COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON TREATIES

Reference: OECD convention on combating bribery

CANBERRA

Wednesday, 11 May 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON TREATIES

Mr Taylor (Chairman)*

Mr McClelland (Deputy Chairman)*

Senator Abetz	Mr Adams*
Senator Bourne*	Mr Bartlett
Senator Coonan**	Mr Laurie Ferguson*
Senator Cooney*	Mr Hardgrave*
Senator Murphy	Ms Jeanes*
Senator O'Chee	Mr McGauran
Senator Reynolds	Mr Tony Smith*

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

For inquiry into and report on:

OECD Convention on Combating Bribery.

WITNESSES

JOINT STANDING COMMITTEE ON TREATIES

(Subcommittee)

OECD convention on combating bribery

CANBERRA

Wednesday, 11 May 1998

Present

Senator Coonan (Chair)

Mr Hardgrave

Mr McClelland

Mr Taylor

Committee met at 9.14 a.m.

Senator Coonan took the chair.

BRIEN, Dr Andrew James, c/- Australian National University, Canberra, Australian Capital Territory 0200

CHAIR—Good morning, ladies and gentlemen. I declare open this sixth and final public hearing in this inquiry into the OECD Convention on Combating Bribery. Today we will take evidence from Dr Andrew Brien, Mr Peter Butler and Ms Hill, before holding a round table discussion to finalise our evidence. The following organisations and individuals will take part: the Attorney-General's Department, the Australian Chamber of Commerce and Industry, Transparency International Australia, Mr Brazil, Mr Butler and Ms Hill. This will give us the opportunity to receive a range of views on a few topics in a limited amount of time and, perhaps more importantly, it will also allow those individuals and organisations to make—albeit briefly—any additional points on the convention and the bill. We do recognise that during the hearings certain issues have identified themselves as the most important ones.

I welcome Dr Brien and understand that you are appearing in a private capacity. Your submission has already been published by the committee. Are there any amendments you wish to make to that submission? If not, would you make a brief opening statement and then we will proceed to questions.

Dr Brien—I do not have any amendments to make. While I think everyone agrees that bribery and the larger issue of corruption are things we need to work out as a nation as we deal with our near neighbours, whether or not this bill is the most effective way to go about doing that is a different matter. As I see it, there are problems dealing with the extra-territoriality of it. The bill has not been placed in a larger context of Australia's actions in this area. The assessment of costs that we see in the national interest analysis are inaccurate I think. There are problems with definitions of facilitation payments and so on. I am not sure that the bill would be workable although it has laudable goals.

CHAIR—Was there any particular point in your brief opening statement that you wanted to elaborate on or are you happy for us to explore them with you?

Dr Brien—I am happy to field questions.

Mr HARDGRAVE—I am particularly interested in a couple of matters with regard to the facilitation payments question. A small or large test has probably preoccupied my mind, amongst others, in this committee and its hearings. I want to put to you the moral issue of a small payment—maybe a facilitation payment or, as you said in your written evidence, a fine or however it might well be presented in another country. If an Australian citizen or an Australian company was to make such a small payment and claim it as part of its legitimate costs for tax deduction purposes there is a moral problem there, is there not?

Dr Brien—I think there is a moral problem there because they are not playing on

a level playing field. They are seeking an unfair advantage by not selling their products on their merits.

Mr HARDGRAVE—Would you accept that there might well be a cultural difference in another country that we should take into account on these matters?

Dr Brien—Of course there are cultural differences, but cultural differences do not make things right. To use a gross example. There are Germans running around who say, 'That's the way we did things back then.' That is a cultural difference, but I do not think anyone would want to justify what happened in the 1940s as cultural differences.

Mr HARDGRAVE—Would you then say that perhaps we should make the whole process transparent? In other words, if a company or an individual were to confess that a gratuity, a facilitation payment or whatever had been paid and it was therefore treated separately and the total amount was well known to everybody in Australia then it could be judged whether or not anything corrupt or otherwise had been occurring?

Dr Brien—The problem with disclosure is that it can often be embarrassing. It is unrealistic to ask for total disclosure. I cannot see how asking people or establishing a law is going to produce the outcome.

Mr HARDGRAVE—Is this embarrassment through transparency worse than perhaps the distortion and/or social harm that may come from bribery?

Dr Brien—That is a difficult question. I guess it comes down to whether or not you want to maintain a culture that is based on kickbacks in the economies within which you work or whether you see yourself engaging in those economies for other than business reasons. That is up to every organisation. I know that a few years ago Pacific Dunlop had the same OH&S practices in the Asian economies in which they operated as they did here. They took a particular line on that. Those sorts of things involve a judgment call.

Mr HARDGRAVE—You have led me on to the other quick line of questioning I will follow that is the nexus of citizenship versus the territory. Surely it might well be that the Australian government could in its full rights apply a citizenship nexus so that an Australian citizen's actions overseas should be judged by Australian authorities. Do you agree with that?

Dr Brien—You could. That would again be a matter for the members of parliament to decide.

Mr HARDGRAVE—You are aware of the Crimes Act, are you not?

Dr Brien—Yes, and we have taken that particular view. I do not think that citizenship should be the only thing to look at. You might want to look at where a person

is resident for the purposes of business. You might want to see that corruption is emerging out of our territories in the sense that these people are travelling from Sydney to one of our near neighbours to do it but the person may actually be an American citizen but an Australian resident. You want to do it on residency. You might want to do it on where companies are registered. There are any number of bases that you could use. I do not think the one that was indicated in the bill was adequate.

Mr HARDGRAVE—So you want a fairly broad range of possibilities and then leave it up to prosecutional discretion?

Dr Brien—Yes, to see how it will run. Then you run into the problem that you are taking on a very big task.

Mr HARDGRAVE—It sounds like it will be a delight for lawyers.

Dr Brien—I am sure lawyers will always benefit.

Mr HARDGRAVE—I think that is the 12th commandment.

CHAIR—I want to explore a few bits and pieces with you. You made the criticism of the bill as it is presently proposed that it is not put in the larger context. I note that you refer in some detail in your submission—I think at page 6—to needing perhaps a better administrative framework and the monitoring of effectiveness and compliance and education, presumably for people who are going to have comply with it, and reporting to parliament and things of that nature. Can you elaborate on how you see the bill being put in a larger context?

Dr Brien—There are two elements. Firstly, simply monitoring to see whether it is actually working or doing more good than harm. Secondly, placing the bill within an overall foreign policy strategy so you have AusAID and the larger Foreign Affairs and Trade interests. Presumably it is in our national interest to encourage our near neighbours to become more democratic, more open, less corrupt and these sorts of things. Merely passing one bill and then not placing it within the broader context of our own national interest and, in fact, the interests of these nation too—as we can see from Indonesia at the moment—it is hard to see what it is doing. It is sitting out there like a pinnacle in the middle of the desert. You might take the view that something is better than nothing but, unless you know what you are aiming for and what you are hoping to achieve, overall then a single piece of legislation is going to be useless.

CHAIR—Do you have in mind that things such as procurement contracts and the provision of aid would be tied into the bill in some way shape or form or imply the same standards or be published in some way?

Dr Brien—I think we need to start looking more closely at where our aid is going

and to whom. We need to start examining the projects that are undertaken. With things such as bribery we need to be very sure that we do not inflict more harm on ourselves and on our national interest by pursuing a law such as this. At the present time, it is just standing alone. You cannot really see how it is going to fit into the larger picture. It may well be that pursuing prosecutions under this legislation and exposing public officials in foreign countries to allegations of corruption is going to cause all measure of harm. We still try not to use the word recalcitrant.

CHAIR—We do try. You mentioned in your answer the problem of an assessment of costs which you have not regarded as adequate in the NIA. Could you elaborate on that?

Dr Brien—One would have expected in the bill some mention to have been made of a reporting mechanism to parliament, a review mechanism or the establishment of some body that would examine the effectiveness of the bill, the number of prosecutions, the costs and so on. There is nothing at all. There is just a vague generalisation that Australia will contribute something towards the monitoring of this by the OECD or someone like that. That is not really good enough.

Our businesses may well suffer economically. The Commonwealth will presumably have to fund the prosecutions and the investigations. It may well be that, in order to obtain the information, the police may want to use wire taps and things like that so then you run into the liberties of individuals to carry on their business. These sorts of things were really inadequately dealt with in the explanatory documents. My own feeling was that it had not been carefully thought out.

CHAIR—From what you have been able to observe in the bill, the NIA and the explanatory memorandum do you have a view about whether or not this bill will impact adversely on businesses trying to do business and get business or in otherwise complying with the bill?

Dr Brien—I think what will happen is that the businesses that are more adept will simply make the facilitation payments, the bribes and so on in ways that circumvent the bill if it passes. They will find ways around it. There will be businesses that may well try to comply. The major problem is that the people with whom you are dealing may become aware of it and seek not to deal with Australian businesses because they know that back home in Australia there is this law that could one day expose them.

CHAIR—Some witnesses before our committee have said that a law such as this would actually assist them to do business because they will be able to say, 'We cannot do this because it is illegal in our country, et cetera.' Do you have a view about that?

Dr Brien—These things cut both ways. It is crystal ball gazing. I think both things could occur. There are some Australian businesses at the moment that refuse to make any

sort of facilitation payment or bribe and they do quite well. There are other businesses that may well engage in facilitation payments. I think it is such an uncertain area that we need to tread very carefully.

Mr HARDGRAVE—Whose morals do you apply here? We are a committee of the Australian parliament so surely we can apply Australian values to this not the values of an emerging economy where these bribes tend to be larger than in an established economy like our's. It is not too difficult for me. It is easy to apply my morals to this, for instance.

Dr Brien—I would prefer people did not make bribes themselves. If you take a purely hard-headed approach to these sorts of things when you are legislating for the national interest occasionally you have to do things or look at things in a different way from purely your own views.

Mr HARDGRAVE—Are you suggesting that this committee should say, 'Facilitation payments, small bribes or however you want to term them are a fact of life in some countries and it is in our national interest to participate in them?'

Dr Brien—No, I am not saying that at all. What I am saying is that this bill as it stands does not work. You need to put it into a larger context. If you proceed with it, I would see it forming part of an overall program where you engage in the education of the foreign officials. Instead of coming in with a guillotine approach, you would work up to it. Australia has had a long history of educating the officials from developing nations, and that has been not only a good thing to do but also in our national interest. I am saying that we need to move down that track as well. The bill by itself does not do it.

Mr HARDGRAVE—There is a lot of disruption in Indonesia at the moment, and that would have to be, by anybody's measure, a corrupt regime in so many different ways. I do not wish to defame all Indonesians, but it has come up in earlier evidence. Perhaps Australia taking a strong stand and passing a tough set of laws in its domestic domain to apply to all citizens might be a great signal to those who want less corruption in a country like Indonesia.

Dr Brien—It may well be, but you need to work on the other fronts as well to make the law effective. That is my point. I would like to see no bribery and no corruption as much as anyone else, but what I want to see are laws that work. There is no point having a law in the books that is routinely evaded. It brings the whole institution of law making into disrepute.

Mr HARDGRAVE—Even further disrepute?

Dr Brien—No, I think we are pretty lucky in this country.

CHAIR—I want to refer to a slightly more technical point that you may wish to raise. You said in your opening statement that you had a number of areas that you wanted to comment on and that one was definitions. You said that you saw a problem with some definitions. That does not surprise us. Perhaps you could tell us what it is.

Dr Brien—Facilitation payments at the present time, as I understand it, are determined by their size. The nature of corruption is not so much the size of the payment. What is a facilitation payment in one nation can be a gigantic bribe in another. It is rather the intent with which the payment is given, the purpose for which it is paid and the way in which it is received by the person who receives it. Having a monetary value on the facilitation payment, as opposed to a pragmatic value, is the wrong way to go. As a consequence, you can find a person will be liable under this bill in one jurisdiction for a facilitation payment, and in another jurisdiction there will also be a facilitation payment but it will be quite clearly a bribe. So there is a problem of justice, of unfairness.

CHAIR—Philosophically, I think a lot of people would agree with you that there is that difficulty, but I would like to deal with the brutal facts. If, from an evidentiary point of view, you had to look at the intention of a recipient, how on earth would you go about doing that?

Dr Brien—Maybe that is a problem with the bill.

CHAIR—It was your point that we should be looking at the intention of the recipient. I am just wondering how on earth you could do that.

Dr Brien—I think what you need to do is go in and see how that particular culture operates. We have a fair level of knowledge of the sizes of the bribes and the way that these things are carried on in the different cultures. Again, that would be a matter for the jury and for the lawyers to bring out and to establish: whether or not the person who received it would have seen it this way or some other way.

Mr HARDGRAVE—Do we have a fair level of knowledge about the levels of bribes?

Dr Brien—I think we do.

CHAIR—Do we really?

Dr Brien—If you go to some of our Pacific Island nations and you give certain sorts of gifts of certain values, they will be seen in particular ways. If you go to our neighbours to our near north, you will be laughed at, and we know that pretty clearly. Business people already know what sorts of gifts are appropriate in certain circumstances.

CHAIR—What if you were dealing with a culture where a bribe was perhaps said

to be simply to augment a very low wage or to otherwise assist people who do not have very much money anyway and who have such a low standard of living that it is regarded as literally payments for services?

Dr Brien—Like a gratuity or something?

CHAIR—Yes.

Dr Brien—That is one of the major problems that you face in this area. Some US companies take a zero tolerance approach. Other companies say, 'These small things that are of the nature of a gratuity, where you are not getting people to make a decision in your favour but you are merely carrying on a practice that is rather like a tip, in that case it is acceptable.' Those companies typically also maintain a register of such payments as well.

Mr HARDGRAVE—This question goes back to my earlier questioning about the transparency of it. Is it not better for Australian companies and individuals participating in this to confess that these are part and parcel of doing business?

Dr Brien—I would like to see that, but whether or not you want to bring that into the bill is a different matter. I think I may have mentioned in my submission that there should be a register maintained of such payments. I think that would be a good idea. That is only speaking from my own personal view.

Mr McCLELLAND—It may be a start if Australian companies kept a register which was given to the government and if other nations adopted the same practice so that there was a central international register to enable the international community to say, 'This is getting out of hand in this area' and start giving guidelines as to what is or is not an appropriate facilitation.

Dr Brien—That would be the beginnings of an effective monitoring and implementation procedure.

Mr McCLELLAND—Perhaps there needs to be penalties for non-disclosure according to the register requirements.

Dr Brien—I think so. Again, there would be proof and you run into a whole lot of other problems. For example, how do you find that information in the first place? Certainly having a register which should be maintained and which the government should be advised of is a good idea.

Mr McCLELLAND—Are there incentives to keep a record for the purpose of taxation deductions or even auditing requirements?

Dr Brien—In those jurisdictions where you can claim facilitation payments off your tax, they do maintain records. Of payments that are like gratuities or tips, corporations do maintain registers. Some of the large aerospace firms say that any sort of payment like that must be logged and you must advise your supervisor. So those things are maintained and they are inspected. They are audited by the company's auditors and so on. You can develop a series of mechanisms, and it would be desirable to do so if this bill were going to have any effect.

Mr HARDGRAVE—I think the CPA has suggested to this committee that the tax laws may need amendment because bribes and payments, no matter how large or small, are illegal and yet they are still tax deductible in Australia. Changing the tax laws might well provide an incentive to the internal mechanisms of any company, large or small.

Dr Brien—It could, and I wish you all the luck in changing the tax laws.

Mr McCLELLAND—On the other hand, it may be useful to have them deductible as an incentive for people to declare them.

Dr Brien—That would be one way in which you could bring out the fact that they have been paid. Presumably you would be dealing with people who would want to make the deduction. The other thing that needs to be brought out is that the businesses in Australia who are the leaders who have taken the high road in this need to be used more as role models for other businesses who may be wavering or may not know which way they are going. That also comes back to an entire implementation strategy for this, and there has not been one devised. You have a bill which may become a law, but there is nothing else there with it.

Mr McCLELLAND—Perhaps we need a complaints mechanism whereby if a competitor found out about a payment—

Dr Brien—All of these things would be part of it. You would have to deal with those sorts of things. But then you run into the national interest analysis which says there are no great costs associated with this bill for the Commonwealth. As soon as you start talking about registration, auditing and a complaints mechanism—

CHAIR—You would have a whole administrative superstructure.

Dr Brien—You would have a bureaucracy which would have to be provided by the Commonwealth in order to ensure some level of impartiality. You could not tender it out.

Mr HARDGRAVE—One would suspect that an even bigger issue is that, if some of these nations are competing with us in certain commodities in a worldwide trade sense, and they build into their social structure the concept of gratuities and bribes and they do

not pay their public officials a sufficient wage to provide the dignity they need to live, we are in fact exposing that underpayment, that lack of dignity afforded by the system to their public officials. That could put pressure on them to bring in things like a basic wage structure.

Dr Brien—There is no doubt that if this were done properly it could become part of a set of initiatives which would produce great outcomes for our region, of which Australia would be a part. We have a long history of helping our region.

Mr HARDGRAVE—So we have to beef the bill up. That is what you are saying.

Dr Brien—Yes, if you want to make it work. And you have to confront the fact that you will have to spend money on it. At the present time it is all motherhood stuff. No-one likes bribery, this is true. No-one likes corruption, this is true. But the bill as it stands is just nothing. You need also to build into the bill protections for the Commonwealth. There are highly developed economies which in the past have not played particularly fairly in the trade arena. We all know who they are, and they continue not to play fairly in the trade arena.

CHAIR—It is a legitimate concern for Australian firms, is it not, that if they have to comply with this bill they might be disadvantaged?

Dr Brien—Yes. To be quite blunt, the Europeans in the past have played pretty tough in this area. In relation to wheat, the United States in the trade boycotts against the former Soviet Union were out flogging their wheat while we were still observing the boycott, and they are supposedly our No. 1 ally. We have to be very careful.

Mr McCLELLAND—It is a bit like the Brisbane Broncos when the ceiling caps were on rugby league players. I say that only for the benefit of Mr Hardgrave.

Mr HARDGRAVE—At least you are not an Easts supporter, Mr McClelland.

Dr Brien—We have to be very careful that we do not disadvantage ourselves. We also need to see who is pushing this. There are other proposals on the horizon such as MAI. They are not coming from economies our size; they are coming from very large conglomerate economies such as the EU. We have to be very careful that we are not making a rod for our backs.

Mr TAYLOR—Dr Brien, you hit the nail on the head when you mentioned the MAI. There is an editorial in the *Australian* this morning on that very subject. Both the MAI and this particular one are within the precincts of the OECD. What impact, if anything, does this have on the MAI and vice versa, bearing in mind that with the MAI the text changes every couple of months?

Dr Brien—I think ultimately they have to be seen as related. The motivation for this is to produce transparency in international business transactions. The motivation for the MAI is to produce a charter of rights for businesses internationally. That is one way it has been described. The two work together. I do not know whether as a national government the Commonwealth should be involved in those sorts of areas for those reasons. It needs to be involved in those areas if it is of benefit to the people of Australia. International big business can look after itself, and it does a pretty good job of it. I think history shows that. The role of the Commonwealth is not to make things easy for them. The role of the Commonwealth is to represent the people of Australia. I do not think this bill, as it stands, adequately does that. To dance ahead a bit, I do not think MAI in its present form does either.

Mr TAYLOR—So there is no chicken and egg situation. It is just an interrelation in the subject matter.

Dr Brien—I am sure people who are behind both of them concede the connections and they are probably working with that in mind. Behind both of them is a view that, if you free up international business transactions, there will be a trickle down effect for ordinary people in the street.

CHAIR—Is that not a warranted assumption?

Dr Brien—No. I do not think history shows that, to be quite honest. Business trundles on and people are dragged along behind it—'dragged' being the operative word.

Mr TAYLOR—I do apologise for being late. The editorial in the *Australian* delayed me a little. This may have been covered earlier and I apologise if it has been. Senator Coonan is running the subcommittee very competently and I, as chairman of the committee, am coming in occasionally. I would not want to presuppose anything that may or may not have already been covered, but I have a question regarding facilitation payments. A few weeks ago when I was involved in one of these hearings I raised the question of whether we needed to quantify that facilitation within the legislation. My personal view is that we should not; that we should keep it as general as possible. Do you agree with that?

Dr Brien—We raised this a while ago. I do not think that putting a dollar figure on it is effective because what will be a facilitation payment in one jurisdiction will not be in another. Also, you will have two comparable business people, one liable under the bill, another one not liable. You will have a problem of justice there.

CHAIR—Dr Brien, we have run out of time. We have a very strict schedule this morning, so I will finish your evidence off, if that suits. It just remains to me to thank you very much for coming before the committee. We are, of course, reliant on people such as you coming and giving us your views. We are very grateful, so thank you again.

[9.47 a.m.]

BUTLER, Mr Peter Mark, OAM, RFD, Partner, Freehill Hollingdale and Page, 101 Collins Street, Melbourne, Victoria 3000

HILL, Ms Gayle Lynette, Special Counsel, Freehill Hollingdale and Page, 101 Collins Street, Melbourne, Victoria 3000

CHAIR—I notice from your submission that you both have an association with Freehill, Hollingdale and Page but, nevertheless, you appear as private citizens to assist the committee.

Mr Butler—That is correct.

Ms Hill—Yes.

CHAIR—Your submission has been published already by the committee. Do you wish to make any amendments or additions to that document?

Mr Butler—No.

Ms Hill—No.

CHAIR—Would either or both of you like to make a brief opening statement before we proceed to questions?

Mr Butler—Just by way of a brief opening—and, in so doing, I will mention the areas that I and Ms Hill would like to cover, which may be helpful to the committee—I would say that we both greatly welcome this legislation. We probably put it on a slightly different basis than has been put in terms of what we have heard. That is, while we certainly agree—and we say this with our both being commercial lawyers—that there are good commercial reasons that the bill should become law, there is another reason.

The other reason is that, inasmuch as it is important for a country to look after its own democracy by ensuring that bribes do not occur and we look with great horror at acts of bribery—for instance, bribery of New South Wales police is regarded as abhorrent—for reasons that have to do with corruption of a democracy, how much more so is it likely to be if that act were to happen in a Third World country, a country that has a fledgling democracy that is struggling with concepts that we regard as being, I suppose, automatic? So, inasmuch as one needs an additional reason not frequently promoted, we would certainly put that one high on the list, and I will say no more than that about it.

There are two issues I would touch on first off. The first one is the jurisdictional issue, and the other one is an issue relating to state legislation. Ms Hill will cover

facilitation payments and some other drafting issues which we think might be useful in clarifying the legislation. I would say that while I am, I suppose, as is Ms Hill, an expert in this area of law, what I am going to say will not be difficult legally or conceptually, I hope. If I am not speaking in plain English, pull me up by all means.

Let me say something about jurisdiction. As you know, the bill, if it becomes law in its current form, only operates where the conduct complained of is at least partly in Australia. Our strong submission is that that will make this legislation ineffective.

The reason I say that, as can be given by a very simple example, is that, if I decide as a senior executive of a major company to pay a bribe overseas, all I have to do to get over this legislation is to step on a plane, draw the money from my subsidiary over there, pay the bribe, and return. This legislation does not in any way seek to say that that is wrong or illegal.

People say, 'Ah yes, but that's a legal nicety or a loophole.' It is not. Indeed, the chances that there would be any territorial nexus by any sophisticated company executive or even, frankly, an unsophisticated one is pretty small.

So what are the arguments against what I have put: why does there need to be territorial nexus? I will put the three or four arguments briefly that I understand have been raised against what I am saying.

First, it is put that it is rare for Australia to legislate extraterritorially. People say that, if you look at the Crimes (Child Sex Tourism) Amendment Act, you would say, 'Well, that's a very special circumstance.' Also, it is instructive to look at the report by the House of Representatives Standing Committee on Legal and Constitutional Affairs published in May 1994 which had something to say about this whole issue in the context of that legislation.

CHAIR—We have that.

Mr Butler—I refer you briefly to two extracts, one on page 10 and the other on page 12. Page 10, paragraph 2.5.1, states:

> The Commonwealth has a two-fold authority for enacting domestic legislation relating to extra-territorial conduct. The first is the external affairs power specified in the Constitution (s51). Mr Greg James QC, provided the Committee with examples of analogous legislation enacted under this head of power. He noted that
>
> > The extra-territorial application of the criminal law, particularly to Australians, or in matters of Australian concern, is no novelty and has been upheld by the High Court.

Over the page at paragraph 2.8.1, quoting from Justice Elizabeth Evatt's evidence:

. . . the committee has had sufficient submissions on extraterritoriality to show that this is well within the power of government. As to the policy of legislating extraterritorially, I simply draw attention to the fact that war crimes legislation, genocide legislation, torture legislation and so on all permit prosecution of extraterritorial crime.

I will not continue to read, but the rest of that extract is relevant.

Mr McCLELLAND—And that bill is now an act of parliament, isn't it, based on extra territoriality?

Mr Butler—Yes, it is.

CHAIR—Given that there is some power though, what do you think then is the gamut of the definition? What should it actually attach to? You have said in your submission that it can be anything—you are probably coming to this and I should not have interrupted you—of residence, principal place of business or what have you.

Mr Butler—Yes, I will answer that very briefly and then go back to my opening. As we say in recommendation 1, it can be:

. . . founded on any of territory, nationality, residence and place of incorporation or business operations.

But I go back to the issue of what is put against my submission on extraterritoriality. People say, 'Ah yes, but the Crimes (Child Sex Tourism) Amendment Act is quite unusual, it is rare; we do not often do this.'

As I have tried to demonstrate, it is not that rare. There is plenty of precedent for it. I then say, 'But look at the name of this bill, the bribery of foreign public officials bill.' This legislation is there, one would have thought, to try to stop Australians or Australian companies from bribing overseas officials. When there is a loophole—if I can call it that—such as the one I have described, it is not going to be effective in doing so.

CHAIR—So you are saying that the main purpose of the bill has an extraterritoriality to it.

Mr Butler—Of course, by definition.

Mr HARDGRAVE—But not necessarily in practice.

Mr Butler—But not in practice, and I will say something about that in a moment. The next thing that is said is, even if it is true that it would not catch a primary offence, the sort of conduct that I have talked about before—that is, the example I gave—might be caught by one of the ancillary offences such as conspiracy, aiding and abetting or attempt. I do not think that is right either.

You see, Madam Chair, for you and I to conspire to do a crime—that is, we are talking about doing something—what we are talking about must be illegal. For instance, if we said, 'Let's you and I rob a bank,' then the reason that is a conspiracy is because the primary offence is illegal: robbing a bank. But, if you and I said, 'Look, let's you and I draw moneys from my account quite legally,' then it cannot be a conspiracy.

Similarly, if you and I talked about the fact that we wanted to bribe an overseas official, and we conspired to do it in precisely the way I have talked about, which is, 'Look, I'll go overseas and pay the bribe in the way I have described and then return to Australia,' I fail to see how there can be any ancillary offence in that example. So, once again—and we are not talking about legal niceties or loopholes here—it just seems to me quite obvious that this requirement of extraterritoriality provides the most obvious and easy out, not in a loophole example but in the way it is likely to occur when a bribe is actually paid.

The third point raised against the proposition is what is referred to as problems of proof; that is, 'Gosh, it's hard to prove that these things occurred where all of it is outside the country.' I accept that there are problems of proof issues. Interestingly, in the report to which I have referred in the child sex tourism act, there is quite a lot in there about problems of proof, as you know. But that is so, regardless of whether a part of the conduct is in Australia or not.

Let me give an example. Suppose part of the conduct that occurs is that there was movement from an Australian fund or a bank account; in other words, suppose I took an Australian cheque overseas and paid the bribe with that. It is a silly thing to do because immediately I would fall foul of the act, and I do not think that would happen. But just suppose it did. It is true that it would not be that hard to prove the cheque was drawn from an Australian account. But you would still have to prove all the other components of the offence—that is, that I took the cheque, that I gave it to the official intending for him to do certain things, and that he did those things in pursuance of my request.

So the problems of proof remain and, for that reason, I do not think it is a very good reason. If it were to be of assistance, I would be happy to talk about problems of proof later. But I do not think it is a good reason for requiring a limitation on extraterritoriality.

The final reason—and I think this is probably 'the reason', as I understand, why there is this requirement in the bill—is that this conforms with minimalistic requirements of the OECD recommendation. That is, in my view, based on an inaccurate reading of what the OECD recommendation says. But, before I take you to the words, because they are very simple, let me actually go a bit further behind that and ask this question rhetorically of the committee: why do we care? What difference does it make if it goes beyond minimalistic requirements?

The reason is likely to be found in the fact that we do not want other countries to have an advantage over us in trade situations where, for instance, they can bribe and we cannot. That strikes me as a morally bankrupt argument. Think of it in terms of my example again. Suppose we did not legislate to prevent the example I have given—that is, I go overseas, pay the bribe and return. Suppose we did not legislate to prevent that and, therefore, we know it is now legal to do so. Then suppose other countries did legislate to prevent that sort of behaviour.

In those circumstances, are we providing the example that we want to provide to other countries, particularly Third World countries, in saying, 'We've just got a great score in terms of a trade advantage. We know your country'—France, for instance, or the United Kingdom or the United States—'cannot bribe people, but we can, so we have an advantage.' All we have to do is set foot in the plane, pay the bribe over there and return. It strikes me that that is a morally bankrupt argument.

I said a moment ago that the limitation is based on a misreading of the OECD requirement. By way of background, let me say that there are some countries which as a matter of their constitution cannot legislate to control the conduct of their nationals overseas. The OECD recognises that. As we have already seen, our country is not one of those. We can do it, if we want to. How does the OECD deal with these two situations? At the bottom of page 3 of our submission, we quote from the OECD recommendations:

The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principals.

Then I will just read the last part:

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

Can I just conclude by referring to the top of page 4 which is also quoting from the OECD recommendation:

Each Party which has jurisdiction to prosecute its nationals for offences committed abroad—

which includes our country—

shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

I read that recommendation at length because that, to my knowledge, is the reason that has been given as to why minimalistic requirements of this OECD recommendation tells us

that we should not do more than state that there needs to be a limit on extraterritoriality. That concludes that part of my submission. I am going to be very quick and deal with another part—

Ms Hill—If I could add a point before we move on to the other part. In our submission, we have drawn an analogy in a number of places with the United States Foreign Corrupt Practices Act. In terms of the territoriality aspect, it has been said that the US legislation contains its own territoriality in that it requires 'the use of the mails by any means or instrumentality of interstate commerce in relation to a corrupt payment'. If I could draw the attention of the committee to particular words of that provision—'in furtherance of'. The way in which the bill has been drafted requires as an element of the actual offence that part of the conduct occur within Australia. The way the US legislation works is that there need only be 'some act in furtherance of'. It is a much lower level requirement. The second point I would like to make is that, more recently, the US itself is acting to amend that provision so that that restriction will be removed.

Mr Butler—The final thing I want to say in this opening is that, at the moment, this legislation does not purport to override relevant state legislation. As you know, constitutionally, if it does not do so then the state legislation will persist except in so far as it is inconsistent. There is at the moment in every state of Australia except Tasmania legislation under the aiding and abetting provisions of their crimes acts which will prohibit the making of any bribe and which even operates extraterritorially.

If I can give you a simple example: if I am an executive of an Australian company based in Melbourne and I receive a phone call from an executive in Indonesia asking whether I would be prepared to agree to the payment of a bribe or even a facilitation payment and I agree, then I am guilty of an offence under the relevant state legislation. The problem is that, in as much as we have a niche already with facilitation payments, which Ms Hill is about to address, it is irrelevant anyway because facilitation payments are already illegal under state legislation in the circumstances of the example I have described.

Ms Hill—I would like to draw the attention of the committee to some of the wording in the primary offence under the bill and in particular to the way the elements of the offence are described in clause 14.1 which states:

(1) A person is guilty of an offence if:
  (a) the person:
    (i) provides a benefit to another person; or
    (ii) causes a benefit to be provided to another person; or
    (iii) offers to provide, or promises to provide, a benefit to another person; or
    (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person.

Then the bill goes on to describe certain other requirements. As these circumstances are described to us in practice, typically, the executive or the person who is responsible for

these matters occurring does not undertake any of those activities. It is often a case of an agent having been engaged. The agent is receiving quite a large sum. The skill of the agent is in making the appropriate bribes, as may be required, whilst still retaining for himself a sizeable profit in order to continue his activities in another project.

CHAIR—So what you are looking at is that there is no authorisation—

Ms Hill—There is no actual authorisation. We would recommend that those elements be expanded to include authorisation and permitting 'the provision', because often that is the way it occurs. This point also touches upon the mens rea element of the offence and whether only intention ought to be required or it should go beyond that to also encompass recklessness. We would recommend that recklessness also be an offence under the legislation.

It comes down to what is recounted to us as the typical situation where bribery of foreign public officials occurs. Again, it is the situation of the agent. The person who is within the Australian company and has responsibility for that part of the business acts under the assumption that, provided the agent does not tell him what he is doing and does not report back to him, he can comfortably close his eyes to the situation and maintain a position of wilful blindness and, by doing so, will not be guilty of any offence. In my view, that is a very transparent device in order to circumvent what ought to be a criminal offence. If a person really can be attributed with the knowledge, then surely that ought to be an offence under the legislation. I would recommend that the elements of the offence be expanded to include recklessness. That would then cover the situation of wilful blindness or turning a blind eye. This would be in line with the US Foreign Corrupt Practices Act. The other issue that I would like to touch on is the issue of facilitation benefits.

CHAIR—Before you leave the definitions, do you have any comment about the definition of 'foreign public official' or any other definitions?

Ms Hill—No.

CHAIR—Okay.

Ms Hill—When people talk to us of facilitation payments or facilitation benefits, it is always used euphemistically as a term for what really is a bribe. It is not even limited to small amounts in that regard. Incidents have been referred to us where the facilitation benefit or payment is in the order of millions of dollars, which we would regard as quite extraordinary. In that respect, we recognise that it can be quite a difficult thing to try to specify a monetary amount. While we see that it would be preferable to regard facilitation payments as small amounts, trying to specify some monetary level can be quite problematic. In our view, it would be preferable to leave that to the circumstances of the case. It may be appropriate to take into account the particular living standards in the

country concerned and whether or not the payment itself might be seen as extraordinary in terms of the recipient's salary and wages. That would then determine whether or not the benefit could be properly regarded as a facilitation benefit.

Our recommendation is also that the bill more closely follow the United States legislation and refer to expediting routine governmental action rather than carving out a defence for people who may be charged with the primary offence and then requiring that person to discharge an evidential burden of establishing that the payment which was made was actually a facilitation benefit and fell within the defence set out in the bill.

CHAIR—So just to marry those two concepts: if there was a routine governmental action and some payment took place, you are saying that it should be small.

Ms Hill—That is right. We are still saying there needs to be some concept of it being a lower level payment as opposed to a large payment. I would not consider a person ought be able to claim a defence or an exception if they have paid a sum totalling hundreds of thousands of dollars or millions of dollars just to continue a licence or something of that nature.

Mr HARDGRAVE—And it would really be up to prosecutors to perhaps determine whether or not it was worth pursuing a matter of a six pack for a telephone service versus half a million dollars for something more.

Ms Hill—Regrettably, yes. I recognise that it is quite a vexed question philosophically as to where you draw the line, but at some point I think the Commonwealth of Australia has to come to grips with the fact that it is going to be very difficult to prosecute for matters of a lesser nature.

CHAIR—Is it satisfactory for Australian firms to simply have no idea about whether or not they are breaking the law and they more or less have to take a punt as to whether paying to get something off a wharf is not going to incur them in any kind of illegal activity but it might? I just have some trouble with a very elastic concept. I also have trouble with trying to be precise. But, in terms of the committee trying to do its best for Australian business as well as for everybody else involved in this terribly difficult question, it seems to me we also have to consider that aspect.

Ms Hill—I think alarm bells would be ringing in most prudent business people if they were asked to make a payment in order to remove goods from wharves or to include $50 in their passport as they go through immigration control at a particular airport. I would think any prudent business person would be seeking legal advice as to whether or not that is a lawful payment to be making.

CHAIR—Even if they are confronted with something when they get there. One of our witnesses—I think it was no less a personage than Mr O'Keefe—gave very graphic

evidence of having to pay a bribe to get through some passport control.

Ms Hill—That is right. As I understand it, the intention of this bill is to pick up those offences of duress and coercion under the criminal code, and we support that. That situation is also often described to us. People are placed in situations where they feel at personal risk, they are concerned for the safety of their families or fear that they may be held captive for a while unless they make a payment.

Mr HARDGRAVE—Would you then perhaps submit that the failure to be transparent about these sorts of matters might in itself highlight the fact that something knowingly illegal or immoral has taken place? If it was indeed Mr O'Keefe who had $50 pushed on to him by some foreign official to get him through passport control, the fact that he was willing to talk about in itself proves that he was not participating in an illegal activity in his mind; he was simply being coerced.

Ms Hill—I think that is probably right.

Mr Butler—If I could say one thing about small. It is perhaps a bit like an elephant to businessmen: it is hard to describe but easy to recognise. I have spoken to a lot of businessmen who have been through the facilitation payment gamut. As you say, it is usually with immigration issues or with getting goods off the wharf. My experience is that they have a very clear understanding of when it is small and when it is not. In other words, they are applying something that people do all the time, and that is a test of reasonableness, to something. The amount will vary and become larger depending on the particular country or economy.

If I were paying a facilitation payment to one of the rulers of Indonesia, it would have to be very big before it would have any effect at all, one would have thought. Yet it may still be a facilitation payment in some circumstances. But to pay even $50 to a minor public official in Cambodia could be a very different thing. That is a thing that is recognised by business people as they go wandering about doing their business.

As for prosecutorial discretion, personally, I would not make too much of it. In the end the real issue is whether, if I were prosecuting a matter, and assuming it was not a defence—and we urge it not be a defence but an exception—I would be able to convince a jury that the payment was other than small in the circumstances. I have the onus of proof. Presumably, I would be saying to witnesses or to the accused, 'Are you trying to say that this payment by you of $150 to expedite goods off the wharf in Cambodia, where the average monthly wage was less than that, is small? Is that what you are trying to tell us?' I can imagine swaying a jury, but it depends. Most importantly, I have the discretion.

Mr McCLELLAND—If that as an exception rather than a defence, as a defence they would bear the onus of proof.

Mr Butler—The accused bears the onus of proof.

Mr McCLELLAND—To fit into the defence, whereas if it was an exemption the prosecutor has to prove that the act was committed and that it did not fall within the exception.

Mr Butler—Correct.

CHAIR—Sorry, we keep interrupting, Ms Hill.

Ms Hill—No, that is all I had.

CHAIR—That is all you wanted to say by way of opening?

Ms Hill—Yes.

Mr HARDGRAVE—I want to pursue further the issue of transparency. In recommendation 5 on page 2 of your substantial and excellent submission, it states that there should be an offence for the failure to accurately record bribery payments in company accounts. In other words, you want to flush out the confessions of payments and participation in payments large or small?

Ms Hill—That is correct. That recommendation parallels the situation under the US Foreign Corrupt Practices Act, which also includes an offence for not maintaining accurate records.

Mr HARDGRAVE—Part 2 of our exercise as a committee is to consider the way this particular exposure draft legislation performs. How does it perform in that area?

Ms Hill—I think it is inadequate in not making provision for that sort of offence.

Mr HARDGRAVE—We have talked a lot about moral issues. Some outside this room might find it delightful to see lawyers and politicians talking about moral issues. Nevertheless, I think we are doing quite well on that front. The broad moral question is that of Australia as an international citizen showing other countries the way to go on this issue. That is really what we have before us. We have a challenge here to come up with a set of laws that suit us that exceed the minimalistic approach of the OECD's recommendations. Let us face it: a multilateral treaty by its definition is always going to be a series of compromises. We should not compromise; we should just go for the high moral ground and set a set of rules that set us apart from the rest of the world. Is that basically your submission?

Mr Butler—I would like to make a couple of points. The first thing is that it is important to know that in every single country that we have surveyed—and we have now

surveyed over 40 of them—it is as illegal in those countries to bribe someone as it would be in this country. In other words, there is a furphy floating around that we are trying to impose our standards on Third World countries. The standards are there; it is embodied by their laws.

CHAIR—Even if they are not observed.

Mr Butler—Precisely. Then you asked why they are not being observed. I think we have in our hands the answer to that. The second thing is that I do not suggest Australia should act unilaterally on this. The United States did, and they have certainly lost a lot of trade as a result of that to countries that do not enjoy their particular law. We are not proposing to do that. We do not say that we even need go beyond what the OECD recommendation is. If we follow it, as I said before, then we will enact laws which are perfectly sensible and healthy and which prohibit bribery even where the offence is entirely extraterritorial. We will be doing so hand in glove with all the other OECD countries. That is the beauty of it.

I have heard that submissions have been made already as to whether this legislation is likely to be effective. Leaving aside the law, I would like to say something about that. I believe it will be effective. I regularly advise corporations and their executives on issues of legal risk. I am a litigator. I often say to companies that they have a 50 per cent chance of winning this case or a 60 per cent chance or whatever. Companies are used to applying commercial risk factors to commercial decisions. That is how they make their money. It is bread and butter to them. But what the sorts of companies that I advise never do—at least never knowingly—is expose their executives to criminal sanction. No sensible company in any area of law would approve or authorise executives to break its own country's laws. The point I have already made must be noted: that is, they are already breaking laws both in the overseas country and the Australian state legislation. I think they are ignorant of it.

CHAIR—Or they are turning a blind eye. If a consultant assists you in a particular country, you might not know what really goes on but you know that the business is going to be done, the deal is going to be done, and that is okay. In a joint venture operation you might not know.

Mr Butler—Yes. The situation that you have described happens terribly commonly, as you know. The way I hear about it is on a nod and a wink basis where, with a smirk behind the hand, the Australian executive will say, 'Of course it is going on and we know that, but we are taking care of it by letting the locals look after it themselves'. One of our submissions is about recklessness. We think that sort of reckless behaviour should be made illegal too, because otherwise people will say that an easy way out is to continue doing what we are already doing.

CHAIR—How on any of your definitions would the conduct that we have been talking about this morning be captured if there is a wholly owned subsidiary of an

Australian corporation and it is not its principal place of business in a sense? Maybe it is a holding company which is doing business with various wholly owned corporations in various other countries.

Mr Butler—It is similar to the US position, subject to one issue which Ms Hill has already raised—namely nationality. If the nationality is established, if I am an Australian citizen and I work for the subsidiary, I would expect to be caught by this Australian legislation in the same way as I would with the child sex tourism legislation. I should not escape it simply because I tend to live overseas.

CHAIR—You are saying that a wholly owned corporation is caught under any of your jurisdictional definitions as you would have it.

Mr Butler—Yes.

Mr HARDGRAVE—You mentioned before that your company surveyed 40 countries on this matter. I hope it would not breach any confidentiality, but is it possible that you could list those countries to the committee, maybe providing it in a written form?

Mr Butler—I am sure we could. To be a bit more specific, all the laws that I have referred to are Third World countries but we have done the laws of the major OECD countries as well. In addition, it is not just our opinion; we have actually asked for our attorneys over there to write to us and tell us what their laws are and they have described them.

Mr HARDGRAVE—I think it would be very handy for the committee to have that. It might settle a couple of matters. A point was made earlier about us all knowing what the amounts are for certain deals or certain transactions or certain routine government activities. Would that be a fair statement to make; that we all know what those amounts are?

Ms Hill—I am not so sure about that in terms of facilitation payments, but certainly in respect of specific projects it tends to become known what size bribe is required in order to get past certain hurdles.

CHAIR—Is it known whether it really amounts to extortion or whether it amounts to nepotism, or are the things that do not appear to be at least the way the bill is framed covered?

Mr Butler—There are consultants from very reputable accounting firms who will advise you at the moment on what level of bribe you should pay for a particular project and whether you have paid too much or whether they are asking too much and so on. I understand that it is also extremely well known where a particular project or permit was granted backed onto a bribe.

Mr HARDGRAVE—Is this knowledge in any form other than hearsay?

Mr Butler—Executives have told us that.

Mr HARDGRAVE—There is not exactly a price list, is there?

Mr McCLELLAND—This is perhaps something that Australia has to do at a diplomatic level to get an international register up and running.

Mr Butler—Yes.

Ms Hill—I would like to deal with this issue of corporate criminal responsibility. Under the Criminal Code there are provisions that deal with corporate criminal responsibility. Look at the corporate culture that exists within a body corporate and whether or not that body corporate failed to create and maintain a corporate culture that required compliance with the relevant provisions.

Ahead of the legislation we have been advising clients that they ought to start looking at this now; that they ought to be putting in place codes of conduct which address this issue. Part of that would involve including in any joint venture documentation provisions that require the joint venture partner to comply with certain standards of conduct and provide certifications as to compliance periodically through the course of the project and perhaps at key milestones—for example, on submission of a tender, on award of a tender, on signing of a contract—so that the Australian executives and company can be discharging their responsibilities in terms of compliance with laws.

Mr HARDGRAVE—There are plenty of Australian companies that already have internal mechanisms in place to expose just that.

Ms Hill—I would not say plenty, but certainly some of the companies that we advise have been putting those in place. With those sorts of things we are drawing to a great extent on the experience of US practitioners under the Foreign Corrupt Practices Act and the sorts of compliance programs that are in place in America.

Mr HARDGRAVE—We do not want to get into the definition of what plenty is, but there are a number of notable companies.

Ms Hill—A number of notable companies, yes.

CHAIR—If there are no further comments, as you are going to participate in the round table discussion, we might bring your evidence to a close, have a break for a couple of minutes and then start the round table discussion.

[10.33 a.m.]

BRAZIL, Mr Patrick, Consultant, Allen Allen and Hemsley, 16 Moore Street, Canberra, Australian Capital Territory 2601

BUTLER, Mr Peter Mark, OAM, RFD, Partner, Freehill, Hollingdale and Page, 101 Collins Street, Melbourne, Victoria 3000

DABB, Mr Geoffrey Preston Morrison, First Assistant Secretary, Criminal Law Division, Attorney-General's Department, National Circuit, Barton, Australian Capital Territory 2600

DAVIS, Mr Brent, Director, Trade and Policy Research, Australian Chamber of Commerce and Industry, 24 Brisbane Avenue, Barton, Australian Capital Territory 2600

HILL, Ms Gayle Lynette, Special Counsel, Freehill Hollingdale and Page, 101 Collins Street, Melbourne, Victoria 3000

McDONALD, Mr Geoffrey Angus, Senior Adviser, Criminal Law Reform, Attorney-General's Department, National Circuit, Barton, Australian Capital Territory 2600

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

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

CHAIR—We are now going to commence the round table which is aimed at wrapping up and exploring some of the issues that have emerged with more particularity during the course of our hearings. I welcome all those participating in the round table. As the final part of the public hearing we want to take the opportunity to ask each of you some questions and to invite anybody participating to actually make a further contribution if need be.

I think the housekeeping rules for this have been explained. We do not want to reinvent the wheel. We have been talking about greasing the wheels all through this inquiry. We do not need to go over the same ground. We would like to hear from you if there are any particular points of emphasis you wish to make and any additional points you wish to clarify.

I propose to deal with the Attorney-General's Department first in topics. Before it goes out of everyone's head what they want to ask, say, about jurisdiction I might ask if

there are any particular comments from the table and so forth. I will start with the Attorney-General's Department evidence. You no doubt have read the transcript and have an idea of the flavour of the information we have received during the course of these inquiries. Are there any general comments you wish to make?

Mr Dabb—No, we are here to assist the committee which obviously has a very difficult task. From what we have seen in the transcript and from what we have heard has been put to the committee, the discussion seems to be bouncing around between broad discussions of principle and questions of morality on the other hand and fine hair splitting examinations of legislation on the other. It is extremely difficult to bring these two things together. The committee has a very difficult task.

CHAIR—Because we are actually looking at an enabling bills I think that brings us fairly and squarely within the context of looking at what we have before us which is specific words, specific provisions, issues of constitutionality, issues of the reach of this bill and how it might be enforced. I think that is the line of country that we really have to focus upon.

Can I open the discussion by saying that there does appear to have been a very strong feeling coming through to the committee—I think I can effectively summarise this—that the territorial nexus has caused some real difficulty for most witnesses. The thrust of the evidence has been, if I can summarise it, that it really renders the bill useless to have the territorial nexus drafted the way it is. The whole purpose of this legislation is to, in effect, look at the conduct that we wish to catch which is wholly or mostly outside Australia and the way it is drafted which means that it is really not going to be very effective. If I toss that up for discussion we can take it from there.

Mr Dabb—We do not have a particular position to urge on this. It is a matter for the government and the parliament what the bill says on this particular point. Perhaps we could assist by way of a little background—I hope without repeating too much of what has been said before. It is unusual for Australia to legislate on a nationality basis. Countries of the civil code tradition—I think this has been put before—customarily do so. It is easier for them because of the procedures they follow. It is extremely difficult in common law jurisdictions with strict rules of evidence, prohibitions against hearsay and so on to prove cases to this very high standard where the conduct has occurred outside of Australia. That, I might say, has been the experience of the child sex tourism legislation so far. People who speak about effectiveness and seem to assume that, simply because with the sweep of the legislative pen, we apply the legislation to nationals abroad that somehow that is going to catch all conduct.

CHAIR—Would it be so easy?

Mr Dabb—The conduct is quite likely to take place in circumstances where it is not simply possible for an investigation to take place by Australian authorities even with

the cooperation of foreign authorities. Witnesses from overseas cannot be compelled to come to Australia. There are all kinds of limitations. There is a question of effectiveness there. As to what the recommendation and the convention requires, as we read it, the purpose of the language is simply—

CHAIR—Are you looking at article 4?

Mr Dabb—Yes, both the recommendation, which I think was referred to at one stage, and the provision in article 4 in the convention. We read that as having been designed by the parties who negotiated it to allow just the kind of freedom of action that we believe a country like Australia has. There are many conventions—and some of these have been referred to—to do with aircraft hijacking, hostages, torture where the intention of the parties was clearly to secure the widest possible application of jurisdiction and actually require parties to legislate for nationals and for offenders when they are within the territory but the offences have been committed outside.

This jurisdictional provision does not belong to that family, to that kind approach. It seems to me to be expressly designed to leave it open to countries like Australia to legislate either on a territorial or nationality basis as they wish. We understand that other countries—the United Kingdom and Canada to mention two—do not intend to legislate on a nationality basis.

Mr McCLELLAND—Have you had the opportunity to read Mr Butler's and Ms Hill's submissions in respect of their suggestion on the additional legs of constitutional power?

Mr Dabb—No, I have not, but I did hear what was said on that this morning. So far as constitutional power is concerned, I do not think there is any doubt—I think all are in agreement—that Australia could legislate to catch conduct of Australian nationals outside Australia.

Mr McCLELLAND—Basically, you are saying A-G's point of view is that it is a policy issue and you are not hard one way or another on that?

Mr Dabb—That is so.

Mr HARDGRAVE—I am glad you said that because I was a bit worried that you were explaining more the down side of the nationality and perhaps considering it as a possibility. I think you used the terminology either/or—that is, you were saying that it is either a nationality or territorial nexus. I suspect that the submission from Ms Hill and Mr Butler offers not just territorial but also nationality, residency, place of incorporation or business operations and that, in itself, provides a much broader scope. As a result, it is perhaps a far more appealing range of circumstances in which to pull up anybody involved in bribery.

Mr Dabb—It certainly would be a broader scope. As we say, constitutionally it is open. The question is whether it is appropriate given the principles that normally underlie the Commonwealth statute book to reach out and catch an Australian national in Germany who is working for a German company who is bribing a Swiss government official when there is absolutely no other connection with Australia.

Mr HARDGRAVE—Let us face it, even though there might well be all sorts of problems associated with proof in an evidentiary sense even having the matter brought to the attention of Australian officials before they even consider prosecution and the fact that such a law exists is a good thing. When the time serves correct, the fact that it could be prosecuted in itself is a good thing.

Mr Dabb—That is a matter for political judgment in the end. The principle that if you think that something that you want to discourage might be a good thing to be the subject of a criminal prohibition could apply to any offence in the statute book.

Mr HARDGRAVE—That is right. The reason I submit that it is a good thing is that when one of those big crimes occur offshore and there is an Australian involved there is a great sense of national shame for all Australians to see an Australian charged with an offence in a foreign country or participating in a foreign activity. In other words, Australia, its parliament, its people expect a certain standard. If we have a law on our books that enforces that standard with regard to bribing public officials I do not see any down side to it at all.

Mr Dabb—The view that the territorial limitation is appropriate sends a message, if you like, that the appropriate country and the appropriate body of courts to deal with it is the foreign country where it occurs. That has traditionally been the basis the Australian criminal law has operated on. From the point of view of the Australian public, there might be some concern that an unreal expectation is being created that Australia will prosecute in its courts when there is a report in the media about an Australian committing an offence. There is a long way from knowing or suspecting a person has committed an offence to assembling a case that can be prosecuted in an Australian court—an enormous gulf, I would say.

Mr HARDGRAVE—The other side of it is that there was a great sense of national shame that Australians amongst other nationalities were involved in child sex activities in the Philippines.

Mr Dabb—Certainly.

Mr HARDGRAVE—So the law that came—whether or not it has produced practical results such as incarceration or whatever as a result of those activities—is nevertheless something that is a response from government.

Mr Dabb—Yes. It is a political matter. At the time I think there was a perception that a very large number of Australians were not only travelling for the purpose of underage sex in the Philippines and other countries but also being encouraged to do so by travel agents; that they were bringing back videos of what they had done and these were being intercepted at the airport. There was a question of whether any action could be taken.

Mr HARDGRAVE—It is a despicable activity and perhaps on the scale of an Australian participating in the bribing of a public official causing an outcome that is not necessarily in the best interests of the nation in which it takes place. If it is a third country with endemic corruption and an Australian participates in it taking advantage of the citizenry, as would be the case in the child sex matters, then I think it is quite right for Australia as a nation to say, 'It is not good enough for our citizens to participate in such immoral activities causing hurt to so many people and we should be prepared to prosecute.'

Mr Dabb—It is one thing to say it should be an offence. I should emphasise that the law enforcement implications from a cost point of view of prosecuting cases where the conduct occurs overseas—bringing witnesses to Australia, even if they can be brought to Australia—could be enormous.

Mr McCLELLAND—Perhaps the answer might be that, if there is extraterritorial provisions in it, there are safeguards against double jeopardy if someone is prosecuted—

Mr Dabb—Yes, that is taken as understood.

CHAIR—That would be you would go. One point that I do not think anyone has mentioned throughout the hearings is that the sort of conduct we are talking about is always going to occur by or on behalf of corporations. The sort of bribery we are looking at is hardly going to be an individual running around with bribes of large magnitude, one would think—that may or may not be right. If we were to look at getting rid of the territorial nexus, do you see any value in placing the focus or emphasis on the conduct of corporations and individuals on behalf of corporations?

Mr Dabb—If the enforcement strategy to be followed was along the lines of what happens in the United States where it is very much aimed at corporations—corporations fear the extremely heavy penalty, perhaps the civil penalty, and, as has been pointed out undertake programs to change their culture to avoid it—that would be one possible approach. But where we are simply using the criminal law and simply have a criminal prohibition, we first need to find an individual who is committing the offence and then go the further step of attributing that liability also to the corporation. While we might think in terms of prosecuting corporations and making them liable to high criminal fines, the main thrust initially has to be on the criminal liability of the individual—certainly as this legislation is constructed.

CHAIR—But on behalf of the corporation? Would you have to have the nexus with the corporation? I am looking at your hypothetical example of the Australian working for a German company overseas and bribing somebody in Cambodia or wherever.

Mr Dabb—There is an 'on behalf of a corporation' element there. It does not seem to me to matter much whether the person is a high officer of a corporation, an employee of a corporation or a person whose only relationship with the corporation is they happen to be acting on behalf ad hoc for the purpose of that particular transaction. One might imagine all kinds of connections.

CHAIR—Yes, but I am just interested in your example and whether that is what we really want. In a moral sense, no doubt my colleague Mr Hardgrave would say it is immoral to be an Australian involved in an illegal activity, no matter where you do it. On another view, if the only nexus with Australia is the fact that somebody is an Australian national but operating wholly outside of Australia and wholly outside of an Australian corporation, is that the sort of conduct we are looking at catching because otherwise we are really biting off a very big mouthful?

Mr Dabb—Once you think in terms of personal nationality jurisdiction, that is the kind of issue you come up against. There is one point perhaps I should have mentioned on the question of territorial jurisdiction. I do not want to make a long statement about it, but I heard Mr Butler this morning speaking about the limitations of the conspiracy offence or the aiding and abetting offence where the conduct occurs in Australia. It may not be appropriate to go through it here and perhaps we could put in something in writing and address what was said more fully. If an agreement were to be reached in Australia to bribe a foreign official and the agreement takes place within Australia, one would not require more for the purpose of liability on a conspiracy basis. It does not matter that a cheque is then drawn on the face of it that could have been drawn for some other purpose and then sent. It is the agreement within Australia that would be caught.

CHAIR—Mr Butler would like to make a comment.

Mr Butler—Very briefly, that was not actually quite my point—

CHAIR—You were talking about the illegal act.

Mr Butler—Yes. It may be helpful if I simply refer to page 15 of the explanatory memorandum dealing with conspiracy because it makes my point very succinctly. Paragraph 60 reads:

Subclause 14.1 (12) governs the application of section 11.5 of the Criminal Code . . . section 11.5 provides that a person who conspires (agrees) with another person to commit an offence . . .

My point is that it is not an offence if you do it in the way I have described in my

submission.

Mr Dabb—That was my point, Madam Chair. I think it was suggested the agreement might simply be that a cheque for, say, $50,000 be drawn and the agreement be no more than to draw a cheque and post it—

Mr McCLELLAND—But that is from a subsidiary within the country; in other words, a person gets on a plane to fly to that country and there is no offence for that subsidiary in that country to draw the cheque.

Mr Dabb—Correct. If the agreement is located entirely outside Australia but the cheque is apparently innocently—in fact, innocently so far as all persons in Australia are concerned—drawn here, yes, I would agree that would be outside—

Mr McCLELLAND—No, drawn overseas. It is drawn by the subsidiary overseas.

Mr Dabb—If the example is that the agreement and all aiding, procuring and advancing of the transaction is overseas, I agree that it is beyond the reach of any ancillary offence here.

CHAIR—Does anybody at the table wish to make a comment about any jurisdictional aspect at all?

Mr Butler—I would like to make one very quick point on the issue of problems of proof. I made this comment before but just to repeat it: the point has been made by Mr Dabb—correctly, I think—that it is hard to prove elements of an offence where those elements have been committed overseas, and I accept that. Nonetheless, taken by itself, that would tell us that we should not legislate at all.

Indeed, if the legislation went on to say, 'Look, unless most of the ingredients for an offence were committed in Australia, then there won't be an offence.' The rationale for that is that, we are so worried about problems of proof, we think it would be ineffective. While I would argue with the principle, I could see the logic of it. The simple fact here is that, of all the ingredients which would institute an offence, if it only requires one small ingredient to be in Australia—such as drawing a cheque in Australia—then it would satisfy the submission that is being made and it would satisfy the bill. You would still have all the other ones to prove. If we are putting our foot in the water and saying, 'Let us say extraterritoriality regardless of problems of proof', which is what we urge, then it does not make it that much harder. It has the advantage that Mr Hardgrave pointed out, which I completely endorse, that the passing of the bill itself will change corporate behaviour.

Mr McCLELLAND—We have spoken of an Australian in a German company, but that German company could be a subsidiary or a related company of an Australian

company and for the purpose of German law regarded as a German corporation. So the activities of an Australian, even if an Australian company only held 15 per cent of the shareholding, still may ultimately be for the benefit of the Australian company. If you do not do that, it would enable setting up corporate structures in other countries to take the activities of Australians away from Australian jurisdiction.

Mr Butler—Yes, I agree.

Mr HARDGRAVE—I would be concerned about trying all of the absolute pinprick broad exceptions that we could come up with to this, it is really just about the general thrust that we want to try to come through with. Was any consideration given to using the Crimes (Child Sex Tourism) Act 1994 as a sort of style guide, if you like, for the drafting of this particular bill we have been considering?

Mr Dabb—No, the view was taken that those particular provisions in the child sex tourism legislation were the exception to the normal rule and that the reasons why nationality jurisdiction was thought appropriate there ought not apply to the same extent here.

Mr HARDGRAVE—What about the United States Foreign Corrupt Practices Act, did you look at that and some of its provisions?

Mr Dabb—As it now stands, that is not jurisdiction on a nationality basis. But I would hasten to say that our advice is that the US does propose to legislate on a nationality basis when it revises its legislation—

CHAIR—As part of its amendment.

Mr Dabb—The US Foreign Corrupt Practices Act has a rather curious area of operation. It already applies to many Australian companies who happen to be issuers in the United States. Its reach so far as entities are concerned does go out quite broadly. But, as our Justice Department colleagues are fond of saying when we speak to them about it, the actual act—the verbs or the conduct that is caught—is 'use of the mails or any means or instrumentality of interstate commerce'. That is what the charge is for a particular purpose.

It is quite correct, as has been said this morning, that that might be quite an easy requirement to satisfy. You simply show that at some point a phone call was made to or from the US for the purpose of getting up the bribe; or there was a bank transfer to or from the US for the purpose of getting up the bribe. But, nonetheless, there is that connection which is required at the moment, which is a very special one. If we are looking at parallels, I might say that that kind of jurisdiction has been used in the Crimes Act in relation to computer offences where you catch certain kinds of misconduct by means of a facility provided by the Commonwealth. It is quite a different kind of

jurisdiction from nationality jurisdiction.

Mr HARDGRAVE—What about the FCPA with regard to facilitation payments?

Mr Dabb—Facilitation payments was the other topic I thought I needed to refer to—

CHAIR—We might just wait until we round this up. It is a bit old-fashioned, is it not, looking at use of mails?

Mr Dabb—We understand that it is almost a pro forma in the US statute book to call up a constitutional basis for legislation—

CHAIR—As we do in the Trade Practices Act.

Mr Dabb—Exactly.

Mr Meaney—Madam Chair, historically, it has more to do with the interpretation of the trade and commerce power under the United States constitution in relation to crime because they have an extended jurisdiction.

CHAIR—With the esoteric ways in which you can communicate now with the Internet, it would be very interesting to see just how they amend the legislation. Before we leave jurisdiction is there any other comment? Yes, Mr Brazil.

Mr Brazil—Just a few comments in relation to extending it on the basis of nationality. We did lean a bit the other way but, having heard the discussion today and the strength of feeling, I can understand why there would advantage in doing that. It would mean that, say, an Australian national working for a German company stationed in Malaysia could be involved in bribery of foreign public officials of yet another country—and let us assume for the moment, as is probably the case, that that conduct is quite lawful within Malaysia—then it is not caught by their law. Nevertheless, we would be extending the arm of Australian legislation to them. Certainly I think we understand the reasons for doing that.

What I particularly wanted to say was that I understand it is not intended that we should in any way drop the territorial connection we have at the moment. That really must remain in there. I just wanted to make that explicit—in case I have missed something—because I think that is important. I think the main target of this legislation, particularly in terms of its most effective area of operation, is in relation to Australian corporates operating overseas. The territoriality connection is very important from that point of view.

CHAIR—Certainly the principal focus.

Ms Hill—I would like to draw the committee's attention to the amendments to the FCPA that are being put through at the moment and support Mr Brazil's statement. They are also including amendments to cover foreign nationals who undertake conduct on US soil in relation to bribery of foreign officials. They will also be caught by the US legislation now.

Mr Rooke—I think it was Mr Dabb who described the current US legislation. The US have made it quite clear—and the draft legislation went to Congress on 5 May—that they will be changing their basis of jurisdiction to a nationality basis. He also mentioned Canada and the UK, and neither of those countries have draft legislation. The Canadians are working towards it. The British at the moment have not shown too much sign of movement at all. The US clearly have decided that they have the same parameters to work in that Australia does, being a common law jurisdiction, and they will go to a nationality basis.

Mr HARDGRAVE—What concerns me with any of these treaties is that Australia is in a unique position because of the make-up of our constitution. Treaties and international agreements can be applied through our own High Court in ways that we do not intend. Do you see any downside or upside or whatever of this particular draft bill as it stands and some of the suggestions about the nationality nexus?

Mr Dabb—The consideration that you have mentioned of what the High Court might make of this bill simply means that the parliament has to do the best possible job it can in achieving as great precision as possible and try to avoid leaving areas open and vague and saying all businessmen know how that works and following that approach.

Mr HARDGRAVE—Perhaps it is a good idea to have a number of specified areas. We have heard of nationality, we have heard of territoriality, we have heard of businesses being based here as being a possible nexus on which to base the bill. We would need to specify those kinds of areas.

Mr Dabb—I think the choices of nationality or territorial basis or both are fairly clear cut and well understood. I do not think using either of those or both of them will give rise to a particular difficulty.

Mr Davis—From a business point of view, we have not gone through in great detail the relative merits of territoriality versus nationality, although we would observe that when one starts to choose models for extraterritoriality—whether it is child sex tourism or bribery—we have to be consistent along the line. In another place I think Mr Hardgrave heard us talking about the multilateral agreement on investment and its extraterritoriality application. In so far as we start to advocate it in one place and we criticise it in another, we have to be very careful about how consistent we are. I know when our trade negotiators are abroad they are very concerned about being dragged into a mire about how others do it. There is multiple jeopardy in this.

CHAIR—Thank you for bringing that to our attention. If there are no further comments on jurisdiction, I propose that we move to facilitation. The gamut of the evidence we have heard on facilitation has varied enormously. You have obviously heard the various options, but my recollection is that the thrust of the evidence has been urging us to seek to define the purpose of the payment along the lines of a routine business payment and that we move away from quantifying the amount that would amount to a facilitation. That seems to be the thrust of it.

If you go to the other end, Mr Hardgrave's view is that bribery is bribery is bribery and it is only a difference of degree not kind, and there should not necessarily be provision for facilitation. That is putting it very simplistically, but the overwhelming sense that I get of facilitation is that people feel a lot more comfortable if one were to try to capture the essence of the conduct or the purpose for which it is paid rather than trying to shut it down by a dollar amount or calling it small. Can I have your comment?

Mr Dabb—Again, this is an area where it is ultimately a matter for political decision which way the legislation goes. All we can do is provide some background to the decision. As I understand it, the provisions in the draft trying to capture the idea of small payments and taking those out of the offence was intended to reflect the part of the commentary to the convention that refers to small facilitation payments not being intended to be caught within the offence.

CHAIR—Can I clarify something now simply because it is convenient to do so. I hope I do not wreck your train of thought. If this committee were minded to go beyond the provisions or the terms of the convention, presumably we would not run into any difficulty in terms of the jurisdictional basis on which we can do it, relying upon either the foreign affairs power or some other power in order to do so. Is that correct?

Mr Dabb—Yes, that is how we understand it. If we are dealing with conduct that is entirely beyond Australia, I think it is clear that it is not necessary for the law to be constitutionally valid that it exactly reflect the terms of the convention.

CHAIR—Thank you very much. I interrupted you where you were talking about the background to small facilitation payments.

Mr Dabb—The provisions in the bill were simply intended to reflect the thought in the commentary that there was something called small facilitation payments that might otherwise be caught but that were to be taken out from the offence. In order to analyse that, we need to see what kinds of payments or benefits the convention requires to be caught. There are two limbs to it. One limb is payments made with the intention of obtaining or retaining business. The other limb is obtaining or retaining an improper advantage in the conduct of business. So there is both the obtaining and retaining of business and the obtaining or retaining an improper advantage.

We have some guidance as to what improper advantage means in the part of the commentary dealing with paragraph 1 of article 1, where it says:

Other improper advantage refers to something to which the company concerned was not clearly entitled—for example, an operating permit for a factory which fails to meet the statutory requirements.

To look at what is intended here, if it is something to which the person offering the benefit is entitled, like a licence or a permit—

CHAIR—Or a stamp in a passport.

Mr Dabb—Exactly, getting a passport back after it has gone behind the counter, the clearance of goods through customs and so on, that is not intended to be caught initially. The definition seems to take it out. We already have all that, and no-one is going to be guilty of it if that is what it amounts to. When we come to facilitation payments, what is there beyond that? All the material we have got back from the United States—and we have tried to probe them fairly closely on how they administer this—is that it is clear from what the intent of Congress was in the FCPA what is intended to be contained in this routine governmental action. It has necessarily to be small because it is only for things like licences or permits.

As we understand it, it is where there is no discretion to be influenced. That seems to be the key to it; that they are non-discretionary actions of government. That is what routine governmental action means. If that is so, if we have an offence that, apart from the gaining or retaining business, only catches payments in relation to improper advantage, we have already excluded all that. In logic there is a big question as to how much further we need to go, because we would be talking about an area where a discretion is necessarily involved.

Here is where the difficulty arises. How can you distinguish between different kinds of discretion? A discretion to grant a permit to import a bulldozer to clear areas of forest is one thing. That is routine. What about the environmental clearance to clear a rainforest? Is that routine? Is that something to which people are entitled? If the test is whether it is discretionary or not discretionary, it seems to cut in only in an area where you are outside improper advantage and in an area where you probably should not be excluding payments in any event. Given that, the provision in the bill was the best we could do by trying to catch this notion of smallness.

Perhaps there is one other point. This is to be a criminal statute. It will be interpreted by the Australian courts as a criminal statute. If cases come up on the borderline where we have provided some sort of routine governmental action defence where we have not set a clear limit, cases will go to the High Court which will agonise over whether we meant to exclude the permit to clear the rainforest or the exemption of

the ship that is leaking too much oil and so on. The opposite point of view—that we leave it all to prosecuting discretion—seems to have quite a bit going for it. Cases are not going to be prosecuted that are going to be expensive and difficult in any event.

Mr McCLELLAND—On that point, what do you say about making the facilitation payments an exemption to the offence as opposed to a defence?

Mr Dabb—Ultimately this comes down to who needs to prove what.

Mr McCLELLAND—But it is quite important. I can see a prosecutor saying, 'Here is the offence made out. In exercising my statutory duty, I had better have a go at this person. They may get up on the defence, but it seems to me that my primary role is to see whether I have enough evidence here for the offence.' Whereas if he says, 'To make out the offence I have to go through this checklist, and then the final one is whether or not it was a facilitation payment', it seems to me that it would make the prosecution discretion more flexible. A defendant will not have to take it to the High Court to find out whether he has discharged the onus of proof.

Mr Dabb—It would certainly make life much easier for the prosecution and the courts if issues regarding the state of mind of the person when they made the payment was intending to get something they were really entitled to anyway or something over and above what they were entitled to, if all that were put on the defence rather than having to make the prosecution concerned about that. I think it is within that permissible area where various scrutiny of bills committees have said that it is appropriate to put the onus on the defence because it is something that is within the state of mind and knowledge of the person who is actually making the payment.

Mr Meaney—I think from the scrutiny of bills committee there is a principle that says, where something is peculiarly within the knowledge of the defendant, it is appropriate to put the onus on that person. Without wishing to preach to those who are better qualified than I am, the burden is different. The burden on the prosecution will always be beyond a reasonable doubt. For the prosecution to prove the state of mind of a defendant in a foreign country beyond a reasonable doubt is totally different from a burden on the defendant—

CHAIR—To adduce evidence.

Mr Meaney—To adduce evidence sufficient to raise a reasonable doubt. They are totally different standards.

Mr HARDGRAVE—Would the transparency question that I keep raising help you in that particular view? If it was a standard payment, a payment that was quite usual and out of the ordinary, then no-one would mind confessing it, be it through the books of their company or whatever. If it was a standard thing, no-one would mind stating it. I guess at

some stage if they decided to disclose it, believing that if it appeared standard then no-one would pursue it any further, could it be pursued later by somebody if they saw a standard payment of $1 million? If a company started to trend up its payment of facilitation, you would start asking questions. If within a company you started to see one executive who arguably was pocketing the money instead of making facilitation payments, there would be internal mechanisms. But transparency would expose a wide range of things, would it not?

Mr Dabb—It would be great if it worked like that and everyone disclosed everything that was material, but a system that depended on that to work properly might be on a rather insecure basis.

Mr HARDGRAVE—I think you are on the wrong side of the table. Would not facilitation payments exposed in companies' accounts be a good thing?

Mr Dabb—It may be. I do not think that is the sort of thing we could help by making a judgment on.

Mr HARDGRAVE—I was after the department's view on it.

Mr Dabb—With the kind of payment that we think about—the labour permit, the entry permit or the visa permit—if a fee is demanded for that, we are into the area of extortion rather than bribery or facilitation payments. They are clearly cases where someone is entitled to something and the public official simply is not performing their duty and is extorting money from a victim. Clearly, that should not be caught by the law and is not within the definition of improper advantage anyway.

Mr HARDGRAVE—But, again, a note within somebody's books, a company record, a memo, the keeping of an official record, a letter to the Australian consulate in a particular country asking them to facilitate some negotiation over those sorts of matters—it is transparent, it is exposed, it is open, it is accountable, it is in itself a far better thing. I would have thought that if you were going to bury the fact that money had changed hands, be it for a fast-track stamp at an immigration point, through to getting a bulldozer through, right through to getting an environmental permit to knock over a raft of trees—for it to be hidden—those things, to my mind, are far more intolerable.

Mr Dabb—I would just make two quick points. One is that it may be possible to build it into the system by saying that the DPP could adopt a system of looking favourably on people who declare to the DPP that they have made a payment. That is some sign that it was not made with a dishonest intent. You could may be build it in there. That would be about the limit of the criminal law, I would think.

Beyond that, the OECD, I think, is already looking at accounting standards and transparency in this area as well as the measure that has been taken here. Also, the US, of course, has its own laws on accounting standards which are separate from a criminal

offence.

CHAIR—There has been some resistance to standardise actually, hasn't there?

Mr HARDGRAVE—And I know you are not here to speak on matters such as company code and tax laws and so forth, but then again there is also the question that these payments are buried within somebody's books, be it consultancy fees or whatever, and then become tax deductible. As an Australian citizen, you must find that disturbing—that people could write off illegal immoral payments as a tax deduction.

Mr Dabb—Yes, and that is another issue that is being looked at at the present time in parallel to this.

Mr Meaney—I would perhaps just add a point here. The question, I think, as phrased by you, Madam Chair, was the question of whether or not there ought to be a monetary limit on whether a purposive approach is a better way to analytically approach it. In terms of the proposals that we have put forward for discussion, there was a combination of those.

I think, notwithstanding the arguments that there is a purposive approach, that what you are looking at is the purpose—and I think you have heard Mr Dab's argument about the way the provision is constructed whereby most facilitation payments would fail the purpose test that you would need to satisfy—I just put forward the suggestion that there may be some benefit if you were to do that, notwithstanding there is a purposive approach, rather than leave it open-ended. And, with the point that Mr Hardgrave mentioned about escalating fees, there might be an advantage in capping that as well.

So statutorily you could say that, notwithstanding the purposive approach, something that was over a particular amount clearly would not be acceptable as a facilitation payment. What that figure might be, I do not know. But, once you get up to a couple of hundred thousand dollars or $1 million, it seems to me that it is going to be very hard on the facts to prove that. But there might be some advantage in just capping it, as distinct from making it an element of the offence.

Mr HARDGRAVE—But, being a neither a lawyer nor an accountant, it would still seem to me that, if you are going to put a specified cap amount in there, you would have to acquit that. You would have to provide some evidence of acquittal of that. In other words, if we have a capped amount much money before we start having attention drawn to that conduct, how did we actually spend that? Was it $50 for this official there, or a carton of beer for a telecommunications linesman—

Mr Meaney—I am sorry, I am not too sure whether we are on the same wavelength. I was not talking about an overall cap; I was talking about per transaction.

Mr HARDGRAVE—Either way, you still would want to be able to acquit it, and so it still comes back to the transparency argument—that disclosure and being transparent itself must be encouraged, surely.

CHAIR—What Mr Meaney is saying—if I understand what he is saying, and I think I do—is that just say, for argument's sake, it is a $1,000 to pull a container off a ship in front of everybody else so that you get it the following day—just for argument's sake. It should be that you would cap it at $1,000 or $2,000 for that. It would be a bit unwieldy though, wouldn't it? You would have schedules for miles of things that—

Mr Meaney—I was not thinking on a transaction basis; I was thinking that maybe you say $10,000; statutorily anything over $10,000 is not a facilitation.

CHAIR—What about cumulatively?

Mr Meaney—That raises the question of the nature of the conduct. You could have payment by instalment. But I think the true analysis of that would be that it would one payment paid in instalment. If it is so much for getting a particular container off a dock, there is a difference between per container and a series of containers.

Mr HARDGRAVE—That is why you would have to acquit any payment that you made; that is why you would have to make transparent and obvious that you had participated in the payment to somebody of a certain amount of money, goods, kind or advantage.

Mr McCLELLAND—I think Mr Meaney is talking about the definition of the defence.

Mr HARDGRAVE—That we will leave to the lawyers to worry about. I am trying to be far more practical, so that Hansard has that word on the record.

CHAIR—Mr Hardgrave has thrown up his hands on this one. Does anyone else want to make a comment about any aspect of facilitation?

Mr Brazil—Yes. Having listened to that discussion, I think it is important for the committee to take note of the fact that the one country that has legislation in this area has a facilitation payment defence in it. It works. I myself think therefore that that really must be the No. 1 model to be looked at.

As for trying to put a cap on it, I think that is for the birds. It just will not work, quite frankly. You can pay it by instalments. You can do all sorts of things. The value of currencies go up and down. One day you can rush in and get your container off the wharf, but the next day suddenly you cannot.

As regards the fact that the purposive approach may not work in all situations, I am sceptical as to whether or not that is so. If the Americans have not got the drafting right, I cannot see why our draftspeople, instructed by I think an expert department like the Attorney-General's Department, cannot do better than them.

Mr McCLELLAND—Does it work as a defence or an exemption in the United States?

Mr Brazil—I really could not answer that. I suspect it is defence, but someone else might be able to answer that.

CHAIR—I think it says in its terms it is a defence.

Ms Hill—No, I am sorry; it is actually an exemption to the primary offence in the US act.

Mr Brazil—I think that is very important. The other thing I would like to raise is something that Mr Dabb approached but did not quite get to. He talked about the DPP taking certain things into account. But, at our hearing before this committee on 17 April, we did raise the question of whether or not it would not be useful to have a machinery for rulings by, I assume it would be, the Attorney-General in this area. We would still see value in that. It is not the transparency that Mr Hardgrave is talking about, but it might help towards that. It might produce a situation where we all know a little bit more about what is going on, what happens to you and what the downsides are.

Mr HARDGRAVE—I remember that mechanism well. That is essentially where someone could ring up and say, 'Look, we've been told to do this; is this reasonable?'

Mr Brazil—It is the sort of thing you can do at the moment with the ACCC in terms of the Trade Practices Act, the sort of thing you can do with the Australian Taxation Office, and the sort of thing that is explicitly allowed under the American structure.

Mr HARDGRAVE—So that in itself is a confession. It would seem to me that you are not intending to do anything untoward by your interpretation of what untoward is; you are willing to confess it and be open and accountable and transparent about it up-front. How would the department view that kind of mechanism, Mr Dabb?

Mr Dabb—I think we would have to identify an agency prepared to take on that role. The Director of Public Prosecutions, as a matter of policy, does not normally give rulings in advance as to whether conduct is going to be criminal or not criminal. So it might involve a small enlargement of the bureaucracy.

Mr HARDGRAVE—In a way that comes back to the question I attempted to ask earlier about the FCPA's approach on facilitation. What sort of notice did the department

take of its provisions when drafting this bill?

Mr Dabb—The first thing we noticed about it was that it did not seem to be consistent with the convention. Having looked at it and read the convention several times and taking the commentary with the convention, we still cannot see how it is.

Nonetheless, the US apparently is going to firmly take the view that the current FCPA exception is consistent with the convention. So we will drop that argument. If they are prepared to justify that, that is okay.

But, beyond that, it does seem to work in a quite different way from the way a defence in a criminal statute would work in Australia. It seems to me that there have not been a great many prosecutions or proceedings—something under 20, I think, since the act came in. They do seem to be largely on a civil basis almost negotiated with the company about what is in issue and what is not in issue, and how big the penalty is going to be. To have a defence or an exception—and we can talk separately about just who the onus lies on—in an Australian statute would cut a very large hole in the conduct that is proscribed by the act.

Mr Butler—I would make a couple of quick comments. The first thing to remember is that facilitation payments in this country are illegal. I sometimes think people think, 'Well, it's probably okay.' But if you imagine, for instance, giving a payment of $50 or $5 to a Customs official so that you can jump the queue, or $5 to the policeman to say that your case comes on first, or whatever, I think we would be a little bit concerned about that.

However, we, as I have said already in our submission, support the idea of having the exception to the facilitation payments. I have in front of me the sort of seminal work, I suppose, on this whole issue, which is called *Doing Business under the Foreign Corrupt Practices Act*, a book by Don Zarin. He refers to the 1988 amendments to the Foreign Corrupt Practices Act to which we have referred in our submission. It picks up not the notion of smallness—it does not talk about that at all—but rather the concept of routine government action, which it defines as obtaining permits and so on. The commentary says—and I do not think anyone would take issue with this:

> The facilitating payments exception is intended to permit modest payments to officials to speed up or secure the performance of essentially clerical activities which do not involve the exercise of discretion.

There is nothing in there about the notion of 'small', and a criticism that I would have of their legislation is that it would not be a bad thing to roll it in. Having said that, I agree entirely with the comment that Mr Brazil made that this actually does work. Companies we have spoken to well understand how the footprint of this exception works. Accordingly, we think we could do a lot worse than simply adopt what seems to work in

another country.

Mr McCLELLAND—For instance, I needed to get a birth certificate for a passport, and I had 48 hours or I could come back in an hour. I paid the difference—$30, I think it was—to get the birth certificate in an hour. That would be the sort of thing that would fall within a facilitation.

CHAIR—That is provided for and up-front and very clear.

Mr HARDGRAVE—That went to the department. You got a receipt from the department; you did not get a receipt from the official.

Mr McCLELLAND—Sure.

Mr HARDGRAVE—Or they did not pocket it to get the job done faster.

Mr Dabb—I would have to say again, we would have great misgivings about how that would work in an Australian criminal statute and what the courts would make of it. The impression we have is that the actual interpretation on the ground in the US is governed heavily by what they call 'the sense of Congress'. We can look at how you might reflect that in an Australian statute, but we would have to begin with this notion of improper advantage to start with and see how much we wanted to go beyond that. But, secondly, the Department of Justice for some reason has very much the whip hand in saying what this means, and it is largely a matter of prosecuting discretion as to how it works.

Mr Butler—I would respond very briefly to that. The first point I would make is that the High Court regularly goes behind legislation to see what the intent was. Explanatory memoranda and so on are regularly looked at by a court to see what the intent was.

The second thing is that Mr Dabb might be right if the words used in the American legislation were not so clear, but they are terribly clear. I will not quote them because the five points of what routine government action are referred to in our submission. But, if one reads those, I would have thought, frankly, they are very clear, lucid.

CHAIR—But if its routine is not improper, surely—

Mr Butler—Yes, that is it precisely. So I do not think an Australian court would have much trouble at all dealing with legislation that incorporated that sort of thing. Furthermore, inasmuch as it did—and I do not think it will—an Australian court will look at the other country's common law to determine whether assistance could be given. That regularly happens in Australian courts too.

CHAIR—Mr Davis, you have been waiting.

Mr Davis—We would recall that this, from a business perspective, is a question of criminal law. We are deeply troubled when we hear, 'Just leave it to prosecutorial discretion.' That is a very wide jeopardy for business or for anyone, and it creates a very interesting precedent in the common law system—'Oh, just leave it to the prosecutor; the parliament can't work it out.' That is a very dangerous scenario, we believe.

We would observe, also, that facilitation payments are to be exempted under the convention, so in one respect there is limited flexibility for the Australian government to decide whether to leave it in or leave it out. It has to be observed that one of the first of a handful of hypothetical cases to be prosecuted—say that it is a large corporation—will be in the High Court so quickly it will make the wharfies' dispute look like a snail's pace. They will be in there very fast.

Then the courts will decide what is meant by 'facilitation payment'. We think that is undesirable. We think it is a responsibility of the parliament, rather than the courts, to decide what is meant by facilitation payment. As we have observed before, there is no easy answer as to what is a facilitation payment. We could use the example of $1 million in Beijing to get a portion of the Three Gorges Dam which might be nothing, but $100 to get a wharf extended in the Cook Islands could be a massive amount. There is no simple answer.

We have encouraged this committee to look at what the other 28-odd members who sign on to this convention do. There is a great deal of wisdom that resides in the Attorney-General's Department, but there is some wisdom in other places, and maybe there is some guidance to be had from there. I guess, if we had to put an option on the table, it would be to remain committed to the view of significance. Is it significant? That is not unknown in Australian law. The Trade Practices Act has been mentioned.

We were intrigued to hear the suggestion of prior authorisation. We would like to see how the parliament could legislate to allow a criminal activity. They have done it before the Trade Practices Act, but Mr Hardgrave's moral arguments may unravel on that one.

CHAIR—Professor Fels has always proven at least willing, if not equal to these tasks, so maybe that is yet another task.

Mr McCLELLAND—Just on that point, Mr Butler's point is valid: we could look at what is a road tested record; we could perhaps look at how the United States of America legislation is framed in that respect and take that as a starting point.

Mr Davis—Just to respond to Mr McClelland, de facto you would end up with a schedule of what is acceptable and what is unacceptable.

Mr McCLELLAND—Is that the case? I understand that is defined in five points. Have you read this exemption for facilitation payments in the United States?

Mr Davis—We have not studied it as closely as others.

Mr McCLELLAND—I understand there are five concepts in it. That is not a schedule.

Mr Davis—De facto, I think, you would be getting into authorisation; de facto you are starting to go towards a schedule.

Mr McCLELLAND—I am not talking about the authorisation; I am talking simply about how the defence or exemption is framed. Isn't that a starting point, to look at what another nation has done?

Mr Davis—Absolutely.

Mr McCLELLAND—Particularly if there is case law proving how it has been road tested.

Mr Davis—Of course, the answer is that one country is just one country. There are 29 participants to this, plus others who may come on board. While the United States has the most experience in the matter, it does not necessarily have the best approach. Others may have a better approach.

Mr HARDGRAVE—Mr Davis, do you think perhaps there is a problem in that it is just 29 nations, that it is just an OECD thing?

Mr Davis—As we have testified before this committee, it is a limited group. It is not necessarily the greatest providers, the greatest recipients, the worst miscreants or the most virtuous. We have said from day one that there is merit in capturing the greatest number of countries. Now some would say this is the obvious place to start; you have to start somewhere and roll out. There is a lot to be said for that argument. But, equally, it is not the end of it.

We would see greater merit in moving it into the World Trade Organisation. We have heard an argument, which we find interesting, which says that, to be truly effective, you should make it part of the World Trade Organisation—get into a government procurement agreement and make it part of a single undertaking which would have a binding effect, and everyone in the WTO, 132-odd countries, would have no choice. We think that is probably more productive, but, again, we are just focusing on the matter at hand.

Mr McCLELLAND—One question, if I can, that might be of concern to your

members is this issue, which I think is quite significant, of whether it is an exemption or a defence. You have expressed concern about prosecution discretion, which I have some sympathy with. Would it be better from the point of view of your members if the prosecutor had to prove as a series of facts that the payments were made, and then also prove that it was not a payment made in the normal course of business, or however those five concepts of the United States are framed—in other words, that the prosecutor bore that onus? If the facilitation payment was a defence, what the prosecutor would have do would be to prove that the payments were made, and then he would say, 'I rest my case', and the defendant would have to get up and say, 'Hold on; it is my job to bear an onus of proof to prove that I did not fall within the defence.' In other words, it is a harder thing for the defendant to do because they would bear the onus of proof.

Having regard to those two concepts—and bear in mind that this could be crucial from the point view of your members—would your members prefer it to be an exemption, that is, that the prosecutor would bear the onus of proving that it was not a facilitation payment?

Mr Davis—This is something that we have not studied closely, so I will just make an informal remark rather than something that binds the organisation because we would have to study the two options very carefully. I guess I come from the position that the first principle of the legal system that we adhere to is the common law system—that is, that the onus of proof is on the prosecution to prove a criminal malfeasance. To us, that is the obvious starting point.

Shifting the onus of proof onto someone to prove that they are not guilty or that they have a partial defence is an interesting leap. Now there are, in law, no doubt, areas where those better legally trained than I could probably find where there are compromises on that first principle, but we would need a lot of persuading to move away from that essential principle—that is, that it is up to the prosecution to prove a criminal action. This is an amendment to the Crimes Act. No matter what we are talking about, that is what this is about for business. We are expanding the range of criminal offences to which business may be subject.

Mr HARDGRAVE—So you would not be interested in transparency, then, because the mere fact that you have confessed that a certain amount of money passed hands helps prosecutors.

Mr Davis—In terms of transparency being introduced into the accounting standards?

Mr HARDGRAVE—As far as transparency of the activity being in itself a disclosure that nothing criminal was intended would be my proposition but, perhaps, you could pervert your proposition to the point where transparency in fact would help the prosecutor rather than the defendant in a particular case.

Mr Davis—I just return to the first principle from our point of view: that is, under our legal system and criminal law, the obligation is with the prosecutor.

Ms Hill—I have a couple of final points. The first is that, in any event, these payments are on the whole unlawful under the laws of overseas countries, so if you are talking about criminal intent, a facilitation payment remains a criminal offence under those local laws. The only country that I have looked at or discovered where there is an exception is Vietnam, and the last time I did the exchange rate calculation it worked out to about a US$50 threshold for a payment. Anything below that was permissible.

Second, given that we are grappling with this issue of 'a bribe is a bribe is a bribe', regardless of the amount of it, one suggestion that we have made in our submission is that we look at the tax deductibility of the facilitation payments and expressly exclude the tax deductibility of those as well.

CHAIR—You know that there is a proposal that that be done?

Ms Hill—Yes. Third, just in relation to the Foreign Corrupt Practices Act opinion procedure that has been referred to, in the reading that I have done, that procedure is rarely utilised by United States' companies, and it has not had much utilisation since about 1980. A number of reasons are given for that, not the least of which is the concern by United States' corporations in disclosing what they are proposing to do, thereby triggering a potential investigation.

CHAIR—We will hear from Mr Dabb, and then I want to move onto another topic, if we can.

Mr Dabb—I am just wondering if we have said enough to indicate our extreme uneasiness at the idea of this United States' language being incorporated into an Australian statute. There is such a thing as a chilling effect on prosecutions. People speak of a chilling effect on business but, the way prosecution decisions need to be made today, having regard to the enormous resources that can be tied up in them, I can imagine a situation where the case might a payment of $50,000 for processing an application to build a factory to process ore without a tailings dam because a tailings dam would cost $5 million, and then there is a complaint about this, and public outrage. The AFP then goes along to the DPP and says, 'Any chance of getting a conviction here', and the DPP—the way things go these days in the real world—is unlikely to say, 'Yes, go ahead', and apply what could be half a million in investigative costs and bring witnesses back on something where the outcome is so uncertain.

Mr McCLELLAND—So you would favour a defence.

Mr Dabb—A defence. I think initially much is to be said for leaving it to prosecution discretion. If we go beyond that we can look for a safe harbour, provided in

as precise terms as possible, and as a defence.

Mr Meaney—And consistent with the Scrutiny of Bills Committee's principles on appropriate practice.

Mr McDonald—Just as a minor point, if you look at the criminal code provisions on evidential burden of proof, it is probably not wise to use the terminology of 'exemption' because something expressed in terms of an exemption is treated as a defence. What you are talking about is putting the complete burden of proof with the prosecution. That is just a little more precise under the code.

Mr Davis—The Director of Public Prosecutions would be concerned at the cost of an investigation and the cost of a prosecution, so therefore his models would suggest that we should go to the exemptions approach. To my mind that suggests that the financial burden is then tipped back onto the business person, in this case, to prove they are not guilty of that offence. So in effect the financial burden of the whole matter shifts from the Commonwealth in this case onto the private sector. Now we are in favour of privatisation, but not that sort.

Mr McDonald—The thing is that it is not an unusual device at all. It is quite common, as Mr Meaney mentioned earlier on, that where the details of the transaction are with someone and they are—

Mr Meaney—Within their peculiar knowledge.

Mr McDonald—That is exactly right, if it is within their peculiar knowledge, then it is actually, if they are innocent then—

CHAIR—They will have the means to establish and produce evidence to make out their defence.

Mr McDonald—Yes.

Mr Dabb—That is so far as that side of the question is concerned. The other side is that the prospects of obtaining a conviction is certainly a relevant consideration as to whether or not to bring a prosecution, and the certainty of the law. If the law is uncertain, that is certainly a proper reason in the public interest not to bring an expensive prosecution.

Mr McDonald—The other point is that, if you just translate words holus-bolus into our legislation, it just cannot be done that way because our whole approach to interpreting the legislation is different. If you were in favour of the American approach, we would have to look very carefully at the whole case law and the way in which it is interpreted to devise a provision that precisely reflected what was required. It is not as

simple as just using those words and getting the same result.

CHAIR—Mr Butler.

Mr Butler—This is a slightly wider point, but I am glad it has been raised. Can I just say that I find the drafting of this proposed legislation, if I can be frank, fairly clumsy. I do not know if other people have had this problem but, if you look at the legislation—and we are only talking about a few very short pages—and try to wade your way through, trying to work out what is likely to fall foul of the bribery provisions, you actually find yourself cross-referencing a number of sections. Really, what we are trying to do here is have it very simple; to make it easily susceptible to clearer drafting. All one has really got to do is say, having defined what a bribe is and is not, that a person should not do it, and that is the end of the problem.

Mr Dabb—That is a matter for the draftsman.

Mr Butler—It is, but—

Mr McDonald—You can tell the litigators.

CHAIR—That is a very clear instruction to the Grants Commission.

Mr McDonald—I think the American comparison to that, on reading the American legislation and our legislation, might be educational in terms of—

Mr Butler—I raise the point on the basis that it is put against introducing something like—and I do not say these should be the exact words—the United States' definition of 'facilitation payment'. It does not fit very well with the exposure draft. I think that is true, but I think that tells us more about the exposure draft than what we want to introduce.

CHAIR—We are going to run a bit short of time. We can come back this afternoon if we desperately need to cover it, but I would like to try and finish if we can. I want to ask, before we move on to a couple of perhaps quicker areas, before we leave this, does anyone at the table have a comment about the reach of the legislation in so far as the definition of 'foreign public official' goes? We received some evidence that it was deficient in many respects, one view being that it did not, for instance, catch payments, perhaps, related to nepotism or payments to officials' families. It may be that is something the department can look at in more detail so that we can move on to more general areas. If anyone else at the table has a comment, say so; otherwise I might ask the department to take that on notice, and perhaps we will look further at that.

Mr Meaney—Could I just have clarification on a point? I guess the issue is the indirect nature of the payments. It is not a payment from A to B; it is A to C because B

does something for you.

CHAIR—Yes.

Mr McCLELLAND—The Corporations Law, as I understand it, has a benefit to a director's family or related people, and it may be worthwhile to look at whether that concept should be incorporated.

Mr Dabb—I think it is covered by the drafting of 14.1 which refers to payments to other persons, but we will look at it.

Mr Davis—You are talking about those who are actually foreign public officials, not those who may become foreign public officials, which is second round work within the OECD.

CHAIR—At the moment we are only looking at what is in

front of us, so we will struggle with that if we have to.

Mr Davis—Okay.

CHAIR—The next topic that I want to cover is penalty. There has been a range of views about the adequacy or otherwise of the penalties. Who wants to start on that? Mr Butler, make it quick, please, if you could.

Mr Butler—I will not repeat in any detail what is said at page 8 of the submission, other than to say it may be thought that the seriousness means it really should come into line with other corporate legislation such as the Trade Practices Act.

CHAIR—So you are looking at the amounts, the magnitude, of the Trade Practices Act.

Mr Butler—Yes.

CHAIR—Thank you. Does anyone else want to make a comment about that? Okay. Coming to another topic, there was some evidence in relation to ancillary offences—the effect of ancillary offences and the effect of the primary offence. Does anybody want to make a comment about whether the ancillary offences, the way they stand, should receive some further attention from us? I suppose it will largely depend on the extent to which we take a different view on territoriality, so I am probably answering my own question as I am asking it. Does anyone want to make some comment about ancillary offences?

Mr Dabb—Only to say that the United Kingdom, on reports we have got, appears

to take such an extravagant view of what is prosecutable as an ancillary offence in the United Kingdom that they do not think any further legislation is necessary.

CHAIR—That is diverting, to say the least. The next topic that I want to look at is whether or not we need to look at extradition under the laws of all the parties that we hope will sign up to the convention, and the state of extradition treaties between them. What impact will article 10.1 of the convention have on Australia's existing laws and treaties—that is, bribery of a foreign public official should be deemed to be included as an extraditable offence under the laws of the parties.

Mr Meaney—Could I just briefly respond to that? Under our test of extradition, an extraditable offence is one that is punishable by more than 12 months. Clearly, once you have got the penalty being punishable by more than 12 months it is an extraditable offence by definition.

CHAIR—Right.

Mr Dabb—That is where a double criminality—

Mr Meaney—Sorry, subject to double criminality—where it is criminalised in the other country.

Mr Dabb—There may also be, as far as extradition is concerned, an issue about whether the country would be prepared to extradite if the offence occurred in that country. That could possibly be a bar to extradition, in that it did not occur in Australia but occurred in the other country. This is if we are proceeding on the nationality basis and not where the offence occurred. Even apart from that, the other country may prefer to take action itself.

Mr McCLELLAND—So we may prefer to, given the cost involved.

Mr Dabb—Yes.

CHAIR—Does anybody want to make a comment on that aspect or anything else that has just been said? What I want to do at this stage is ask each person who is participating in the round table—we have got 10 minutes; we have apparently got something coming in at 12.00—whether they would like to make a closing comment. You might just like to summarise the main aspects you urge upon the committee, and then we can declare it finished.

Mr Rooke—Briefly, I just want to emphasise the fact that TI sees this legislation as a small but important part, nevertheless, in the whole process. It is part of an international move which both affects the developed world—through the OECD convention primarily, but in other ways—particularly under the other provisions of the

OECD recommendations, but also the developing world, so that it has to be seen in context. It has to be seen in the context of the behaviour of businesses.

Mr Davis, of course, represents the ACCI which has many members in the business community. Some of the larger companies have participated in TI related meetings, and indeed are members of TI Australia, and they have made it very clear that they welcome the proposed legislation. A number of them have actually commented that they would like to see it stronger. We have talked to companies like BHP, Telstra, Arnotts, Fosters Brewing, GMC Holden, Papuan Oil Search. They have participated in meetings we have had in Canberra and Sydney, and they are already moving towards this.

Gayle Hill mentioned beefing up their own internal codes. BHP—I have it in front of me here—are very clear on the subject of facilitation payments, but only under strict supervision and accounting clearly and accurately, it says here; internally, nevertheless, but they want to know what is going on within their own organisation.

CHAIR—I am very glad to hear that. Unfortunately, BHP did not come along to give us any evidence or the benefit of their experience here.

Mr Rooke—Telstra have developed something called an ethics clause which apparently they put into all contracts with not only suppliers but joint venture partners and local agents as well. BHP do not do this, but they have a process of actually having a dialogue with all these people and explaining that, 'This is the BHP code of conduct. We do not bribe. We do pay, in certain circumstances, minor facilitation payments, but please do not embarrass us by behaving in ways which we cannot find acceptable.' So this is the way the business community is working already. That is one key issue. The other is what is happening in other countries.

CHAIR—Can we wind it up, please, because I have to let everybody have a go, so could you just get to your conclusion?

Mr Rooke—Yes, what is happening in other countries. The OECD has recently released a report on the situation at 1 April which says that, although very few countries actually met the 1 April deadline to submit the convention to their legislatures, all expect to have done so and their implementing legislation will be in place by the end of this year. The only exception is the Netherlands, I think, which thinks it might be early next year, so we are part of a process. We must not forget that.

CHAIR—Yes, thank you very much. Either Mr Butler or Ms Hill; I am sorry I have to lump you together.

Ms Hill—I would just like to close by encouraging the committee to endorse the legislation with changes on the basis of jurisdiction because it will provide a clear signpost for corporations and give them, as Peter Rooke has said, the ability to indicate to overseas

officials that they are unable to comply with any demands for bribes.

CHAIR—Thank you. Because you were so succinct, do you wish to—

Mr Butler—Could I just say thank you to you, Madam Chair, and the committee for giving all of us the opportunity to say something. I wish more legislation provided us with this opportunity because it is wonderful for us to feel, if we have got something to give, that we are able to give it.

In the end, while this is a small step, it is a very important one for the reason Gayle Hill says. I think the best comment I heard this morning was probably that of Mr Hardgrave when he said that this is an opportunity for us to rejoice in the fact that we are Australians and we can take pride in the fact, first of all, that we are going to try and stop people doing things that are reprehensible and, secondly, we can show the way in an important area, especially where Third World countries are concerned.

Mr Davis—There are two parts to this review. Firstly, there is whether we should accede to the convention or not, and we think we should not for the simple reason that our government and the opposition parties say we have a national interest test. Is accession in our national interest? We think not. I cannot see how losing jobs, losing investment opportunities abroad and trade are in our national interest so we do not believe we should accede.

Should the view be taken otherwise and we do accede, then we would remind everyone that there is an element of comparability in this whole exercise. We are not an island in this respect, and we would like to see what others do, and they may answer many of the difficult questions that have been put on this table. It is not that we are soft on corruption—far from it. It is a cancer in our global trading system. We would like to see it go away, but we just do not think this instrument is the way to go.

CHAIR—Thank you, Mr Davis. Last word to Attorney-General's.

Mr Dabb—Two quick things: thank you for your patience in allowing us to try and explain some of the difficulties we have grappled with in this legislation, and, secondly, I am sorry we could not be of more help in giving you news of what other countries are doing with this. If we do get further information on other countries' legislation, we will feed that in as soon as we can.

Mr Brazil—I simply wish to say two things. Thank you very much for listening to us, and I wish you very well with your report.

CHAIR—I want also to add my gratitude to each and every one of you, and in fact to all of the people who have come before us to give evidence. These committees

really are only as good as the sort of input they get, so we are extremely grateful for the range of views, the diversity of opinion and the learning that we have experienced with people who have far more experience than we have in these sorts of matters. So, on behalf of the committee, thank you one and all.

Thank you to *Hansard* who travelled with us while we took evidence, and thank you to members of the subcommittee who have toiled on this matter. I think they will be glad to see it come to a conclusion; certainly they are sick of the subcommittee Chair. But, having said all of that, I now bring this meeting to a close.

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

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

Subcommittee adjourned at 11.57 a.m.