the recent packages. We should push for it and take a bit of the high ground, so that in a sense it means that Australians are pushing other things to make the target countries more ethical and we are also pushing Australian companies to be more so.

The other reason for contesting the minimalist approach, apart from the fact that we are not very good at corruption, is that I am really concerned about the message we send out to business. If we say we will pass this act because everybody else is doing it—we will willingly follow the rest but go no further—then this is a clear signal that minimal compliance is okay. With minimal compliance you get the tax avoiding mentality: if it is not against the law it is okay. Once you do that, then of course it has no positive ethical effect and they start looking for loopholes, and there are enough good lawyers to find loopholes in any act, especially in this one. So I would very strongly argue against taking a minimalist approach because if you do then it could well become a dead letter and certainly you will miss the opportunity.

CHAIR—Thank you.

Senator BOURNE—We have had a fair bit of evidence about how big is small in the gratuities and one suggestion that is going to come up this afternoon, that we can see

from what is in here, is that we should put a monetary limit on it in Australian dollars. Another one that we had this morning is that we should look at the relevant American act which basically puts an intent on it rather than a limit. Do you have a view on that?

Prof. Sampford—I would put the intent rather than the monetary limit. If somebody is charged with an offence, and it is a fairly small offence, in that case they probably know that they are not likely to be punished as much but nevertheless they are always concerned. What you want to do is to affect the way that they are behaving with regard to others.

Senator BOURNE—Mr Hardgrave was saying earlier today about transparency of those small gratuities. Tell me if I get this wrong, Mr Hardgrave, but I think the general idea is that if you have to pay a $50 fee to get out of the country, even though you have your ticket and your boarding pass, then if you are happy to pay that and you think that is legitimate under the act, you should be quite transparent about it and it should be written down somewhere and available if somebody wants to see it. Do you have a view on that?

Prof. Sampford—It is probably better for the company's internal practices and for the person as well. There are basically one or two things. One is to see that this is actually a different form of payment system within that country. This is the most difficult area in definition, but not the most difficult area as far as this kind of act is concerned, because it is the grand corruption that really is the problem. Nonetheless, the payment should be fully recorded. The first thing is that it is essentially a question of duress and you list it as duress—that is, being very careful about what is acceptable—because obviously if people are under duress—you would not give me the contract otherwise—it does not wash.

Senator BOURNE—A good point.

Prof. Sampford—I agree that the issue is being transparent and open about it and recognising it. Another point is that maybe those who are pushing for higher standards within our international community through the government's support should really have discussions with businesses about that in developing their own ethical codes and internal practices so that there is a bit of feedback there. Again, these things should be entirely openly discussed.

Mr HARDGRAVE—I should confess for the record a certain amount of bias in my consideration of Professor Sampford's submission, as I am, to the best of my knowledge, the only graduate of Griffith University ever to be elected to federal parliament. Having said that, let me proceed with a couple of questions. The question of transparency that Senator Bourne has raised is in itself an admission of a legal practice; whereas if you were not being transparent—you were trying to hide something—it would tend to be something that was not quite so legal. Would you agree with that basic assertion?

Prof. Sampford—I suppose that if you are not prepared to write it down it indicates that you are a bit worried about it. Throughout all these circumstances, it is better, if you are worried about it, that you have some form of communication. Internally, for instance, in every ethics regime which I talk about there, you must have someone to whom you can refer where you have got a problem like this. If the image that we have of ethical behaviour is of the lone saint who fights against temptation and does the right thing, this kind of solitary approach to ethics is very heroic but the way to make businesses or any other institution more ethical is not by concentrating on the ethics of the individual but on the institutional structures which make it easier for individuals to be ethical. It is very important that you have processes where those people can ask somebody who can then interpret the code and, if necessary, get legal advice. That is initially openness within the corporation. But if you design your ethical regime so that people are not making these decisions by themselves you have one of two things: either the whole business becomes corrupt or else the level of corrupt behaviour drops enormously.

Mr HARDGRAVE—The other thing that was raised by some this morning too was concern about bringing in a nationality nexus. If an Australian national commits an offence under an Australian law—no matter where in the world—they perhaps could be charged under that Australian law without the territorial approach of it actually having to be connected territorially to Australia. Do you think that that in itself, following the examples of the Crimes (Child Sex Tourism) Amendment Act 1994, in the case of this kind of moral question as well might be a worthwhile pursuit?

Prof. Sampford—This is not an area of law I am particularly familiar with but, as I understand it, the common law countries have tended to follow very much a territorial base and civil law countries a nationality base.

CHAIR—A lot of that has to do with enforcement, I think.

Prof. Sampford—Yes, that is the sort of practical thing. I think that both nationality and territoriality are themselves under increasing question in a global world. This is something that is thrown up by a global world so that, whereas you see both of those as being coherent and intelligible approaches by nation states—the nationality thing is coherent and intelligible; it is what the civil law countries have—neither of them is particularly satisfactory. We should not see ourselves as limited or constrained by either because of where an action occurs in a global world.

Say there is a corporation which is all over the place, you may have a nationality because you are told that you have got to have one, but you may have several residencies and so forth. I would not want to restrict our laws by either. We have got to be very sensible and sensitive, but I would not say, ‘Oh, this is terrible because it breaches our territorial approach or this is terrible because it breaches or follows a national approach.’ The nature of these problems indicates the weaknesses of both of those limitations.

Mr HARDGRAVE—To paraphrase to some extent, you would like to see a legislative regime obviously tougher than the exposure draft; something that says to the world, 'Look, Australia has high moral standards and we are going to enforce them wherever and whoever is involved.'

Prof. Sampford—Yes, I would do that. But the other thing is that I would see it as part of a package, so that the law is only part of it, and maybe not the strongest operative part. The other thing though, pulling up this global emphasis, is that you cannot do it by Australian law and or by Australians alone, but it is just a question of what we do. Do we actually follow or do we attempt to lead, because this will work when you have actually got international cooperation. Australia should try to provide leadership in that. That is perhaps the ultimate answer to your question about nationality and territoriality. It is by mutually supportive work, not only by Australian ethical regimes and Australian laws but also by the laws of other countries, and the ethical regimes of foreign companies and foreign bureaucracies. That is how it will really limit the problem, but I think Australia can take a lead.

One reason I would say Australia can take a lead is that I am very proud to say, in public sector ethics, Australia is seen as being one of the leaders. The Nolan committee on standards of public life in the UK followed the model that our institute had proposed for Queensland and regards it as world's best practice. An International Institute for Public Ethics—a professional body of public ethicists—will be set up in Australia this year, based in Brisbane, because of the leading role that has been taken. So the idea of Australia taking a leading role is not actually nonsensical. One of the reasons is that we are a middle-sized power and not seen as threatening, as is the US. That is one of the reasons why Australia rather than the United States is seen as the natural home for this institute. I would not discount the possibilities of us taking some moral leadership in this matter.

Mr HARDGRAVE—What about extending it beyond the direct bounds of this convention, looking at NGOs and the role of the United Nations in various countries? In other words, as part of our association with various other organisations in the world, we would like to see strong, ethical practices invoked. An example I will give to fill you in on something someone said yesterday was that it had been their experience on the Thai-Burma border some years ago where a truck load of rice gathered by the United Nations was seized by Thai military personnel. The United Nations bought it back from the military personnel so that they could continue the distribution of it, which in itself was a codified but nevertheless real example of accepting a form of corruption. Do you think, as a country, we should be seeking better practices out of those organisations?

Prof. Sampford—Absolutely, on two bases. I talked about the ideal of the lone ethical saint being the image of ethics and it is wrong. Although it is great to have saints, there are not enough saints to go around. So it is better to make organisations that can be run by normal people and save the saints for some particularly high value added activity. Firstly, you try to make the institution supportive. But in order to bolster ethical

behaviour, it is not just going to be the Australian law and the Australian corporation but also, hopefully—this is why I am talking about Australia taking a lead—other organisations. It can be the military or NGOs—most NGOs are not too bad, but some of the United Nations bodies can be a bit worrying. We should recognise all the elements, all the temptations and dilemmas that might be thrown out and try to deal with as many as we possibly can. You then get a knock-on effect.

The other thing I want to say is that the kind of approach I talk about—ethical standards in legal regulation and institutional reform—I think is true whether you are trying to improve the conduct of corporations, the military, the UN, businesses, governments and bureaucracies because this really reflects what we need to do to improve behaviour of individuals. So it might be intellectual laziness, but I would say that the way to approach problems within the Thai military is very similar to problems within an Australian business operating overseas. You want to get that range of normative institutional and economic incentives and values in sync and pushing in the right direction.

Mr HARDGRAVE—Do you get the feeling that the World Bank, the IMF, whoever it is trying to bail out Indonesia at the moment, have moved far enough down the track in trying to look at those issues?

Prof. Sampford—No, I do not think they have. I think they are aware of the problems. They are trying to do some things. I do have a feeling that they are putting some strong conditions on cuts in welfare, and so forth. You can have different views about the importance of cuts in welfare in any society and that is something that has to be debated by its own polity.

CHAIR—Don't you think that is coming at it from the wrong end? Cuts in welfare are probably down the bottom of the barrel as far as how you would actually do this.

Prof. Sampford—Yes. I do not want to get into a debate about welfare reform in Indonesia because what I was really saying was—

Mr HARDGRAVE—I was at the ruling elite and questions being asked about the familial systems and so forth.

Prof. Sampford—What I was trying to get around to, by saying that they have actually been very strong on various welfare cuts and so forth, is I would have liked to have seen them being much stronger on that—really strong on that. In fact I was disappointed. I would have much preferred they had gone strong on the ethics, because I think that probably has more to do with the real problems than cutting rice subsidies and so forth.

Mr HARDGRAVE—You would be satisfied there is quite a nexus between

corruption and some of the problems that have happened in our near north neighbours?

Prof. Sampford—Actually, I think it is probably much more complex than you might think. I am sure there is a nexus, but there is another thing sometimes with developing countries. I am not in favour of corruption at any time, but it may well be that a lot of their success was because of certainty. Businesses need, not certainty, but a certain level of confidence, and it may have been that corruption actually helped them in the past. I do not think it is the best way of doing it. What probably happened is that it helped them get to a certain point more quickly than they might have because businesses could be more confident. Basically, they were paying the people who made the decisions, but they had more confidence so it helped them. That form of development might be quicker, but it leads to some very big problems, which is what we are seeing.

In any case, it is bit like me having arguments about whether coups d'etat are actually a good way out of military repressive regimes. I say that, although it might help you get to a better state quicker, it actually is a very bad precedent for the future. Economic development through corruption may get you more quickly to a more developed state, it may get you into what might look economically more healthy at the time, but it is institutionally far more dangerous and liable to fall over more quickly.

Mr HARDGRAVE—The benevolence of a dictator does not last as long as you would like.

Prof. Sampford—My coup argument is that, because basically you expect the military to solve problems, therefore you have to get more coups. It means of course, and I think this is important in Indonesia and some of these other countries—and I do not know enough about it to be certain; I am probably slandering various people, but I have got parliamentary privilege—

CHAIR—You are absolutely privileged here.

Prof. Sampford—I know that. What I am saying is that it probably means that what they are used to doing if there is a problem is having an agreement between business and government as to how they will fix it to their own benefit. It is a bit like, 'The solution is the coup in coup ridden countries. The solution is business corruption in corrupt countries.' In a sense, we get there quickly, but then it is in a very damaged state.

In respect of the other measures—and I think this is quite important; I deal with it later on in the statement—about pursuing the proceeds of this crime, I think it is quite true that a lot of these funds end up in First World countries and actually damage the balance of payments of these other countries. I think the First World and the banking system have an enormous responsibility to deal with this. Often the money is not lost; it is actually sitting in some bank account somewhere in a First World country.

I think we, as First World countries, have a moral responsibility to the victims of this corruption to actually pursue it. If the corrupt proceeds cannot be put in a bank—they are not going to leave them in the country because they might lose office—and if we made it transparent enough that the results of that bribery and corruption would be returned to the victims, and if we changed our approach to banking, then this would have a very important effect. Not only would it affect law and morality; it would also mean that the proceeds of crime might not be available to those who insist on bribes. I think that might be as great a contribution as we could make, and there is a great reluctance of this, but you must realise that this is what we are doing as a First World to assist it. Firstly, First World countries are paying bribes and, secondly, their banks are housing the proceeds of them. So I think that is something where we might be able to do more than anybody else.

Ms JEANES—You say in your submission that the Australian government should consider ways in which its other activities might support the push for higher standards. One of the other submissions that we received suggested that the government could make conditional on any company receiving government funds that they have a system enforcing ethics within the company. Would you see that as an appropriate avenue for the government to take?

Prof. Sampford—Anyone receiving funds from any source?

Ms JEANES—Anyone receiving any form of government funding.

Prof. Sampford—That is sort of the US approach of attaching various conditions to government funding. I would like to see an adequate ethics regime required for any listed company. That would be something that should be expected by the ASX and the ASC as a way not least of increasing the chances that the regulations will be followed. I have another thing that I think is actually true by implication, but I think should be made very explicit. A company that does not have an adequate ethics regime of the kind that is presumably discussed with government and seen as being adequate should be fully liable and the directors should be fully liable for the criminal behaviour. In a sense you cannot control every individual and you cannot expect directors to control all activity within their companies and in short make sure there is no corrupt behaviour, but they can be expected to set in place adequate ethical regimes.

These days there are general provisions that ascribe to corporations and directors various responsibilities for illegal acts of their operatives and there is the defence that you have got an appropriate compliance regime. I think it is very important that we emphasise that here. Of course if they have got an adequate ethical regime, then they are quite safe because in a sense they have done their job. They cannot ensure that every member of their corporation is a law-abiding individual, but they should be expected to set in place ethical regimes which actually are very much in their own interests. We all know that, if an ethical problem emerges within a business, a political party or anything else, we spend

an awful lot of time on it. I would like to encourage them by one way or another.

I suspect the emphasis on the potential corporate liability and directors liability if they do not have an ethical regime is the way to do it, as I have actually suggested. I would not probably have a great deal of problem if there was also a conditionality of some sort on government aid, but that is not the way I would think of it. I would do it via the corporate liability route and make it quite clear that, if you have got an ethical regime up to a minimum standard, then you should be able to avoid that responsibility.

Mr HARDGRAVE—So you are suggesting that on top of quality assurances there is ethical assurance, EA?

Prof. Sampford—I have not used the term, but yes. I think this is good for the businesses themselves. When I talk about an ethical regime, I think you have to build ethics into the way in which corporations run. If you do not do that, then it is just an add-on, it is just something else. It is not an optional extra, but it is a resented extra. So you need to encourage them to build their ethical regimes into their management structures and management training.

Ms JEANES—For the immediate purposes of this legislation you suggested it would have been more appropriate to determine principles of behaviour that would underpin the legislation.

Prof. Sampford—Yes.

Ms JEANES—If we were to seek a determination of such principles, who would you see as being involved in determining them?

Prof. Sampford—My general view on these things is that you want to get together a group of people with appropriate perspectives on it. You would want to get together corporate executives from a number of different levels, not just, say, the board. You would get people like the AICD and so forth to nominate people. You would get a small group of between 20 and 30 people together. You would have, say, half a dozen people from business and you would have members of ministerial and/or bureaucratic staff who are interested in the area. You would have a number of academic inputs—ethics lawyers, management experts, political scientists or whoever you thought provided useful perspectives. You would then get them to discuss the principles and try to develop those principles while you are at the very beginning because it would be hard to introduce it late in the period. That is the general structure I would suggest.

This group should consist of members of the target group, relevant members of government who are involved in the regulating of the activity and the drafting of the laws, and also those academics who may have useful perspectives to add to it. That is the general model. I think it could be done as soon as possible in any kind of legislation—

whether it is new corporate law, new taxation law or something like this. I have said that enough times previously that it would be inconsistent if I did not mention it. When does the treaty require us to have our legislation passed?

CHAIR—End of 1998.

Prof. Sampford—In this case it is probably too late to have the ideal process, but you could get a group together who would help in finetuning the legislation. You could also use them for the next stage because this will not be the last piece of legislation on this. So the group could advise on how to finetune this piece of legislation and you could then get ideas from that same group for the next stage. That to me would be the ideal way to go.

CHAIR—I think you are absolutely right. It has been put to us that, whatever the benefits of this legislation, it is very much a first step. Indeed, however one might want to push the envelope and have a better attempt the first time, there is a certain element of overreaching unless you get everybody involved—all of the elements that you have suggested as well as an international effort on various levels to make it globally workable. We certainly take that on board.

Unless there is some aspect of your submission, Professor Sampford, that you have not had an opportunity to highlight and you wish to, we are a bit pressed for time so we might bring our session with you to a close, bearing in mind that you can get back to us if some other aspect crops up. It is an evolving field. We would also like to take the opportunity to do the same thing as we start our deliberations, should we need to refer back to you. Apart from that, it remains for me to thank you for coming and sharing these insights with us.

Prof. Sampford—I enjoyed it. Thank you very much.

[2.29 p.m.]

BROOME, Mr John, Chairperson, National Crime Authority, GPO Box 5260, Sydney New South Wales 2001

CHAIR—Welcome, Mr Broome. We have not received a submission from you but we are very glad that you are here. Would you like to make an opening statement before we proceed to ask you some questions?

Mr Broome—Thank you, Senator. My apologies for not being able to provide you with a written submission. I simply have not had a chance to do so. But I thought the issues involved were sufficiently important that it was worth coming and spending some time with the committee. I would like to make a few general observations and then perhaps we can expand upon some of the issues through questions and answers.

Initially, my position is one that strongly supports the treaty and the implementation of it through domestic legislation. I have significant reservations about scope and about the way in which legislation of this kind can practically be implemented. But, in saying that, I would not want to in any sense be seen to disagree that this is a significant step. It is a step in the right direction; it is to be encouraged. I would say all those other very positive things about it, but there are some issues which do need to be examined.

The second point is to clarify which of the number of the hats that I tend to wear I might be seen to be wearing in this context. From a National Crime Authority point of view, we would not have a direct interest in the subject matter of the legislation or the treaty, essentially because the conduct involved does not fall within the definition of 'relevant criminal activity' within the National Crime Authority Act. So I do not see us as having a task of investigating offences under the legislation. Of course, that could change if governments decided to change the nature of the jurisdiction which we exercise.

But I am also co-chairman of what is called the Asia-Pacific Group on Money Laundering, an initiative which very much owes its genesis to Australia and to support from successive Australian governments. The group has recently received some significant funding under the government's national illicit drug strategy. The Asia-Pacific group has sought to take action within the region to encourage anti-money laundering initiatives.

One of the central issues is the need for transparency in financial transactions and the need for financial organisations within the region to recognise that corruption is a major problem in terms of money laundering. The evidence would tend to suggest that those institutions which are capable of being the subject of corruption are also those which are more likely than not to see their facilities used for activities such as money laundering—whether they be banks, financial institutions or even major corporations where investments may be undertaken for other than legitimate means.

It seems to me that it is in that second capacity that some issues arise from both a regional and a more global perspective because unethical business behaviour, payment of bribes and inducement to corruption are, in my view, inextricably linked with the lack of financial transparency and the possibility of the undermining of institutions, both private and public, which can flow from that. Therefore, they have very real domestic national interest considerations as well as international relations concerns. The work I have been doing in relation to anti-money laundering shows the very substantial interrelationship of these issues. It is why, for example, the IMF sees anti-money laundering initiatives as essential. Michel Camdessus has recently said that the IMF's view is that international money laundering represents somewhere between three and five per cent of global GDP, which makes it the biggest industry going. It is bigger than arms; it is bigger than oil. We are talking about the movement of the proceeds of crime internationally being the major financial activity going on from a single source—albeit it is from many sources, I appreciate.

CHAIR—Is there any information about to what extent that involves governments?

Mr Broome—It involves governments in the sense that, in many places, the financial institutions through which these funds are channelled are government owned or controlled. It is not that many years ago that at least one Australian bank was government owned and controlled and, to the extent that the Commonwealth was used as a vehicle for money laundering, one could say governments were involved.

CHAIR—I will not say which bank.

Mr Broome—I think Australia is taking an enormously important lead in this area. The Reserve Bank is one of the major central banks in the region that is taking substantial action to deal with the money laundering issue. Australia has a lot to be proud of in this regard. This is another step in terms of dealing with corruption issues not only regionally but globally.

I make those observations to show that if there is an undermining of the financial system or of major institutions within countries then the implications can be quite wide ranging. One of the real dangers with money laundering is that it can simply undermine elected governments, particularly in smaller jurisdictions. If you are a small country and there are tens of millions of illegal funds moving through your economy, you are enormously vulnerable to blackmail at a national level. In the last year or so, we have seen a scam which almost bankrupted Vanuatu. It was caught and it did not happen, but if the scam had gone ahead it would have led to a major problem of instability in one particular country. So it is an issue in the Pacific; it is an issue in South-East Asia; it is an issue globally.

So when we are looking at issues which are dealing with anti-corruption activity, it seems to me that they are not just narrowly focused on the kinds of issues which this

legislation directly deals with, which is, after all, effectively confined to the corruption of officials in government owned enterprises. Those problems are not limited to those particular people and those particular corporations. Indeed, I think one of the problems is the scope question, which I might come back to.

So in a broad sense, I guess that is why I think there are some interesting issues to raise. As I said, certainly from my perspective, I think the legislation and the treaty are to be encouraged. I recognise that, because this is the result of an OECD process, Australia has not been in a position to perhaps have all of the outcomes it would have wished. This is a compromise; it is a first step. Indeed, the identification of the second round of discussion topics is almost a catalogue of what one could say are the shortcomings of the current draft.

CHAIR—I think it is a signpost to the fact that this is very much a first step.

Mr Broome—Exactly. I recognise all of those things. I think there are issues as to how much of a lead Australia can and should take. One can at least ask the question as to whether we should be prepared to legislate further than the convention requires. I think it is somewhat ironic that, during the discussions about Australia's response to the convention, some elements within the business community were concerned that Australia go no further than was absolutely necessary to comply. These are sometimes the same elements which demand that Australia takes a peremptory forward step in terms of other economic initiatives. It seems to me that there is at least a slight variation in approach, which is interesting in this context.

The A-G's paper, which was prepared as a background document, provides a very useful overview, and I think they have done a very good job in discussing the issues. The sorts of points I would like to make are perhaps some very preliminary comments, and then you can ask me some questions. I think it is a shame that the bill only applies to foreign public officials in relation to foreign public enterprises. One does not have to look too far afield to identify jurisdictions in which corporations may not fall within the definition of the legislation but where one might even be prepared to say that there is at least a suggestion of official corruption involved if bribes were to be paid to the companies of which people might find themselves in control.Perhaps one should assume some hypothetical nation somewhere in the Pacific where the government was characterised by a close involvement in business of people very close to those in charge. The fact that those kinds of corporations would not be caught by this legislation is a fairly obvious shortcoming, because it is almost official corruption in the sense that the legislation talks about.

One of the points I want to make is that I think enforcement will be difficult. Enforcement of this kind of offence is resource intensive. The kind of work that we do at the NCA in relation to international drug trafficking and in relation to organised crime demonstrates that if you are smart enough, wealthy enough, have the appropriate corporate

structures and use what is now a global market, it is very easy to make a great deal of money illegally and to remove the profits from Australia. In my view, it is just as easy to hide away the activities which this legislation seeks to control.

The idea that a $12,000 fine under the Corporations Law will ensure that people's books disclose these payments only has to be said to be shown to be a joke. Those Corporations Law obligations to accurately and properly report financial transactions have not worked in the past, and they will not work in relation to this legislation. One has only to say, 'Let's examine the spectre of the 1980s,' to know why they will not work. If major companies which have been involved in the auditing of Australian public companies were unable to discover many of the events that were going on in the 1980s, then I do not think the AFP and others, with no increase in resources—as is envisaged—will be able to detect these kinds of offences unless there is whistleblowing or some kind of intelligence which in fact tells you where to look.

So there is going to be a need for informants and there is going to be a need for serious examination of the penalties. If you look at the paper, I think from memory the maximum corporate fine is $330,000 based on the application of the gaol terms being converted into maximum fines. It is not inconceivable that the kinds of bribes which would be involved will be certainly in excess of the maximum penalty, so isn't that just another price that one pays to engage in the conduct? So I think there is a real issue there about penalties.

There are fundamental issues about corporate governance, which I do want to come back and touch on in a moment because this is not just an issue about the payment of bribes in foreign countries; it is a question of how companies behave and what their ethical behaviour is. Let us face it, in most international companies, Australia is just another foreign country. So the conduct which we are talking about legislating to prohibit somewhere else is, for those companies, Australia in many respects.

They do not have to be Australian companies to be caught by this legislation. So we need to think about the interrelationship between, say, a US based corporation paying bribes in some unidentified Asian country and that company also contemplating paying, if not actually paying, those bribes in Australia because from their perspective we are just another foreign country. I think there are some real ethical issues that come out of that, which is why I have some problem with some of the negative comments coming from some sectors of the business community.

CHAIR—I suppose we might be increasingly attractive because of our relative stability?

Mr Broome—One of the reasons that I believe Australia is vulnerable to money laundering, for example, is that it is a great place to invest and it is part of a global market. We are linked into international commerce in such a way that there can be vast

movements of legitimate funds to hide illegitimate ones. We have a sophisticated work force. We have a modern company law which to a large extent enables people to operate quite legitimately and properly behind corporate structures which they may not be able to use in other jurisdictions. So there is a whole vast range of reasons why for all the right reasons we are a great investment location, but why we are equally vulnerable to these kinds of things.

The other point I mention is the tax issue. It is not directly related to this legislation, but of course the government is also taking steps to remove the capacity of companies to claim as tax deductions the payments this legislation is dealing with. My response to that is to say, 'And about time too.' I think it is absolutely appalling that we could regard as a legitimate tax deduction the payment of what are not just being made illegal acts in Australia but what are and will remain illegal acts in the country in which they are taking place. That seems to me to say something fundamental about the ethics of the companies involved. It seems to be perfectly all right to pay a bribe in a foreign country to achieve a business outcome. If that is okay in that foreign hypothetical country, why isn't it all right in Australia, or does it reflect a preparedness to break the law here as well?

I perhaps should say that one of the hats I did wear in the past was the deputy chairman of the Trade Practices Commission. I saw at very close quarters the behaviour of a lot of very major Australian public companies whose conduct was in breach of the Trade Practices Act. The preparedness of those companies—and in some cases I can say to repeatedly breach the act, because we are talking here about cases which have been through the courts and have been established in those circumstances—

CHAIR—You mean part IV type conduct?

Mr Broome—Yes, not just part V but part IV. There are major Australian corporations, particularly corporations that involve themselves in the kinds of activities that this legislation is directed at, which have a track record of breaches of part IV. The building industry is one which has been spectacularly represented. The building royal commission in New South Wales demonstrated classically the involvement of major building companies in what was quite obviously unlawful conduct in Australia. When people said, 'Everyone else is doing it,' that was the excuse in the building industry.

I have a great deal of difficulty with the concept that it is okay because someone else has got to do it. I think there should be a line drawn in the sand. And I have some difficulty with the notion that you can be a little bit pregnant. I do not want to buy into a policy debate in a broad sense. I would not want to involve myself in any conflict with my minister, but I think that one of the issues in relation to facilitation payments is the question of whether you can be a little bit pregnant.

I understand exactly the rationale for what is being proposed. It is a pragmatic

solution to a very difficult problem. But when do facilitation payments expand to a level where there is something else? Unless the threshold is quite low, I think there is a real risk that it then starts to at least blur the edges.

CHAIR—Whatever overarching morality arguments there might be about facilitation payments and bribes, it has been put to us by some witnesses—and there is a range of views about it, obviously—that what this admittedly quite narrowly focused legislation is dealing with is the major stuff, the grand corruption, the serious payments and the serious movements of money that are going to potentially undermine economies. Also, it has been put to us that there is really, for all intents and purposes, a difference in kind, not just degree, between major corruption and greasing the wheels of bureaucracy, where there is a very poor level of income in certain countries and a culture that allows it, et cetera, where what you are paying for and what you are getting is really what you are entitled to anyway. It seems to me that we can get to a point where we can really talk about a difference in kind. You probably do not accept that, but I am interested to know how you would put it.

Mr Broome—I am enough of a pragmatist to accept the argument entirely. There are certainly jurisdictions in which it is clearly accepted and understood that the income of many people working for governments is augmented by facilitation payments. That is just the way the system works. The governments cannot afford or are not prepared to pay even a subsistence wage to their public officials and one has to be realistic and recognise that in those circumstances you will certainly see these practices flourish. And yes, I think there are degrees of difference. There are some fairly major First World countries in which, for example, those who work in restaurants do not get paid wages; they live off tips. So tipping becomes a facilitation payment, if you want to give it that kind of description.

The point I am making is that I think we should recognise it for what it is—it is a pragmatic solution. I do not think you can dress it up as some kind of principled outcome, if I can put it in those terms. We are saying that there is a distinction between the level at which a payment of a small amount of money gets an application form processed at all and where the form gets processed at the top of the pile, and certainly there are orders of magnitude issues.

CHAIR—I suppose there is how advantaged you are by it and whether it is really improper from the point of view of the person who needs the service.

Mr Broome—Yes.

CHAIR—Certainly, it might be improper for the person who has to take the money and not declare it, or whatever they do with it, but this legislation is very much concentrated on the Australian citizen, the Australian worker, the Australian employee who is going to be paying to get his stuff off the wharf or whatever he has to do.

Mr Broome—The point I am making is that, whether we regard these payments as proper as distinct from accepting that they are going to be paid in any event, the test might go: what would we say if an Australian public official sought a payment of the kind involved in Australia? If a social security applicant going into Centrelink was asked to pay an extra $100 to facilitate the processing of their unemployment benefit application, I think we would all have exactly the same reaction to that attempt.

Mr HARDGRAVE—Absolutely.

Mr Broome—Therefore, I do not think that you can.

CHAIR—But would we? If you say to the Telecom guy, 'There's six bottles of Tooheys for you if you come up the road a bit faster,' how would we react to that? Most Australians probably do not worry much about that sort of thing.

Mr Broome—I would still pose the question the way I did. Take the Centrelink example first—

CHAIR—That is very clear. I think that that is the universal—

Mr Broome—Let us say it is six bottles of scotch, so the value is at least $100 as well.

Mr HARDGRAVE—It would be very cheap scotch.

Mr Broome—Yes, very cheap scotch.

CHAIR—'A bottle of scotch if you do my house before you do the next in the street.'

Mr Broome—What I am saying is: would the Australian community sanction that kind of activity and, more importantly, would they agree with members of parliament sanctioning that kind of activity? So we have a public and a private morality issue. There are a lot of those going on in government right now.

Having said that, the point I am trying to make is that I do not think we should then pretend that facilitation payments are something which I don't believe they are, but I am not saying that we should not recognise the pragmatics of the bill and the government's response. I think if I were sitting in the minister's shoes, I would come up with the same kind of pragmatic answer. We need to recognise the realities of the world, but I do not think we should say that it is anything other than a compromise—a pragmatic response to a problem. It recognises the difficulties of getting your application dealt with rather than actually buying yourself a contractual outcome. It is that order of magnitude difference.

CHAIR—What you are really saying is that we should not try to elevate it into some point of principle that does not bear analysis.

Mr Broome—Let's not give it some sort of principled outcome.

Mr HARDGRAVE—I have been pursuing this line of questioning—from my colleagues' point of view probably ad nauseam. I certainly do not want to get the justice minister, who is a friend of mine, offside either, but it strikes me that it goes back to one of the core principles you highlighted in your opening remarks—that is, the question of transparency. I do not want to pre-empt you. Other witnesses have readily agreed and some have been confused by what I have had to say, but it seems to me that by making it apparent that money has changed hands in the form of a facilitation payment within a company system, saying, for example, 'Well, look, we've left this country. It's cost us $50 to get our passport processed; $50 J. Bloggs Esq.'—signed off, diary note, whatever; it is still nevertheless transparent, it is open. So one would suspect that it is not a corrupt activity. However, a larger amount of money or something that was corrupt probably would be hidden. So transparency is actually the answer rather than the value or size of the amount.

Mr Broome—I think transparency is important, but I think, at the end of the day—and I do not want this to be overstated, but I have seen enough specific examples to feel confident about making a statement of this kind—there are major Australian companies in which substantial illegal conduct is not hidden in their books. It is not hidden; it is there for all to see, up to and including the board, because it is just the way they do business. I can tell you about price fixing agreements and about bid rigging arrangements which were recorded with absolute precision. In fact, in the building royal commission companies sent each other invoices for the payment of the illegal amounts involved in sharing the costs of tender.

Mr HARDGRAVE—I presume that that was for tax purposes.

Mr Broome—Probably, yes. So they not only made the illegal payment; they claimed it on their tax and it was there in their books. I can tell you of cases where there was market sharing going on in the concrete industry in Brisbane where, because there is no honour amongst thieves, a firm of accountants was employed to keep track of all the deals to make sure nobody cheated on the market share. There was also a price fix going on, but there was a market sharing arrangement. Their market share figures were recorded and reported to their head offices. What I am saying is that I think there can be transparency and still be impropriety.

CHAIR—It is really what is accepted in an industry.

Mr Broome—It is culture.

CHAIR—That is a very pervasive thing and, if that takes hold and everyone does it and if it is the only way you are going to be in this club, then you do it, I suppose.

Ms JEANES—What happened to the companies once that was discovered?

Mr Broome—In the case in New South Wales, a variety of things happened. In the case of those companies which had dealt with the Commonwealth as a customer, there were requirements that they refund the amount which had been illegally paid by the Commonwealth through the way these tenders were structured, otherwise they would not get any further work. The state government did take criminal action against a number of the people concerned.

In the case of the concrete industry, the companies were fined. The actual fines occurred after I left, but my recollection is that they were fined in the order of $5 million or $6 million each. There is enough information on the public record to say that was still, in my view—and I stress it is a personal opinion—less than the companies had made out of the price fixing and the market sharing. There is now a series of private actions being brought by customers who are seeking to recover what they believe was wrongfully taken from them through those price fixing arrangements and so on, so there is a lot of litigation going on. In those cases, there was some reaction.

I guess the best known of all the market sharing and price fixing cases is the Mayne-Nickless TNT freight case. There was a case where the companies reputedly spent in excess of $18 million defending proceedings brought by the Trade Practices Commission, and they eventually had to pay fines in the order of $6 million each, plus personal fines against senior executives. But there would be those who would suggest that, at the end of the day, given the period of time over which the conduct admittedly occurred—because they did admit it—they were probably still in front.

Mr HARDGRAVE—But corruption flourishes more in the dark than in the light, doesn't it?

Mr Broome—It does, so transparency is an essential step in trying to achieve the kind of corporate cultural outcomes. I guess all I am saying is that it is not necessarily going to work of its own. If external accountants are prepared to report conduct which they find to be improper, then there is an external check and balance in the system. Transparency is essentially necessary for that because I do not believe history suggests that auditors have got a great record of finding these kinds of things unless they are very transparent. Even then, I am saying there is still a further problem.

Mr HARDGRAVE—What about the concept of 'ethical assurance', to use my terminology, that the previous witness brought up? Companies should be rewarded by status, I guess, based on their ethical practices of bringing all that stuff out into the open.

Mr Broome—I think that is highly desirable, but you have to ask how that reward takes place.

Mr HARDGRAVE—They get contracts or they do not get contracts.

Mr Broome—Yes, but there has to be a distinction. If you take the concrete case—which is a good example, because it highlights the point—most of the companies in the industry in the particular region took part. The companies which did not take part hardly prospered because of it. One of the difficulties is having a process where those who are behaving correctly are able to obtain the benefits of their activities. That is one of the reasons why the 'They are all doing it' kind of excuse worries me, because that leads almost inevitably to the fact that everyone will do it.

There really has to be some very strong economic incentives for companies to behave in the correct way. One of the obvious ways is to make sure they cannot get tax benefits for behaving incorrectly. That would go domestically as well. I just find the notion that things like fines can be regarded as tax deductions as a curious concept. I know the argument is that, if you do not do that, there is a double penalty—they have paid the fine and so on. But the best discipline on companies is the actions of shareholders, and shareholders will only respond when they can see a demonstrable outcome in terms of their share value or dividend.

Mr HARDGRAVE—So we are down to whistleblowers and even then whistleblowing is not going to work. If they are all doing it, no-one is going to dob anyone in.

Mr Broome—Yes, except that my experience in the Trade Practices Commission showed me that there are plenty of whistleblowers around. There are people inside companies who simply will not stomach some of the things that go on.

CHAIR—And some competitors presumably.

Mr Broome—And some competitors. They are the two sources. Often the competitors are also playing up themselves.

CHAIR—Absolutely, but they have great satisfaction in dobbing in.

Mr Broome—They will dob in, particularly small competitors who will say, 'If we can knock the big boys off, then we'll at least have a fighting chance.' In my time in the commission, I would say that in at least 50 per cent—probably substantially more than that—of the cases that we were able to investigate, we became aware of the problems through some kind of whistleblowing. More often than not it was internal, but usually it was a customer who suspected that there was something untoward going on or it was a competitor. There were a lot of competitor dob-ins and a lot by internal company office

holders.

My concern with this legislation is that for the AFP—and this is no criticism of them at all—this offence is going to be very difficult to investigate and deal with short of that kind of behaviour. It is going to be resource intensive. I think the attempt to try to keep this territorial—and I understand exactly why that is being done—

CHAIR—Do you think that is defensible?

Mr Broome—I think the greatest argument for territorial legislation is to look at at least one major international jurisdiction which asserts a great deal of extraterritoriality, and one can then often explain the concern that countries have about extraterritoriality. Australia has been on the receiving end of some of that extraterritorial action by countries like the US in the past. Generally, yes, I think a territorial approach is defensible. Increasingly, of course, as the world becomes a global village, it is much harder to draw those nice lines around whether it is an island or it is just another line on a map because the world just does not work that way any more. Australian companies are not Australian companies; they are international companies.

We are encouraging our domestic companies to be international. We are letting international companies trade, and I am not objecting to that at all. We are part of a global market and it seems to me that in that context the payments we are talking about here can be effected without any territorial link whatsoever.

CHAIR—And are more likely not to have a territorial link.

Mr Broome—I would say that the only companies we will catch taking some proscribed action within Australia will be the unlucky or the stupid.

Mr HARDGRAVE—So we really do need this nationality nexus.

Mr Broome—Yes. Once you do that, you then increase the call on the resources exponentially. So it is a trade-off.

Mr HARDGRAVE—But given your hat as co-chairman of the Asia-Pacific Group on Money Laundering and given the fact that the federal government has put some money in to resource that, and given that it is seen as an important moral dilemma—which ties, very much so, into the convention that we are talking about here today; I guess that is why you are here, amongst other things—given all of that, to not go down the path of looking for extra resources, to take on the high moral ground as is best possible, government would be being a little bit pregnant itself, would it not?

Mr Broome—No-one is more conscious of the difficulties of agencies and resources in the current environment, and not just in the last two years. I come from an

agency which had cuts effected by the former government and by the current government. We have been dealt with in a very bipartisan fashion. I say that not to be trite, but to make the point that cutting of government expenditure is not a recently invented phenomenon, and we need to not forget that.

That said, in the last year we have had very substantial increases in the resources given to us by the government. I have said in many other places that I am very grateful for that; I believe it is a very substantial vote of confidence in our organisation. We have seen all of the cuts that we had previously suffered restored, and more, in the last nine months, through the drugs initiative and through last year's budget. So I am in a very fortunate position in that sense, that we have actually been given resources to do a job of work. But I know how resource intensive these activities are. When I read that this is going to be done by the AFP, without resources; I have to say that that is not going to happen.

Mr HARDGRAVE—Mr Broome, when all is said and done, the global village, e-commerce, the Internet and all the other things are now simply drawing the world together. In an almost instantaneous sense commerce is acted upon right around the world. Therefore, with money laundering and international transactions, I would think that, if common everyday Australians like myself can buy a couple of CDs out of some record shop in San Francisco and they are delivered within 10 days, then someone far more sophisticated in these matters could do just about anything.

Mr Broome—And do.

Mr HARDGRAVE—And on that basis, given that the world is changing and that technology is giving us these changes, I would have thought there is a growing responsibility on government to respond. I am of that government.

Mr Broome—I would not disagree. I think one of the reasons the government has funded the secretariat for the Asia-Pacific Group is because it recognises that we need to do something, certainly regionally. We are talking about trying to cope with a fairly large regional area. But none of this can be done unilaterally. You cannot deal with something like money laundering in Australia alone, because the funds by definition are removed from the jurisdiction. They are going to go to some place overseas; they are probably going to go to three or four places. If you cannot catch the first transaction—that is, the movement from Australia to, say, Hong Kong or Thailand or the US—the chances of getting the second or the third are almost nil. The same thing will happen with these kinds of payments. You have got to have an international network; you have got to have cooperation; and you have to look at these things in terms of global solutions.

Mr HARDGRAVE—And, as you said in your opening remarks, going further than the legislation is not sending a bad message overall, is it?

Mr Broome—I do not think it is. I think that in many respects we have a great international reputation for dealing with a lot of these law enforcement issues.

CHAIR—What would happen, though, if we were out in front of everybody else? Given that to make it work is really going to need, as you quite rightly point out, some sort of global solution, is that going to matter?

Mr Broome—If we only legislate to the level where we say that we can guarantee we can enforce, so be it. But in so much public policy I do not think we sell ourselves that short. I think we are prepared to legislate to deal with what we see as social or legal problems. Of course you will never always be able to catch all of the crooks, but that does not mean that we do not make certain conduct an offence.

I guess the attempt to deal with child sex tourism and so on is a good example of that. It is really setting a moral bar on the high jump. All I am saying is that there is at least an argument that says Australia could set the bar a little higher if it wanted to. It would send a signal. Australia has a very important international reputation, a very high reputation for taking the lead in so much of this area. Australia is one of the main countries in dealing with the development of mutual assistance treaties around the globe and with linking common law and civil law jurisdictions in the work that we did in the 1980s. We are recognised in the UN context for a lot of those kinds of initiatives. We have much more influence than is proportionate to our size.

I understand exactly why the OECD standards are set where they are. I know enough about the debates that went on to know the trade-offs that this represents. Any international gathering represents trade-offs. The challenge for Australia is to ask, 'Are we prepared to in fact set the bar a little higher?' Even if we cannot catch all of the offenders, what kind of signal do we want to send internationally and to our own companies about what we believe is appropriate behaviour? Increasingly, as we operate in the region, I think we have a role to play there.

CHAIR—Given that we all seem to be thinking in a similar way that this is a first step, your suggestions for how this current draft might be improved are to extend, or at least remove, the territorial nexus and to perhaps do something more specific about the coverage of the act.

Mr Broome—Yes, I think the territorial nexus is one area that could be looked at. I think the second area is the definition sections in relation to the public enterprises, where you have got to have at least 50 per cent shareholding. That seems to me, again, to raise some questions about where the bar might be set.

CHAIR—Do you also have a view about the definition of foreign public officials?

Mr Broome—The definition of an official is probably all right if you are going to

pitch it at those in official positions. You really have to decide whether it is going to be dealing with those officials in the public sector themselves or someone who will influence them or receive the payment. The definition provisions make it clear that the payment can be to some other person other than the public official but used for the purposes of influencing the public official. In so far as we are talking about a payment to a third party—a child, a relative, a holding company or however it is done—which is going to influence the public official, I think that is probably a reasonable step to take.

The fundamental question is whether you talk about it in terms of situations where you do not have 50 per cent government ownership. Is that the right threshold? Governments may well be able to exercise control over companies with far less than 50 per cent. I know the definitions do talk about the capacity to exercise control through the appointment of directors and so on, so it is possible that a lower than 50 per cent threshold would operate. A good example of that is with the strategic alliance between Qantas and BA. I think it is fair to say that British Airways might be able to influence the outcomes more than their 35 per cent ownership suggests because of their board appointments and so on. I am not saying that is wrong; that is just a good example where I happen to be aware of the details. I think that can be looked at.

The real question is whether the company is private, a mix or a separation. In many jurisdictions, it will be a private corporation with no government ownership or no direct government involvement at all that will operate in a very official way, if I can use that sort of language. I think that is the real question.

CHAIR—It might not even be as obvious as holding out.

Mr Broome—No. It will be the situation where the utility company, the road manufacturing company, the railway, whatever, is in fact a private corporation in a jurisdiction in which—

CHAIR—It might be a family member?

Mr Broome—Yes, and so on. So there is another issue. They are the sorts of areas. As for the capacity to enforce, yes, we do have a good network in terms of mutual assistance, extradition and so on. That framework is there and is quite well in place.

CHAIR—But there is a question of resources.

Mr Broome—There is a question of resources. Then you look at the four areas which are going to be examined in the next round. In one sense, that also suggests possible areas of extension.

CHAIR—Thank you very much. Time has beaten us. Was there any aspect that we have not covered with you that is a burning issue and you want to bring up?

Mr Broome—No.

CHAIR—We interrupted you all the way through.

Mr Broome—That is fine. I think we have covered all the examples. I thought the trade practices experience was very good because it highlighted the issues that worried me personally about this.

CHAIR—It was very revealing and very interesting. Mr Broome, the committee is very grateful that you were able to come along, even under these conditions of not having had a chance to put in a written submission. Your insights have been invaluable. Thank you. When undertaking the process of deliberation, we may need to get back to you if you do not mind.

Mr Broome—Thank you.

[3.16 p.m.]

O'KEEFE, the Hon. Barry Stanley John, Commissioner, Independent Commission Against Corruption, 191 Cleveland Street, Redfern, New South Wales 2016

CHAIR—Welcome to the committee. Your submission has been already published. I want to ask you two preliminary questions. First of all, are there any amendments or additions you want to make to your written submission? Secondly, if not, would you care to speak to it or make an opening statement so we can then proceed to some questions?

Mr O'Keefe—The answer to the first question is no. The answer to the second question is yes. Our experience at the ICAC is that eliminating corrupt conduct is in the end about two things: one, leadership and, two, such leadership being put into action so as to change a cultural environment. I am now not talking about national characteristics; I am talking about the culture of a given organisation. If those two things are present, then mechanically, technically, one can over time bring about the change that is essential to ensure that there is a clean and honest Public Service where integrity is the touchstone.

The importance of the present proposed legislation and the treaty, first, is that it gives leadership. It gives leadership in a region in which Australia is and has been traditionally regarded as a leader in a way that is disproportionate to our population size. Hong Kong, Japan, Korea, Indonesia, Malaysia, India and the People's Republic of China have all sent their officers down to the ICAC to have them observe how we work and to train a number of them in our procedures. We had a minister who I think was No. 4 in the Chinese hierarchy visit and stay with us in order to observe how we did our work because of our reputation and the desire expressed by that government to bring about a change in what has regrettably been occurring in the People's Republic of China since it was opened up to foreign influence.

That those various countries, including the Philippines and Papua New Guinea, seek to have some leadership from an organisation such as the ICAC indicates to me that, firstly, they are looking for leadership in that field and, secondly, Australia seems to be the natural place for them to come. That being so, it casts upon Australia an obligation in the international field. Leading by example is the only way. You can say all the things that you like, but unless you put the precepts into practice you then have a values gap—a gap between what are asserted to be the values of the organisation or government and the way in which it in fact behaves.

Firstly, that is a situation that is productive of extreme cynicism. Secondly, there is a great tendency to say, 'We'll do what they do.' So it is important that Australia first has the words and then makes sure that it has the wherewithal and the will to enforce those words. Thirdly, there is the question of integration. The adoption of legislation of the kind presently contemplated will bring us into the same frame of reference as the OECD countries and will bring us into a cognate frame of reference to that which has prevailed

in the United States since 1977 with their legislation following the Lockheed scandal. Therefore, we have a large number of significant trading countries that subscribe to the ethic, so we are not out on our own.

By linking in with that network and giving the lead in the region, it seems to me that we are much more likely to produce a general international response of like kind, and somebody has to start. It is said, for instance, in relation to some countries such as the People's Republic of China, that there is so much corruption, why worry about it? The answer to that is: it means that you have your state enterprises actually sold—I have examples of this—and the money taken across in suitcases to Hong Kong. Unless you start somewhere, the place falls apart. So this is a good place to start, but you need integration domestically as well.

You may have that domestic integration at a couple of levels. You may want a legislative integration. I recognise that section 109 will give primacy to Commonwealth laws, but the concept of complementary state laws and Commonwealth laws is now a commonplace in a way in which it was not 20 years ago. We know that the complementarity of those laws means that they are the more effective. You do not have arguments about section 10, you do not have choice of forum arguments, and you do not have loopholes because you have got disparate legislation.

The other point is that of administrative integration. In our submission, you will see that we advocate that there be some administrative procedures put in place to ensure that those who are demonstrated to have breached the law should have some economic sanctions applied to them. In the state of New South Wales, since I have been Commissioner for the ICAC, I have been urging the government to have a policy that it will deal only with companies, partnerships and entities that have codes of conduct which are enforced and mesh mutatis mutandis with those in place in the public sector—so you do not even deal with people on the short list until they subscribe to these principles.

That is not a bad starting point. We have found that the big ones in the construction field—Lend Lease, Leighton, Multiplex, Transfield, all of them—have these codes and are very serious about enforcing them. That means that the big ones give the leadership to the others, so it is not so hard to bring this about. I could see such administrative procedures working just as well in this field as they do in relation to bribery and such offences at a state level.

Another point is that resources will always be an issue. I am going through budget arguments at the moment. It does not matter how well you do your job, there will be competing demands for money—health, education, police and, in the Commonwealth field, defence; name the sector and there will be a competitor. There will always be a limited purse and there will be a claim, generally genuine, that we do not have enough money to do all the things that we should do or sometimes would like to do. Therefore one should look for a mechanism that is self-regulating, or at least in part self-regulating.

We know that the hip-pocket nerve is one of the most tender of nerves in any individual or company. There are two ways in which you may deal with that. One is the 'stop list' principle. First, if somebody is shown to have done something wrong and they do not have in place codes and modes of enforcement, then, just as in the United States in the banking laws—money laundering laws—they get a stiffer period of exclusion. If you have the codes in place and this was a sort of wild-card activity by somebody who was out of control, then they get a lesser infliction on them. So it causes people to examine what they are doing, come into the fold and be serious about ensuring that they do the right thing.

The third thing is that self-regulation also has a greater advantage if not only are you excluded from Commonwealth contracts—and that is where integration around the whole of Australia is important—but there is complementarity that says you do not get any government work around Australia. That would be an incredibly powerful inducement to people not to do the wrong thing. Just on that point, although it is not directly involved here, is the deprivation of tax deductibility for such matters. It then has a double sting: you do not earn money and you do not get your deduction, so you pay out more money. The effect of that—in our experience here in New South Wales—has been quite dramatic.

The other thing is that once you get people into the fold, into the mode of thinking that 'We want to be good,' it has great spin-offs for those who are in the organisations. Take four public sector organisations in New South Wales that used to be called the state government railways. It was a bottomless pit of corruption. I am not saying it is eliminated but, having convinced them to split the organisation into four with a new start and with each of the organisations seriously committed to the elimination of corruption, people can stand up and say, 'I work for the railways. We do a jolly good job and I am proud of it.' So you get within the organisation a pride in doing the right thing, rather than being 'clever' and getting around the rules—if that is not the ethic of the organisation then you do not do it. When people do get around the rules, they get their marching orders or some other appropriate imposition.

It seems to me that, at a time when there is a tendency to wind back bureaucratic size and bureaucratic function at every level of government, the self-regulating procedures assume a greater importance. They certainly do monetarily but we have found this other effect as well. If I or my officers go into a place and say, 'Thou shalt do this,' the first response is, 'Who the hell do they think they are that they can come and tell us how to run our business? We have been running our business for so long.' But if what you can do is to engage with them in a process that they genuinely feel they not only are part of but own, then you really do get a cooperative effect. I cannot stress too much the benefit that we have had in New South Wales of the cooperative approach.

Without wishing to be vainglorious, that is my contribution to the ICAC. It was not always thus. Long after I am gone we will see even more beneficial effects than those we have seen in the 3½ years that I have been there. It takes a while to convince people that

they really want to be good, but then there is the great joy of being good and not having to worry when the phone rings and you think to yourself, as I am told people do, 'Hell, what's this?'

CHAIR—It is 'want to be good' as opposed to 'better be good.'

Mr O'Keefe—It is, but you marry the two of them, and that is why you still have penalties and prosecution provisions. But there is going to be a serious problem of proving offences under this sort of legislation when what occurs occurs in a foreign country and the nexus to Australia is tenuous, to say the least. That is why you need more than that. That is the only additional contribution that I can effectively make.

CHAIR—Thank you very much. Before I let my colleagues loose, could you describe a little bit for the record, the New South Wales procurement reform proposals, and how we might think about those?

Mr O'Keefe—They were launched last month I think—it may have been the end of February—and they are looking to the very thing that I was talking about earlier and had been urging on the government. They move along the path of saying, 'You have to have these sorts of principles that apply to the way in which you do business before the New South Wales government will do business with you.' It has not gone quite as far, but there is one principle, if the government accepts a suggested amendment to it—which I have discussed with the government already informally—that can achieve just that. The principle is: you have to have an organisation that subscribes to these principles and does something about ensuring that it is not just words but actions as well. It is quite short. I should have brought a copy but I did not. I can send you one.

CHAIR—Yes, thank you very much.

Mr O'Keefe—It is a very worthwhile initiative. The economic benefits that stem from such an approach are quite marked. Our Premier rings me regularly. Notwithstanding the tensions that will always exist between those in government and those in an organisation like the ICAC, it is also important that there be communication and rapport at an appropriate level, and that is Premier to Commissioner. He rings me quite regularly and he said the last time, 'Barry, we have just landed the development at Port Botany—$250 million. They came up from Victoria. Why? Somebody put the arm on them down there and they say that is not the way they do business. They want to come to a place that they think is serious about doing honest business where you get a fair run for your money and where you have got a body to ensure that that happens.'

Those sorts of principles and the existence of a place like the ICAC can be turned into a positive in economic terms. I can multiply that by half a dozen phone calls and the money by much more than that. It is actually being used currently as a serious sales pitch by New South Wales for overseas investment—and is working, I am told by the Premier.

Mr HARDGRAVE—The small value question has come up a few times.

Mr O'Keefe—The $100 or whatever, yes.

Mr HARDGRAVE—Yes, routine government action payments. I have actually thrown your $100 suggestion at a couple of people.

Mr O'Keefe—And they have been horrified?

Mr HARDGRAVE—They are all a bit vague on exactly whether or not you can quantify such a small amount. One suggestion was that we would a laughing stock if we started to prescribe interest in anything as small as $100. My retort—if I may comment before I get your reactions—has been that transparency is really important. So a company which engages in the 'legal' activity of throwing $100 or $20 at somebody to make sure that a routine government action actually occurs—or occurs faster than something else, or is a reward for the action occurring—and if that is a legal or acceptable action in that country, then the company here should not be afraid to confess it; to hide it would be, in itself, an admission of covert activity. How did you arrive at the $100?

Mr O'Keefe—May I take it first as a matter of principle. My view, and the view taken by the ICAC in Hong Kong, for instance, is zero tolerance to corruption. Now you have to say, 'That is all right for the culture in Australia.' How do you now ensure that the principle is applied without trying to export our values and impose them on somebody else? There are some places you cannot get out of. They take your passport and say, 'You can't catch your plane unless you pay this amount.' I had that happen to me in Paraguay some years ago. It was only $US10, but there cannot be any question about that. That official was making an illegal impost on me and it would be equally ridiculous to say that in some circumstances that should be criminally sanctionable here in Australia for having done it. So you then ask what approach do you take.

Our problem with 'small' was: I am small, I am five foot five. I am very small compared with one of my drivers who is six foot eight and a half, but I am big compared with my granddaughter. The same is true in money terms around the world. So what is your basis of comparison? One million dollars in a $2 billion contract might be very small. What do you relate it to? That is the first thing.

The second thing is that we have found here in New South Wales that one of the best ways of saying no is to have a statute that tells you you must say no. Recently we had published our Premier saying to somebody from Queensland who wanted a job as a industrial registrar, 'That is not on. Barry O'Keefe would be up me like a rat up a drain if we did that. We cannot do that in this state.' Even those people—and I am not ascribing this to the Premier—who may want to pay it have got a good out with the legislation and they say that is what the legislation says is our limit, rather than to have this haggle over whether it should be $50, $200 or $1,000. Once you are on the slippery slope, you are in

real trouble.

CHAIR—If I can clarify a point there because this is very relevant. For argument's sake say that the price for your exit in the instance you gave was $150. It would be equally as unfair to visit you with any consequences if you had to pay $150. It seems to me that there may be more utility at looking at the purpose of the payment or trying to characterise what you are doing it for. Something you are totally entitled to anyway and you just have this obstacle in the way imposed, no doubt unreasonably, is very different to the sort of grand corruption that we are really looking at here of big bribes that are going to undermine economies and that are the focus of this legislation. Do you think there might be an approach there that works?

Mr O'Keefe—I understand the argument. The concern that caused us to find a nominal figure like $100 was the use in the American legislation of the term 'facilitation payment', which in the end can mean almost anything. What do you facilitate? You facilitate getting into the office of the minister. You know once you can get into the office of the minister the contract is on the desk to be signed and you are going to sign it. You are entitled to get in to see him, but it costs you $1 million to get through the door.

There are all sorts of dodges that can be adopted and made to seem as if it is some sort of requirement in order to do what you are entitled to do. The places that that applies to very markedly are India, particularly at the low level of the public service, and Indonesia, again at the low level of the public service.

Mr HARDGRAVE—Would you see $100 as a cumulative amount? Ten visits at $100 a time is $1,000.

Mr O'Keefe—No. I am seeing that as a one-off. Then you have the problem that people may stack them up, but the courts then look at the reality of the situation. Take money laundering: you do not have to report amounts under $10,000. You have a discretion to report amounts under $5,000—you may report them or you may not. We know that there is a provision which says, if people keep sending $9,999, then you will look at that as a suspicious transfer and you will aggregate them.

Mr HARDGRAVE—Coming back to the transparency argument, is there value in enforcing the need to be transparent about facilitation payments?

Mr O'Keefe—There is. I think one way of doing that is that companies will be required in their annual reports to report on facilitation payments—or whatever one calls them—that is, to whom they have been made and the amounts that have been paid.

Ms JEANES—Is it not important to provide a map regardless of the amount? A $50 entrance fee to a minister or a $50 payment being required to get on a plane to go home, isn't that all important in terms of providing a map of the world and where you

have to make these facilitation payments?

Mr O'Keefe—It may be, but—as with the conduct for our state parliamentarians, so too with this—my view is that one should get the legislation into position, then you see how it works. One can have a two-year review period and you can map that through returns that are done administratively. But reporting whether you have been put on a stop list, whether charges have been laid against you and amounts that have been paid, not just in aggregate but in detail, has a very good effect. We find it in New South Wales in relation to travel. Each public entity is required to report on the amount spent on overseas travel, who the officers were that were the beneficiaries of it and how much was spent on each particular thing. It has a very good effect.

Ms JEANES—One suggestion made earlier today, apparently based on a US model, was that a phone call can be made to a departmental officer to inquire, 'Is it appropriate for me to pay this particular sum of money?' or 'Am I going to be in trouble legally if I pay this particular sum of money for this particular purpose?' Do you see any use in the government setting up such an office?

Mr O'Keefe—It could be beneficial provided that there are some criteria against which the person who is going to answer the question can formulate the answer. So you are back to the prescription in any event, I think.

Mr HARDGRAVE—On the question of territorial nexus versus nationality being a criteria for the basis of law, I guess behind that is the notion that setting a higher mark on the moral high jump for Australia, Australians and Australian companies is an ideal aim and would send a good message in the area. What is your view on that, given that some might say we are still trying to impose values on other countries but probably, more likely, we are ensuring that our own citizens maintain those values no matter where they go?

Mr O'Keefe—I attended a seminar in Canberra on this very issue. The basis on which the legislation is presently drafted essentially looks at what our traditions are rather than at the continental tradition. That does not mean that we export that to other countries; they may adopt a different nexus. I was quite content with what was in the legislation, having heard the explanation for it.

Mr HARDGRAVE—So you are happy with the territorial approach?

Mr O'Keefe—Yes. Remember that there is going to be something that brings it to Australia in any event. There is going to be a person or an entity here; if there is not, then it is not affecting Australia adversely. Even if you have agents, a holding company and subsidiary companies, there will be something in Australia. What you really want is a person in Australia. If you have not got a person in Australia, then should we really be getting upset about it? It is the Australian image that matters, it seems to me.

Mr HARDGRAVE—The retort could be that an Australian convicted of mass murder, an Australian convicted of international terrorism, an Australian convicted of child sex crimes or charged or whatever, would bring us great national shame. It could be suggested that an Australian at the centre of a bribery allegation would do the same and, if the domestic laws of the country in which it took place did not hold that Australian to book, then perhaps we should.

Mr O'Keefe—My experience is that a person who is charged—we will say in 1998—with some heinous offence and happened to have been a member of parliament 20 years ago will be described as 'ex-MP', or the headline will be 'ex-minister' for a minister of religion.

Mr HARDGRAVE—It's hard to get rid of bad news, isn't it?

Mr O'Keefe—It is. The Australian who is so convicted may not have been in Australia for 30 years, but he will still be called an Australian. You cannot get away from that; that is the way the media operates.

Senator BOURNE—It seems that from most of the evidence that I have heard, many people think that this is a first step, that we can go further. From your statements about leadership, I would imagine that you think we can go further too. One idea that we got from a previous witness was pursuing the proceeds of crime. With grand corruption, the money has to go somewhere and generally it goes to First World countries—it could be coming here. If it is, as one of the next steps we should be looking at legislation to enable us to identify where those proceeds are going, freeze them and send that money back to the people who are being acted against corruptly. Do you have any ideas of where we should look next after this legislation?

Mr O'Keefe—Do you mean after the confiscation of assets?

Senator BOURNE—No, but that would be good.

Mr O'Keefe—I think that the confiscation of assets for such crimes is effective. It happens only in a limited number of those cases, as we find with the drug money. But that it does happen from time to time means that for the people who engage in it—I am not saying that they think twice about doing it—it makes it harder for them to get any benefit out of having done it. That is a real and effective deterrent for some—there is no point in involving yourself in criminality if the government takes it all from you anyway. Then you play the risks: am I going to be found out, and will they be able to prove a case?

When I was sitting as the chief judge of the commercial division, often we would get proceeds of crime applications. The number of times that criminals had to fork out big amounts which were forthcoming, and then really had to live on the breadline, were quite numerous; and that word goes around. So you need an effective enforcement procedure.

Going back to what I said earlier, I think that those administrative arrangements about deprivation of contractual rights or capacity to tender and doing it on an Australia wide basis is an important part of how one enforces this. It is a next step. My own belief is that, as the common law has shown us, one should move forward only when one is pretty confident about what one is doing, see how it works and then go further.

Without wishing to sound political, one of the great misfortunes that Gough Whitlam has had to live with was too much too quickly, which an electorate is not prepared to absorb in a conservative atmosphere. I think that is true generally of the law: hastening slowly is better. You should see how it works and get a fair idea from that of what is the best way to go next. I think these administrative ways of dealing with whether or not people get contracts have been very effective here in New South Wales.

Senator BOURNE—Yes, and if it was coordinated, particularly so.

Mr O'Keefe—That is right. That is why the domestic integration is important.

Mr LAURIE FERGUSON—You mentioned the area of the deprivation of contracts a few times. You mentioned subscribing to principles, and at one stage you spoke of not just subscribing to them but doing something practical about them. When you threw around a few of the names of companies in the building sector, it worried me a bit that they are getting such a plus behind their names. When you say that they do something practical about it, what is the follow-up—what is the process?

Mr O'Keefe—They have internal audit divisions, corruption prevention divisions and offices and sections that have powers to ensure that the codes of conduct are being enforced.

Mr LAURIE FERGUSON—Nothing external?

Mr O'Keefe—No, although in some instances, particularly with our public works department, they have an open book method of costing. That means that you have to cheat in order to cover up payments that are not appropriate payments—that is, made inappropriately to people. For instance, take FreightCorp, which is the freight section of our former State Rail: the CEO there is a chap called Lucio de Bartolomeo. He has set up a section headed by a lady lawyer with some investigators—I think there are about a dozen people in that section.

That section has a pretty good budget and a free brief to ensure that the codes of conduct which that organisation has adopted are being enforced. They have about 4,000 employees, I think—they are not as big as State Rail. They would be a model organisation. That is what I mean by not only having the words but having something to enforce them. If you look at the annual reports of that organisation and the State Rail Authority, both have reports about the activities of those units, and they include that as a

badge of honour. That is what I was driving at.

Mr LAURIE FERGUSON—When we talk about the building sector and the companies you specified—

Mr O'Keefe—There are others. They are big ones that spring to mind but, once you get a few of the big ones in, the rest fall in behind anyway.

Mr LAURIE FERGUSON—Are those standards limited just to internal competition? For instance, do you know whether it goes to the manner of getting development approvals?

Mr O'Keefe—The nature of the codes that they have is both aspirational and proscriptive. The aspirational sections certainly would cover development applications and the like. I cannot tell you offhand from memory whether the proscriptive ones do as well. That was one of the reasons why, for instance, when we have been looking at the question of a code of conduct for parliamentarians here, the inclusion of aspirational aspects is important. That should not just be as a preamble but as the way we want to do and should do our jobs, and then we say that these are the things you should not do. If you concentrate on the negatives, it is a sort of Ten Commandment thing—a 'thou shalt not' approach. But adultery does not include certain things, so the President of the United States tells us—you get that sort of attitude. Aspirational statements tend to get away from that. They elevate the level.

CHAIR—Have you had an opportunity to look at the definitional sections and, if so, do you have any view as to whether the coverage of the definitions of 'foreign public official' and 'foreign public enterprise' are adequate?

Mr O'Keefe—The 50 per cent question, which was raised just as I came in, is a bit like our $100, I suppose. The point that was made about British Airways in relation to Qantas is a very good point, it seems to me. That real control of the organisation does not depend upon holding more than 50 per cent of the shares; it depends upon a number of factors which will include the spread of the shares and the nature of the people who hold them. You will remember that years ago it was said in a cartoon: 'What's the best way to run a successful airline? Own a newspaper!' It is a bit like that.

There are some people who, by their nature, own a newspaper. The son-in-law of the president, or whatever, might have only X per cent but that will be the all important X per cent. And 50 per cent, that definition did concern me a bit; again, it is a first step. I did not really know the basis on which it had been chosen. That had not been dealt with. I think Mr Regan dealt with this down in Canberra, did he not? Somebody dealt with it in Canberra.

CHAIR—Anyway, it is a live issue with us.

Mr O'Keefe—Yes. What you are really concerned about is effective control, rather than a mere shareholding.

CHAIR—That is exactly the point. Thank you very much for coming, Mr O'Keefe. On behalf of the committee, I express our gratitude and appreciation that you have taken the time to share your particular insights with us. We really do rely on people coming to tell us about their experience and for that we are much indebted.

Mr O'Keefe—Can I say that the Australian position is increasing markedly. I have been invited to go to England in two weeks, as one of 10, to advise the ministers of finance of the Commonwealth countries and, on the way back, the Italians. The will is there. People are sick of money being bled off and getting shoddy work for too high a price because people's palms are being greased and pockets lined. It is an appropriate time and that is why this is important legislation. For us at the ICAC, it is our bread and butter. We think it is pretty important.

CHAIR—Thank you. That completes the program for today's hearing. I would like to thank all those who gave evidence today for the time and effort they have devoted to this inquiry. We expect that we will have our last hearing in Canberra on Monday, 11 May 1998, and that our report will be tabled in parliament before the end of the budget session on 2 July 1998.

Resolved (on motion by **Senator Bourne**):

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

Committee adjourned at 3.58 p.m.