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Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania

Submission to Inquiry into Foreign Bribery

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Publish What You Pay (PWYP) Australia and the Uniting Church in Australia Synod of Victoria and Tasmania welcome the opportunity to provide this joint submission to the Government's inquiry into foreign bribery.

PWYP Australia is a coalition of 30 humanitarian, faith, environmental, research and union organisations campaigning for greater transparency and accountability in the extractive industries that enjoy broad support across the Australian community. PWYP Australia works with the international PWYP network of over 800 civil society organisations to ensure that mining and oil and gas revenues are used for economic development and poverty reduction in resource-rich countries, including Australia.

Foreign bribery falls on the continuum of corruption that plagues the extractives industry, particularly its activities within developing countries, and is inextricably tied to a country's economic and human development. The Australian Government has a responsibility to ensuring fair, equitable and sustainable practices are operating in the extractive sector, particularly as Australian extractive companies increase their presence in many of these developing nations. For example, in Africa, more than 150 Australian companies, holding about 1500 licenses, work across 33 African countries currently, an organisational presence higher than Canada, China or the United Kingdom.¹ PWYP Australia endorses a strengthening of Australia's legislation around foreign bribery, along with the introduction of mandatory disclosure legislation for extractives industries' payments to foreign governments and Australia's implementation of the Extractive Industries Transparency Initiative.

Transparency International's *Global Corruption Report 2009* has found that business continues to play a very exposed role as the supplier of corrupt payments to civil servants, members of government and political parties. Kickbacks may be actively solicited, extorted or offered proactively. Irrespective of the degree of coercion involved, the fact remains that bribery fosters a culture of impunity and repeat corruption, undermines the functioning of public institutions and fuels a public perception that governments and bureaucracies are up for sale to the highest bidder.²

¹ International Consortium of Investigative Journalists, 'Fatal Extraction: Australian Mining's Damaging Push Into Africa. 150 Companies, 1,500 Licenses , 33 Countries: Fatal Extraction by the Numbers', 15 July 2015, <http://www.icij.org/project/fatal-extraction/150-companies-1500-licenses-33-countries-fatal-extraction-numbers>

² Transparency International, 'Global Corruption Report 2009: Corruption and the Private Sector', p. xxv.

TI stated in the 2009 report that:³

The scale and scope of bribery in business is staggering. Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10%.

TI states that the cost is measured in more than money as when bribes allow reckless companies to disregard the law, the consequences range from exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences. Even facilitation payments are found to be harmful, as they are funnelled up through the system and help nurture and sustain corrupt bureaucracies, political parties and governments.⁴

In 2014, the OECD released a study of 17 countries that had successfully prosecuted a foreign bribery case. The study analysed a total of 427 cases from 1999- 2014. Of these 427 bribery cases, almost one fifth (19%) occurred in the extractives sector.⁵ The bribes were primarily promised, offered or given to employees in State Owned or controlled Enterprises (SOE) and on average the bribes equalled 10.9% of the total transaction value. A total of 53% of cases were reported to involve corporate management or the CEO of the business making the bribe⁶, undermining claims that most bribes are made by rogue employees acting outside of instruction of senior management. Only 2% of these bribery charges came from whistleblower activities – further highlighting the need for stronger protection mechanisms for private sector whistleblowers. Almost half of the cases studied showed bribery of public officials occurred from countries with high (22%) to very high (21%) levels of human development. While we do not have access to the same data in a local Australian context, the *Deloitte Bribery and Corruption Survey 2015 Australia and New Zealand*⁷ provides us with a current snapshot of corruption and how it is managed and negotiated within a local context. The survey reports only 31% of organisations that have offshore operations feel they have a comprehensive understanding of relevant foreign bribery laws and 34% reported limited or no working knowledge at all of the applicable domestic or foreign bribery laws in the regions in which they were operating. A total of 40% of organisations operate in what Transparency International refers to as 'high risk areas' and of those, 35% had experienced an incident of corruption or bribery within the last five years. Of organisations that had experienced known instances of foreign bribery and corruption in the last five years, the largest percentage was in the energy and resources industries at 30%. PWYP Australia is also aware that of the 28 foreign bribery cases referred to in the OECD Phase 3 report, 13 were from the mining sector (46.4%).⁸ This confirms PWYP Australia's concerns that transparency in extractives industries is still fundamentally an issue not being adequately addressed by current Australian policy initiatives or legislation.

Of significant concern was that of 427 bribery cases examined by the OECD, 69% of them were settled without sanctions being imposed, making a crime type where the offender has a

³ Transparency International, 'Global Corruption Report 2009: Corruption and the Private Sector', p. xxv.

⁴ Transparency International, 'Global Corruption Report 2009: Corruption and the Private Sector', p. xxv.

⁵ OECD, 'OECD Foreign Bribery Report An analysis of the crime of bribery of foreign public officials', OECD Publishing, 2014
<http://www.oecdilibrary.org/docserver/download/2814011e.pdf?expires=1439353603&id=id&accname=guest&checksum=FA2BAD8C4BB2F7E2D5064E31AD8CDAFE>

⁶ OECD, 'OECD Foreign Bribery Report, 2 December 2014, <http://www.oecd.org/daf/oecd-foreign-bribery-report-9798264226616-en.htm>

⁷ <http://www2.deloitte.com/au/en/pages/risk/articles/bribery-corruption-2015-survey.html>

⁸ http://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/add_1314/AGD/AGD-AE14-057.pdf

better than even chance of escaping sanction even if they do get caught.⁹ Equally concerning is the length of time taken to conclude bribery cases, with an average case taking 7.3 years and the longest time taken to reach a final sentence in a foreign bribery case being 15 years.¹⁰

The US has demonstrated that national legislation can be used to help try and level the global playing field against bribe payers, targeting a significant amount of its enforcement effort towards foreign multinational corporations with a presence in the US that have paid bribes overseas.

In writing this submission the authors heard common stories from both companies and non-government organisations operating in certain developing countries of being placed under duress by local government officials to pay bribes, not just small bribes in the form of facilitation payments. In reality these demands amount to a form of extortion. The government official demanding the payment knows the cost to the company of them not carrying out their job in a timely manner will be greater than the cost to the company of the payment they are demanding. Overwhelming, these demands for bribes were illegal under the laws of the country in which the bribe was being demanded. The Unit believes greater efforts should be made by the Australian Government to provide support to companies and non-government organisations in being able to resist demands for bribes.

1. Recommendations

The Australian Government should:

- Introduce whistleblower protection and reward legislation for private sector employees. The protection part of the legislation should be based on the UK *Public Interest Disclosure Act 1998* and the reward part of the legislation should be based on the US *False Claims Act*.
- Introduce a requirement for a public register of the ultimate beneficial owners of companies, given the role shell companies and special purpose entities play in bribery and many forms of illicit flows.¹¹ Australia should also support this becoming a global standard.
- Follow the lead of the UK and criminalise bribery directed at foreign private parties as well as public officials when the bribes are paid by Australian residents or Australian companies or their agents.
- Maintain the current situation where there is no statute of limitation for the foreign bribery offence under Division 70 of the *Criminal Code*.
- Debar companies convicted of foreign bribery from Australian Government contracts for a period of time to be decided after further consultation as to what would act as an appropriate deterrent to foreign bribery.
- Provide greater support to companies in being able to resist demands for bribes in any form from foreign officials. It should seek to work with industry associations of industries likely to experience demands for bribes in the industry association supporting its members in resisting demands for bribes.
- Repeal of Section 70.4 of the *Criminal Code*, with an exception for payments that are required by law to foreign officials under the laws of the country the Australian company is operating in.

⁹ OECD, 'OECD Foreign Bribery Report, 2 December 2014, <http://www.oecd.org/daf/oecd-foreign-bribery-report-9798264226616-en.htm>

¹⁰ OECD, 'OECD Foreign Bribery Report, 2 December 2014, <http://www.oecd.org/daf/oecd-foreign-bribery-report-9798264226616-en.htm>

¹¹ Global Witness, 'Undue Diligence. How banks do business with corrupt regimes', March 2009, pp. 109-111.

- The repeal of Sections 25-52(4) and 26-52(5) of the *Income Tax Assessment Act 1997 (Cth)* that allow for bribes made in the form of facilitation payments to be claimed as tax deductions.
- Amending paragraph 70.2(2)(b) of the *Criminal Code* to ensure bribery remains an offence irrespective of the value of the benefit offered or given, but a court may consider the value where value alone suggests a benefit is not legitimately due.
- Amending subsection 70.2 of the *Criminal Code* so that, when proving that a benefit was offered or provided with an intention to influence a foreign public official, it is not necessary to prove an intention to influence a particular foreign public official. The Unit also supports an equivalent amendment to the offence of bribing a Commonwealth official in Division 141 of the *Criminal Code*.
- Deleting the word 'dishonestly' from Divisions 141 and 142 of the *Criminal Code* to harmonise domestic and foreign bribery offences and ensure greater compliance with the *UN Convention Against Corruption*.
- Evaluate existing corporate guidance materials and develop official guidance materials on what is a culture of compliance' and a good anti-bribery compliance program, especially targeting small and medium businesses involved in overseas transactions.

Table of Contents

1. Recommendations	3
2. Examples of alleged Foreign Bribery Cases involving Australian Businesses or Individuals	7
2.1. Getax and Nauru.....	7
2.2. Securrency	7
3. Australia’s Obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention Against Corruption	14
4. Resourcing and Effectiveness of Australian Law Enforcement Agencies	16
4.1. Cases of concern.....	18
4.1.1. Special Agricultural and Business Leases in PNG.....	18
4.1.2. OZ Minerals in Cambodia.....	20
4.1.3. Layne Christenson	21
4.1.4. Tenix.....	22
4.2. Disclosure of Ultimate Beneficial Ownership of Companies	23
5. Range of Penalties.....	24
5.1. Debarment.....	24
6. Statute of Limitation	24
7. Range of Offences	24
7.1. False Accounting Offence.....	24
8. Measures to Encourage Self-Reporting	24
9. Corporate Guidance.....	25
10. Private Sector Whistleblower Reward and Protection	26
11. Facilitation Payment Defence	28
11.1. Corporate Policies on using the Facilitation Payment Defence for paying Bribes....	31
11.2. Australian Government monitoring of bribes paid under the Facilitation Payment Defence	35
11.3. The Legality of Bribes paid under the Facilitation Payment Defence	36
11.3.1. Cambodia	36
11.3.2. India.....	36
11.3.3. Indonesia	37
11.3.4. Lao People’s Democratic Republic	38
11.3.5. Lesotho	38
11.3.6. Mexico	38

11.3.7. Nigeria	38
11.3.8. Tanzania	39
11.3.9. Uganda	39
11.3.10. Zambia	40
12. Economic Impact of Foreign Bribery	40
13. References	43
Appendix 1. Details of company policies on payment of bribes under the Facilitation Payment Defence.	46
Appendix 2. Background to Publish What You Pay Australia	61

2. Examples of alleged Foreign Bribery Cases involving Australian Businesses or Individuals

2.1. Getax and Nauru

Australian phosphate company Getax was named by *The Sunday Age* in January 2013 as one of the 28 companies that the OECD had identified as having allegations of foreign bribery made against it.¹² *The Sunday Age* reported that the AFP had interviewed two complainants on claims that Getax had bribed parliamentarians in Nauru in order to obtain a phosphate mining permit, but that the investigation could not continue due to lack of jurisdiction¹³. PWYP Australia understands that as of 2015, this investigation has been reopened and the AFP are well progressed into an investigation into Getax, a wholly owned Australian company. Leaked emails to the Australian Broadcasting Corporation (ABC) appear to show hundreds of thousands of dollars being paid to current Nauruan politicians whilst they were in opposition to help install a government amenable to allowing Getax to buy phosphate at prices below market value.¹⁴

2.2. Securrency

Securrency, a subsidiary of the Reserve Bank of Australia, was accused of using money laundering schemes to channel millions of dollars to offshore companies.¹⁵ This allegedly was not stopped by RBA up to six months after the police started investigations for bribery, which may have allowed corrupt conduct to continue.¹⁶

Confidential documents allegedly revealed that Securrency had wired \$5.8 million of bribe money to a company in Seychelles in early August 2009.¹⁷ Following which \$1.45 million was wired in late September 2009.¹⁸ Close to \$23 million were allegedly paid by Securrency to win currency contracts in Nigeria.¹⁹ Tracing the money trail, the documents allegedly revealed that the payments made by Securrency to the Seychelles were then wired to a Lebanese businessman and British businessman offshore accounts.²⁰ Allegedly, these funds were then sent to high-ranking Nigerian officials.²¹ Securrency's first payments linking to Nigerian deals dated back to late 2006 which involved a sum of \$6.4 million sent to another tax haven, Isle of Man.²²

¹² Maris Beck and Ben Butler, 'Police reopen OZ, Cochlear bribery cases', *The Sunday Age*, 13 January 2013, <http://www.smh.com.au/business/police-reopen-oz-cochlear-bribery-cases-20130112-2cmrt.html>

¹³ Maris Beck and Ben Butler, 'Bribery Cases Reopened', *The Sunday Age*, 13 January 2013.

¹⁴ Hayden Cooper and Alex McDonald, 'Nauru President and Justice Minister face bribery allegations involving Australian company', 7:30 Report, ABC, 8 June 2015, <http://www.abc.net.au/7.30/content/2015/s4251115.htm>

¹⁵ Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

¹⁶ Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

¹⁷ Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

¹⁸ Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

¹⁹ Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

²⁰ Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

²¹ Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

²² Nick McKenzie and Richard Baker, "Slush fund paid \$23m in bribes: how RBA firm hid the money trail", *The Age*, 20 November 2010.

An audit released by the RBA regarding Securrency, blamed senior executives “for not disclosing important information to the board.”²³ The RBA also banned the business practice of hiring overseas middlemen.²⁴ It was also alleged that Securrency circumvented anti-bribery laws by routing money through Switzerland to pay a Vietnamese agent millions of dollars in commission.²⁵

The case involving Securrency has been summarised in the TRACE Compendium as follows:²⁶

In May 2009, The Age, a Melbourne-based newspaper, reported that Securrency may have made improper payments to Vietnamese government officials in order to secure a contract in 2002 to supply polymer banknotes to the Vietnamese government. Securrency allegedly hired Hanoi-based Company For Technology and Development ("CFTD") as its local agent because it employed the son of the State Bank of Vietnam's governor. The company also allegedly partnered with Banktech, a subsidiary of CFTD that was run by the governor's son. The newspaper alleged that millions of dollars in commissions were made to CFTD and/or Banktech, ostensibly for translation services, organizing meetings and picking up people from the airport. Some of the payments were allegedly routed through a bank account in Switzerland.

On November 19, 2009, federal police raided Securrency's offices in Melbourne, as well as the homes of two executives - Myles Curtis, the Managing Director, and John Ellery, the Company Secretary. According to an article in the Sydney Morning Herald on March 31, 2010, Curtis and Ellery left the company following the release of a KPMG audit report into the alleged bribery. Curtis and Ellery had been on suspension since the November raids. According to the article, the KPMG audit found that, between January 2003 and January 2009, Securrency had paid almost AUD 47.5 million in commissions and other payments to a global network of politically connected agents, yielding revenue of AUD 361.4 million.

The UK Serious Fraud Office joined the investigation, as two of Securrency's sales executives conducted much of their work from England. On October 6, 2010, over 80 UK SFO investigators raided nine properties (eight residential premises and one commercial property) across the UK. Two Britons were arrested. The Australian and Spanish authorities carried out related raids as well.

On October 15, 2010, the UK SFO announced that three additional individuals had been arrested in connection with the matter.

According to press reports, the company's activities in India also became part of the investigation.

Additional press reports on 7 August 2012 suggest that the Reserve Bank of Australia suppressed evidence of secret commissions paid to middle men hired by Securrency or NPA to secure bank note contracts in Malaysia and Nepal. A press release by the RBA issued on 22 August 2012 vehemently denies the media allegations, and explains that ongoing judicial proceedings prevented the release of the relevant documents. No RBA employees have been charged in the case.

²³ Nick McKenzie and Richard Baker, “Slush fund paid \$23m in bribes: how RBA firm hid the money trail”, *The Age*, 20 November 2010.

²⁴ Nick McKenzie and Richard Baker, “Slush fund paid \$23m in bribes: how RBA firm hid the money trail”, *The Age*, 20 November 2010.

²⁵ Nick McKenzie and Richard Baker, “From the sunny Seychelles to the misty grey Isle of Man: how the RBA millions disappeared into financial darkness” *The Age*, 20 November 2010.

²⁶ <https://www.traceinternational2.org/compendium/view.asp?id=162>

NIGERIA

Media sources allege that in connection with the 2006 deal to supply NGN 1.9 billion in banknotes to the Central Bank of Nigeria, Securrency paid NGN 750 million (approximately USD 4.6 million) in bribes, and that much of the bribe money was transferred into bank accounts in tax havens belonging to two UK businessmen. Some media reports name the two businessmen. The reports allege that the funds were transferred from the businessmen's accounts to those of Nigerian officials, and that the transactions took place between 2006 and 2009.

MALAYSIA

It is alleged that NPA and Securrency paid a Malaysian arms broker to pass bribes to Malaysian Central Bank officials. Media reports allege that NPA [Note Printing Australia Limited] set up a project called Exocet, through which they paid Kayum AUD 3 million between 2003 and 2007. The commissions paid to Kayum - up to 20% - raised concerns with some NPA executives in 2007. But, according to media sources, NPA held a board meeting in September 2007, attended by the RBA assistant governor, the Securrency and NPA chairman, and others, at which participants were informed that Securrency was planning to pay Kayum a secret commission of AUD 492,000 that would be hidden in an overpriced banknote contract. When, in 2008 Kayum wrote a letter reminding the RBA that he "managed to personally convince my prime minister/finance minister and the Malaysian cabinet to accept and adopt polymer bank note technology," NPA gave him an additional AUD 600,000 in commissions.

Following these revelations, the RBA issued a statement to the press, noting that there had been no attempt by the bank to hide information from the authorities, and that the "bank's executives acted in good faith and with integrity."

The assistant governor of the MCB and the arms dealer, Abdul Kayum, were later arrested.

RBA Response to Allegations

Media accounts published in September 2012 allege that despite receiving written notice of the bribery in 2007, RBA governor Glenn Stevens and top executives remained silent for years, or worse. These allegations are answered in a comprehensive statement made by Glenn Stevens, governor of the RBA, in an opening speech to the House of Representatives Standing Committee on Economics on 8 October 2012. A memorandum elaborating this statements was also submitted to the committee.

Stevens first declares the purpose of his address: to review the background of Securrency and NPA, to review "in detail the sequence of events that began with the Reserve Bank Board asking about the use of foreign sales agents" by Securrency and NPA, and to give "an account of the way Securrency, NPA and the Reserve Bank behaved after the allegations...were aired in the media in May 2009."

2006-2007

In 2006 Securrency and NPA were asked by the Board of the RBA to articulate their policies on the employment of agents. In February 2007 the RBA board asked the companies to achieve faster progress on implementing policies regarding the employment of agents and the assurance of ethical conduct.

The manager of NPA raised concerns about two of NPA's agents in April 2007, which

were presented at the NPA Board meeting in May 2007. In a report to the Board, it was noted that two of the three agents had not signed the required affirmation and one had failed to provide a written response regarding improper conduct, as required by NPA's policies. Therefore, at the May 2007 NPA board meeting, it was decided to terminate the contracts of two agents and conduct a review of all agent files. Recommendations were made to the RBA, which concluded in June 2007 that a further investigation needed to be conducted, and that Securrency should be asked to report on its use of agents, and that NPA should cease using agents. The NPA board concluded on 29 August 2007 that, "after an extensive investigation with assistance from external lawyers, the sub-committee had identified instances of weakness in controls and documentation, and in contract management, but it had found no evidence of illegality or impropriety by NPA managers and staff."

A similar audit was commissioned regarding Securrency's agency practices; as a result, Securrency terminated its Malaysian agency agreement as of 15 July 2007. Another audit of Securrency was conducted in 2008. A settlement was reached in September 2007 with NPA's terminated agent, and NPA's board was notified in May 2008. Likewise, arrangements were made to pay Securrency's terminated agent for work performed prior to the termination.

2009-2010

According to the 8 October 2012 press statement, in May 2009, after receiving inquiries from the newspaper *The Age*, the new Securrency Chairman first contacted the auditors KPMG to ask that it conduct a review of Securrency's agent policies and procedures. When the newspaper article was published, the Securrency Chairman (B. Rankin) contacted the Australian Federal Police ("AFP") and "proposed that an investigation be conducted." Securrency informed the AFP about the prior audit, but the AFP did not request the documents produced by the audit until January 2010. Securrency refrained from engaging KPMG in order not to hinder the AFP investigation. With the AFP's approval, KPMG was later engaged by the companies in July 2009 to conduct an independent audit.

As a result of the audit, Securrency learned from KPMG in October 2009 that "concerns about possible corrupt payments had been raised by a Securrency employee with Securrency senior management in early 2007. These concerns had never been made known to the Securrency Board or the Audit Department when it conducted either the 2007 or 2008 audits. At the time the CEO and CFO of Securrency were stood down and the use of agents suspended pending further inquiry. The preliminary findings reported by KPMG also indicated that there had been failures to fully implement the procedures specified in Securrency's agent policies and procedures."

In conclusion, the RBA press statement notes that "the persons charged with wrongdoing are no longer with either company," and that "the use of foreign sales agents at NPA ceased in 2007...NPA these days operates under a tighter charter to keep its focus more closely aligned with the Bank's core objectives and risk tolerance." Use of sales agents by Securrency was discontinued after the KPMG report.

HOW CONDUCT WAS DISCOVERED

The conduct appears to have been uncovered by the investigative reporting of *The Age* newspaper. According to Securrency, following *The Age*'s allegations in May 2009, the company referred the matter to the Australian Federal Police ("AFP"). The AFP commenced an investigation shortly thereafter and then executed search warrants on the company's premises and the executives' homes in November 2009.

In July 2009, Securrency engaged KPMG to conduct a forensic investigation into the allegations and to review the company's compliance policies and procedures regarding the retention of commercial intermediaries. According to Securrency, the investigation preliminarily found that a Securrency employee filed an internal complaint with management in 2007, after which management conducted an internal investigation and concluded that no action was required. This information was not disclosed to Securrency's Board or to the Reserve Bank of Australia's auditors who conducted a compliance audit shortly thereafter.

In November 2009, Securrency's Board asked Curtis and Ellery to "stand aside" from their positions as the investigation continued. The Board also suspended overseas marketing activities involving foreign agents.

ENFORCEMENT RESULT

AUSTRALIA

On July 1, 2011, the Australian Federal Police ("AFP") charged Securrency and its sister company, Note Printing Australia ("NPA"), with bribery of foreign public officials in connection with alleged bribes paid to public officials in Indonesia, Malaysia and Vietnam between 1999 and 2005 - through international sales agents - in order to secure banknote contracts. Six individuals from Victoria - who previously worked for Securrency or NPA as chief executives, chief financial officers or sales agents - were arrested and charged as well. According to the AFP, the Australian arrests coincided with related bribery charges laid against two individuals in Malaysia by the Malaysian Attorney General's Chambers, following an investigation by the Malaysian Anti-Corruption Commission.

On 27 October 2011, both NPA and Securrency entered guilty pleas at the Melbourne Magistrate's Court to three charges each of bribing or conspiring to bribe foreign officials to obtain a business advantage.

On 12 March 2012, the Australian Securities and Investment Commission (ASIC) released a statement that it did not intend to prosecute Securrency International Pty Ltd and Note Printing Australia Limited, noting, "ASIC considers a range of factors when deciding to investigate and possibly take enforcement action. In line with its normal practice, ASIC has reviewed this material from the AFP for possible directors' duty breaches of the Corporations Act and has decided not to proceed to a formal investigation. ASIC intends to make no further comment on this matter."

Ellery

On 18 July 2012, David John Ellery, who served as Securrency's CFO, pleaded guilty to a charge of false accounting in relation to a AUD 79,502 payment to Kuala Lumpur arms broker Abdul Kayum Syed Ahmad. Specifically, Ellery admitted that he created a false document to facilitate a payment to Kayum even though he knew the latter was not entitled to it. Ellery is one of nine individuals to have been indicted by the Australian Federal Police. In accepting his guilty plea, the Victoria Supreme Court acknowledged Ellery's willingness to testify against the eight remaining defendants. Ellery's counsel noted that his client had not been involved in a wider conspiracy, and falsified documents at the behest of his superiors, and even that Ellery had warned senior colleagues at Securrency that Kayum was not entitled to any money from the company.

Following a hearing on 18 July 2012, the Supreme Court of Victoria (Melbourne) issued a sentencing judgment on 20 August 2012. Ellery's offenses could invoke a

maximum 10 year prison sentence. The judge went to great lengths to explain Ellery's offense and the court's reasoning. Ellery approved a commission payment to Kayum in Malaysia of AUD 79,502. Later, when an invoice fabricated by Kayum reflected the same amount but showed an itemized list of "expenses," Ellery forwarded it for payment. When questioned about the "expenses" subsequently, Ellery concealed the nature of the payment. In his favor, the judge noted that Ellery did not create the false document, did not at first wish to approve it, ultimately approved it without any idea of personal gain. When confronted, Ellery pleaded guilty early in the proceedings, and agreed to cooperate in ongoing investigations both of Securrency and NPA offenses in Malaysia and other jurisdictions. The judge therefore sentenced Ellery to 6 months' imprisonment suspended for two years, meaning that the sentence could be imposed if, at any time during the coming two years, Ellery commits another offense punishable by imprisonment.

Other Individuals

Amended charge sheets were issued against 8 individuals on 14 August 2012: Anderson, Boillot, Brady, Curtis, Gerathy, Hutchinson, Leckenby and Marchant. A summary of the charges follows:

Mitchell Anderson – Charged with conspiring between December 1999 and June 2000 in one instance, and February 2001 in another instance, to confer a benefit on another person when such benefit was not legitimately due him, with the intention of influencing a foreign public official in the exercise of the official's duties in order to obtain or retain business with the Bank of Indonesia.

Christian Boillot and Barry Brady – Charged with conspiring between October 2001 and December 2003 to offer to provide a benefit to another person to whom such benefit was not legitimately due, with the intention of influencing a foreign public official in the exercise of the official's duties in order to obtain or retain business with Bank Negara Malaysia.

Myles Curtis - Charged with conspiring between December 1999 and June 2000 in one instance, and February 2001 in another instance, to confer a benefit on another person when such benefit was not legitimately due him, with the intention of influencing a foreign public official in the exercise of the official's duties in order to obtain or retain business with the Bank of Indonesia.

Curtis is also charged with conspiring between October 2001 and December 2003 to offer to provide a benefit to another person to whom such benefit was not legitimately due, with the intention of influencing a foreign public official in the exercise of the official's duties in order to obtain or retain business with Bank Negara Malaysia.

Curtis is also charged with conspiring between January 2001 and September 2004, and again between January and October 2003, with offering to provide a benefit to a person when not legitimately due to that person, with the intention of influencing a foreign public official in the exercise of the official's duties, in order to obtain or retain business with the State Bank of Vietnam.

Curtis is also charged with dishonestly falsifying documents made or required for an accounting purpose (by concurring in the making of a false debit note), between June and July 2006, with a view to gain for another.

Clifford Gerathy - Charged with conspiring between January 2001 and September 2004, and again between January and October 2003, with offering to provide a benefit to a person when not legitimately due to that person, with the intention of

influencing a foreign public official in the exercise of the official's duties, in order to obtain or retain business with the State Bank of Vietnam.

Gerathy is also charged with dishonestly falsifying documents made or required for an accounting purpose (by concurring in the making of a false debit note), between June and July 2006, with a view to gain for another.

Peter Hutchinson - Charged with conspiring between December 1999 and February 2001 to confer a benefit on another person when such benefit was not legitimately due him, with the intention of influencing a foreign public official in the exercise of the official's duties in order to obtain or retain business with the Bank of Indonesia.

John Leckenby - Charged with conspiring between December 1999 and February 2001 to confer a benefit on another person when such benefit was not legitimately due him, with the intention of influencing a foreign public official in the exercise of the official's duties in order to obtain or retain business with the Bank of Indonesia.

Leckenby is also charged with conspiring between October 2001 and December 2003 to offer to provide a benefit to another person to whom such benefit was not legitimately due, with the intention of influencing a foreign public official in the exercise of the official's duties in order to obtain or retain business with Bank Negara Malaysia.

Rognvald Marchant – One charge was withdrawn.

Australian authorities are seeking the extradition of an Indonesian intermediary hired by the RBA, Radius Christanto, who was in custody in Singapore. Together, Ellery and the other eight defendants are alleged to have made or authorized over AUD 1.6 million in improper payments.

UNITED KINGDOM

On 8 September 2012, the SFO [Serious Fraud Office] charged William ("Bill") Lowther with one count of conspiracy to corrupt during 2003. Lowther first appeared in court on 20 September, and pleaded not guilty at a hearing in March. On 26 November 2012, his trial began Southwark Crown Court.

At the trial, prosecutors claimed that Lowther was the driving force behind Securrency, and that the company was desperate to turn a profit and pay back start-up loans. In order to secure two dozen note printing contracts with Vietnam worth GBP 90 million, Lowther arranged to send the son of the governor of the State Bank of Vietnam to Durham Business School in Britain. Lowther is alleged to have arranged for an interview at the school, driven Le Duc Minh, Le Duc Thuy's son, to the interview, and thereafter arranged for the payment of GBB 18,000 in tuition, in addition to GPB 3,400 for rooming expenses for Minh.

Media reports dated 24 October 2012 that the SFO is also investigating corruption by Securrency in certain African nations.

MALAYSIA

The Malaysian Anti-Corruption Commission (MACC) investigation - On 1 July 2011, the MACC reported that Abdul Kayum bin Syed Ahmad, 62 years, Director of Aksavest Sdn. Bhd had been charged with having "corruptly given a gratification of RM50,000.00 to Dato' Mohamad Daud bin Dol Moin through a middleman on the 24th November 2004 at EON Bank, Jalan Taipan, Subang Jaya, Selangor as an inducement to assist Note Printing Australia Ltd to secure currency printing contracts

for RM5 polymer bank notes from Bank Negara Malaysia. The second charge is for a similar offence allegedly committed on 15th February 2005 at the same venue." Likewise, another press release was issued by the MACC on the same day, noting that "Dato' Mohamad Daud bin Dol Moin was earlier charged this morning at the Special Courts for Corruption at Jalan Duta, Kuala Lumpur Court Complex on two counts of charges for accepting the gratification from the accused, Abdul Kayum bin Syed Ahmad."

NIGERIA

Media sources allege that on 11 January 2013, the Economic and Financial Crimes Commission of Nigeria (the EFCC) arrested Charles Chukwuma Soludo at his Abuja residence, and detained him for questioning in connection with the note printing contract with Securrency. Soludo served as the governor of the Central Bank of Nigeria between 2006 and 2008. Media reports indicated that in addition to Soludo, 12 senior former CBN and Nigerian Security Printing and Minting Company officials were also arrested.

UK authorities have charged Emmanuel Okoyomon with bribery and money laundering for allegedly receiving bribes from Securrency in relation to a contract to print bank notes in Nigeria. According to media reports, Mr. Okoyomon had been arrested as part of the work of Nigeria's Economic and Cinancial Crimes Commission. In May 2015, the Nigerian High Court approved Mr. Okoyomon's extradition to the UK.

It should be noted that William Lowther was reported to have been acquitted of the charge against him in his UK trial.²⁷

3. Australia's Obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention Against Corruption

The Organisation for Economic Co-operation and Development (OECD) *Convention on Combating Bribery of Foreign Public officials in International Business Transactions* (OECD Convention); and the *United Nations Convention Against Corruption* (UNCAC) are core international mechanisms for addressing corruption. Australia signed the OECD Convention in December 1998 and legislation to implement the convention was passed in June 1999. UNCAC was signed by Australia in December 2003 and was ratified by Parliament in December 2005. Australia's adherence to these conventions have been reviewed systematically since becoming signatories, and Australia has received passing marks on implementing processes to fulfil its obligations to the OECD Convention and UNCAC. It is, however, important to note that even in having successfully achieved pass marks for enactment, Australia has continued to receive criticism for its implementation of certain aspects of both conventions, most noticeably from the OECD, and recommendations to improve Australia's effective implementation of these conventions has been received from both bodies. The *OECD Phase 3 Report on Implementing the OECD Anti-Bribery convention in Australia*²⁸ published in in October 2012 highlighted numerous areas of concern where Australia was not meeting its requirements under the OECD Convention and outlined 33 recommendations that the established OECD working group required Australia to implement or show processes of implementing when it next reported. Australia's progress on these

²⁷ http://www.bankingday.com/nl06_news_selected.php?selkey=14140

²⁸ <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf>

recommendations was published by the working group in their report, *Australia: Follow-up to the Phase 3 Report and Recommendations*²⁹ in April 2015. While the report found that Australia had been working adequately to address the recommendations made in the initial Phase 3 report and had successfully implemented 16 of the 33 recommendations, with a further 9 partially implemented, it also highlighted that Australia is still struggling to meet its requirements on legislative reform to enact recommendations addressing facilitation payments (Phase 3 report recommendations 2b, 4a, 14a and 11) and whistle blower protection (Phase 3 report recommendations 15d, 15b, 15c and 16a).

Australia's responsibility to enacting reform in these areas was also echoed in a summary of the first review of Australia's implementation of the UNCAC in 2012.³⁰ The scope of the review was limited to Chapter III - Criminalization and Law Enforcement and Chapter IV – International Cooperation. The recommendations put forward in this report advocated for Australia to "Continue to periodically review policies and approach on facilitation payments in order to effectively combat the phenomenon and continue to encourage companies to prohibit or discourage the use of such payments, including in internal company controls, ethics and compliance programmes or measures."³¹ Also the Australian Government should look at "The adoption and implementation of legislation currently under review for the establishment of a comprehensive scheme for public sector whistle-blower protection and to expedite access to existing protections for private sector whistle-blowers."³² Australia has adopted this legislation for public sector whistleblower protection but is yet to introduce a similar mechanism for the private sector.

Initially the OECD Convention did not require signatories to criminalise facilitation payments however the 2009 report *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* shows that the OECD is moving towards much firmer guidelines in this area recommending:³³

"... in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:

- i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;*
- ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records."*

This move towards stricter guidelines leaves Australia open to continuing criticism that it is not meeting its obligations under the OECD Convention. Transparency International has also called on Australia to remove the qualified defence of facilitation payments³⁴. PWYP Australia and the Uniting Church of Australia, Synod of Victoria and Tasmania, recognise the work successive Australian governments have done in addressing the recommendations of the OECD and UNCAC. We recommend that the full implementation of recommendations is enacted and that legislative reform to ensure this is undertaken is passed as a matter of priority.

²⁹ <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf>

³⁰ <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf>

³¹ <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf>

³² *ibid*

³³ <http://www.oecd.org/daf/anti-bribery/44176910.pdf>

³⁴ http://issuu.com/transparencyninternational/docs/2013_exportingcorruption_oecdprogre

4. Resourcing and Effectiveness of Australian Law Enforcement Agencies

The Australian Federal Police (AFP) are responsible for the investigation of allegations of foreign bribery relating to Australian citizens, Australian residents, Australian registered companies or any instances of foreign bribery which partly or wholly occurred in Australia.³⁵ The establishment of the Fraud and Anti-Corruption (FAC) business area under the Crime Program in February 2013 enhances the AFP response to foreign bribery, using a multi-agency approach to strengthen prevention and enforcement capability in areas of serious fraud and corruption (including the Australian Taxation Office, Australian Securities and Investments Commission, Australian Crime Commission, Australian Customs and Border Protection Service, Department of Human Services, Department of Immigration and Border Protection, Department of Defence, and Department of Foreign Affairs and Trade).³⁶

The AFP currently has its first and only prosecution under foreign bribery legislation introduced in 1999 in the *Securrency/NPA case*, although the number of foreign bribery investigations has increased to 17 in 2015 (up from 7 in October 2012). Despite a serious lack of convictions for foreign bribery, the latest OECD report relating to the implementation of the OECD Anti-Bribery Convention in Australia (April 2015) noted significant improvements in foreign bribery enforcement since a 2012 OECD Working Group on Bribery report, which documented concern for Australian enforcement of foreign bribery laws. The OECD's *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (October 2012) noted a serious lack of foreign bribery convictions and extremely low enforcement of foreign bribery laws in Australia.³⁷ While the Working Group welcomed Australia's recent efforts in the enforcement of foreign bribery laws, it expressed "serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low".³⁸ Recommendations and identified areas of improvement from the report as pertaining to law enforcement were as follows:

- Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials.³⁹
- The AFP take sufficient steps to ensure that foreign bribery allegations are not prematurely closed, and be more proactive in gathering information from diverse sources at the pre-investigative stage.⁴⁰
- Concurrent or joint investigations with Australian and foreign authorities should continue to be systematically considered.⁴¹
- Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate.⁴²
- The AFP continue to provide its officers with additional training in foreign bribery, and training to law enforcement officials to implement the *Cybercrime Legislation Amendment Act 2012*.⁴³

³⁵ Australian Federal Police, 'FAC Foreign Bribery Fact Sheet,' *AFP: Fraud and Anti-Corruption Business Area*, July 2014, <http://www.afp.gov.au/~media/afp/pdf/f/facforeignbriberyfactsheet.pdf>

³⁶ Australian Federal Police, 'Fraud and Anti-Corruption Business Area', 2015, <http://www.afp.gov.au/policing/fraud/fac-business-area>

³⁷ OECD, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia,' *OECD Working Group on Bribery*, October 2012, <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf>

³⁸ *Ibid.*, 5

³⁹ *Ibid.*, 49

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 5

⁴² *Ibid.*, 50

⁴³ *Ibid.*

- Adopt a whole-of-government approach to raise awareness of foreign bribery.⁴⁴

Despite serious concerns about lack of enforcement, the OECD report also identified positive developments, as foreign bribery became a priority for the Australian government. Since 2012, and particularly since the establishment of the FAC, the AFP has focused on strengthening investigation, enforcement and prosecution efforts involving foreign bribery. Transparency International's 2012 progress report on the enforcement of the OECD Anti-Bribery Convention named Australia as one of its most improved enforcers.⁴⁵ The AFP has continued to increase enforcement efforts and taken significant steps to strengthen its ability to prosecute corporate criminals in anti-bribery investigations.⁴⁶ The AFP has made a number of efforts to improve its record of enforcement since the 2012 OECD Phase 3 review, with 16 out of 33 recommendations fully implemented, 9 partially implemented and 8 not implemented.⁴⁷ The OECD's follow-up report to the Phase 3 review, published in April 2015, identified the following improvements in law enforcement:

- Australia has made good progress on addressing a number of important recommendations. In particular, the AFP has been active in improving its policy and operations regarding foreign bribery. Australia has reviewed its overall approach to enforcement, resulting notably in the establishment of an inter-agency Fraud and Anti-Corruption Centre (FAC Centre) (*recommendation 1*).⁴⁸
- The FAC Centre has improved coordination between the AFP and ASIC (*recommendation 6*). The coordination between these two agencies was further increased through staff secondments, knowledge-sharing, and an inter-agency MOU setting out the roles and responsibilities of the two agencies (*recommendation 6 and 7a*).⁴⁹
- An AFP Foreign Bribery Panel of Experts was also established, which considered all of the Working Group's recommendations to the AFP (*recommendation 8b*). AFP officers have benefited from foreign bribery training by the Panel of Experts, in addition to other foreign bribery training (*recommendation 10a*).⁵⁰
- In addition, the AFP has made progress towards ensuring that foreign bribery investigations are thoroughly investigated, that all avenues are pursued, and that allegations come from diverse sources; although the Group would like to see an increase in enforcement before it can conclude that *recommendation 8a* has been fully implemented.⁵¹
- Australia has made significant steps in terms of improving the resourcing, effectiveness and structure of law enforcement agencies in regards to investigating and prosecuting foreign bribery since 2012, with recent cases demonstrating the improvement in enforcement efforts by the AFP.

In a media statement in October 2013, the AFP reaffirmed its commitment to improving its capacity to tackle foreign bribery offences, devoting significant resources to the pursuit of foreign bribery investigations. The AFP also joined the International Foreign Bribery

⁴⁴ Ibid., 51

⁴⁵ Fritz Heimann and Gillian Dell, 'Exporting Corruption? Country Enforcement of the OECD Anti Bribery Convention Annual Report 2012', *Transparency International*, 2012, http://issuu.com/transparencyinternational/docs/2012_exportingcorruption_oecdprogress_en?e=2496456/2042485

⁴⁶ Georgia Wilkins, 'Hurdles in solving corporate frauds,' *The Age*, November 9, 2013, 7

⁴⁷ OECD, 'Australia: Follow-up to the Phase 3 Report & Recommendations,' *OECD Working Group on Bribery*, April 2015, <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf>, 4

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

Taskforce (IFBT) in May 2013, a trans-border agreement enabling like-minded countries to work collaboratively to combat foreign bribery and support OECD and UN anti-bribery conventions. Head of the FAC, Linda Champion, has recently warned companies of a “foreign bribery crackdown”⁵² as the AFP goes ahead with prosecutions and investigations into Australian companies paying bribes to foreign officials, including CIMIC (formally Leighton Holdings) and BHP Billiton. Champion told *The Australian Financial Review* in August 2015:

*You will see, over the next 12 months or so, some matters hopefully go to prosecution stage, which will send a very strong message that we are taking this [foreign bribery] crime very seriously and enforcing the legislation [...] We started ramping up our efforts towards foreign bribery a couple of years ago and now we are starting to see the fruits of that – understanding the crime type better, sharing more information through overseas agencies, and the legal processes – and now we've got some healthy investigations under way to get some real momentum in that area.*⁵³

4.1. Cases of concern

At the same time, we remain concerned at the level of resourcing applied to deal with allegations of foreign bribery by the AFP and the willingness to vigorously pursue cases. These concerns are highlighted in the cases below.

4.1.1. Special Agricultural and Business Leases in PNG

The Justice and International Mission Unit, Synod of Victoria, Uniting Church in Australia wrote to the Attorney General on 14 April 2014 to request a thorough investigation of companies with Australian links that had been accused of illegal activities in Papua New Guinea Commission of Inquiry reports into Special Agricultural and Business Leases (SABL) released in September 2013.

The Commission of Inquiry found evidence of illegal and criminal activity around the SABL process.⁵⁴ This included allegations of fraud⁵⁵, bribes and ‘inducements’ being paid to government officials⁵⁶, “legal requirements were deliberately breached”⁵⁷, “landowners’ signatures were forged”⁵⁸ and “we found instances where ‘consent’ of landowners for SABL titles to be issued directly to foreign owned companies was obtained fraudulently through misrepresentations”.⁵⁹

Of particular concern were the findings of the Commission of Inquiry about the role bribes had paid in corrupting the SABL process. The Commission of Inquiry found:⁶⁰

⁵² Patrick Durkin, ‘AFP ramps up probes into foreign bribes,’ *The Australian Financial Review*, August 10, 2015

⁵³ Ibid.

⁵⁴ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, pp. 235-242.

⁵⁵ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 235.

⁵⁶ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 235.

⁵⁷ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 236.

⁵⁸ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 239.

⁵⁹ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 240.

⁶⁰ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 239.

“We found that landowner companies and developers routinely pay ‘allowances’ to government officials to carry out land investigations. It is improper and raised issues of conflict of interest. We have found that in such instances the investigating officer inevitably makes recommendations in favour of the developer.”

The Commission of Inquiry report by Commissioner Nicholas Mirou found that a Queensland-led PNG registered company, International Timber and Stevedoring Ltd (IT&SL), had colluded with government officials to “fraudulently acquire” SABLs.⁶¹ Simon Malu, Director of Land Acquisition in the relevant PNG Department alleged he had been paid allowances directly by IT&SL.⁶² The Commission found Mr Malu had neglected his duty to the PNG landowners and that “No due diligence was conducted and it is evident that he was merely been directed by IT&SL due to the fact that he had already compromised his position when he was paid allowances [from] IT&SL over the said project”.⁶³ IT&SL obtained four leases over more than two million hectares belonging to tens of thousands of people in PNG’s Western Province. Local landowners alleged their signatures had been forged on consent forms related to the granting of an SABL for the benefit of IT&SL.⁶⁴ IT&SL is a PNG registered company jointly owned by IT&S USA Inc (a Delaware registered company with 12 million shares), Hilo Investments Pty Ltd (a Queensland registered company with 7 million shares) and Paul and Winifred Japhlom, PNG nationals with 200 shares.

Victory Plantation Limited, a PNG registered company with only two shareholders, both Australians, was also named in the Commission of Inquiry report by Chief Commissioner John Numapo:⁶⁵

Victory Plantations Limited (VPL) played a major role in assisting the facilitation of the entire land acquisition process and collaborated with Simon Malu and Alois from DLPP to carry out the land investigations and compiled the LIR. Again, all these were done without the knowledge of the Department of Oro and the Oro Provincial Government. We consider the conduct of the developer-VPL to be unethical, improper and wrong. The developer has taken over a role that clearly belongs to the State. Moreso, the whole arrangement gives rise to a conflict of interest situation. We doubt if the land investigations was ever carried out at all and the LIR compiled freely, fairly and independently without any undue influence from VPL as the preferred developer of the project.

Given that Mr Malu alleged that he had accepted ‘allowances’ from IT&SL, it raises questions about why he also allegedly failed to carry out his duties properly in dealing with VPL and gave them favourable treatment. The Commission of Inquiry also found in the VPL case “the Agency Agreement form appears to be signed by the same person which suggests fraud.”⁶⁶

⁶¹ Nicholas Mirou, ‘Commission of Inquiry into Special Agricultural and Business Lease Report’, June 2013, p. 431.

⁶² Nicholas Mirou, ‘Commission of Inquiry into Special Agricultural and Business Lease Report’, June 2013, p. 449.

⁶³ Nicholas Mirou, ‘Commission of Inquiry into Special Agricultural and Business Lease Report’, June 2013, p. 451.

⁶⁴ Nicholas Mirou, ‘Commission of Inquiry into Special Agricultural and Business Lease Report’, June 2013, p. 468.

⁶⁵ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 203.

⁶⁶ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 203.

The Commission of Inquiry was also concerned that VPL has conducted illegal logging activities.⁶⁷

Evidence before the inquiry suggested that the developer [VPL] has already carried out some clear felling (logging operations) in the area and if there is any truth in this then the VPL must immediately cease its operations as without an FCA clear felling cannot take place. This is contrary to Section 90B of the Forestry Act 1991.

The AFP wrote back to the Justice and International Mission Unit to state that after an initial investigation no further action would be taken. It is rare that a foreign public official will allege they have accepted payments from a foreign company, as in this case.

The Committee should seek to hold an in camera session with the AFP to explore why the investigation into the allegations against International Timber and Stevedoring Ltd and Victory Plantations Limited for possible foreign bribery were dropped.

The Committee should seek contact with Commissioners John Numapo and Nicholas Mirou and with Simon Malu to see if the AFP ever made contact with them regarding the allegations against International Timber and Stevedoring Ltd and Victory Plantations Limited for possible foreign bribery were dropped.

The Committee should invite International Timber and Stevedoring Ltd and Victory Plantations Limited to respond to the allegations made against them in the Commission of Inquiry reports.

4.1.2. OZ Minerals in Cambodia

The Australia Federal Police (AFP) to have reopened an investigation into allegations that OZ Minerals paid a bribe in Cambodia.⁶⁸ Media have suggested the AFP revived the OZ Minerals case after criticism from the OECD for initially dismissing the allegations in January 2013 and not rigorously enforcing foreign bribery laws.⁶⁹ Allegations of corruption first appeared in 2011 when a Cambodian newspaper released an investigative report claiming that in 2009 OZ Minerals allegedly paid \$US4.6 million to buy out Shin Ha, a partner in the project holding a 20% share, on the proviso that exploration licences signed by the mining minister would be delivered.⁷⁰ Three Shin Ha directors, who had close or familial connections with officials from the mining ministry, are alleged to have received funds in proportion to their shareholding⁷¹. The AFP initially found that OZ Minerals did not have a case to answer, however the OECD issued a strong rebuke stating “The AFP did not inquire into key matters that could have corroborated the allegations, such as whether the board

⁶⁷ John Numapo, ‘Commission of Inquiry into the Special Agricultural and Business Leases’, 24 June 2013, p. 205.

⁶⁸ Matt Chambers, “OZ Minerals faces Cambodian bribery investigation”, *The Australian*, 27 April 2015, <http://www.theaustralian.com.au/business/companies/oz-minerals-faces-cambodian-bribery-investigation/story-fn91v9q3-1227322087261>

⁶⁹ Matt Chambers, “OZ Minerals faces Cambodian bribery investigation”, *The Australian*, 27 April 2015, <http://www.theaustralian.com.au/business/companies/oz-minerals-faces-cambodian-bribery-investigation/story-fn91v9q3-1227322087261>

⁷⁰ Matt Chambers, “OZ Minerals faces Cambodian bribery investigation”, *The Australian*, 27 April 2015, <http://www.theaustralian.com.au/business/companies/oz-minerals-faces-cambodian-bribery-investigation/story-fn91v9q3-1227322087261>

⁷¹ Matt Chambers, “OZ Minerals faces Cambodian bribery investigation”, *The Australian*, 27 April 2015, <http://www.theaustralian.com.au/business/companies/oz-minerals-faces-cambodian-bribery-investigation/story-fn91v9q3-1227322087261>

members were indeed related to foreign public officials, the due diligence conducted by the company was sound and the buyout proceeds were channelled to the board members.”⁷²

The Committee should ask the AFP, in camera, why the original investigation into OZ Minerals was dropped and then why it has been reopened?

4.1.3. Layne Christenson

The Securities and Exchange Commission (SEC) in the United States charged Layne Christenson more than \$US5 million (\$A5.7 million) for violations of foreign bribery laws in 2014.⁷³ Layne Christenson is a construction, drilling and water management company based in Texas, USA, with subsidiaries worldwide, including Australia. The SEC found that Layne Christenson, through Stanley Mining Services, a company wholly owned by Layne Christenson Australia - a subsidiary of Layne Christenson - had moved money through its US bank account to Stanley Mining Services to reduce its tax bill in numerous African nations, including Mali and Guinea, and to pass bribes to customs for equipment clearance.⁷⁴ Further some of the payments were falsely reported – being recorded as payment for “freight services” or described as “legal commissions”.⁷⁵

Among the findings in the US Securities and Exchange Commission’s order were:⁷⁶

- Layne paid nearly \$800,000 to foreign officials in Mali, Guinea, and the Democratic Republic of the Congo (DRC) to reduce its tax liability and avoid associated penalties for delinquent payment. The bribes enabled Layne to realize more than \$3.2 million in improper tax savings.
- Layne made improper payments to customs officials in Burkina Faso and the DRC to avoid paying customs duties and obtain clearance to import and export its equipment. The bribes were falsely recorded as legal fees and commissions in the company’s books and records.
- Layne paid more than \$23,000 in cash to police, border patrol, immigration officials, and labour inspectors in Burkina Faso, Guinea, Tanzania, and the DRC to obtain border entry for its equipment and employees. The bribes also helped secure work permits for its expatriate employees and avoid penalties for non-compliance with local immigration and labour regulations.

The AFP would not comment on the case. "This investigation is a matter for US authorities. As such all inquiries should be directed to them," an AFP spokesman said.⁷⁷

⁷² Matt Chambers, “OZ Minerals faces Cambodian bribery investigation”, *The Australian*, 27 April 2015, <http://www.theaustralian.com.au/business/companies/oz-minerals-faces-cambodian-bribery-investigation/story-fn91v9q3-1227322087261>

⁷³ Georgia Wilkins, ‘Subsidiaries Snared in Bribe Case’ *The Age*, 29 October 2014, p. 27, http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=BCDEE9D378F8A30D1582FB8A2CAE396C?sy=af&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1637&clsPage=1&docID=AGE141029CI4J35L4A88

⁷⁴ Georgia Wilkins, ‘Subsidiaries Snared in Bribe Case’ *The Age*, 29 October 2014, p. 27, http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=BCDEE9D378F8A30D1582FB8A2CAE396C?sy=af&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1637&clsPage=1&docID=AGE141029CI4J35L4A88

⁷⁵ Georgia Wilkins, ‘Subsidiaries Snared in Bribe Case’ *The Age*, 29 October 2014, p. 27, http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=BCDEE9D378F8A30D1582FB8A2CAE396C?sy=af&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1637&clsPage=1&docID=AGE141029CI4J35L4A88

⁷⁶ US Securities and Exchange Commission, ‘SEC Charges Texas- Based Layne Christensen Company with FCPA Violations’, Media Release, 27 October 2014, <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857>

⁷⁷ Georgia Wilkins, ‘Subsidiaries Snared in Bribe Case’ *The Age*, 29 October 2014, p. 27, <http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=BCDEE9D378F8A30D1582FB8A2>

The Committee should ask the AFP, in camera, why they chose not to investigate and possibly prosecute those connected with the Australian part of Layne Christenson involved in this foreign bribery case?

4.1.4. Tenix

The Transfield Company was founded in 1956 by Franco Belgiorno-Nettis and Carlos Salteri. The company focused on major engineering projects and rose to become one of the biggest companies in the region.⁷⁸ In 1995, Transfield Holdings (as it was named then), under the managements of Paul Salteri and Marco Belgiorno-Zegna, split into two due to alleged irreconcilable differences between the families. The Belgiorno-Nettis family took the construction side of the business and kept its operations under the Transfield name. The Salteri family took the defence operations which were renamed Tenix Defence Systems.⁷⁹

In January 2008, Tenix Defence was acquired by BAE systems for A\$775 million.⁸⁰

In 2011, raids were conducted by AFP agents on premises linked to Tenix⁸¹. The search warrants issued against Tenix Defence, accused it of involvement in a foreign bribery scheme designed to win lucrative defence contracts across Asia in the early mid-2000s, before being acquired by BAE in 2008.⁸² It was BAE that did a forensic audit work and called in the AFP when irregularities were found.⁸³

The Age reported that up to five Tenix deals were being investigated upon by the AFP.⁸⁴ Allegations against Tenix involved kickbacks worth hundreds of thousands of dollars paid to high-ranking officials in Indonesia and other Asian countries.⁸⁵ Furthermore, Tenix allegedly made high risk payments of several million dollars that may have been used as bribes.⁸⁶

In 2001-02, Tenix had a contract to supply six search-and-rescue vessels for the Philippines coast guard. This deal was made possible due to a \$109 million guarantee from the Export Finance and Insurance Corporation (EFIC) which enabled the Philippines to borrow from banks so as to pay Tenix for the boats.⁸⁷ In 2005, senior Filipino politicians protested against repaying the loan as there had never been appropriation for the boats in the national budget. In 2008, the Philippines Parliament declared the deal illegal and passed a bill banning the payment of interest on the loan.⁸⁸ This resulted in \$100 million Australian government money unrepaid. Declassified diplomatic cables allegedly revealed that Australian officials in 2001 were already aware that the contract was facing financial problems. Furthermore, cables allegedly showed that in 2005, Australian officials were aware that an order by the Philippines for search and rescue vessels from Tenix was made without the required budgetary approvals in Manila⁸⁹.

CAE396C?sy=af&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1637&clsPage=1&docID=AGE141029CI4J35L4A88

⁷⁸ Nick McKenzie and Richard Baker, "Brothers in Arms", *The Age*, 7 March 2012.

⁷⁹ Nick McKenzie and Richard Baker, "Brothers in Arms", *The Age*, 7 March 2012.

⁸⁰ Nick McKenzie and Richard Baker, "Brothers in Arms", *The Age*, 7 March 2012.

⁸¹ Nick McKenzie and Richard Baker, "Defence firm faces bribe probe", *The Age*, 7 March 2012.

⁸² Nick McKenzie and Richard Baker, "Defence firm faces bribe probe", *The Age*, 7 March 2012.

⁸³ Nick McKenzie and Richard Baker, "Bribery probe extends to ex-navy men", *The Age*, 21 March 2012.

⁸⁴ Nick McKenzie and Richard Baker, "Defence firm faces bribe probe", *The Age*, 7 March 2012.

⁸⁵ Nick McKenzie and Richard Baker, "Brothers in Arms", *The Age*, 7 March 2012.

⁸⁶ Nick McKenzie and Richard Baker, "Bribery scandal widens", *The Age*, 24 September 2012.

⁸⁷ Nick McKenzie and Richard Baker, "Defence firm faces bribe probe", *The Age*, 7 March 2012.

⁸⁸ Nick McKenzie and Richard Baker, "Bribery probe extends to ex-navy men", *The Age*, 21 March 2012.

⁸⁹ Nick McKenzie and Richard Baker, "Bribery scandal widens", *The Age*, 24 September 2012.

In 2012, two retired senior Royal Australian navy officers were under investigation for alleged involvement in foreign bribery tied to the contract to supply search and rescue vessels to the Philippines Coast guard.⁹⁰

A search of the TRACE Compendium did not reveal how the case was resolved.⁹¹

The Committee should ask the AFP, in camera, what was the outcome of their investigation into this case and if it is still on-going? If the case is still under investigation, the Committee should ask the AFP what are the barriers that are preventing them from bringing it to closure?

4.2. Disclosure of Ultimate Beneficial Ownership of Companies

Australia should introduce a requirement for a public register of the ultimate beneficial owners of companies, given the role shell companies and special purpose entities play in bribery and many forms of illicit flows.⁹² It should also support this becoming a global standard. Research by Findley, Nielson and Sharman also found Australian corporate service providers were near the top of corporate service providers in terms of being willing to set up an untraceable shell company even when there was significant risk the company in question would be used for illicit purposes.⁹³

An OECD report into foreign bribery released in December 2014 found that in 25% of foreign bribery cases, the illicit money was channelled through shadowy secret companies. The report listed the ways law enforcement was tricked by "... subsidiary companies, local consulting firms, companies located in offshore financial centres or tax havens or companies established under the beneficial ownership of either the public official who received the bribes or the individual or entity that paying the bribes."⁹⁴

A public register of the ultimate beneficial owners of companies would be a significant step in addressing the risks raised by opacity of shell companies.

In a recent interview Detective Constable Mark Lugton of the UK Overseas Anti-Corruption Unit within the City of London Police said of public registers of beneficial ownership of companies:⁹⁵

This is an excellent idea and has been lobbied for by law enforcement for some time. Clearly not being able to trace the real owner of a company is open to abuse, not only for bribery and corruption but also for other fraud offences. The idea that in this global market individuals can hide behind companies is no longer acceptable. This will obviously make the work of law enforcement that little bit easier at least within the UK and will provide a further hurdle for the criminal elements within business to jump over.

⁹⁰ Nick McKenzie and Richard Baker, "Bribery probe extends to ex-navy men", *The Age*, 21 March 2012.

⁹¹ <https://www.traceinternational2.org/compendium/view.asp?id=390>

⁹² Global Witness, 'Undue Diligence. How banks do business with corrupt regimes', March 2009, pp. 109-111.

⁹³ Michael Findley, Daniel Nielson and Jason Sharman, 'Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies', Centre for Governance and Public Policy, Griffith University, 2012, p. 21.

⁹⁴ Adam Foldes, 'OECD sheds light on Transnational Corruption', Transparency International, 5 December 2014.

⁹⁵ UN Convention Against Corruption Civil Society Coalition, 'Interview with Mark Lugton, Detective Constable, Operations, UK Overseas Anti-Corruption Unit', 23 July 2015, http://uncaccoalition.org/en_US/interview-with-mark-lugton-detective-constable-operations-uk-overseas-anti-corruption-unit/

The G20 Leaders' Summit in Brisbane in November 2014 took a small step forward in disclosure of beneficial ownership by committing to implement the G20 High Level Principles on Beneficial Ownership Transparency.⁹⁶

5. Range of Penalties

5.1. Debarment

There is a growing argument that the range of penalties for individuals and companies convicted of foreign bribery offences should include debarment from government contracts. Currently, individuals and companies would not be debarred from government contracts and programs if convicted of foreign bribery or fraud offences in Australia or in other countries. As a noteworthy anti-corruption initiative, systems of debarment have operated in the United States, European Union and United Nations for quite some time, to deter companies from engaging in unethical and corrupt behaviour. An important tool in fighting corruption, debarment effectively 'blacklists' those who have been convicted of certain crimes (e.g. bribery or fraud) from winning government-funded work. Even if a debarment system was not formally instituted in Australia, regulators could blacklist offenders on the basis of other well-established foreign debarment systems, such as those used in the US or World Bank. Although generally governments are not bound by other governments' or institutions' debarment decisions, governments may "take note, and make informal enquiries, when another government or institution takes action against a contractor."⁹⁷ Cross-debarment has the potential to increase anti-corruption efforts with minimal effort by allowing Australian authorities to exclude offenders from public-sector procurement contracts.

6. Statute of Limitation

We note that under Section 15B of the *Crimes Act*, a prosecution may be commenced at any time if the maximum penalty is a term of imprisonment of more than six months. A prosecution of a body corporate may be commenced at any time if the maximum penalty is a fine of more than 150 penalty units. Thus the current foreign bribery offence under Division 70 of the *Criminal Code* has no statute of limitation. We do not believe this should change.

7. Range of Offences

7.1. False Accounting Offence

In addition to the false accounting offence in the US *Foreign Corrupt Practices Act*, there is also a false accounting criminal charge under the UK *Theft Act 1968*⁹⁸ which is commonly used in fraud and bribery cases.⁹⁹ Australian law should adopt a similar approach.

8. Measures to Encourage Self-Reporting

A survey of 250 senior executives from Australian and New Zealand companies conducted by Deloitte seems to suggest many companies fail to report the detection of bribery. The survey was reported to have found that one-third of all companies operating in high-risk

⁹⁶ G20 Leaders' Communique, Brisbane Summit, 15-16 November 2014, p. 3.

⁹⁷ Christopher R. Yukins, 'Cross-Debarment: A Stakeholder Analysis,' *The George Washington International Law Review* 45, no. 2 (March 2013): 221, <http://docs.law.gwu.edu/stdg/gwilr/PDFs/45-2/JLE201.pdf>

⁹⁸ Section 17.

⁹⁹ Transparency International UK, 'Countering Small Bribes', June 2014, p. 22.

overseas jurisdictions, including in Asia, Africa and the Middle East, had uncovered a suspected bribery or corruption incident in the past five years.¹⁰⁰ It was reported that only a handful of those companies had reported their suspicions that their own staff have engaged in foreign bribery or other criminal activity.¹⁰¹

The UK Serious Fraud Office has issued guidance to companies that self-reporting of bribery will be taken into consideration in any decision to prosecute.¹⁰²

The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. That Guidance explains that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a 'genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.' Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.

9. Corporate Guidance

There are already corporate guidance materials that exist. For example, Transparency International UK has produced a booklet on 'Countering Small Bribes' to assist businesses. Guidance is also provided by the large accountancy firms, for a fee. It would be worth evaluating the usefulness of existing corporate guidance materials and developing from them official guidance materials for companies.

Existing guidance materials include:

- Guidance to the UK *Bribery Act 2010* at:
<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>
- 'Adequate Procedures – Guidance to the UK *Bribery Act 2010*' from Transparency International UK at:
<http://www.transparency.org.uk/our-work/publications/10-publications/95-adequate-procedures-guidance-to-the-uk-bribery-act-2010>
- 'A Resource Guide to the US Foreign Corrupt Practices Act' at:
<http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>
<http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>
- The OECD 'Recommendations for further combating bribery' includes as Annex II the 'Good Practice Guidance on Internal Controls, Ethics and Compliance', and can be found at:
<http://www.oecd.org/corruption/governmentsagreeonestepupfightagainstbribery.htm>
- Transparency International 'Business Principles for Countering Bribery' which can be downloaded from www.transparency.org
- OECD 'Anti-corruption and Ethics and Compliance Handbook' at:
<http://www.oecd.org/g20/topics/anti-corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm>
- 'Small Bribes Buy Big Problems' at: www.cipe.org/publications/fs/pdf/092107.pdf
- 'Diagnosing Bribery Risk' by Transparency International UK which can be found at:
<http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf> or
<http://www.transparency.org.uk/our-work/publications/10-publications/678-diagnosing-bribery-risk>
- 'Guide for Anti-Corruption Risk Assessment, UN Global Compact 2013'

¹⁰⁰ Nick McKenzie and Richard Baker, 'Firms keep bribes quiet', *The Age*, 26 March 2015.

¹⁰¹ Nick McKenzie and Richard Baker, 'Firms keep bribes quiet', *The Age*, 26 March 2015.

¹⁰² Transparency International UK, 'Countering Small Bribes', June 2014, p. 23; and UK Serious Fraud Office, October 2012, <http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx>

- 'RESIST: Resisting Extortion and Solicitation in International Transactions' by Transparency International which can be found at: www.transparency.org
- 'Doing Business without Bribery' by Transparency International UK which can be found at:
<http://www.transparency.org.uk/our-work/publications/94-ti-uk-doing-business-without-bribery-trainers-handbook>
or <http://www.doingbusinesswithoutbribery.com/>
- 'Fighting Corruption through Collective Action: A Guide for Business' which can be found at: http://info.worldbank.org/etools/docs/antic/Whole_guide_Oct.pdf

There is a British Standard companies can get to demonstrate their systems oppose bribery, BS 10500 Anti-Bribery.¹⁰³

An international standard, ISO 37001 Anti-bribery management system, is under development.¹⁰⁴

AUSTRAC has recently issued advice to businesses to avoid being caught up in laundering money related to foreign bribery, including cases of Australian companies paying bribes to foreign officials, through their strategic analysis brief *Politically exposed persons, corruption and foreign bribery*.¹⁰⁵

The City of London Police run an Economic Crime Academy which provides an extensive range of course on all aspects of economic crime, and tailors training to fit a relevant company or sector.¹⁰⁶

10. Private Sector Whistleblower Reward and Protection

Whistleblowers in the private sector in other jurisdictions have played a valuable role in exposing cases of foreign bribery. The OECD Working Group on Bribery *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* released in October 2012 found Australia provided inadequate protection to whistleblowers in the private sector:

144. Regarding private sector whistleblowers, laws cited by the Australian authorities are insufficient or irrelevant to foreign bribery. Section 317A of the Corporations Act protects officers, employees and contractors of Australian companies who disclose violations of the Corporations Act to ASIC. This covers disclosure of foreign bribery-related false accounting, but not foreign bribery per se. Whistleblower laws that apply only to financial institutions are not so restricted and cover disclosures about any misconduct, including foreign bribery. None of these laws, however, protects disclosures to law enforcement or the media....

The Working Group highlighted the value of whistleblower protection in combating foreign bribery:

145. Despite inadequate protection, some whistleblowing does occur. Some participants at the on-site visit believed that whistleblowing in the private sector has been useful in detecting misconduct such as foreign bribery. In the Securrency/NPA case, one whistleblower reported wrongdoing to the company and the AFP, while a second disclosed allegations to the media. The case, however, may also highlight the

¹⁰³ <http://www.bsigroup.com/en-AU/BS-10500-Anti-Bribery/>

¹⁰⁴ http://www.iso.org/iso/iso_37001_anti-bribery_management_systems_standard_brochure.pdf

¹⁰⁵ AUSTRAC, 'Politically exposed persons, corruption and foreign bribery', July 2015.

¹⁰⁶ UN Convention Against Corruption Civil Society Coalition, 'Interview with Mark Lugton, Detective Constable, Operations, UK Overseas Anti-Corruption Unit', 23 July 2015, http://uncaccoalition.org/en_US/interview-with-mark-lugton-detective-constable-operations-uk-overseas-anti-corruption-unit/

need to better protect whistleblowers, as two Securrency employees claim to have been dismissed after raising bribery concerns. Commentators believe that better whistleblower protection could lead to a higher level of foreign bribery enforcement.

The OECD Working Group on Bribery recommended:

... Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable ground from discriminatory or disciplinary action.

Since 1863 the US has also had the *False Claims Act* which has encouraged whistleblowers to come forward with information about fraud against the government in return for a share of the damages recovered. The *False Claims Act* empowers citizens to bring suit on behalf of the government for fraud against the government.¹⁰⁷ The Act rewards the whistleblower 15% to 25% of the fraud recovered due to the whistleblowing.¹⁰⁸

The provision of financial reward for whistleblowing has allowed the US to expose major cases of illegal activity against the US Government. Between 1986 and 2008 the amount of recovery from fraud was more than US\$20 billion, and fraud has been detected at 50 times the rate before the amendments to the *False Claims Act* were made in 1986.¹⁰⁹ Last year the US Internal Revenue Service paid former banker Bradley Birkenfeld US\$104 million for his role in exposing the role Swiss bank UBS had played in US citizens engaging in tax evasion. According to the IRS, Birkenfeld had “provided information on taxpayer behaviour that the IRS had been unable to detect, provided exceptional cooperation, identified connections between parties to transactions, and the information led to substantial changes in UBS business practices and commitment to future compliance.” They went on to say “While the IRS was aware of tax compliance issues related to secret bank accounts in Switzerland and elsewhere, the information provided by the whistleblower formed the basis for unprecedented actions against UBS.” His information directly resulted in UBS having to pay a US\$780 million fine to the US Government and over 35,000 taxpayers voluntarily repatriated their illegal offshore accounts. This resulted in the collection of over US\$5 billion in back taxes, fines and penalties. His disclosure also indirectly led to revised tax treaty negotiations between the US and Swiss governments, and to UBS subsequently releasing the names of over 4,900 US taxpayers with offshore accounts, who were then investigated.¹¹⁰

A 2007 study of corporate fraud in the US between 1996 and 2004 by Alexander Dyck, Adair Morse and Luigi Zingales found only 6% of frauds were uncovered by the SEC and 14% by auditors. By comparison 19% were exposed by employees and 14% by the media.¹¹¹

Media sources have reported as part of the Stop International Tax Evasion Program by the Canadian Revenue Agency, whistleblowers will be rewarded up to 15% of federal tax collected for information leading to tax recoveries exceeding \$100,000.¹¹² The rewards will only be paid where the questionable activity involves foreign property, or property located or

¹⁰⁷ Indira Carr, “The UK Bribery Act: Business Integrity and Whistleblowers”, *Financial Fraud Law Report* 4(4), April 2012, pp. 368-369.

¹⁰⁸ Kim Sawyer, “Rewarding whistleblowers for risk brings results”, *The Australian Financial Review*, 23 December 2008.

¹⁰⁹ Kim Sawyer, “Rewarding whistleblowers for risk brings results”, *The Australian Financial Review*, 23 December 2008.

¹¹⁰ Lowtax Library Newswire, “IRS Pays UBS Whistleblower USD104 m’”, 14 September 2012.

¹¹¹ Kim Sawyer, “Rewarding whistleblowers for risk brings results”, *The Australian Financial Review*, 23 December 2008.

¹¹² Jason Fekete, “Whistleblowers will get cash rewards for helping nab tax cheats”, *Montreal Gazette*, <http://www.montrealgazette.com>, 21 March 2013.

transferred outside Canada, or transactions conducted partially or entirely outside Canada. However, reward payments will be subject to income tax.

Germany also provides rewards for whistleblowing.¹¹³

11. Facilitation Payment Defence

TI's *Business Principles for Countering Bribery* argues that facilitation payments are a form of bribery and that companies should work towards their elimination.¹¹⁴

Transparency International (using Kaufman and Wei's landmark 1999 research) have highlighted that facilitation payments increase, rather than decrease, red tape and have wider reaching and long term consequences – impacting negatively on tax revenues, governance structures and opening the door to more serious forms of corruption, while also leaving companies open to risk.¹¹⁵ TI has pointed out “Small bribes are part of a spectrum of corruption. They are not isolated acts. Often, facilitation payments are demanded within a network of bribery whereby junior officials have to share their bribery gains with seniors.”¹¹⁶

TI has stated that facilitation payments are illegal in most countries, although a small number including Australia, New Zealand, South Korea and the USA provide exceptions, in certain circumstances, for facilitation payments when paid abroad.¹¹⁷ They remain illegal in their own domestic law. Canada passed legislation in 2013, the *Corruption of Foreign Public Officials Act*, that bans companies from paying small bribes to foreign officials in the form of facilitation payments.¹¹⁸ It is reported that out of 33 countries evaluated by the OECD, 25 report having no exemption for facilitation payments in their anti-bribery laws.¹¹⁹

TI UK has stated there is growing international recognition that facilitation payments are not easily separated from other forms of small bribe and more and more companies are following a no-bribes policy throughout their global operations, with no exemptions for facilitation payments.¹²⁰

In the US there has been a narrowing down of what is accepted by the Department of Justice and Securities and Exchange Commission as meeting the definition of a facilitation payment.¹²¹ Of significant note is that the foreign official being bribed with the facilitation payment must have no choice in the action for which the facilitation payment is being demanded. All the official can do is to provide the action to speed it up. If the official has discretion, then a payment would appear to have been made for obtaining an advantage not available to others.¹²² In the words of the US Department of Justice:¹²³

The FCPA's bribery prohibition contains a narrow exception for “facilitating or expediting payments” made in furtherance of routine governmental action. The

¹¹³ Jason Fekete, “Whistleblowers will get cash rewards for helping nab tax cheats”, *Montreal Gazette*, <http://www.montrealgazette.com>, 21 March 2013.

¹¹⁴ http://www.transparency.org/global_priorities/private_sector/business_principles/faq

¹¹⁵ http://www.transparency.org/files/content/corruptionqas/The_impact_of_facilitation_payments.pdf

¹¹⁶ Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 38.

¹¹⁷ Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 4.

¹¹⁸ Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 36.

¹¹⁹ Will Fitzgibbon, ‘Wealthy nations preserve bribery loophole’, International Consortium of Investigative Journalists, 30 January 2014.

¹²⁰ Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 4.

¹²¹ Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 37.

¹²² Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 37.

¹²³ Quote from the Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’, cited in Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 38.

facilitating payments exception applies only when a payment is made to further “routine governmental action” that involves non-discretionary acts. Examples of “routine governmental action” include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official’s discretion or that would constitute misuse of an official’s office.

The Australian Council of Super Investors (ACSI) published a report in October 2011 that found while more Australian companies are now prohibiting bribery than five years ago, they still lag behind their international peers.¹²⁴ They found 59% of ASX 200 companies with international operations prohibit bribery, but only 16% of ASX 100 companies prohibit small bribes in the form of facilitation payments and only half restrict or control them. It was found 28% of the ASX 100 do not publicly disclose a policy that prohibits either bribery or bribes made as facilitation payments.¹²⁵ The report concluded of over half of the ASX 200 companies that have operations in the UK or US, 35% have no stated policy that prohibits bribery or bribes paid as facilitation payments and 43% have inadequate management systems to implement company policy.¹²⁶

ACSI noted some Australian States define bribery to already include facilitation payments. Further, they extend lawful application of State law to include extra-territoriality, including to overseas locations where there is some connection to the State of the conduct which has resulted in the facilitation payment being made.¹²⁷

The UN Office on Drugs and Crime has stated that that “a facilitation payment is simply another term for a bribe.”

In permitting the payment of small bribes in the form of facilitation payments a company is likely to undermine its own anti-corruption policies. It is likely to be a source of confusion for employees and other parties the company deals with. On the one hand a company may state that it is committed to operating within the law and not paying bribes and having zero tolerance to bribes, while on the other it is allowing certain bribes to be paid if they meet a definition of a facilitation payment. Employees may find it hard to deal with the technical differentiation between a bribe and a bribe paid as a facilitation payment.¹²⁸

The not-for-profit international organisation TRACE interviewed 42 companies engaged in international business and found none of the companies that approached the issue of prohibiting bribes in the form of facilitation payments carefully and comprehensively reported significant or prolonged disruption to their business activities.¹²⁹

Ernst and Young reported six months after the implementation of the UK *Bribery Act 2010*, which prohibited the payment of any bribe, only 6% of 406 business representatives believed the law had affected their ability to do business.¹³⁰ Jonathan Middup, Head of the E&Y Anti-

¹²⁴ Australian Council of Super Investors, ‘Anti-Corruption and Bribery Practices in Corporate Australia’, Research Paper, October 2011, pp. 5, 12-13.

¹²⁵ Ibid. p. 14.

¹²⁶ Ibid. p. 5.

¹²⁷ Ibid. p. 8.

¹²⁸ Transparency International UK, ‘Countering Small Bribes’, June 2014, p. 39.

¹²⁹ TRACE, ‘The High Cost of Small Bribes’, 2003, p.5.

¹³⁰ Ernst and Young, ‘Nearly six months on, UK companies claim Bribery Act has not affected ability to do business says EY’, Media Release, 9 December 2011.

Bribery and Corruption team stated: “The premise that UK businesses need to pay bribes to be competitive abroad is a false one.”¹³¹

Four months later E&Y reported that 24% of middle managers believed the *Bribery Act 2010* was affecting the UK’s competitiveness.¹³² The survey revealed only 15% of the 1,000 middle managers surveyed had received any kind of training or guidance from their employer about the *Bribery Act*.¹³³ John Smart a partner at E&Y stated:¹³⁴

Businesses may feel that they have been placed at a competitive disadvantage due to the Bribery Act. In the short term it may seem to hand opportunities to less scrupulous competitors, particularly in sectors or countries where the risks of bribes or facilitation payments are more common. However with increasing enforcement and a global drive to reduce corruption, in the long run there will be a level playing field among different countries.

Although the requirements set out by the Bribery Act clearly need to be taken very seriously, it is wrong to assume that the Act will hurt British competitiveness on the global stage. With the right policies, procedures and systems in place, British companies have nothing to fear, and neither do their customers.

However a survey by Control Risks in March 2015 found that just 1.3% of businesses in the UK felt that bribes in the form of facilitation payments were essential to keep their business going.¹³⁵

A survey by Control Risks was reported in March 2015 to have found that 12.2% of Australian and New Zealand businesses felt that bribes in the form of facilitation payments were essential to keep their business going, compared to 1.3% of businesses in the UK, as noted above, and 24.6% of businesses in China.¹³⁶ This would appear to reinforce the view that the willingness to pay bribes is strongly influenced by a business culture in a country.

It has been argued an inability of Australian companies to pay small bribes in the form of facilitation payments would result in Australian companies being placed at a competitive disadvantage compared to foreign companies. Of course, the same argument can be made for other forms of bribery that are already illegal under Australian law. In fact, the competitive disadvantage argument could be used to justify any sort of corrupt behaviour. It is generally accepted that bribery has a corrosive impact on governance, good government and properly functioning markets. Allowing for small bribes in the form of facilitation payments on the grounds of competitive disadvantage is to say that a little bit of bribery is acceptable to level the playing field. Clearly the goal should be to work to raise the bar for all companies to have to compete without corruption being present in the business environment. This is made harder to achieve if a government like the Australian Government allows its companies to pay a certain level of bribes while saying it would like bribery stamped out.

Companies should seek to actively collaborate with each other, including with foreign companies and industry associations, to deter and eliminate demands for bribes. Any

¹³¹ Ernst and Young, ‘Nearly six months on, UK companies claim Bribery Act has not affected ability to do business says EY’, Media Release, 9 December 2011.

¹³² Ernst and Young, ‘Nearly a year on, one in four worry that Bribery Act is affecting UK competitiveness’, Media Release, 30 April 2012.

¹³³ Ernst and Young, ‘Nearly a year on, one in four worry that Bribery Act is affecting UK competitiveness’, Media Release, 30 April 2012.

¹³⁴ Ernst and Young, ‘Nearly a year on, one in four worry that Bribery Act is affecting UK competitiveness’, Media Release, 30 April 2012.

¹³⁵ Sarah-Jane Tasker, ‘Fears of spike in foreign bribery’, *The Australian*, 27 March 2015.

¹³⁶ Sarah-Jane Tasker, ‘Fears of spike in foreign bribery’, *The Australian*, 27 March 2015.

problem of competitive disadvantage from refusing to pay bribes would be overcome if all companies refused to pay bribes and supported each other in such a policy.

An example of an industry association playing a positive role in combating bribery is the British Chamber of Shipping which offers to act as the conduit for passing on information on local corruption to the UK Serious Fraud Office and the local British Embassies or High Commissions. This may be useful where a company is reluctant to work with competitors (primarily because of competition law sensitivities) or be prepared to draw attention directly to the local corruption because of possible reprisals.¹³⁷ Such a role played by an industry association can assist companies in resisting the payment of bribes.

The Australia-Africa Mining Industry Group (AAMIG) is an industry organisation established to represent Australian and Australian-based mining, exploration, service and supply companies operating in Africa. It states its four main areas of focus include:¹³⁸

- Meaningful engagement of host-country communities,
- Political and social risk management,
- Anti-bribery and corruption,
- Security risk management.

The AAMIG have been the most vocal public advocates for the maintenance of Australian companies being able to pay small bribes to foreign officials for them to carry out their jobs, under the facilitation payment defence in the Australian *Criminal Code*.

We find it difficult to understand the argument made by some companies and industry associations that it is impossible to resist the demands for small bribes from junior government officials for them to carry out their jobs, but at the same time the company is able to resist demands from more senior government officials for large bribes for them to do their jobs. Discussions with former employees of companies where the company has given in to demands for payments from foreign officials has indicated that such payments then extend to larger forms of payment to more senior government officials, in violation of the *Criminal Code*. The wall of secrecy around the frequency and amounts paid in bribes in the form of facilitation payments by Australian companies operating overseas make verification of such claims impossible.

It is vital that the Committee ask companies and non-government organisations to provide the written records of any small bribes they have paid under the facilitation payment defence to shed light on what happens in practice. How often are such bribes paid? Are they paid to a handful of officials or hundreds? Do most officials get a one off payment or are they on a regular facilitation payment payroll? In practice, how large can the bribes be? What services are such small bribes paid to facilitate? Is there any disclosure to local authorities when payments are made?

11.1. Corporate Policies on using the Facilitation Payment Defence for paying Bribes

We attempted to gain a clearer picture of the practice of Australian companies in paying small bribes to foreign officials under the facilitation payment defence. To do so we wrote to all ASX 100 companies and all corporate member organisations of the Australia-Africa Mining Industry Group requesting to know their position on facilitation payments. The letter asked:

- In which countries does your company allow employees to make facilitation payments?

¹³⁷ Transparency International UK, 'Countering Small Bribes', June 2014, p. 25.

¹³⁸ <http://aamig.com/>

- What information is recorded when a facilitation payment is made?
- Who in the company keeps the records of facilitation payments? Is there a central contact point?
- Are there any limits to the amount that may be made as a facilitation payment?
- Are facilitation payments authorized before they are made? If so, who authorizes them?
- Approximately how many facilitation payments would your company make each year?
- What is the approximate value of facilitation payments made each year?
- Are the records of the facilitation payments shared with any Australian Government body, and if so which body?
- Are the records of the facilitation payments shared with any government authorities in the country they are made in? Under what circumstances is such information shared?

No company that allowed small bribes to be paid as facilitation payments provided any information on the size of the payments made individually or in aggregate, the countries the bribes are paid in, how many of these small bribes are made in a year, or if the information about the small bribes paid is shared with the Australian Government or any other government.

Table 1 represents the public policies or statements made in correspondence of the ASX100 companies as of late 2013 with regards to employees being able to pay small bribes to foreign officials under the facilitation payment defence. This is an area where company policies have been shifting, so it is likely that more companies now would have policies prohibiting the payment of small bribes under the facilitation payment defence. Also, it is likely there are companies that have banned the payment of all bribes as an internal policy that is not public and which has not been disclosed to us.

Table 1. Policies of ASX 100 Companies as of 2013 on paying small bribes in the form of facilitation payments. One star signifies connection with developing countries, two stars signifies connection with African countries.

Prohibit Facilitation Payments	Only If Allowed by Local Law	Allows Facilitation Payments
1. Ansell * 2. ANZ Bank* 3. Aristocrat Leisure** 4. BHP Billiton Limited** 5. Computershare** 6. Downer ** 7. Flight Centre** 8. Goodman Group* 9. Insurance Australia Group * 10. Leighton Holdings* 11. Lend Lease* 12. Macquarie Group** 13. Miclyn Express Offshore Limited* 14. Myer* 15. Newcrest Mining * 16. Orica** 17. OZ Minerals * 18. Pacific Brands* 19. Rio Tinto Limited** 20. Speciality Fashion Group* 21. Super Retail Group* 22. Telstra**	1. Alacer Gold* 2. Amcor** 3. Billabong** 4. Coca-Cola Amatil* 5. Cohlear** 6. CSL Ltd* 7. Resolute Mining*	1. ALS Limited** 2. Alumina Limited* 3. Aquarius Platinum** 4. ARB Corporation* 5. AWE Limited* 6. Ausdrill ** 7. Beadell Resources* 8. Beach Energy * 9. Bluescope* 10. Boart Longyear* * 11. Boral* 12. Brambles ** 13. Carsales.com.au * 14. Commonwealth Bank* 15. Crown 16. David Jones* 17. DuluxGroup* 18. Elders Ltd** 19. Fletcher Building* 20. Forge Group** 21. Goodman Fielder* 22. Gaincorp* 23. G.U.D Holdings *

<p>23. Toll Holdings** 24. Treasury Wine Estates** 25. UGL Ltd* 26. Wesfarmers* 27. Westpac* 28. Woodside Petroleum* 29. Worley Parsons**</p>		<p>24. Gryphon Minerals ** 25. Harvey Norman* 26. Incitec Pivot ** 27. Intrepid Mines* 28. James Hardie* 29. Karoon Gas * 30. Kingsgate * 31. Lynas* 32. Medusa Mining* 33. Mermaid Marine** 34. Mirabela Nickel * 35. Monadelphous * 36. National Australia Bank* 37. Navitas Ltd** 38. News Corp * 39. NRW Holdings** 40. Nufarm Ltd** 41. OceanaGold* 42. Oil Search* 43. Origin Energy* 44. Orotongroup * 45. Paladin Energy** 46. PanAust* 47. Perseus Mining** 48. Platinum Australia** 49. Premier Investments* 50. Qantas** 51. QBE Insurance* 52. Resmed* 53. Resource Generation** 54. SAI Global ** 55. Santos* 56. Seek Ltd* 57. Sims Metal 58. Management** 59. St Barbara* 60. Telecom New Zealand 61. Tower Ltd* 62. Virgin Australia Holdings* 63. Westfield Group* 64. Woolworths* 65. Wotif.com*</p>
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Appendix 1 of the submission contains further details of individual company policies when it comes to the payment of small bribes under the facilitation payment defence.

One of the problems of small bribes paid by Australian companies to foreign officials under the facilitation payment defence was raised by the QBE Insurance Group in its support of the facilitation payment defence to the Attorney General's Department in 2011.¹³⁹ The letter stated:¹⁴⁰

¹³⁹ Duncan Ramsey, General Counsel and Company Secretary, Group Executive, QBE Insurance, to Graeme Dunn, Attorney General's Department, 16 December 2011.

¹⁴⁰ Duncan Ramsey, General Counsel and Company Secretary, Group Executive, QBE Insurance, to Graeme Dunn, Attorney General's Department, 16 December 2011.

QBE has wholly owned subsidiaries together with joint ventures in Asian countries and the Pacific Islands, where the day to day running of the business relies on regular interaction with government and regulatory bodies. It is a common instance to pay a public official a minor sum of money in exchange for obtaining regulatory approvals more quickly.

This raises questions if the bribes paid by QBE, its subsidiaries and joint venture operations as facilitation payments mean that it obtains regulatory approvals more quickly at the expense of other businesses that refuse to pay such bribes? Are QBE, its subsidiaries and joint venture operations able to jump the queue for regulatory approvals?

The Committee should request that the QBE Insurance Group appear before the Committee and explain how they ensure their payment of small bribes as facilitation payments does not mean other businesses have to wait longer for regulatory approvals? In which countries are such payments made? Exactly what regulatory approvals are they made for? Do any of these regulatory approvals require assessment by the public official? If so, how does the QBE Insurance Group insure that the payments made do not bias the public official to not carry out their duties thoroughly in order to speed up the approval?

Almost no members of the Australia-Africa Mining Industry Group replied to the letters. Those that did referred us to speak directly with the Australia-Africa Mining Industry Group. For example, Sarama Resources Ltd stated in a letter dated 14 October 2013: "This is an issue we have addressed with the support of the Australia-Africa Mining Industry Group ("AAMIG") so you may wish to contact them."

The exceptions were Airland Logistics, MMG and AMEC. Airland Logistics that replied to state "Airland Logistics also opposes these payments (Facilitation Payments) and encourages employees, agents and contractors to resist making them if possible."

MMG replied to say:

As a matter of policy, MMG has adopted the position that it deems a facilitation payment to be an 'Improper Benefit' and prohibits its making in principle.

Similar to Uniting Church's position, MMG acknowledges that in certain jurisdictions (including Australia), facilitation payments are considered a legal defence against bribery. MMG is, therefore, currently taking the position that under very limited circumstances, a facilitation payment may be permitted but only under strict conditions.

Those conditions are:

- (a) In certain circumstances, not making a facilitation payment could result in a 'significant adverse impact' on the MMG's business in a country. This has been defined very narrowly as an impact which substantially and adversely affects the entire MMG business in the relevant country and which has to be of a lasting and not just short term nature.*
- (b) In addition to the above, the following additional limitations are being imposed by MMG's policy:*
 - a. making the facilitation payment will not contravene any applicable Anti-Bribery Laws (confirmed by legal advice); and*
 - b. making the facilitation payment will, or is reasonably expected to, overcome the significant adverse impact on MMG's business in the relevant country; and*

- c. *there is no reasonable alternative to making the facilitation payment in order to avoid the significant adverse impact on MMG's business in the relevant country; and*
- d. *prior approval for making the facilitation payment has been obtained from the Code of Conduct Committee; and*
- e. *the details of the facilitation payment are clearly recorded in accordance with MMG policy.*

AMEC replied to say:

AMEC (comprising AMEC plc and its subsidiaries) is committed to having high ethical standards and, consequently, it does not offer, pay, solicit or accept bribes, kickbacks, facilitation payments or other prohibited payments to or from any person, including foreign officials. Furthermore, as AMEC plc is a company registered in England and Wales it is subject to the UK Bribery Act 2010 and it is, therefore, not permitted by law to make facilitation payments.

In response to the specific queries raised in your letter, we can confirm that AMEC does not allow employees to make facilitation payments in any countries.

However, the willingness to pay bribes in the form of facilitation payments is not restricted to private companies, but extends to government-run enterprises. For example in October 2013, under a Right to Information request Hydro Tasmania provided the Synod of Victoria and Tasmania, Uniting Church in Australia of copy of the business' 'Bribery and Corruption Policy'. The policy allowed for the payment of bribes in the form of facilitation payments with the following instruction to employees "Ensure records are kept of any transaction involving the payment of a 'facilitation payment' as described above."

11.2. Australian Government monitoring of bribes paid under the Facilitation Payment Defence

On its fact sheet on foreign bribery the Australian Government advises:¹⁴¹

The Australian Government recommends that individuals and companies make every effort to resist making facilitation payments. A growing body of research and the experience of a growing number of major companies demonstrate that businesses can achieve net gains by refusing to make payments. The Australian Government acknowledges that this can be a difficult position to take, with short-term risks for business, and that this difficulty is increased for smaller businesses that may feel they lack the bargaining power of major companies. However, the Australian Government is committed to global efforts to reduce corruption and to supporting Australian businesses seeking to eliminate payments to officials.

We wrote to the Australian Government to find out what steps it took to monitor compliance of Australian companies with their compliance with the *Criminal Code* and where Australian companies were paying small bribes to foreign officials under the facilitation payment defence what checking was done to ensure such bribes were compliant with the defence.

The Attorney General, Senator The Hon George Brandis, replied to the Unit on 5 December 2013 indicating the Australian Government does no checking of Australian companies to ensure the small bribes they pay to foreign officials are compliant with the facilitation payment defence. "There is no legislative requirement that facilitation payments be disclosed to a regulator. Such a requirement would impose unnecessary administrative obligations on business."

¹⁴¹ Australian Government, 'Foreign Bribery', www.ag.gov.au/foreignbribery.

It was indicated that such checking of compliance would occur “Where appropriate, the Australian Federal Police would assess the relevance of the facilitation payment defence in the course of a foreign bribery investigation.”

On the more positive side the Australian Government seeks to “discourage Australians from making facilitation payments in line with Australia’s obligations under the OECD Anti-Bribery Convention” and “encourages good governance and reporting of allegations of foreign bribery to the Australian Federal Police of the Department of Foreign Affairs and Trade”.

11.3. The Legality of Bribes paid under the Facilitation Payment Defence

One of the arguments that has been mounted by some of those seeking to maintain the payment of small bribes to foreign officials under the facilitation payment defence is that such payments are not illegal in the countries they are made in. So, we wrote to the foreign embassies of developing countries in which Australian companies operate to ask whether their government forbids the payment of facilitation payments to government officials in their country. If this is the case, we requested to know which piece of legislation forbids such payments, preferably providing the section of the legislation that prohibits such payments. We also requested to know if Australian companies that make facilitation payments in their country informed their government of when such payments have been made and any details about the payments?

Many foreign governments the Unit wrote to did not reply. Some responses indicated obvious offence at even being asked if their officials could legally ask for ‘facilitation payments’. As one African Government official wrote back:

“Bribes are illegal. In fact, the problem we have is with multinationals making such claims as the one you mention to justify service. Not only is it not true, that you cannot get services in Africa without bribes, but it is an insult to the Africans and even worse for Australia to even consider legalizing the giving of bribes is astounding. Is that not legalizing corruption? Besides, in our laws both the giver and taker of bribes are guilty of contravening the laws. I wonder what the reaction would be if I asked an Australian the same question you ask me?”

The following governments replied to provide advice on their anti-bribery laws and if the payment of small bribes to their officials were legal:

11.3.1. Cambodia

The government officials are forbidden from getting the facilitation payment in exchange for providing public services to citizens, public or private institutions. If they do they can be charged with Article 594 (Acceptance of Bribery) of *Criminal Code of Cambodia* and Article 36 of the *Anti-Corruption Law 2010 (ACL)*.

A ‘facilitation fee’ was described in the definition of benefit/advantage in Article 4 of the ACL. The relevant parts of Cambodian law are Articles 592, 593, 594, 595, 597, 605 and 606 of the *Criminal Code*, and Articles 33, 34 and 35 of ACL.

The government had plans of legalising some facilitation fees for public services by publicising a legal fee for each service and promoting a transparent and accountable execution.

11.3.2. India

Facilitation payments are considered to be bribes and are illegal. The *Prevention of Corruption Act 1988* in Chapter III: Offences and Penalties, Sections 7-16 prohibit a public servant taking gratification other than legal remuneration in respect of an official act.¹⁴²

¹⁴² http://www.persmin.gov.in/DOPT/EmployeesCorner/Acts_Rules/PCAct/pcact.pdf

For example:

Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

For a short summary of relevant corruption laws in India, go to: http://www.prsindia.org/administrator/uploads/general/1302844978_PRS%20Note%20on%20corruption%20laws.pdf

11.3.3. Indonesia

Indonesia government forbids the payment of facilitation payments to government officials and considered as corruption (bribery and gratuities).

The Indonesia government has ruled a facilitation payment as gratuities and bribery under Law No. 20/2011 and Law No 31/1999.

The definition of gratuities according to the explanation of Article 12 B Law. 20 of 2001 includes money, goods, rebates (discounts), commissions, interest-free loans, travel tickets, lodging, travel, free medical treatment, and other facilities. Gratuities cover those received at home and abroad and carried out by electronic means or without electronic means.

Law No. 20/2001 Article 12 paragraph (1) provides an exception in that the provisions referred to in Article 12B Paragraph (1) do not apply if the recipient of the gratuities reports them to the Corruption Eradication Commission.

The Committee should seek advice from the Corruption Eradication Commission of notification of any gratuities paid by Australian companies to Indonesian officials.

Article 12B Paragraph (1) of the Law No.31/1999 jo. 20/2001, states “Every gratuity to an official or state officials considered bribery, if related to the position and contrary to obligations or duties”.

Article 12C Paragraph (1) of the Law No.31/1999 jo. 20/2001, reads “Provisions referred to in Article 12B Paragraph (1) does not apply if the recipient receives gratuities reported to the Commission.”

Article 12 of Law No. 20/2001 states:

1. Fined with imprisonment for life or imprisonment for a minimum of 4 years and a maximum of 20 years imprisonment and a fine of Rp 200 million and Rp 1 billion at most.
2. State employees or state officials who accept gifts or promises, but are known or reasonably suspected to gift or the promise given to move in order to do or not do something in his post, which is contrary to his duty.

3. State employees or state officials that the purpose of enriching himself or another person unlawfully, or by abusing his power to force someone to give something, pay, or receive payments by piece, or to do something for himself.

11.3.4. Lao People's Democratic Republic

Pursuant to Resolution No. 26/NA, dated 20 May 2005, of the National Assembly adopted the *Anti-Corruption Law*. Article 25 on the *Rights and Duties of a Person who has Position, Power and Duty* specifies that no corrupt acts (which would include the payment of facilitation payments to government officials) by a public official shall be permitted. For example:

(1) *To receive money, material items, or other benefits from any individual or organisation that relates to his functions which causes damage to the interests of the State and society, or the rights and interests of citizens.*

11.3.5. Lesotho

The *Prevention of Corruption and Economic Offences Act* of 1999 prohibits corruption under section 25(1) and section 25(2) that come in a form of facilitation payments. It prohibits acceptance of as well as an offer of facilitation payments:¹⁴³

Corrupt transaction by or with agents

25. (1) *An agent commits the offence of corruption if he corruptly accepts, or agrees or offers to accept from any person, for himself or for any other person any benefit as an inducement or reward doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business.*

(2) *A person commits the offence of corruption if he corruptly gives or agrees to give or offers to give to any agent any benefit as inducement or reward for doing or forbearing to do, any act or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business.*

11.3.6. Mexico

The Government of Mexico prohibits all kinds of bribery to all government officials. The current Federal Criminal Code of the Mexican United States in its Chapters X and XI, articles 222 and 222bis, typifies bribery as crime committed by the public servant (regardless of its position within national territory overseas) and the facilitator.¹⁴⁴

11.3.7. Nigeria

The Nigeria government forbids the payment of facilitation payments to government officials and considered as an offense deserving penalty in *The Corrupt Practices and other Related Offences Act 2000*. Sections 8 through to 22 describe the offences that attract penalty.¹⁴⁵

Facilitation payments would be classified under Section 2 as a type of "gratification".

"Gratification" means:

- a) *Money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether moveable or immovable, or any other similar advantage, given or promised to any person with intent to influence such as person in the performance or non-performance of his duties;*

¹⁴³ http://www.commonlii.org/ls/legis/num_act/pocaeoa1999457.pdf

¹⁴⁴ Correspondence from Beatriz López Gargallo, Ambassador of Mexico, to the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, 6 September 2013.

¹⁴⁵ http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Nigeria_Corrupt%20Practices%20Act_2000_en.pdf

- b) *Any officer, dignity, employment, contract of empowerment or services and any agreement to give employment or render services in any capacity;*
- c) *Any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or part;*
- d) *Any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;*
- e) *Any forbearance to demand any money or money's worth or valuable thing;*
- f) *Any other service or favour of any description, such as protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not, already instituted, and including the exercise or the forbearance from the exercise of any right or any civil power of duty; and*
- g) *Any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the proceeding paragraphs (a) to (f).*

11.3.8. Tanzania

In Tanzania, *The Prevention and Combating of Corruption Act of 2007* forbids facilitation payments.

The Prevention and Combating of Corruption Bureau (PCCB) was established under *The Prevention and Combating of Corruption Act No. 11 of 2007 (PCCA No. 11/2007)*. This Act came about after the repeal of *The Prevention of Corruption Act (PCA) Cap 329 (RE 2002)*. This was after the Parliament of the United Republic of Tanzania passed *The Prevention and Combating of Corruption Bill of 2007* on April 16, 2007. His Excellency President of the United Republic of Tanzania Jakaya Kikwete assent the bill on June 11, 2007 to make it an Act of parliament which came into force on July 1, 2007.

Section 21 of the PCCA No. 11/2007 states:

- (1) *Any person who intentionally promises, offers or gives to a foreign public official or an official of a public international organisation, directly or indirectly, an undue advantage, for that foreign public official himself or another person or entity, in order that the foreign public official acts or refrain from acting in the exercise of his official duties to obtain or retain business or other undue advantage in relation to a local or international economic undertaking or business transaction, commits an offence and shall be liable to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both.*
- (2) *Any foreign public official or an official of a public international organisation who intentionally solicits or accepts, directly or indirectly an undue advantage, for himself or another person or entity in order that he acts or refrains from acting in the exercise of his official duties, commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both.*

The Tanzania Investment Centre is a “one stop facilitative centre” for all investors. They charge a facilitation fee of 10% for those serviced, for instance, to facilitate prospective investors in obtaining Resident Permits from the Department of immigration. Such fees are documented and recorded in government revenues.

11.3.9. Uganda

The *Anti-Corruption Act 2009* bans all bribery of public officials, with Section 5 stating:¹⁴⁶
A person who—

¹⁴⁶http://www.ulii.org/files/ug/legislation/act/2009/2009/the_anti_corruption_act_no_6_of_2009_pdf_77364.pdf

(a) directly or indirectly by himself or herself or through any other person offers, confers, gives or agrees to offer any gratification to any member of a public body an inducement or reward so that the member—

(i) votes or abstains from voting at any meeting of that public body in favour of or against any measure, resolution or question submitted to that public body;

(ii) performs, or abstains from performing his or her duty in procuring, expediting, delaying, hindering or preventing the performance of any official act; or

(iii) aids in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(b) being a member as is referred to in paragraph (a) directly or indirectly solicits or accepts any gratification for himself or herself or for any other person, by himself or herself, or through any other person, as an inducement or reward for any act or abstaining from performing any act, referred to in subparagraphs (i), (ii) and (iii) of paragraph (a);

commits an offence.

11.3.10. Zambia

The Anti-Corruption Act No. 3 of 2012 provides that an act of corruption is committed when a person receives or offers a gratification during performance of official duty.

“ gratification ” includes—

(a) money, any gift, loan, fee, reward, commission, valuable security, property, or interest in property of any description, whether movable or immovable;

(b) any employment or contract of employment or services and any promise to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any service, favor or advantage of any description, such as protection from any penalty or from any action or proceedings of a disciplinary or penal nature, and including the exercise or the omission from the exercise of any right of any official power or duty;

(e) any valuable consideration or benefit of any kind, discount, commission, rebate, bonus deduction or percentage;

(f) any right or privilege; and

(g) any aid, vote, consent or influence;

As such, facilitation money is seen either as a ‘commission’ or ‘reward’ of some sort.

Section 19 and 20 precisely makes out the offence of corruption by either a public officer (Section 19) or private person (Section 20).

The Committee should seek to establish which countries prohibit all bribes and in which the payment of small bribes as facilitation payments are legal under local laws.

The Committee should ask Australian companies that allow facilitation payments to be paid to produce their records of such payments to examine if payments are being made in breach of local laws in the countries where the companies are operating.

12. Economic Impact of Foreign Bribery

According to Daniel Kaufman, during his tenure as Director of Global Governance at the World Bank Institute, a “conservative approach” to measuring bribery of public sector actors

by private sector entities yielded an estimate of US\$1 trillion annually in corrupt payments in 2001.¹⁴⁷

The \$1 trillion estimate does not include the full extent of 'tainted procurement', but only the bribe fees associated with such procurement. While, for instance, the estimates of bribery exchanging hands for public procurement bids can be estimated in the vicinity of US\$200 billion per year, the overall annual volume estimate of the 'tainted' procurement projects, where such bribes take place, may be close to US\$1.5 trillion or so. Finally, there is no attempt to include the extent of fraud within the private sector, but only bribery transactions between the private and public sector.¹⁴⁸

It should be noted, at the same time, that the \$1 trillion worldwide annual bribery estimate does include bribes between firms and public officials or politicians in the industrialized world, and also between multinational corporations from industrial countries bribery to the public sector in emerging economies. It also includes bribery within emerging economies.¹⁴⁹

According to the World Bank Institute research there is a '400% governance dividend' of good governance and corruption control: countries that improve on control of corruption and rule of law can expect (on average), in the long run, a four-fold increase in incomes per capita. Thus, a country with an income per capita of US\$ 2,000 could expect to attain US\$ 8,000 in the long run by making strides to control corruption. Similarly, such a country could expect, on average, a 75% reduction in child mortality.¹⁵⁰

The World Bank Institute have also found that the business sector grows significantly faster where corruption is lower and property rights and rule of law is safeguarded. On average, it can make a difference of about 3% per year in annual growth for the enterprises.¹⁵¹

The World Bank Institute reports that through in-depth country diagnostic work, they also found that corruption and bribery is a regressive impost. Not only do smaller enterprises pay a higher share of their revenue in bribes than their larger counterparts, but also poorer households bear a disproportionate share of the bribery burden, paying a much higher share of their incomes than higher income households - often for public services that were expected to be provided for free. Researchers at the International Monetary Fund, utilizing worldwide data on income distribution, have also found that corruption is associated with increased income inequality.¹⁵²

The World Bank Institute has explored the impact of 'state capture', where certain private enterprises are able to buy the laws and regulations they want. The Institute found that where state capture is a major constraint, the private sector as a whole suffers by growing much more slowly - in contrast to the firms that are 'purchasing' laws and regulations, which do benefit privately. Some of the firms engaging in capture are multinationals, others are part of the domestic elite. At the same time, there are many multinational and domestic

¹⁴⁷ David Kennedy and Dan Danielsen, 'Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act', Open Society Foundations, 2011, p. 18.

¹⁴⁸<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

¹⁴⁹<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

¹⁵⁰<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

¹⁵¹<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

¹⁵²<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

corporations which are making a commitment to good governance and integrity, and prepared to work with governments to have an investment climate with less corruption.¹⁵³

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¹⁵³<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>

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Appendix 1. Details of company policies on payment of bribes under the Facilitation Payment Defence.

Table 2: List of ASX 100 Companies publicly disclosed Facilitation Payment Policies as of late 2013. One star signifies connection with developing countries, two stars signifies connection with African countries.

Company	Prohibition on Facilitation Payments?	Policy details
Alacer Gold Corporation*	Only when it is not permissible under local law.	<ul style="list-style-type: none"> • Prohibited activities include authorising, offering or paying anything of value to any foreign public official, political party or candidate for the purpose of influencing or causing another person to influence any act or decision of the foreign official or entity in order to obtain or retain an advantage in the course or business. Gifts, entertainment and political contributions are also covered. • Payments to foreign public officials that would be prohibited are legal only if: <ul style="list-style-type: none"> (a) they are lawful under the written laws of the foreign officials country ; (b) they are made as responsible and bona fide expenditure directly related to either promotional activities or the execution or performance of a contract with foreign government; or (c) they are payments made to expedite or secure performance of routine government action.
ALS Limited**	No	<ul style="list-style-type: none"> • Code covers gifts and entertainment, improper payments and bribery.
Alumina Limited*	No	<ul style="list-style-type: none"> • Corruption and Money Laundering Policy covers any arrangements to gain influence or favour, gifts, and political donations. • Under the corruption policy, all contracts or agreements for provision of services must precisely document the service provided and the basis of compensation.
Amcor Limited**	Only when it is not permissible under local law.	<ul style="list-style-type: none"> • Amcor's Corporate Code of Conduct and Ethics Policy states: "Amcor is opposed to making such payments as a matter of policy, and every effort should be made to resist them. An understanding of what lies behind a request (e.g. the person may be seeking recognition or status) may suggest ways to meet the request in an acceptable way. <p>.... no facilitation payments of any amount can be made unless the prior consent of all of the following persons within Amcor has been</p>

		<p>obtained:</p> <ul style="list-style-type: none"> ○ your Business Group President; ○ your Business Group Chief Financial Officer; ○ your Business Group General Counsel; and ○ the Group General Counsel. <p>When seeking approval, you should confirm that each of the following applies:</p> <ul style="list-style-type: none"> ○ the purpose of the payment is to expedite the completion of a routine service or administrative action, which Amcor is entitled to under local law and in the ordinary course of events. The payment must not be an attempt to distort a proper decision-making process; ○ there is no reasonable alternative to making the payment; ○ the business consequences of not making the payment will be serious; ○ the type and amount of the payment is consistent with what is customarily sought, made and sanctioned in the country concerned; ○ the payment will not expose Amcor or the co-worker to legal action under any applicable law or regulation; ○ management is aware of the payment; and ○ the payment is accounted for clearly and accurately.”
Ansell Limited *	Yes	<ul style="list-style-type: none"> • Facilitating payment, gifts, and entertainment and political contribution are separate policies under the Code of Conduct. • Facilitating payments always prohibited by Ansell. Ansell will not distinguish between “facilitating payments” and any other bribe.
ANZ Banking Group Limited*	Yes	<ul style="list-style-type: none"> • The making or receiving of improper payments, gifts and political donations are all covered under ANZ’s bribery and corruption policies. • Employees must ensure that all dealings are properly recorded and transparent according to the Anti-Bribery Policy.
Aquarius Platinum Limited**	No	<ul style="list-style-type: none"> • Corporate Code of Conduct covers political donations.
Aristocrat Leisure Limited**	Yes	<ul style="list-style-type: none"> • Policies cover political donations, gifts and entertainment, bribery and corruption. Facilitation payments are strictly prohibited. • Any business gifts and entertainment must be recorded accurately and fairly in ALL’s records.
ARB Corporation	No	<ul style="list-style-type: none"> • No policy publicly available.

Limited*		
AWE Limited*	No	<ul style="list-style-type: none"> • Exceptions for facilitation payments in some countries. • AWE’s Business Conduct Policy covers political contributions, corrupt payments and practices, facilitation payment and gifts.
Ausdrill Limited**	No	<ul style="list-style-type: none"> • Policies cover gifts and entertainment. Employees must read and comply with the “Australian Government Fact Sheet on Foreign Bribery”, which covers facilitation payments made to expedite or secure the performance of a routine government action of a minor nature and the payment is of a minor value. • According to the “Australian Government Fact Sheet on Foreign Bribery” (attached to the ASL’s Code), in order to satisfy the defence to the offence, a company or individual who makes a facilitation payment must make record of that payment.
Beadell Resources Limited*	No	<ul style="list-style-type: none"> • Policies cover gifts, favours and bribery to government officials are prohibited to offer, provide or solicit directly or indirectly any special treatment or favour from or to a public official in return to anything of economic value or the promise or expectation of future value or gain. Political contributions must not be made on behalf of the Company without consulting the Company first.
Beach Energy *	No	<ul style="list-style-type: none"> • No policy publicly available.
BHP Billiton Limited**	Yes	<ul style="list-style-type: none"> • Bribery and Corruption Policy covers facilitation payments, gifts and hospitality and contributions. • The making of facilitation payments is prohibited by BHP Billiton. • Requests for facilitation payments must be reported to line managers and Group legal without delay.
Billabong International Limited**	Only when it is not permissible under local law.	<ul style="list-style-type: none"> • Policies cover facilitation payments, gifts, gratuities, political contributions. • Facilitation payments may only be made in countries where it is permissible and, if the payment is accounted for clearly and accurately and is made to the relevant organisation rather than an individual. Before any such payments are made, advice from Billabong’s legal team must be obtained.
Bluescope Steel Limited*	No	<ul style="list-style-type: none"> • BSL is opposed to making facilitation payments and “every effort should be made to resist them”. However, minor facilitation payments may be approved if certain conditions are met. • An accurate and auditable record of all financial transactions relating to the Company must be maintained. No entry should be made in the Company’s records that distorts or disguises

		the true nature of any transaction.
Boart Longyear Limited**	No	<ul style="list-style-type: none"> • Policies cover facilitation payments, gifts, entertainment and political contributions. • Facilitating payments require approval and must be recorded appropriately.
Boral Limited*	No	<ul style="list-style-type: none"> • Policies cover facilitation payments, gifts, entertainment and political donations.
Brambles Limited**	No	<ul style="list-style-type: none"> • Gifts and entertainment and political donations covered separately from bribery and corruption policies. • Bribery and corruption principles require all commercial transactions will be properly and accurately recorded.
Carsales.com.au Limited *	No	<ul style="list-style-type: none"> • No policy publicly available.
Coca-Cola Amatil*	Only when it is not permissible under local law.	<ul style="list-style-type: none"> • Policies cover gifts, entertainment and political contributions. Employees must ensure that their actions are in requirements with the requirements of the <i>Bribery of Foreign Act Officials Act 1999</i>
Cohlear Limited**	Only when it is not permissible under local law.	<ul style="list-style-type: none"> • Code covers respecting laws, customs and business practices of countries, in which Cohlear operates, and gifts and entertainment.
Commonwealth Bank*	No	<ul style="list-style-type: none"> • Policies cover political donations.
Computershare Limited**	Yes	
Crown Limited	No	<ul style="list-style-type: none"> • Policies cover gifts or any form of bribery from anyone.
CSL Limited*	Only when it is not permissible under local law.	<ul style="list-style-type: none"> • Policies cover gifts and entertainment, political donations, facilitation payments or financial rewards or inducements in exchange for making business decisions. • In the event that a CSL employee encounters a request for, or a perceived need for, a facilitation payment, the CSL employee must notify CSL Legal. In limited circumstances when not prohibited by local or applicable laws, and where not in contravention with CSL's Bribery and Corruption policy, a facilitation payment may be approved by CSL legal. In such cases, the payment must be appropriately and accurately recorded with CSL's books and records to reflect the substance of the payment and the underlying transaction.
David Jones Limited*	No	<ul style="list-style-type: none"> • Policies cover gifts and benefits
Downer **	Yes	<ul style="list-style-type: none"> • Downer prohibits the making of facilitation payments, as well as getting someone else, including agents or business acquaintances, to make a facilitation payment on Downer's behalf or on behalf of any of Downer's people.

		<ul style="list-style-type: none"> • Downer has specific statutory obligations in insuring that Downer's people accurately and completely record and explain Downer's transactions, financial position and performance. Downer also expects People to fully cooperate with its internal and external auditors and provide true and accurate information.
DuluxGroup Limited*	No	<ul style="list-style-type: none"> • Code covers financial inducements, facilitation payments and, gifts and entertainment. • The DuluxGroup is opposed to making facilitation payments and every effort should be made to resist making those payments, In circumstances where this is not possible, advice should be sought from the line manager, next most senior person or DuluxGroup General Counsel before proceeding with any payment.
Elders Limited**	No	<ul style="list-style-type: none"> • Policies prohibit accepting or giving gifts or other benefits of a significant value or engage in activities that could, or could be perceived, to compromise judgment or objectivity in the performance duties for the company.
Fletcher Building Limited*	No	<ul style="list-style-type: none"> • Policies cover gifts and hospitality
Flight Centre Limited**	Yes	<ul style="list-style-type: none"> • Policies cover facilitation payments, gifts and hospitality. • Facilitation payments are strictly prohibited.
Forge Group Limited**	No	<ul style="list-style-type: none"> • No policy publicly available.
Goodman Fielder Limited*	No	<ul style="list-style-type: none"> • Policies cover corrupt conducts including bribery and political donations.
Goodman Group*	Yes	<ul style="list-style-type: none"> • Policies cover gifts and political donations. Facilitation payments are prohibited regardless of whether they are deemed legal under the jurisdiction in which they occur.
Graincorp Limited*	No	<ul style="list-style-type: none"> • Code covers corruption, bribery, political donations, gifts and gratuities.
G.U.D Holdings Limited *	No	<ul style="list-style-type: none"> • Policies cover gifts, loans, hospitality, and political associations.
Gryphon Minerals Limited **	No	<ul style="list-style-type: none"> • Code mentions that improper inducements must not be submitted or accepted. And such inducements are to be reported to management.
Harvey Norman Holdings Limited*	No	<ul style="list-style-type: none"> • Code mentions that the giving and receiving of inducements, bribes, secret commissions and secret profit is not permitted under any circumstances.
Incitec Pivot **	No	<ul style="list-style-type: none"> • Statement on bribery includes the prohibition of improper payments to public official's customers or any other individual or entity whom Incitec Pivot does business with. Gifts and favours are covered separately under the

		Code of Conduct for directors and senior management.
Insurance Australia Group *	Yes	<ul style="list-style-type: none"> A letter from Chris Bertuch, Group General Counsel & Company Secretary, IAG, to the Uniting Church in Australia dated 30 September 2013 stated: "Under the IAG Code of Ethics policy, facilitation payments made to foreign officials would be considered a breach of the Code, specifically, Chapter 4 – Our Governance; Bribery and Corruption. As such, IAG does not allow or undertake this practice in its business dealings."
Intrepid Mines Limited*	No	<ul style="list-style-type: none"> Policies cover gifts, entertainment, kickback, gratuities or other benefits not legitimately due or any other illegal payments for favourable treatment or as inducement for doing business.
James Hardie Industries PLC*	No	<ul style="list-style-type: none"> Policy covers facilitation payments. Gifts and entertainment, political contributions are covered under different policies. Financial records are to be kept in accordance with generally accepted accounting principles and controls at all times. Fully and accurately reflecting all transactions. No unrecorded fund or asset may be maintained.
Karoon Gas Australia Limited*	No	<ul style="list-style-type: none"> Policies cover gifts and hospitality and inducements or unauthorised commissions by any of its employees or officers.
Kingsgate Consolidated Limited *	No	<ul style="list-style-type: none"> Under the Dealing with Public Officials Policy, facilitation payments are only allowed under strict criteria and circumstances, including management approval and must be clearly recorded.
Leighton Holdings*	Yes	<ul style="list-style-type: none"> Policy covers the prohibition of facilitation payments, political contributions and activities, where Leighton Group does not make direct contribution in cash or in-kind to any political party. However, Leighton Group does engage in the democratic process by participating in events with political parties and discloses any financial contributions for the attendance (as required to the Australian Electoral Commission and the State Commissions).
Lend Lease Group*	Yes	<ul style="list-style-type: none"> The Bribery and Corruption Policy cover facilitation payments. Lend Lease prohibits all forms of bribery, including the offering, promising, or giving, or requesting, agreeing to receive or accepting, directly or indirectly of bribes or "facilitation payments".
Lynas Corporation Limited*	No	<ul style="list-style-type: none"> Policies cover gifts, entertainment and improper incentives. Should an employee be unable to refuse a gift of excessive value due to cultural requirements,

		the employee must give the gift to the company, and inform the Human Resources department. The executive committee will then decide how to donate the gift.
Macquarie Group Limited**	Yes	<ul style="list-style-type: none"> • Policy covers gifts and entertainment and facilitating payments. • Macquarie also declares all its political expenditure in Australia to the Australian Electoral Commission. • Macquarie prohibits the use of facilitating payments, whether directly or through third parties.
Medusa Mining Limited*	No	<ul style="list-style-type: none"> • Policy includes inducements of any kind to government officials aiming to obtain favourable treatment. Gifts and entertainment and political contributions are treated as separate policies.
Mermaid Marine**	No	<ul style="list-style-type: none"> • Code covers bribery, gifts, gratuities and political donations.
Miclyn Express Offshore Limited*	Yes	<ul style="list-style-type: none"> • Policy covers facilitation payments, inducements, commissions (including any item intended to improperly obtain favourable treatment or avoid unfavourable circumstances), gift and political contributions.
Mirabela Nickel Limited *	No	<ul style="list-style-type: none"> • No policy publicly available.
Monadelphous Group Limited*	No	<ul style="list-style-type: none"> • Policy covers gifts, prizes, hospitality and entertainment.
Myer Holdings Limited*	Yes	<ul style="list-style-type: none"> • Policy covers bribes, inducements, gifts, and gratuities and political involvement. Facilitation payments are not allowed to be paid or received.
National Australia Bank Limited*	No	<ul style="list-style-type: none"> • Covers bribery, fraud and gifts.
Navitas Limited**	No	<ul style="list-style-type: none"> • Policies cover gifts and political involvement. • Employees must report expenditures accurately. The Company will treat submission of a fraudulent expense report as a serious misconduct.
Newcrest Mining Limited *	Yes	<ul style="list-style-type: none"> • Payments can be made where legally sanctioned and from part of the relevant regulatory regime for example a “fast-track” visa. Appropriate records must be kept, the official published fee structure must be paid and official receipts must be provided and retained.
News Corporation*	No	<ul style="list-style-type: none"> • Policies cover facilitation payments, gifts, entertainment, hospitality, and political payments and activities. • News Corporation ensures that all payments to third parties are recorded accurately and documented appropriately.
NRW Holdings Limited**	No	<ul style="list-style-type: none"> • Policies cover gifts, hospitality, entertainment and political payments and involvement.
Nufarm Finance	No	<ul style="list-style-type: none"> • Policies cover commissions, fees or gifts fall

Limited**		outside normal commercial business practice, or the bounds of socially acceptable behaviour.
OceanaGold Corporation*	No	<ul style="list-style-type: none"> The Integrity, Fairness and respect policy covers gifts and entertainment and political donations.
Oil Search*	No	<ul style="list-style-type: none"> Financial Inducements/Unacceptable Payments Policy covers unacceptable payments to government officials in connection with obtaining favourable treatment. Employees must ensure that all Oil Search accounting records accurately and fairly reflect, in reasonable detail, the underlying transactions.
Orica Limited**	Yes	<ul style="list-style-type: none"> Bribery policy covers facilitation payments. Code of Conduct contains policies on gifts, entertainment, travel and political contributions.
Origin Energy Limited*	No	<ul style="list-style-type: none"> Policy covers gifts and gratuities.
OrotonGroup *	Only when it is not permissible under local law.	<ul style="list-style-type: none"> Code of conduct refers to acting with honesty, fairness and respecting the law.
OZ Minerals Limited *	Yes	<ul style="list-style-type: none"> Policies cover gifts, entertainment and gratuities and legal donations. Facilitation payments are prohibited and “every effort should be made to resist them”. Group entities must retain and maintain accurate books and records of all dealings with government, government officials, government entities and third parties.
Pacific Brands Limited*	Yes	<ul style="list-style-type: none"> Policies cover facilitation payments. Pacific Brands has a separate gifts policy. Pacific Brands employees do not make, and will not accept, facilitation payments or “kickbacks” of any kind. If asked to make a payment of this nature, employees should immediately refuse and report the matter.
Paladin Energy Limited**	No	<ul style="list-style-type: none"> Policies cover bribery, fraud and corruption, political activities, gifts and facilitation payments. A signed pro forma record of facilitation payments must be kept and accurately reported by all staff upon making a facilitation payment. The record must include the value and the date of the payment, identify of the foreign public official, particulars of the routine government action that was sought to expedite or secure certain processes and the means to identify the identity of the person who gave the benefits.
PanAust Limited*	No	<ul style="list-style-type: none"> Bribery and Corruption Policy covers corrupt payments to government officials to obtain any improper or legitimate benefit or advantage. Gifts and entertainment and political donations

		are covered separately under other policies.
Perseus Mining Limited**	No	<ul style="list-style-type: none"> No public policy available.
Platinum Australia Limited**	No	<ul style="list-style-type: none"> Policies cover facilitation payments, gifts and favours. Platinum Australia does not support making facilitation payments, and expects employees and offers to make every effort to avoid them. Where the payment cannot be resisted, it must be at a minimum approved by the employee's supervisor and be accounted clearly and accurately.
Premier Investments Limited*	No	<ul style="list-style-type: none"> Policies cover gifts and entertainment.
Qantas Airways Limited**	No	<ul style="list-style-type: none"> Policies cover gifts and political donations. Financial records must be maintained to accurately and completely record and explain transactions.
QBE Insurance Group Limited*	No	<ul style="list-style-type: none"> Policies cover gifts, entertainment and political contributions and activities and payments to foreign officials in exchange for or in order to, induce favourable treatment or to affect any government decision other than statutory or similar fees. All company payments and other transactions must be properly authorised by management and be accurately and completely recorded on QBE's books and records in accordance with generally accepted accounting standards and established corporate accounting principles.
Rio Tinto Limited**	Yes	<ul style="list-style-type: none"> Bribery and Corruption Policy covers facilitation payments. Other policies in the Code cover gifts and entertainment and political donations. Facilitation payments are prohibited. Rio personnel must not offer to make facilitation payments, directly or indirectly, to government officials.
Resmed Incorporated*	No	<ul style="list-style-type: none"> Resmad's Report on ESG issues covers kickbacks, political contributions, bribery and gratuities. All records must be reliable, accurate and complete on all material aspects. Undisclosed or unrecorded funds, receipts or payments that are inconsistent with Resmed's business practices are prohibited.
Resolute Mining Limited**	Only when it is not permissible under local law.	<ul style="list-style-type: none"> Facilitation payments to government officials must be legally sanctioned and form a part of the relevant regulatory regime. Appropriate records involving facilitation payments made to government officials to expedite or to secure performance for routine government acts must be kept and official receipts must be provided and retained.

Resource Generation Limited**	No	<ul style="list-style-type: none"> • Policies cover gifts and entertainment, bribery, corruption and gratification. Facilitation payments are also covered. • No facilitation payments can be made without Board Approval.
SAI Global Limited**	No	<ul style="list-style-type: none"> • No publicly available policy.
Santos Limited*	No	<ul style="list-style-type: none"> • Policies cover gifts, entertainment and political affiliations.
Seek Limited*	No	<ul style="list-style-type: none"> • No publicly available policy.
Sims Metal Management Limited**	No	<ul style="list-style-type: none"> • Policies cover bribery and corruption and political donations. Sims Metal Management is also subjected to the jurisdiction of the US <i>Foreign Corrupt Practice Act</i> that prohibits the offer or payment of money or anything of value such an entertainment and gifts to an official of a country for any improper advantage. • The Books and Records provision requires Sims Metal Management to keep reasonably accurate statements of accounts while the Accounting Control provision requires Sims Metal Management to establish internal accounting procedures to provide reasonable assurances on the accuracy of their books and record.
Speciality Fashion Group Limited*	Yes	<ul style="list-style-type: none"> • Policies cover acceptance benefits, gifts or entertainment beyond which is considered normal business practice. • In a letter to the Uniting Church in Australia dated 2 October 2013, Alison Henriksen, Chief Financial Officer, Specialty Fashion Group, stated the company does “not participate or undertake in any form of bribery with our business dealings, nor do our employees.
St Barbara Limited*	No	<ul style="list-style-type: none"> • No public policy available.
Super Retail Group*	Yes	<ul style="list-style-type: none"> • Policies cover gifts, gratuities or other things of value in effort to influence the judgment (or to induce conduct) of the second person or entity. This includes giving to government officials or union representatives. • In a letter to the Uniting Church in Australia dated 1 October 2013, Peter Birtles, CEO of Super Retail Group, stated the company does not participate in facilitation payments.
Telecom Corporation of New Zealand	No	<ul style="list-style-type: none"> • Policies cover gifts, personal benefits and support political parties.
Telstra Corporation Limited**	Yes	<ul style="list-style-type: none"> • Policies cover gifts, hospitality. Facilitation payments are covered under the Anti-Bribery and Anti-Corruption Policy. There is also a separate Political and Other Donations policy. • Facilitation payments are strictly prohibited.
Toll Holdings	Yes	<ul style="list-style-type: none"> • Toll Holding’s Code of Ethics states: “We

Limited**		prohibit bribery to anyone, and the making of undue payments or kickbacks in any form, whether direct or indirect. This includes a prohibition on all bribes or facilitation payments to speed up routine government transactions or to secure business.”
Tower Limited*	No	<ul style="list-style-type: none"> • Policies cover gifts, entertainment and gratuities.
Treasury Wine Estates Limited**	Yes	<ul style="list-style-type: none"> • Treasury Wine Estates Limited policy states: “In most countries, facilitation payments are treated the same as bribes and are unlawful. As a result, TWE prohibits so-called ‘facilitation payments’. TWE Group Legal should be consulted and involved in any matters which may concern the giving and receiving of facilitation payments.”
UGL Limited*	Yes	<ul style="list-style-type: none"> • Policies cover facilitation payments and political donations. • Facilitation payments are considered to be bribes and are not permitted by UGL
Virgin Australia Holdings Limited*	No	<ul style="list-style-type: none"> • Policy covers payments, gifts and entertainment.
Westfarmers Limited*	Yes	<ul style="list-style-type: none"> • Policies cover gifts, gratuities, and relationship with politicians and government officers • Facilitation payments are covered separately. • The making of facilitation payments by Westfarmers personnel or Group companies is prohibited.
Westfield Group*	No	<ul style="list-style-type: none"> • No publicly available policy.
Westpac Group*	Yes	<ul style="list-style-type: none"> • Policies cover facilitation payments, gifts, favours, entertainment and political donations. • Westpac employees and contractors do not offer or give facilitation payments.
Woodside Petroleum*	Yes	<ul style="list-style-type: none"> • Policies cover gifts, entertainment, bribes, political donations, financial and other inducements, Facilitation payments are prohibited and any request for bribes or facilitation payments must be reported to the General Counsel.
Woolworths*	No	<ul style="list-style-type: none"> • Policies cover gifts, gratuities, and political donations and government relationships. Policies prohibit any form of inducement in return for business. • All financial transactions and funds need to be recorded truthfully and supported by the proper paperwork so they can be audited reliably and reported honestly.
Worley Parsons**	Yes	<ul style="list-style-type: none"> • The policy covers facilitation payments and gifts and entertainment. Political contributions are covered under a different policy. • Worley Parsons’ people and partners may never make facilitation payments. All records such as books, accounts, e-mails and file notes

		must precisely reflect the transactions they relate to, comply with operational requirements and be retained in line with Worley Parsons' document retention policy. Worley Parsons' has segregated some of the record keeping duties and set up financial controls including audits to prevent fraud and corruption.
Wotif.com Holdings Limited*	No	<ul style="list-style-type: none"> No publicly available policy.

Table 3. List of ASX Companies of interest who allow Facilitation Payments (FP) and Countries of Operation.

Company	Operation	Country/Countries
Alacer Gold	Gold exploration	Turkey
ALS Limited	Environmental & Facilities Services	55 African countries, Asia, Australia, Europe, America
Alumina	Bauxite mine and Alumina refinery	Jamaica, Brazil and Suriname
Amtcor	Packaging Company	Brazil, Honduras, Columbia, Peru, Argentina, Venezuela, Ecuador, El Salvador, Mexico, Morocco, Italy, Czech Republic, Russia, Turkey, Indonesia, India, Thailand, China, Ukraine, Russia, Kazakhstan, Turkey, Malaysia, Philippines, China, Mexico
Aquarius Platinum	Platinum mine	South Africa, Zimbabwe
ARB Corporation	Manufacturing facility	Thailand
AWE Limited	Exploration activities	Bulu basin, Indonesia, Java Sea
Ausdrill	Drilling and contract mining	Africa (Burkina Faso, Ghana, Mali, Tanzania and Zambia)
Beadell Resources	Gold exploration	Australia and Brazil
Beach Energy	Oil and Gas	Egypt, Romania, Tanzania
Billabong	Mostly Apparel	Includes Brazil, Indonesia, Peru, South Africa and Thailand
Bluescope	Building solutions and products	China, Indonesia, Malaysia, Thailand, Vietnam, India, China
Boart Longyear	Exploration Drilling Services	Gabon, Ghana, Mali, Mexico, Senegal, Sierra Leone, Dem Rep of Congo, Cambodia, Argentina, Peru, Burkina Faso, China, Kazakhstan, Eritrea, Thailand, Liberia, Zambia, Brazil, Laos, Russia, South Africa, Paraguay
Boral	Building and Construction Materials	Thailand, Indonesia, Mexico, China, Philippines, India,

		Vietnam, Trinidad and Tobago
Brambles	Pallets Document storage and destruction	Argentina, Brazil, China, Czech Republic, Guatemala, Hungary, India, Indonesia, Italy, Malaysia, Mexico, Namibia, Saudi Arabia, Slovakia, South Africa, Swaziland, Thailand, Turkey, Zimbabwe
Carsalescomau	WebMotors, provides vehicle pricing information etc	Brazil
Coca-Cola Amatil	Operations	Fiji, Indonesia, Papua New Guinea
Cohlear	Direct Operations	Includes The Middle East, Asia Pacific region, Africa
Commonwealth Bank	Joint ventures	China, Vietnam, India, Indonesia
Computershare	Operations	Includes China, India, Italy, Russia and South Africa
Crown	Casino and resort owner	Australia and Macau with agent relations throughout Asia
CSL Ltd	National plasma fractionator	Includes Malaysia amongst others
David Jones	Operations	Sourcing from Asia
DuluxGroup	Paint manufacturer and marketer	Southeast Asia
Elders Ltd	Meat processing facilities and Automotive operations	China, Thailand, South Africa
Fletcher Building	Manufacturer of building products	Including Hungary and Malaysia
Forge Group	Construction services	Ghana
Goodman Fielder	Products manufactured in Papua New Guinea Food supplier	China, Philippines, Indonesia and over 20 Asia Pacific countries
Gaincorp	Grain marketing platform	Includes Europe, Asia, China
GUD Holdings	Manufacturer and distributor of locking systems, storage equipment and water systems	China and Malaysia
Gryphon Minerals	Gold exploration	Burkina Faso, Mauritania, Liberia, Cote d'Ivoire
Harvey Norman	Retail stores and operations	Croatia, Malaysia
Incitec Pivot	Explosives manufacturing and distribution	Mexico, Turkey, Malaysia, Indonesia, Papua New Guinea, China, Pakistan, India, South Africa
Insurance Australia Group	Operations	China, Malaysia, Thailand, Vietnam
Intrepid Mines	Gold and Silver project	Indonesia, Ecuador, Mexico
James Hardie	Cement manufacturing	Philippines
Karoon Gas	Exploration and evaluation projects for hydrocarbons	Offshore in Brazil, Peru

Kingsgate	Gold mine	Thailand
Lynas	Exploration and development of rare earths minerals	Malaysia
Medusa Mining	Gold mine	Philippines
Mermaid Marine	Vessel operations	China, Malaysia, Egypt and West Africa
Mirabela Nickel	Nickel mine	Brazil
Monadelphous	Pipeline remediation, field facilities construction services, associated gas and related operations	Papua new Guinea, China
National Australia Bank	Business banking and wholesale divisions	China
Navitas Ltd	Education services provider	Asia, India, Africa
Newcrest Mining	Gold and copper mines	Indonesia, Papua New Guinea, Cote d'Ivoire, Fiji, Peru
News Corp	International media company	Includes Europe, The Americas, Fiji, Papua new Guinea
NRW Holdings	Provides services to the mining resource sector	Includes Guinea, West Africa
Nufarm Ltd	Manufacture and supplier of agricultural chemicals with production and marketing operations	Czech Republic, Hungary, Italy, Romania and Slovakia, Argentina, Brazil, Columbia, Ecuador, Greece, Guatemala, Malaysia, Mexico, Egypt, Panama, Peru, Brazil, China, South Africa
OceanaGold	Gold and copper mine	Philippines
Oil Search	Oil and gas exploration	Papua New Guinea
Orica**	Mining and construction Explosives services, and chemicals	Philippines, Mexico, Thailand, India, Indonesia, Laos, Malaysia, Mongolia, Brazil, Bolivia, China, Ghana, South Africa, Zambia, Columbia, Slovakia, Russia, Papua New Guinea, Vanuatu, Vietnam, Bulgaria, Cuba, Turkey, Tanzania, Venezuela, Argentinean, Kazakhstan, Czech Republic, Ukraine, Peru
Origin Energy	Petroleum Exploration and Production	Kenya, Thailand, Laos, Vietnam, Papua new Guinea, Samoa, Solomon Islands, Tonga, Vanuatu
OrotonGroup	Luxury goods retailer	Italy, China
Paladin Energy	Uranium mines and exploration activities	Namibia and Malawi, Niger
PanAust	Gold and copper mine	Laos
Perseus Mining	Gold mines and exploration	Ghana, Cote d'Ivoire, Kyrgyz republic, Guinea

Platinum Australia	Platinum mine	South Africa
Premier Investments	Speciality retail chains	Asia, China
Qantas	Flights	Africa, Asia, South America, Vietnam, Fiji
QBE Insurance	Insurance operations	Latin America, Eastern Europe, Asia
Resmed	Sales and marketing and manufacturing activities	North and Latin America, China, India, Malaysia
Resolute Mining	Gold mines and exploration	Mali, Tanzania, Ivory Coast
Resource Generation	Coal mines	South Africa
SAI Global	Assurance services	Asia, South Africa
Santos	Exploration, development, production, transportation and marketing of hydrocarbons	Includes Papua New Guinea, Indonesia, Bangladesh and Vietnam
Seek Ltd	Owens stakes in a number of international based online employment business	China, Brazil, Mexico, South East Asia
Sims Metal Management	PNG recycling etc	Papua New Guinea, China, South Africa, Malaysia
Speciality Fashion Group	Women's wear retailer	Primarily China
St Barbara	Gold mining operations	Papua New Guinea
Super Retail Group	Retail brands	China, Vietnam
Telecom New Zealand	Large government enterprise	Australasia
Toll Holdings	Logistic services	Asia, Americas, Africa, Europe, Middle East
Tower Ltd	Insurance operations	Fiji, American Samoa, Samoa, Pacific Islands
Treasury Wine Estates	International wine business	Includes Italy, Argentina, South Africa
Virgin Australia Holdings	International airline services	Asia, Greece, Russia, Oman, Kenya, Saudi Arabia, Lebanon
Westfield Group	Shopping centre portfolio with investment interests	Brazil, Italy
Woolworths	Operations	China, India
Wotifcom	Online accommodation and travel services booking company	Malaysia, Thailand

Appendix 2. Background to Publish What You Pay Australia

Publish What You Pay is a global campaign for transparency and accountability in the mining and oil and gas industries. In Australia, the campaign is supported by a coalition of organisations that are committed to promoting good governance in resource-rich countries to ensure that citizens benefit equitably from their natural wealth, including through advocacy for the mandatory disclosure of all payments made between extractive industry companies and governments on a country-by-country and project-by-project basis.

The current members of Publish What You Pay Australia are:

- Action Aid Australia
- Aid Watch
- Anglican Overseas Aid
- Australian Conservation Foundation
- Australian Council for International Development
- A Billion Little Stones
- Burma Campaign Australia
- Caritas Australia
- Catholic Mission
- ChildFund Australia
- Columban Mission Institute
- Conservation Council of Western Australia
- CFMEU – Mining and Energy
- CAER – Corporate Analysis. Enhanced Responsibility
- Economists at Large
- Friends of the Earth Australia
- Global Poverty Project
- Greenpeace Australia Pacific
- Human Rights Law Centre
- Jubilee Australia
- Mineral Policy Institute
- Oaktree Foundation
- Oxfam Australia
- Search Foundation
- SJ Around The Bay
- Tear Australia
- Transparency International Australia
- Union Aid Abroad – APHEDA
- Uniting Church in Australia – Synod of Victoria and Tasmania
- World Vision Australia