

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Joint Standing Committee on Treaties

OECD CONVENTION ON COMBATING BRIBERY

AND

DRAFT IMPLEMENTING LEGISLATION

16th Report

June 1998

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ISBN

Produced by

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* Members of the OECD Bribery Sub-Committee.

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² Replaced Senator K Carr (ALP, VIC) from 4 December 1996.
³ Replaced Senator K Denman (ALP, TAS) from 12 December 1996.
⁴ Replaced Senator B J Neal (ALP, NSW) from 5 March 1998.
⁵ Replaced Mr A C Smith (LP, QLD) from 27 May 1998.
⁶ Replaced Mr C W Tuckey MP (LP, WA) from 24 September 1997.
⁷ Replaced the Hon W E Truss MP (NP, QLD) from 23 October 1997.

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EXTRACT FROM RESOLUTION OF APPOINTMENT

The Joint Standing Committee on Treaties was formed in the 38th Parliament on 30 May 1996. The Committee's Resolution of Appointment allows it to inquire into and report upon:

- (a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
- (b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- (c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

RECOMMENDATIONS

**The Joint Standing Committee on Treaties recommends that-
the Australian Government:**

- undertake through diplomatic channels the cooperation of other OECD members to work towards increasing the number of adherents to the OECD Convention and, in particular, the adoption of complementary domestic legislation;
- raise the issue of adherence to the OECD Convention, and the passing of complementary domestic legislation, at the next meeting of the South Pacific Forum, and
- raise with members of the Association of South East Asian Nations the desirability of adherence to the Convention, and the passage of complementary domestic legislation (paragraph 3.42);

the offence proposed to be created in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be amended to broaden the fault elements under paragraph 14.1(1)(c) to include the element of recklessness (paragraph 5.47);

the definitions included in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be re-examined with a view to ensuring that, consistent with the scope of the proposed legislation, these definitions are comprehensive and that they are expressed with the greatest possible clarity to ensure certainty in the proposed Bill (paragraph 6.39);

the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be amended so that the basis for the exercise of jurisdiction in relation to the proposed offence is extended to include any of territoriality, nationality, residence, place of incorporation or business operation (paragraph 7.57);

the ancillary offences set out in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be redrafted so that the basis for the

exercise of jurisdiction in respect of ancillary offences be any of territoriality, nationality, residence, place of incorporation or business operation (paragraph 8.25);

- neither of the options put forward in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* to address facilitation benefits be adopted;
- the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* adopt in lieu a purposive approach to facilitation benefits in terms similar to those included in the US *Foreign Corrupt Practices Act of 1977*, and
- payment or provision of a facilitation benefit to secure a routine governmental action be a defence to a charge under the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* (paragraph 9.87);

the Minister for Justice consult with the Attorney-General for each of the States and Territories concerning inconsistencies that may need to be addressed between the provisions in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* and in relevant legislation of the States and Territories (paragraph 10.13);

the Minister for Justice consult with the Attorney-General for each of the States and Territories concerning inconsistencies that may need to be addressed between the provisions in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* and in relevant legislation of the States and Territories (paragraph 10.15), and

the penalties for the offence of bribery created by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* should include confiscation of property acquired from the proceeds of the bribery (paragraph 10.17).

The Joint Standing Committee on Treaties, having concluded that payments to secure routine governmental action should be an available defence to a charge of bribery under the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*, and that there should be an obligation to record such payments in the accounts of organisations, recommends that the Minister for Justice consider the feasibility of imposing a penalty in the Bill for non-compliance and the penalty that should be imposed (paragraph 10.19).

The Joint Standing Committee on Treaties recommends that-

the Minister for Justice examine the viability of undertaking an education campaign with peak industry bodies such as the Australian Chamber of Commerce and Industry, the Business Council of Australia, the Minerals Council of Australia and the Australian Chamber of Manufactures to inform Australian firms of the provisions of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* (paragraph 11.48);

the Minister for Foreign Affairs request the Australian Agency for International Development to undertake an audit of its good governance programs to ensure that the objectives underpinning the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* are adequately incorporated in relevant development assistance projects (paragraph 11.54);

the Director of Public Prosecutions and the Australian Federal Police keep under review costs incurred in implementing the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* to ensure that funds required for investigation and prosecution of alleged offences are adequate (paragraph 12.21);

the Minister for Justice examine the benefits and practicalities of introducing a requirement that payments of bribes be disclosed in business accounts (paragraph 13.24);

the Minister for Justice examine the scope for making available rulings on whether future conduct would infringe the provisions of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* (paragraph 13.56).

The Joint Standing Committee on Treaties recommends that:

- **Australia sign and ratify the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, and**
- **the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be amended in accordance with the recommendations set out in this Report, and**

- the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be introduced into the Parliament as soon as practicable (paragraph 14.44).

CHAPTER 1

BACKGROUND TO AND CONDUCT OF THE INQUIRY

Background to the OECD Convention

1.1 The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention) is ultimately derived from the Recommendation, made in May 1994, by the Council of the Organisation for Economic Cooperation and Development (OECD). It recommended that Member countries should take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.¹

1.2 The OECD Council further recommended that Member countries should criminalise bribery of foreign public officials 'in an effective and coordinated manner' by submitting proposals to their legislatures by 1 April 1998, seeking enactment by the end of 1998.²

1.3 In May 1996, the Council included in its communique a commitment to criminalise bribery of foreign public officials in international business transactions.

1.4 In May 1997, in its Recommendation, the OECD's Ministerial Council recommended that Member countries should legislate to criminalise bribery of foreign public officials in an effective and coordinated way. It also decided that an international convention to criminalise bribery, in conformity with the Agreed common elements, should be negotiated with a view to its entering into force by the end of 1998.³

1.5 The text of the Convention was adopted by an OECD negotiating conference on 21 November 1997. When it was opened for signature on 17 December 1997, OECD Ministers affirmed their intention to submit the Convention and proposals for its implementation to their competent bodies by 1 April 1998.

¹ Transcript, 9 March 1998, p. 7.

² *ibid.*

³ Exhibit No 3, p. 2.

Referral of the draft legislation

1.6 On 2 December 1997, the Minister for Justice, Senator the Hon Amanda Vanstone, announced the Government's intention to prepare legislation to prohibit the bribery of foreign officials. Passage of that legislation would be dependent on other OECD countries seeking to introduce similar legislation.

1.7 In a subsequent letter to the Committee Chairman, Senator Vanstone stated that Australia's draft legislation would be consistent with the Convention's terms. This legislation would be included in the Commonwealth Criminal Code and would be drafted to meet most of Australia's obligations under the Convention. She also said that she intended to table the OECD Convention 'at the earliest available date', and believed it would be appropriate for the Committee to examine the draft legislation as part of its inquiry.

1.8 On 19 February 1998, the Minister forwarded a copy of the exposure draft of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*, (the Bill) to this Committee for its views. She considered that our inquiry would be 'the focus of consultations on the legislation and the Convention'.

1.9 At the first public hearing, she stated that the results of our deliberations would be important for the timing of the Bill's progress after its introduction into the Parliament. It will not be enacted until treaty processes are completed.⁴

1.10 The Australian Taxation Office (ATO) is preparing legislation to remove the tax deductibility of bribes.

1.11 On 31 March 1998, the Chairman wrote to the Treasurer and the Minister for Justice, stating that it was our view that it was inappropriate for either piece of legislation to be presented to the Parliament before our report was tabled. On 28 April 1998, Senator Vanstone responded, saying that the Bill would not be introduced before the tabling of this Report.

⁴ Transcript, 9 March 1998, p. 4.

Tabling of the Convention

1.12 The Convention, together with its National Interest Analysis (NIA), was tabled in both Houses of the Parliament on 3 March 1998, and the '15 sitting day' period for this document expired on 2 April 1998.⁵

1.13 On 13 February 1998, the Chairman had already advised the Minister for Justice that, if the draft legislation were referred to the Committee for consideration with the Convention, in all probability it would not be possible to meet the normal deadline before binding treaty action can be taken.

The inquiry

1.14 On Friday 6 and Saturday 7 March 1998, the Convention was advertised in national newspapers, calling for submissions by Wednesday, 25 March 1998. These advertisements stated that the Committee would consider the Convention with the draft legislation.⁶

1.15 Letters seeking submissions were also sent to individuals and organisations with an interest in the Convention and the issues it raises. These letters also stressed that submissions to the inquiry should comment on the draft implementing legislation as well as on the Convention itself.⁷

1.16 Those submissions which were received are listed in Appendix 1.

1.17 Public hearings were held on 9 and 30 March, 6 April and 11 May 1998 in Canberra, in Melbourne on 16 April and on 17 April 1998 in Sydney. Those witnesses who appeared at these hearings are listed in Appendix 2, while additional material received during the course of the inquiry is listed in Appendix 3.

1.18 It is regrettable that BHP, an organisation which has demonstrated such a commitment to the elimination of bribery, did not forward a submission to this inquiry and declined to evidence at a public hearing. While Telstra forwarded a

⁵ Senate, *Hansard*, 3 March 1998, P161; House of Representatives, *Hansard*, 3 March 1998, PP139-140. The other treaties tabled on 3 March 1998 were considered in our *Thirteenth Report*, March 1998, which was tabled in both Houses on 6 April 1998. This Convention was mentioned on pp. 3-4.

⁶ See *The Australian Financial Review*, 6 March 1998, (Review Section) p. 11 and *The Weekend Australian*, 7-8 March 1998, p. 39.

⁷ We would like to thank Transparency International Australia for its assistance with this mailing list.

submission, similarly it was not prepared to assist the Committee by giving evidence at a hearing.

1.19 This inquiry has been significant for two reasons:

- it was the first one in which a Minister gave evidence at a public hearing of the Committee, and
- it was also the first time that draft enabling legislation had been referred to the Committee for consideration in conjunction with an inquiry into a treaty.⁸

⁸ See *First Report*, August 1996 (tabled on 9 September 1996), p. 1, for details of the formation of this Committee.

CHAPTER 2

THE NEED FOR THE CONVENTION

Corruption

2.1 Corruption is one of the greatest challenges facing the contemporary world. It covers a range of nefarious activities, including extortion, nepotism, cronyism, bribery, and money laundering. It can take both active or passive forms, ranging from actual involvement to 'turning a blind eye' to such activities. The World Bank estimates that bribes emanating from industrialised to developing countries amount to about \$US80 billion per year, where the total net flow of direct investment, trade and development assistance to developing nations is about \$US180 billion per year.¹

2.2 The seriousness of the effects of international bribery, and particularly its relationship to the fraudulent enrichment of political elites in developing countries, has been 'grossly under-estimated'. It is more serious today than it was in the past because misappropriated monies removed from developing countries involve large amounts which have the potential to bankrupt a fragile economy.²

2.3 Bribery can also destabilise countries by undermining confidence in institutions, such as democracy and the law, and several witnesses linked such corruption with recent, serious national problems in Australia's region.³

2.4 Traditionally, there has been a widely held view that corruption was an inevitable element in the development of nations, a substitute for violence and political instability. This view now cannot be sustained, especially in view of the symbolic effect of the Convention.⁴

¹ Submissions, pp. 15-16; Transcripts, 16 April 1998, pp. 173, 182.

² Submissions, p. 1.

³ See, for example, Transcripts, 6 April 1998, pp. 117-118, 11 May 1998, p 296, Submissions, pp. 169, 79.

⁴ Submissions, pp. 1-2, Transcript, 17 April 1998, pp. 232-233.

2.5 The Australian Chamber of Commerce and Industry (ACCI) regards corruption in all its forms as a cancer in the global system of trade, investment, requiring decisive and effective action to eradicate it completely.⁵

2.6 At a personal level, corruption can have devastating effects on those innocent people who suffer from its effects. Mr Brian Hurlock drew attention to the linkage between current economic problems in Australia's region and endemic corruption, low-level results of which he saw at first-hand in refugee camps in Thailand in the 1980s and early 1990s.⁶

2.7 The National Interest Analysis (NIA) for the Convention states that bribery of foreign public officials is a serious international issue because:

- it distorts international trade and investment by raising transaction costs;
- it reduces efficiency;
- it creates a level of uncertainty for business, as the size of a bribe rather than the merit of a product or service determine decisions;
- it disadvantages both suppliers and customers, and
- it undermines the integrity and, in some cases, the stability of governments.⁷

2.8 Dr Andrew Brien agreed that, while there is a range of economic consequences of bribery, there are also political and social consequences. An IMF study suggests that, if a country improves its standing on a corruption index, it will enjoy the benefits of an increase of four percentage points of investment with resulting improvements in employment and economic growth. It was therefore possible that reducing bribery had greater and more direct economic consequences for a nation than reducing distortions in international trade.⁸

⁵ Submissions, p. 95; Transcript, 30 March 1998, p. 37. The submission from Transparency International Australia quotes the President of the World Bank, Mr James Wolfensohn, about 'the cancer of corruption' (Submissions, p. 16). See also Transcript, 16 April 1998, p. 173.

⁶ See Transcript, 16 April 1998, pp. 193-202 (*passim*). Submissions, pp. 80, Transcript, 16 April 1998, pp. 165, 168-169.

⁷ Unless otherwise indicated, the NIA is the source of the material in this section.

⁸ Submissions, pp. 115-116.

Australia and the Convention

2.9 The Convention provides a framework within which Australia and other OECD members can introduce criminal sanctions for and minimise the risk of commercial disadvantage through bribery. Participation is not limited to OECD members, so that an opportunity is provided for other countries to become parties to the Convention.⁹

2.10 As set out in the NIA, the Government considers that Australian firms are not significantly involved in corrupt practices overseas, and that such firms will ultimately benefit from a reduction in the incidence of international bribery which should result from the OECD's action.¹⁰

2.11 Making bribery a criminal offence is seen as an important step in addressing this issue. Some Australian business groups may view criminalisation of this matter as disadvantageous because some competitors overseas will not be subject to the same business constraints. If Australia took unilateral action to make this a criminal offence, however, it would undoubtedly cause harm to its firms operating overseas without any compensating advantages.

2.12 All witnesses who participated in this inquiry accepted the proposition that eliminating bribery from international business transactions was a desirable goal. It was also agreed that the Convention was worthwhile, if only as a first step towards stamping out corruption in all its forms. In her address at the first public hearing for this inquiry, the Minister for Justice, the Hon Senator Vanstone, recognised that the Convention would not completely solve the problem of corruption, but that something must be done to reduce it.¹¹

2.13 Senator Vanstone also pointed out that, because of the cost of investigating and prosecuting offences under the legislation, the focus of law

⁹ All submissions to the inquiry opposed bribery, giving excellent practical and moral reasons for opposing it, providing useful insights into the problem and its causes. There was support, if not universal, of the need for the Convention.

¹⁰ Dr Camillo Premoli stated that Australian firms are 'appallingly bad' at bribery, that this is very dangerous and, while it is unethical, it is also 'suicidal' to bribe badly. The proposed legislation 'will protect us from costly mistakes'. (Submissions, p. 5, Transcript, 17 April 1998, p. 228.) See also Transcript, 16 April 1998, p. 175.

¹¹ The point that this Convention is only a first step was made by a number of witnesses. Transcripts: 6 April 1998, pp. 81, 94, 96; 16 April 1998, pp. 163, 191-192, and 17 April 1998, p. 271; Submissions, p. 139.

enforcement will by necessity be on 'very large scale' bribes, or 'grand' corruption.¹²

2.14 A number of witnesses suggested that only a broad, coordinated, multilateral effort of nations moving forward together would achieve a reduction in corruption. There was, therefore, an obligation on Australia to make a contribution to that larger effort.¹³

2.15 Allen Allen & Hemsley suggested that, because of the provisions for the entry into force of the Convention in Article 15.1, Australia should only become bound when 'it is established that a sufficient number of significant countries' have indicated that they will implement it.¹⁴

2.16 The NIA states that there are differences of opinion about the measures recommended in the Convention, and its implementation through the draft enabling legislation. The variety of views set out in this section about the applicability of the Convention are among those which will be examined in this Report.¹⁵

2.17 The Department of Foreign Affairs and Trade (DFAT) said that adoption of the Convention and its entry into force would send important messages about the commitment of governments to deal with the problem to those who might be tempted to engage in bribery, and to those who might be tempted to tolerate it overseas.¹⁶

OECD membership

2.18 The OECD has 29 members, and five non-member countries have also indicated their interest in this Convention.¹⁷

2.19 Australia has not yet signed the Convention, and the NIA points out that the Government will determine a date for ratification which will ensure that Australia does not move in advance of other OECD countries on this matter.¹⁸

¹² Transcripts: 9 March 1998, pp. 3, 12, 16 April 1998, p. 150.

¹³ Submissions, p. 99, Transcripts: 9 March 1998, p. 3, 16 April 1998, pp. 148, 163-164, 17 April 1998, pp. 204, 209, 212.

¹⁴ Submissions, p. 102, Transcript, 17 April 1998, p. 204.

¹⁵ See, for example, Submission No 17, pp. 95-97 and No 33, pp. 193-195.

¹⁶ Transcript, 6 April 1998, p. 81, Submissions, p. 140.

¹⁷ The members of OECD are listed in Appendix 4. The five non-members are: Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. See Exhibit No 22, p. 1.

¹⁸ For consideration of Article 15, dealing with the entry into force of the Convention, see paragraphs 3.21 and 3.22.

OECD work program

2.20 The OECD Working Group on Bribery in International Business Transactions (the Working Group) has a work program in place which requires it to examine the following areas and report to the 1999 Ministerial Meeting:

- bribery of foreign political parties;
- advantages promised or given to a person in anticipation of that person becoming a foreign public official;
- bribery of foreign public officials as a predicate offence for money laundering legislation, and
- the role of foreign subsidiaries and offshore centres in bribery transactions.

2.21 While this indicates a resolve by the OECD to continue work against corruption into other significant areas, the difficulties involved in making progress should not be underestimated.

Further implementation of the Convention

2.22 Appendix 5 sets out the stages reached by OECD members and some of the other countries involved in their implementation of this Convention, including whether domestic legislation is in place and whether that legislation includes a defence for facilitation payments.

2.23 This schedule makes it clear that this country is not alone in its moves against corruption, and that progress is being made towards implementation of the Convention. We fully support its entry into force and implementation for domestic purposes through the draft Bill. Within the OECD, Australia must continue to support the prompt entry into force of the Convention for, and passage of complementary domestic legislation, by the Parties and the other interested nations.

2.24 There are many problems to be dealt with before corruption can be extinguished at a global level. One example, from the Australia Burma Council, will suffice. It isolated a particular concern with reference to Article 1.1 of the Convention, which states that each member shall take necessary such measures as may be necessary to establish the offence of bribery of foreign public

officials. It observed that the proposed legislation would not be effective in reducing bribery within Burma or other countries which are not governed by the rule of law.¹⁹

2.25 Australia is not alone in its desire to deal with corruption, or for the Convention to be implemented fully through legislation by OECD members and other nations. As the Convention is an initial step in addressing a major global problem, it is important that the processes of its entry into force and the passage of domestic legislation be handled effectively and implemented in the national interest.

'Bribery' in this Report

2.26 While acknowledging that generically corruption encompasses a wide range of activities, in this Report the definition of 'bribe' or 'bribery' will be taken from the Convention. It will mean the offer, promise, or giving of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.²⁰

2.27 Article 1.2 of the Convention refers to other offences such as: complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official. It states that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a foreign public official of the Party to the Convention. This Article provides that these actions should also be criminal offences.

2.28 Article 1.3 of the Convention states that the offences set out in the previous paragraphs should be regarded as 'bribery of a foreign public official'.

UN Declaration Against Corruption

2.29 On 18 December 1996, the United Nations (UN) adopted the *Declaration against Corruption and Bribery in International Commercial Transactions*. This Declaration commits UN members to criminalise such bribery in an

¹⁹ Submissions, pp. 196-198 (*passim*). Burma is not a member of the OECD.

²⁰ This definition has been adapted from Article 1.1 of the OECD Convention.

effective and coordinated manner, and to deny tax deductibility for bribes. As the NIA points out, this Declaration has no standing in international law.²¹

Recent Parliamentary consideration

2.30 A recent report by the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT), linking recent economic problems in South East Asia with corruption, stated that:

The crisis in the economies of the region demonstrates that corruption is a serious political and economic problem. Its cause rests in the political systems where there is little transparency, accountability and scrutiny; the lack of a free press, a viable opposition and an independent judiciary. These fundamental civil and political rights are the means by which corruption, while not eliminated, is kept at bay.²²

2.31 The JSCFADT noted that Australians have often been unaware of the ethical issues involved in corruption, and consequently, ignore them whilst complying with corrupt expectations or alternatively have retreated to a sense of outraged moral superiority. It saw the encouragement of debate on social and political questions in multilateral and bilateral regional forums as a useful way to clarify national direction, purpose and identity, involving both political leadership at home and dialogue abroad.²³

2.32 That Committee therefore recommended that the Australian Government:

support the development of an East Asian political community in the form of a regional forum developed through consultation with all regional governments.²⁴

²¹ See Exhibit No 6. Transcript, 6 April 1998, p. 80.

²² Joint Standing Committee on Foreign Affairs, Defence and Trade, *Australia and ASEAN: Managing Change*, March 1998, p. 117. See *The Australian Financial Review*, 7 April 1998, p. 2. See also p. 120 of the JSCFADT Report for a reference to the introduction of draft legislation to 'criminalise bribery'.

²³ *ibid*, p. 119.

²⁴ *ibid*, Recommendation 14, p. 119. To date, the Government has not yet responded to the recommendations in the JSCFADT Report.

CHAPTER 3

THE CONVENTION

The Convention in brief

3.1 The Commentaries to the Convention point out that it deals with what some countries call 'active corruption', meaning the focus is on the offence committed by the person who promises or gives a bribe, rather than 'passive bribery' which is the offence committed by the official who receives it. In some circumstances, the recipient will have induced or sought the bribe and in that sense will be the more active.¹

3.2 It also points out that the Convention seeks to assure 'a functional equivalence' in the measures to be taken by the Parties, without requiring uniformity or changes in the fundamental principles underpinning their legal systems.

3.3 The preamble to the Convention recognises that bribery is a widespread phenomenon in international business transactions which raises serious moral and political concerns, undermines good governance and economic development and distorts international competitive conditions. Among other things, it also:

- welcomes the efforts of companies, business organisations and trade unions as well as other non-governmental organisations (NGOs) to combat bribery, and
- recognises that progress in this field requires efforts at the national level, as well as multi-lateral cooperation, monitoring and follow-up.

3.4 Article 1.1 requires each Party to take such measures as are necessary to establish domestic legislation making a criminal offence of bribing a foreign public official to act, or refrain from acting, in the performance of official duties. It establishes a standard to be met by Parties, but does not require them to use its precise approach in defining the offence under their domestic laws.

3.5 Such matters as complicity, the attempt and conspiracy to bribe a foreign public official shall also be criminal offences to the same extent as the attempt

¹ Exhibit No 5, p. 1. Unless otherwise indicated, material in this section is drawn from the Commentaries.

and conspiracy to bribe a public official of the Party (Article 1.2). These offences are understood in terms of their normal content in national legal systems but, for them to be subject to territorial jurisdiction, it is not necessary for further action to be taken within the Party's territory.

3.6 Thus, the offence included in the draft legislation would be committed where the conduct occurred wholly or partly within Australia, but not where the conduct occurred wholly outside this country.

3.7 Article 1.4 defines 'foreign public official', 'foreign country' and use of a public official's position:

- a. 'foreign public official' means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
- b. 'foreign country' includes all levels and subdivisions of government, from national to local;
- c. 'act or refrain from acting in relation to the performance of official duties' includes any use of the public official's position, whether or not within the official's authorised competence.

3.8 Each Party is to take necessary measures, in accordance with its legal system, to establish liability for the bribery of a foreign public official (Article 2). Thus, if criminal responsibility cannot be attributed to legal persons (ie. corporations) in a legal system, the Party will not be required to establish such responsibility.

3.9 Article 3 states that the range of penalties for bribery must be comparable to the offence of bribing officials of the Party, including incarceration for effective mutual legal assistance and extradition. Non-criminal sanctions should be available where criminal responsibility cannot be attributed. Measures should be taken to ensure the proceeds, the profits or other benefits, of bribery are subject to seizure and confiscation, or that fines of comparable value to the benefit received can be awarded. Additional civil or administrative sanctions can also be considered.

3.10 The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the act of bribery is not required. Nationality jurisdiction is to be established according to general principles and conditions in each Party's legal system, including dual criminality (Article 4).

3.11 Investigation and prosecution of bribery shall be subject to each party's rules and principles, including prosecutorial discretion, and shall not be influenced by national economic interest, the potential effects upon relations with another State, or the identity of those involved (Article 5).

3.12 Any statute of limitations applicable to the offence shall allow an adequate time for investigation and prosecution (Article 6).

3.13 In Article 7, bribery of a Party's public official is to be construed broadly so that bribery of a foreign official is to be a predicate offence for money laundering legislation on the same terms when active or passive bribery of domestic officials is an offence.

3.14 Article 8 deals with accounting matters, professional responsibilities of auditors and disclosure of material contingent liabilities which will need to take into account the full potential liabilities under the Convention, as well as other losses which might flow from the conviction of the company or its agents for bribery. The accounting offences under this Article will generally occur in the company's home country, while the bribery itself may have been committed in another country.

3.15 Prompt and effective assistance will be provided to another Party for criminal investigations and proceedings of offences within the Convention's scope, including documents. A Party shall not decline to render mutual legal assistance within the scope of the Convention on the grounds of bank secrecy (Article 9).

3.16 Under Article 10.1, bribery shall be included as an extraditable offence under the Parties' laws and the extradition treaties between them. Under Article 10.2, the Convention may be considered as the legal basis for extradition if no extradition treaty exists between two Parties. Each Party shall take measures so that it can extradite or prosecute its nationals for bribery and, where a Party declines to extradite a person for bribery because the person is a national, the case shall be submitted to its authorities for prosecution (Article 10.3).

3.17 The OECD Secretary-General shall be notified of the authority or authorities responsible for making and receiving requests on consultation, mutual legal assistance and extradition without prejudice to other arrangements between the Parties (Article 11).

3.18 The Parties shall cooperate in carrying out a follow-up program to monitor and promote full implementation of the Convention (Article 12).

3.19 Until its entry into force, the Convention will be open for signature by members and non-members invited to become full participants in the Working Group on Bribery. After entry into force, it will be open to accession by any non-signatory member, or full participant in the Working Group or any successor. For each such non-signatory, it will enter into force on the 60th day following the deposit of the instrument of accession (Article 13).

3.20 The Convention is subject to acceptance, approval or ratification by signatories in accordance with their laws (Article 14.1). The various instruments shall be deposited with the Secretary-General of the OECD, who shall serve as depositary (Article 14.2).

3.21 The Convention will enter into force on the 60th day following the date on which five of the ten countries which have the ten largest export shares, set out in the Annex which is part of the document, and which by themselves represent at least 60 per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval or ratification. For each signatory depositing its instrument after entry into force, the Convention enters into force on the 60th day after the instrument is deposited (Article 15.1).²

3.22 If, after 31 December 1998, the Convention has not entered into force, any signatory which has deposited an instrument of acceptance, etc, may declare its willingness in writing to the depositary its readiness to accept entry into force. The Convention will then enter into force on the 60th day following which such declarations have been deposited by at least two signatories. For each signatory depositing its instrument after entry into force, the Convention will enter into force on the 60th day following the date of deposit (Article 15.2).

3.23 Any Party may propose an amendment to the Convention which shall be submitted to the depositary who will circulate it to other Parties at least 60 days before convening a meeting to discuss the proposal. Amendments will be adopted by consensus, or by other means to be determined by consensus, and will enter into force 60 days after the deposit of an instrument of ratification, etc, by all the Parties (Article 16).

3.24 Under Article 17, a party may withdraw from the Convention by written notification to the depositary, and the withdrawal will be effective one year after receipt of the notification. Cooperation will continue on all requests for

² In the Annex referred to in Article 15.1, Australia is 15th in the statistics of total OECD exports. It will not be among the group whose instruments of acceptance, approval or ratification will determine the entry into force of the Convention. See Appendix 4 for the list of OECD members, where the figures for the exports of the ten largest countries, from that Annex, are also given.

assistance or extradition which remain pending before the effective date of withdrawal.

3.25 The Convention does not require the criminalisation of so-called 'facilitation payments': comparatively small sums paid to induce officials to perform their lawful functions such as the issue of licences or permits. The Commentaries to the Convention states that such payments do not constitute payments within the meaning of Article 1.1 and are not an offence.

3.26 Such payments will usually be illegal in the country where they are made. They are made to induce public officials to perform their functions. This type of corruption is considered to be a domestic matter and best addressed by strengthening good governance in the countries concerned, rather than by legislative action by Parties to the Convention. This matter will be addressed during our consideration of the implementing legislation.

Costs

3.27 The Convention (Article 12) requires Parties to bear a share of the costs of the follow-up program through the OECD's normal budget processes. There are no other, direct financial costs in complying with it, although the Committee noted that cost of investigations and administration of any enabling legislation may be considerable.

3.28 Investigation and prosecution costs will be met by the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions (DPP) 'from within their existing funds'. The Attorney-General's Department (AGs) will also meet costs of receiving international requests for extradition or other assistance for investigations and prosecution of bribery offences from within existing funds.

Future protocols

3.29 The OECD Working Group on Bribery in International Business Transactions (the Working Group) has a work program in place which requires it to examine the following areas and report to the 1999 Ministerial Meeting:

- bribery of foreign political parties;
- advantages promised or given to a person in anticipation of that person becoming a foreign public official;

- bribery of foreign public officials as a predicate offence for money laundering legislation, and
- the role of foreign subsidiaries and offshore centres in bribery transactions.

3.30 The Working Group's report(s) may give rise to proposals to amend the Convention. Article 16 allows for it to be amended through the consensus of the Parties, or by such means as they may determine by consensus.

Implementation

3.31 Draft legislation to implement the Convention will be considered in the following chapter. It will also be necessary to make regulations under the *Extradition Act 1988* to give effect to the additional obligations imposed.

3.32 State and Territory laws against secret commissions would, in some cases, cover the offence of bribery if the official is based in this country. Such prosecutions, however, appear to have been rare. In future, such cases would be likely to be prosecuted under Commonwealth legislation. There will be, therefore, a negligible change to existing Commonwealth/State/Territory roles as a result of implementing the Convention.

3.33 The primary thrust of the Commonwealth offence, where it is partly committed in this country or its Territories, will be to extend Australian jurisdiction overseas. Thus, the offence included in the draft legislation would be committed where the conduct occurred wholly or partly within Australia, but not where the conduct occurred wholly outside this country. Such an offence is properly a matter for Commonwealth legislation, and it will be further developed in Chapter 7 on jurisdiction.

Consultation

3.34 Information on the proposed Convention was provided to the States/Territories through the SCOT process. The NIA states that they have not sought detailed information or expressed any views on the Convention.

3.35 A submission was received from Ms Robyn Gray who expressed views on the probable impact of the enabling legislation on the States and Territories.³

³ See Submission No 8, pp. 23-54, Transcript, 17 April 1998, pp. 217-225.

3.36 The NIA also details the measures taken by representatives of the AG since 1995 to consult with other agencies, members of the business community, academics and NGOs with an interest in this matter.

3.37 These activities included an inter-departmental working group in 1995 and participation in a 'round table', organised by Transparency International Australia (TI) in March 1998. Many of those organisations and individuals forwarded submissions to this inquiry and gave evidence during the program of public hearings.⁴

3.38 While not strictly related to the usual consultation process connected with the NIA, it is regrettable that Australian corporations as BHP and Telstra did not give evidence at a public hearing and, in BHP's case, forward a submission to this inquiry. The Committee considers that such organisations with substantial overseas operations could have provided some valuable insights into the subject matter of this inquiry and corporate governance issues.⁵

Conclusions

3.39 While this Convention will undoubtedly be a useful first step against corruption, it must be seen in context. The OECD only has 29 members and a further five countries have expressed an interest in it. This is not a large number of nations and, as the list of members in Appendix 4 makes clear, apart from (South) Korea, no South East Asian nations are members. There are no Pacific Island nation members.

3.40 The credibility and effectiveness of a multi-lateral treaty involving relatively few members and excluding so many developing nations must be questioned. It is important that more nations become involved in the international fight against corruption, and this Convention could be an ideal starting point in this endeavour.

3.41 Australia has a reputation for lack of corruption in the overseas activities of its corporations. It is in a good position to advocate the need for the provisions of this Convention with non-members of the OECD, particularly as a useful follow-up to the more general 1996 UN Declaration against Corruption and Bribery.

⁴ Transcript, 9 March 1998, pp. 7, 11. The individuals/organisations consulted by the interdepartmental working group on 7/8 March and 6 September 1995 are listed in Appendix 6.

⁵ This matter will be further addressed in Chapter 11.

3.42 The Joint Standing Committee on Treaties recommends that:

the Australian Government:

- **undertake through diplomatic channels the cooperation of other OECD members to work towards increasing the number of adherents to the OECD Convention and, in particular, the adoption of complementary domestic legislation;**
- **raise the issue of adherence to the OECD Convention, and the passing of complementary domestic legislation, at the next meeting of the South Pacific Forum; and**
- **raise with members of the Association of South East Asian Nations the desirability of adherence to the Convention, and the passage of complementary domestic legislation.**

CHAPTER 4

THE DRAFT BILL

Effect of the Bill

4.1 As set out in the General Outline to its Explanatory Memorandum (EM), the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* (the Bill) amends the *Criminal Code Act 1995* (the Code) by inserting the offence of bribing a foreign public official (the offence), including one who works for an international organisation.¹

4.2 The effect of the Bill is:

- to prohibit providing or offering a benefit which is undue to another person, with the intention of influencing a foreign public official in the exercise of his/her duty to obtain or retain business, or obtain or retain an improper advantage;²
- to apply the prohibition to conduct within and outside Australia, unless providing or offering the benefit occurs wholly outside Australia;
- to ensure, however, that the ancillary offences of attempt, complicity, incitement and conspiracy which occur outside Australia apply where they relate to conduct proscribed in the offence which occurred or was planned or expected to occur in Australia, and
- to ensure that Australia complies with the key features of the Convention.

4.3 Although the Convention and its Commentaries provide detailed consideration of the offence, Mr Dabb representing AGs Department advised that if the Bill sought to prohibit conduct which occurred entirely outside

¹ Transcript, 30 March 1998, p. 23. Unless otherwise specified, material in this Chapter is drawn from the Explanatory Memorandum (EM) to the Bill. The provisions of the Bill were also explained at public hearings: see Transcripts: 9 March 1998, pp. 8-10, 30 March 1998, pp. 21-36 (*passim*).

² 'Benefit' is defined in subclause 14.1(8) of the Bill as including 'any advantage and is not limited to property'. The definitions in the Bill will be considered in Chapter 6.

Australia, it was not necessary for the Bill to reflect exactly the Convention's terms.³

The Bill in brief

4.4 In Clause 2, the Bill provides for commencement of the Act on Proclamation, but not earlier than on the day on which the Convention enters into force in Australia. Subclause 2(2) provides that, if the Act is not proclaimed earlier, it will commence six months after the Convention enters into force. The EM states that this will provide some flexibility about the commencement date to ensure that there is adequate awareness of the new provisions. It also avoids having unproclaimed legislation in the statute books for a long period.

4.5 Clause 3 provides that the Act specified in the Schedule, the Code, is amended.

The Offence

4.6 The Bill creates the offence in section 14.1.

4.7 Subclause 14.1(1) creates that offence, and provides that a person is guilty if a combination of the elements in paragraphs 14.1(1)(a), (b) and (c) are proved. The elements of the offence in this subclause mirror those contained in Article 1 of the Convention.

4.8 Paragraph 14.1(1)(a) prohibits a person from providing or causing a benefit to be provided to another person. It also prohibits offering to provide, or promising to provide, a benefit to another person or causing an offer of the provision of a benefit, or a promise of the provision of a benefit to be made to another person.

4.9 As defined in subclause 14.1(8), 'benefit' includes any advantage, and is not limited to property. Paragraph 14.1(1)(b) requires that the benefit must be undue. Subclause 14.1(4) provides that, in deciding whether a benefit is 'undue' in a particular situation, there should be no regard had as to whether it may be customary, or perceived to be so, nor to its value or to any official tolerance of such conduct.

³ Transcript, 11 May 1998, p. 329.

4.10 Paragraph 14.1(1)(c) provides that the person who has undertaken to provide an undue benefit to another person, either a foreign public official or a third person, must do so with the intention of influencing the exercise of official duties, to obtain or retain business (subparagraph (c)(i)), or to obtain or retain an improper advantage in the conduct of business (subparagraph (c)(ii)).

4.11 'Duty' is defined in subclause 14.1(8), and means any authority, duty, function or power conferred on an official, or that the official holds out as having. Subclause 14.1(5) provides that in deciding whether an advantage is 'improper' in a particular situation, there should be no regard had as to whether it may be customary, or perceived to be customary, nor to its value or to any official tolerance of such conduct. This is consistent with the formulation at subclause 14.1(4), relating to undue benefit.

4.12 The offence carries a maximum penalty of imprisonment of ten years but, as noted at the foot of subclause 14.1(1), section 4B of the *Crimes Act 1914* empowers a court to impose a fine or a sentence of imprisonment, or both, and automatically provides for a maximum fine based on the maximum term of imprisonment.

Extension of the Bill

4.13 Subclause 14.1(2) extends the Bill to every external Australian Territory, to ensure they are not treated as foreign countries for the purpose of this offence. 'Australia' is defined in subclause 14.1(8).

Jurisdiction

4.14 Subclause 14.1(3) provides that the offence of bribing relates to conduct occurring in and outside Australia, with the proviso that at least some of the conduct referred to in subclause 14.1(1)(a) must occur in Australia. This qualification ensures that jurisdiction for the offence remains territorial and therefore consistent with the traditional approach to jurisdiction taken in Australian law. The basis for jurisdiction in subclause 14.1(3) is specific to this offence, and it is likely a general jurisdictional clause will be included in the Code when other offences are inserted.

4.15 The purpose of subparagraphs 14.1(3)(a) and (b) is to ensure that, where the only part of the prohibited conduct which takes place in Australia is the receipt of the benefit, this will be sufficient to satisfy the minimum extra-territorial requirement of the paragraph: namely, that at least some of that conduct must take place in Australia. They are intended to remove any doubt

that proof of receiving the benefits in Australia, or that those benefits would have been received in this country, will be sufficient to establish the territorial element of the offence.

4.16 Jurisdiction will be considered in more detail in Chapter 7.

Undue benefit and improper advantage

4.17 Subclauses 14.1(4) and (5) define matters which must be excluded when determining whether a benefit is 'undue' or an advantage 'improper'.

Defence of lawful conduct

4.18 Subclause 14.1(6) sets out the provisions of the defence of lawful conduct in the foreign official's country. The Table in this subclause prescribes the method by which the applicable law is determined, and the source of that law will vary according to the connection of the official with the foreign government or international organisation.

4.19 The Commentaries to the Convention makes the intention clear that the conduct referred to in clause 14.1(1) should not be an offence if the advantage was permitted under the law of the officials' country. This is consistent with the principle and defence of lawful authority, and the Table prescribes the source of the applicable law which will apply to different classes of foreign public officials. The nine different classes are those which are contained in the definition in subclause 14.1(8).

4.20 Nevertheless, it is clearly understood that in any event bribery, by whatever name, will be an offence in most countries.

Facilitation benefits

4.21 Although the term 'facilitation benefit' is not used in the Convention, the Commentaries state that in some countries they are 'made to induce public officials to perform their functions, such as issuing licences or permits'. They are generally illegal in the country concerned.⁴

4.22 Subclauses (7A) and (7C) of the Bill provide alternative clauses as a defence to the primary offence.

⁴ Exhibit No 5, paragraph 9.

4.23 These subclauses set out, for consultative purposes, alternatives as to how these benefits might be excluded from the scope of the offence. The Commentaries state that facilitation benefits are not intended to extend to an offence which is international in nature, and primarily aimed at larger bribes which may distort trade.

4.24 Subclause (7A) provides as a defence to the primary offence that the benefit was less than a threshold amount (yet to be specified). Alternatively, subclause (7C) provides as a defence that the benefit was of a 'small' value. Whether a benefit was 'small' in the circumstances would be left to prosecutorial discretion. The defendant bears the evidential burden in respect of both alternatives proposed in subclauses 7(A) and 7(C). (See subsection 13(3) of the Criminal Code.)

4.25 No guidance is provided by the Convention or in its Commentaries as to what is meant by a 'small' facilitation benefit and vagueness may only be avoided by specifying a figure, as proposed in subclause (7A).

4.26 Subclause (7B) is intended as a mechanism to avoid uncertainty resulting from fluctuations in exchange rates.

4.27 The EM states that it 'is quite possible that no one will be able to suggest a universally appropriate figure' for inclusion in the Bill. Subclause (7C) is essentially a formulation which would leave a decision up to a jury.

4.28 Questions arise as to:

- Whether the Bill should exempt facilitation benefits from the scope of the offence.
- If so, whether the preferred course is to nominate a threshold amount or, alternatively, to describe the exempted benefit as 'small' in quantum or nature.
- Whether it would be desirable to make no provision at all and to remove facilitation benefits from the Bill, on the basis that small infringements are unlikely to be prosecuted in any event.
- Whether facilitation payments benefits would be dealt with more effectively by a different approach such as characterising the purpose of the benefit, for example to secure routine governmental action. This approach is adopted, for example, in the US *Foreign Corrupt Practices Act of 1977*.

4.29 Facilitation benefits will be considered in more detail in Chapter 9.

Definitions

4.30 Subclause 14.1(8) provides key definitions of the following:

- Australia;
- benefit;
- control;
- duty;
- foreign country;
- foreign government body;
- foreign public enterprise;
- foreign public official;
- international organisation, and
- share.

4.31 These definitions will be considered in Chapter 6.

Ancillary offences

4.32 Subclauses 14.1(9) to 14.1(12) govern the application of the ancillary offence provisions in the Code to the offence. They ensure that the offences of attempt, complicity, incitement and conspiracy which occur outside Australia apply where they relate to conduct proscribed by the offence which occurred or was planned or expected to occur at least partly within Australia. They are all consistent with Article 1(2) of the Convention, and will be considered in Chapter 8.

Financial impact

4.33 The Financial Impact Statement in the General Outline to the EM states that the Bill 'is expected to have little impact on Commonwealth expenditure or revenue'. There was, however, agreement that substantial sums may be required to investigate and prosecute alleged offences, especially as most of the conduct proscribed will occur overseas. Resource issues will be considered in Chapter 12.

Regulation Impact Statement

4.34 Referring to the Bill, the Assessment of Costs and Benefits section of the EM states:

It is not possible to assess the costs and benefits as it is uncertain how much trade depends on the payment of bribes to foreign officials.

4.35 The Trade Impact Assessment section of the EM states that it is not possible to be certain about the short term impact of the measures proposed in the Bill. It draws attention to the belief which some organisations and individuals hold that it is likely to compromise the capacity of Australian commerce and industry to compete in existing and foreign markets. This is especially so for markets outside the OECD's limited membership.

4.36 It also points out that, if other OECD countries move to pass complementary domestic legislation, the Convention should minimise the potential for serious distortions of trade which may result, for example, if purchasing decisions are not made on merit, but on the size of a bribe.

Issues raised by the Bill

4.37 It was generally accepted that bribery per se was evil and had to be addressed. The Convention was seen by witnesses as a worthwhile first step towards stamping out corruption. There were considerable differences of opinion, however, about the scope, the detail, timing and likely effectiveness of the draft legislation.⁵

4.38 Annex 5 contains details of the progress made by OECD members and the five interested countries in implementing the Convention. While Australia does not intend to be ahead of the majority of OECD members in implementing the Convention, the provisions of Article 15 are designed that it enter into force generally by 31 December 1998, or as soon as possible thereafter.

4.39 Specific matters which arose for consideration included:

- the scope, purpose and objectives of the draft Bill;
- whether the draft Bill was likely to meet those objectives;
- whether the definitions in the draft Bill are adequate;

⁵ See paragraph 2.12 above.

- the effectiveness of territoriality as the basis for jurisdiction in the draft Bill;
- whether the options included in the draft Bill to exempt facilitation benefits provide the most effective means to deal with such benefits;
- whether the treatment of ancillary offences in the draft Bill will meet its objectives;
- whether the penalties created in the Bill for the offence are appropriate to the seriousness of that offence;
- whether the governance issues raised by the Convention and the draft Bill have been addressed, and
- whether the resources required to implement the provisions of the Bill effectively have been adequately addressed in the National Interest Analysis for the Convention and in the Explanatory Memorandum to the Bill.

4.40 These matters will be considered in the following chapters.

CHAPTER 5

SCOPE OF THE BILL

Objectives of the Bill

5.1 The Convention is 'a very significant response by the international community to a growing awareness of a real problem of transnational corruption'. Australia's draft enabling legislation addresses the bribery of foreign public officials. The Bill therefore does not attempt to address conduct more accurately described as extortion, nepotism or cronyism. It does not seek to 'cover the field'.¹

5.2 The NIA points out that the OECD is working on four other areas related to bribery of foreign public officials to report to the 1999 Ministerial Meeting:

- bribery of foreign political parties;
- advantages promised or given to a person in anticipation of that person becoming a foreign public official;
- bribery of foreign public officials as a predicate offence for money laundering legislation, and
- the role of foreign subsidiaries and offshore centres in bribery transactions.

There are therefore significant aspects of corruption which are not be covered presently by either the Convention or the Bill.

5.3 As was pointed out in Chapter 2, in addition to bribery, corruption can involve such conduct as extortion, nepotism, cronyism and money laundering. It can take both active or passive forms, ranging from actual involvement to 'turning a blind eye' to such activities. The focus of this Convention, and hence the draft enabling legislation, is on 'grand' corruption and very large bribes.²

¹ Transcript, 9 March 1998, p. 2.

² *ibid*, pp. 3, 12.

5.4 Many witnesses acknowledged that the Bill is 'a first step' and that Australia's legislation must be part of a multilateral effort to address a global problem. It was generally accepted that Australia should not move too far ahead of other members of the OECD.³

5.5 As presented, the draft enabling legislation implements the Convention by taking the traditional territorial approach to jurisdiction of common law countries. Section 14.1 requires a territorial connection or nexus with Australia or its territories for the offence of bribing a foreign public official to occur.

5.6 Mr Dabb of AGs confirmed that, if the Bill extended jurisdiction to prohibit conduct which took place outside Australia, it was not necessary that the relevant provisions exactly reflect the terms of the Convention. The Bill could depart from or contain provisions different to the terms of the Convention and yet be valid. Jurisdiction will be addressed in more detail in Chapter 7.⁴

Issues

5.7 In considering the general scope of the Bill, the Committee was concerned to establish whether:

- the Bill effectively prohibits the bribery of foreign public officials;
- the Bill will be enforceable;
- there are any omissions from the Bill which could make it either defective and/or unenforceable, and
- the likely effect of the Bill on Australian trade.

General comments

5.8 The Minister for Justice, Senator Vanstone, expressed the view that implementing the terms of the Convention was 'going to be a difficult process'. Mr McDonald of AGs noted that the legislation operated to draw together the substance of the Convention and its Commentaries and should be considered in conjunction with them.⁵

³ See, for example, Transcripts: 6 March 1998, p. 52, 6 April 1998, pp. 121, 122.

⁴ Transcript, 11 May 1998, p. 329.

⁵ Transcript, 9 March 1998, pp. 3, 8.

5.9 While Dr Camillo Premoli believed the Bill would make corruption 'marginally more difficult', Mr Broome, Chairperson of the National Crime Authority (NCA), expressed 'significant reservations' about it and the way in which legislation of this kind could be implemented practically.⁶

5.10 Dr David Chaikin stated that the Bill was conservative in that it sought to comply with the Convention in 'minimalist' terms, giving undue emphasis to protecting Australian businesses from any competitive disadvantage arising from this legislation. Mr Peter Butler also observed that the Bill conformed to the minimalist requirements of the Convention and, with specific reference to the need for a territorial nexus in the Bill, believed that this was based on an inaccurate reading of the OECD's Recommendation and its agreed common elements of criminal legislation on jurisdiction for the offence.⁷

5.11 Mr Butler did not see any need for the Bill to go beyond the OECD recommendations, stating that adherence to the Convention would produce a law which was 'perfectly sensible and healthy'. He also believed that the Bill would be effective. No sensible company would approve or authorise executives to break the law of the nation.⁸

5.12 Dr Andrew Brien regarded the Bill as having laudable goals, but doubted whether it would be workable.⁹

5.13 While the Mining Council of Australia (MCA) also regarded the Convention's objectives as laudable, it believed that implementation of actions envisaged under the Convention were unlikely to achieve success in effectively combating corruption in overseas business dealings. The MCA was not convinced that the approach in the Convention and the Bill would achieve the desired aims, or be in the national interest. It was also concerned that the approach taken did not adequately address the commercial realities of undertaking business in countries where bribery and corruption are endemic, or accepted as part of the normal business culture.¹⁰

⁶ Transcript, 17 April 1998, pp. 229, 269.

⁷ Submissions, p. 2, Transcripts: 17 April 1998, p. 234, 11 May 1998, pp. 307, 309. Exhibit No 3, p. 6.

⁸ Transcript, 11 May 1998, p. 316.

⁹ Submissions, pp. 116, 122, Transcript, 11 May 1998, pp. 296, 300.

¹⁰ Submissions, p. 93.

5.14 Mr Davis of the Australian Chamber of Commerce and Industry (ACCI) did not believe that Convention and the Bill were likely to be effective in eradicating corruption in all its forms. He noted that the Bill did not cover extortion.¹¹

5.15 He also observed that the Convention, and the related legislation, failed to include a reservation for the national interest. The Chamber was supported in this matter by the Minerals Council of Australia. Dr Brien also expressed concerns about the same subject, asserting that the NIA did not properly canvass the implications for wider issues of national interest beyond economic ones. The legislation, he believed, should ensure that it did not create a further source of public expenditure which failed to produce a clear public benefit that outweighed that cost.¹²

5.16 The St James Ethics Centre believed that the Bill had 'very little utility'. It observed that if a bribe were to be paid to a foreign public officials and received entirely outside Australia, no offence would be committed. The Centre asserted that the intention lying behind the Convention could be evaded 'far too easily'. It also stated that:

- the ancillary offences could also be evaded, relatively simply, by ensuring that no part of a benefit was paid in Australia;
- some potential offences, such as those relating to child sex tourism, require 'full extra-territoriality' to apply if they are to exist effectively, and
- most forms of bribery involving foreign officials are such that no connection with Australia need occur.¹³

5.17 The Centre urged, in the strongest possible terms, that the Bill include a provision that corporations, (and directors if included), be able to offer as a complete defence to a charge, evidence of the measures taken to create a corporate culture in which the payment of bribes to foreign officials is not acceptable.¹⁴

¹¹ Submissions, p. 95, Transcript, 30 March 1998, p. 37.

¹² Submissions, p. 96, Transcripts: 30 March 1998, pp. 38, 41, 44, 347; Submissions, p. 193; Submissions, pp. 117, 123, Transcript, 11 May 1998, p. 296, 298, 304-305.

¹³ Submissions, p. 58.

¹⁴ *ibid*, p. 59.

5.18 Mr Ahrens, of Baker & McKenzie, expressed the view that the Bill was adequate and he doubted that Australian corporations would have much difficulty with it, provided that they could identify with precision what conduct was prohibited in the legislation. In this context, he did not find the Bill's Explanatory Memorandum (EM) helpful because it did not provide explanations or useful examples of what conduct was legitimate or what was not.¹⁵

Specific matters

5.19 Mr Butler drew attention to the fact that the Bill did not purport to over-ride relevant State legislation. Under the Australian Constitution, unless it 'covers the field', the States' legislation will persist over the Bill, except where there is inconsistency. In every State except Tasmania, there is legislation under the aiding and abetting provisions of the various Crimes Acts, which operated extra-territorially, and prohibited the making of any bribe.¹⁶

5.20 Telstra's submitted that, to avoid potential conflicts of laws, the Bill should expressly purport to cover the field of bribery of foreign public officials relevant to ancillary offences. If the Bill was silent on this point, the matter could be open to doubt, with both Commonwealth and State/Territory laws having application to the same incident.¹⁷

5.21 Under State/Territory laws, there is no defence comparable to that proposed in the Bill for so-called 'facilitation benefits'. There is potential for such a benefit to be made to an individual who could have available the defence provided in the Bill, but be liable to prosecution for having committed an offence under the relevant State/Territory legislation. Telstra believed that this outcome was 'undesirable from both a legal and commercial perspective'.¹⁸

5.22 Ms Robyn Gray drew attention to the fact that bribery in New South Wales is a common law offence confined to public officials. The Bill did not prohibit conduct by a foreign public official who actively received or passively solicited a benefit, and it was possible that a person could be liable under both State and Commonwealth laws. The prosecution could then rely on either Commonwealth or State legislation. Given the differing penalties currently

¹⁵ Transcript, 17 April 1998, p. 216.

¹⁶ Transcript 11 May 1998, p. 311, Submissions, pp. 165. Telstra's submission, at pp. 132-133, made the same point.

¹⁷ Submissions, p. 132.

¹⁸ *ibid*, p. 133.

available, she had concerns about the potential for anomalous outcomes when two parties to a corrupt transaction were tried, separately or together, under different legislation.¹⁹

5.23 Ms Gray also believed that there would be an omission if the Bill did not include an additional provision covering the possibility of a foreign public official taking a bribe in Australia. It would be simpler to have one Commonwealth law which covered both parties to an act of bribery. If there were such a provision, both parties to a transaction could be tried under the same legislation, with a similar penalty regime and by the same prosecutorial agency.²⁰

5.24 Ms Gayle Hill stated that the Bill was inadequate because it did not include an offence of failing to maintain accurate records, as did the US *Foreign Corrupt Practices Act of 1977* (FCPA). She believed that conduct prohibited in the Bill should also include authorisation and permitting bribery. Ms Hill and Mr Butler questioned whether the intention to commit the offence ought only to be required, or whether it should go beyond that and add recklessness.²¹

5.25 They noted that the fault element of the proposed offence requires that the defendant acts with the intention of influencing a foreign public official in the exercise of her/his public duty. The most common scenario for grand corruption in international business transactions occurs where the principal engages an agent or consultant, usually at a grossly inflated fee or for a percentage of the project price, and condones or allows the agent to pay whatever bribes may be required to obtain the necessary approvals, etc. In such a case, recklessness in the form of wilful blindness or the turning of a blind eye by the principal to the corrupt activities of the agent or consultant should be culpable under the substantive offence.²²

5.26 Including recklessness as well as intention as a fault element would bring the proposed offence more closely into line with the FCPA, where there is a prohibition against any person making a payment etc **while knowing** that all or part of the payment will be applied in a corrupt fashion. The FCPA also provides a definition to the effect that a person's state of mind is **knowing** if that person is aware that the agent or consultant is engaging in such corrupt

¹⁹ *ibid*, pp. 23-24, Transcript, 17 April 1998, pp. 222.

²⁰ Transcript, 17 April 1998, p. 224.

²¹ Transcript, 11 May 1998, pp. 315, 312, Submissions, pp. 158, 162-163.

²² Submissions, p. 162, Transcript, 11 May 1998, p. 312.

conduct,

or that such a result is substantially certain to occur, or the person has a firm belief that such a circumstance exists, or that such a result is substantially certain to occur.²³

5.27 Ms Hill and Mr Butler recommended broadening the proposed offence under paragraph 14.1(1)(c), so that the fault element of the offence may be established either by proving that a person has the requisite intent, or by proving that the person is reckless with respect to a circumstance, which will bring into play the general principles of criminal responsibility in the Code. Including recklessness as a fault element will ensure that the common ploy of engaging an agent or consultant and then adopting a position of wilful blindness will no longer be available as a transparent device to avoid criminal responsibility.²⁴

5.28 Mr Davis of the ACCI drew attention to what the Chamber regarded as a loophole in the Bill: when conduct occurred wholly outside Australia and no territorial connection with Australia could be established. For example, there could be a joint venture in a foreign country and the Australian parent company might not be aware of bribes being paid, or it might be that someone remote from the centre of corporate power had acted on their own initiative to resolve a problem. The Chamber also pointed out that as provided in the Bill the benefit is to be measured against the recipient not the payer so that, while the benefit could be modest to the recipient, it could be worth a great deal to the payer.²⁵

5.29 He suggested that in such a case, where the Australian firm has no knowledge or involvement, the evidentiary burden of proof of an offence under the proposed territorial jurisdiction in the Bill would 'be just about impossible'.²⁶

5.30 Mr Allan Asher noted that, to prove an offence under the Bill, conduct must occur at least partly in Australia. Because of local performance requirements, business was commonly done overseas by wholly owned subsidiaries and, in some countries, corporate structures were required which would quarantine them from the jurisdiction created by this legislation.²⁷

5.31 Mr Brian Hurlock was unable to understand why, in subclause 14.1(3), the Bill has gone to such lengths to exclude bribery or attempted bribery of

²³ Submissions, p. 162, Transcript, 11 May 1998, p. 312.

²⁴ Submissions, p. 163, Transcript, 11 May 1998, p. 312.

²⁵ Transcript, 30 March 1998, pp. 47-48, 45.

²⁶ *ibid*, p. 48.

²⁷ Transcript, 6 April 1998, pp. 96-97.

foreign public officials as an offence by Australian citizens where there is no direct link to Australia or its territories. He referred to the *Crimes (Child Sex Tourism) Amendment Act 1994*, and asked why it was not possible to make those who bribe officials overseas liable for their actions even if every aspect of the offence was committed in the foreign country. He stated that it is important to close what he saw as a loophole, noting that this country would not be doing as much as it could unless Australian nationals knew that they could be prosecuted at home, even if all the benefit was also in the foreign land.²⁸

5.32 Article 5, addressing enforcement of the Convention, provides in part that investigation and prosecution of bribery of a foreign public official shall be subject to the applicable rules and principles of each Party.²⁹

5.33 Mr Thomas Bartos stated that the NIA suggested that compliance with this Article is ensured because the DPP is generally responsible for serious federal offences such as bribery of a foreign public official. There is, however, no express legal requirement for the DPP to deal with the subject matter of the Convention. The NIA also fails to point out that, although the DPP is responsible for prosecutions, investigations are usually carried by the AFP without the involvement of the DPP. If both the DPP and the AFP satisfy this requirement of Article 5 in every case, Australia will not be in breach of the obligation in the Article. Mr Bartos suggested it may be safer to take executive or legislative action to ensure that this will occur in practice.³⁰

5.34 He believed that the Bill could include a provision charging the DPP and the AFP with the enforcement responsibilities in the Convention, in the same terms as in Article 5. This could be in similar terms to those of that Article and would not impact on DPP or AFP policy, except to the extent that the Code would prevail in the case of any inconsistency between those policies and the Code.³¹

5.35 Article 4.2 of the Convention provides that each Party which has jurisdiction to prosecute nationals for offences committed abroad shall take such measures as may be necessary to establish jurisdiction for bribery of foreign public officials according to the same principles. The NIA states that Australia need not observe this Article, since this country does 'not apply our general criminal law to conduct of Australian citizens outside Australia'. Mr

²⁸ Submissions, pp. 81-82, 83, Transcript, 16 April 1998, p. 161.

²⁹ The second part of Article 5 specifies that such things as national interest shall not influence investigation or prosecution of an alleged offence.

³⁰ Submissions, p. 75.

³¹ *ibid*, p. 76, Transcript, 6 April 1998, p. 109.

Bartos

believed that the most reasonable interpretation of this Article is that Parties must exercise jurisdiction over their nationals unless the general principles of their legal systems impose a limit on so doing.³²

5.36 Australia does not have such a limitation, and he referred to the child sex tourism legislation as amply demonstrating Australia's competence to exercise jurisdiction over its nationals abroad. Mr Bartos recommended extension of jurisdiction for the prosecution of Australians who commit offences under the Convention wholly outside Australia.³³

5.37 He also asserted that the Bill's intended exclusion of facilitation benefits exposed a very serious definitional problem which could potentially undermine the Convention's good intentions. In practice, he said, differentiating between a bribe and a facilitation benefit might be extremely difficult. While they are not mentioned in the Convention, these benefits were dealt with in the Commentaries and form part of the 'context' in which the Convention was to be interpreted. Neither the Convention nor the Commentaries were helpful in explaining the concept and, in Mr Bartos' view, the Bill's provisions may be too vague and unwieldy to be effective in practice. He referred to 'a very serious and tangible' difficulty with the Bill in drawing the line between these benefits and bribery. While business needed certainty, he observed that the purpose of a law is defeated if it is stated so clearly that it can be circumnavigated.³⁴

5.38 DFAT also noted that the Convention and the Commentaries were silent on the matter of facilitation benefits, and believed that the Bill should omit subclauses 14.1(7A) to (7C) in favour of prosecutorial discretion.³⁵

5.39 Ms Gayle Hill referred to the defence of a 'routine governmental action' for a facilitation benefits. She noted the difficulty of drawing a line between such benefits and bribery, but referred to the problems which would be caused by prosecuting matters of a lesser nature.³⁶

Conclusions

5.40 The Committee is most appreciative of the detailed and thoughtful submissions it received as to the objectives and purpose of the Bill, and whether

³² *ibid*, p. 74, Transcript, 6 April 1998, p. 107.

³³ Submissions, pp. 74-75, Transcript, 6 April 1998, pp. 107, 110.

³⁴ Submissions, p. 71, Transcript, 6 April 1998, p. 107.

³⁵ Submissions, p. 141, Transcript, 6 April 1998, p. 86.

³⁶ *ibid*, p. 313.

it is likely to be effective. The Committee is mindful that the conduct sought to be impugned, and which the Bill specifically seeks to address, is limited to a specific aspect of corruption, that of bribery of foreign public officials. The Bill has therefore sought to define the matters required to make the legislation effective, but has not addressed others.

5.41 A number of witnesses were critical of the Bill because it did not venture into some of these areas which fall outside the scope of the Convention.

5.42 As previously mentioned, the OECD is examining a number of other matters related to bribery of foreign public officials which may require revisiting the scope of matters covered in the legislation at some future point.

5.43 The task in hand however is to evaluate whether the enabling Bill is capable of effectively implementing the terms of the Convention. The purpose of the Bill is to prohibit corrupt conduct, characterised as the bribery of foreign public officials. Such a purpose necessarily excludes consideration of such forms of corruption as extortion, nepotism, cronyism or money laundering. It also excludes matters specified in Article 5 of the Convention, provisions relating to enforcement.

5.44 The Committee has therefore confined its inquiry to whether the draft legislation will effectively implement the defined objectives. While in subsequent chapters the Committee recommends refinements and modifications to make the Bill more effective, the scope of corruption addressed in the Bill is both defined and limited by the terms of the Convention, and the Committee's Report should be read in this light.

5.45 The Committee has been assisted by constructive suggestions for refinement and improvement of the proposed legislation which have been taken up and discussed in other chapters.

5.46 Ms Hill and Mr Butler proposed that the offence created by the draft legislation be broadened to include the element of recklessness as an attribute criminal responsibility for the actions of an accused who wilfully turns a blind eye to the actions of an agent or a consultant. It is the Committee's view that this would be consistent with the scope and intention of the proposed legislation, and would make it more effective and enforceable.

5.47 The Joint Standing Committee on Treaties recommends that the offence proposed to be created in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be amended to broaden the fault elements under paragraph 14.1(1)(c) to include the element of recklessness.

CHAPTER 6

DEFINITIONS

Issues

6.1 Bearing in mind the scope of the Bill which seeks to prohibit bribery of foreign public officials, the Committee considered:

- whether the definitions are sufficiently comprehensive;
- whether any definition requires amendment, and
- whether additional definitions are required.

The definitions

6.2 Subclause 14.1(8) of the Bill contains definition of relevant terms. AGs commented that they were all necessary because of conceptual differences between governments in different countries. As the Bill creates a criminal offence for which the maximum penalty is ten years' imprisonment, it is also necessary to be precise. The AFP supported this approach saying that, for the purposes of police investigations, definitions needed to be tight.¹

6.3 The EM refers to the *Acts Interpretation Act 1901* and the definition of 'Australia' to include its external Territories.²

6.4 'Benefit' includes any advantage and is not limited to property. This is consistent with Article 1.1 of the Convention, and with domestic bribery offences.³

6.5 'Duty' of a foreign public official is defined to mean any duty, authority, function or power conferred on the official, or which the official holds out as having. This definition is intended to cover every situation where an official is required to make a decision in the course of her/his work.

¹ Transcripts: 9 March 1998, p. 9, 30 March 1998, pp. 28, 53.

² Unless otherwise specified, material in this section is drawn from the EM.

³ Transcript, 30 March 1998, p. 24.

6.6 'Foreign country' is widely defined to include colonies or overseas territories or territories outside Australia whose international relations are governed by another country, and other territories outside Australia which are partly self-governing but are not recognised by Australia as sovereign states.

6.7 'Foreign government body' is defined to include national, local or regional governments in a foreign country, or an authority, body, or enterprise of the government of the foreign country, or of a part of that country. The EM points out that the importance of different tiers of government varies markedly from one nation to another.

6.8 'Foreign public enterprise' is defined by reference to the Commentaries to the Convention. Paragraph (a) of the definition relates to a company or any other body or association where the government of a foreign country:

- holds more than 50 per cent of issued share capital, or
- holds more than 50 per cent of the voting power in the company, or
- may appoint more than 50 per cent of the company's board of directors, or
- is otherwise able to exercise control over the company, including expecting the directors to act in accordance with directions.⁴

6.9 Paragraph (b) provides that, if the enterprise is a body or association other than a company, it must be one where either:

- the members of the executive committee are accustomed, or are under an obligation, to act in accordance with the wishes of the foreign government or part of it, or
- the foreign government or part of it is in a position to exercise control over the body or association.

6.10 Paragraph (c) provides that the company, defined in paragraph (a), or the body or association, defined in paragraph (b), is only a 'foreign public enterprise' if it enjoys special legal rights, status or privileges in the foreign country because of its relationship with that government. This implements the

⁴ See Exhibit No 5, paragraphs 14 and 15.

restriction in the Commentaries which deals with the operation of an enterprise on a normal commercial basis, without preferential subsidies or other privileges.⁵

6.11 The term 'foreign public official' is widely defined to mean a member of a legislature of the country, or anyone employed by, under contract to, appointed by or otherwise in the service of a foreign government or international organisation.

6.12 'International organisation' is defined because foreign public officials can include persons who are officials of such an organisation, as well as persons who are officials of a foreign government. The term means an organisation:

- of which two or more countries, or the governments of two or more countries, are members, or
- which has been established by an organisation of which two or more countries or governments of countries are members, or
- which is a sub-group established by such an international organisation.

6.13 This definition accords with the Commentaries to the Convention, and is similar to definitions of these organisations in other Australia legislation.⁶

6.14 'Share' is defined to include stock, and this can be taken to mean the capital of a company, as defined by investors in that company. The EM adds that this definition is necessary because the term 'issued share capital' occurs in subparagraph (a)(i) of the definition of 'foreign public enterprise'.

Views of witnesses

6.15 **Benefit.** AGs explained that the 'undue' benefit in subparagraph 14.1(1)(b) referred to a situation where there is a legitimate expectation for receipt of the benefit. The Commentaries, in referring to 'other improper advantage', deal with a situation where there was clearly not an entitlement. The AFP expressed concern that it would be a matter of interpretation as to what 'undue' meant.⁷

⁵ See Exhibit No 5, paragraph 15.

⁶ See Exhibit No 5, paragraph 17, which refers to the *Veterans' Entitlement Act 1986* (section 30B) and the *Nuclear Non-Proliferation (Safeguards) Act 1987* (section 4).

⁷ Transcript, 30 March 1998, pp. 25, 52, Exhibit No 5, page 1, paragraph 5.

6.16 Ms Gray drew attention to the fact that although 'benefit' in the Bill included any advantage, in the Criminal Code it included money, real and personal property, and included money and contingent benefit in the NSW Crimes Act. She observed that it was preferable that there was consistency of definition between the Bill and the Code because the latter will come into force in NSW at some time in the future.⁸

6.17 Mr Brazil of Allen Allen & Hemsley had a technical difficulty with the phrase 'undue benefit' in paragraph 14.1(b) of the Bill, noting that the reference was derived from Article 1 of the Convention to any 'undue pecuniary or other advantage'. It was pointed out that the word 'undue' was ambiguous in English. The Commentaries state that it is not an offence if the advantage was permitted or required by the written law or regulation of the official's country. It was suggested that a more satisfactory solution was to use the words already in the EM, to the effect that the benefit must not be legitimately due to the person who received it.⁹

6.18 With reference to 'obtain and retain' business or an improper advantage in the conduct of business, in paragraph 14.1(1)(c) of the Bill, Mr Brazil also noted that 'retaining' business would not be covered in a situation where a person wanted to end a contract involving some act of great bribery and might be sued.¹⁰

6.19 Dr Andrew Brien stated that 'undue' was not defined in subclause 14.1(8), although the word had been used in paragraph 14.1(1)(b). He believed that, as the definition stood, payments could be 'undue' as it was ordinarily understood, but would fall outside the ambit of paragraphs 14.1(1)(a) and (c).¹¹

6.20 He also referred to the difficulties of discovering that undue benefits had been provided and proving it. Some guarantees were needed for those whistleblowers who come forward with evidence.¹²

6.21 **Improper advantage.** He also asserted that, with 'undue benefit', the phrase 'improper advantage' was at the heart of the proposed legislation. It was not defined, although the EM states that 'improper' had its usual meaning and

⁸ Submissions, p. 24, Transcript, 17 April 1998, pp. 221-222.

⁹ Submissions, pp. 106-107, Exhibit No 5, page 2, paragraph 8, referring to EM, page 15, paragraph 9. Associate Professor Gerard Carney, at Submissions, p. 11, made a similar observation about pecuniary advantage.

¹⁰ Transcript, 17 April 1998, p. 207.

¹¹ Submissions, p. 121.

¹² *ibid*, p. 122.

was consistent with the interpretation of 'undue benefit'. He said that the concept needed definition, and it would be useful to include the idea that an advantage was improper if a decision was unrelated to the merits of the business proposal but was based on the self-interest of the official.¹³

6.22 Mr Willis of the Law Council of Australia noted that there was 'not much guidance' as to what the phrase meant in the Bill, while Associate Professor Gerard Carney stated that subparagraph 14.1(1)(c)(ii) referred to 'obtain or retain an improper advantage in the conduct of business'. Article 1 of the Convention referred to 'or other improper advantage in the conduct of international business'. He pointed out that, while the exclusion of 'other' was immaterial, the exclusion of 'international' gave the Bill much wider scope and potentially extended its operations beyond a 'faithful pursuit' of the Convention.¹⁴

6.23 Allen Allen & Hemsley had difficulty with the phrase in subparagraph 14.1(1)(c)(ii), saying that it was almost impossible to interpret.¹⁵

6.24 **Foreign public enterprise.** AGs noted that it was becoming harder to define such bodies because partial government ownership was so common. In the Bill, it has been defined to include 'everyone from military to employees of international organisations', and including ostensible authorities.¹⁶

6.25 Mr Dunstan of Allen Allen & Hemsley observed that paragraph (c) of the definition attempted to exclude foreign companies owned by governments which are in fact normal commercial entities. He said that this was done by excluding from the definition a body or association which enjoyed special legal rights or a special legal status under the law of a foreign country, or enjoyed special benefits or privileges under that law.¹⁷

6.26 He pointed out that application of this definition to China would come up with about 3,000,000 companies which might fall within it. He believed that it had departed slightly from the Convention, in that paragraph 15 of the Commentaries states:

¹³ *ibid*, p. 121.

¹⁴ Transcript, 16 April 1998, p. 154, Submissions, p. 10.

¹⁵ Submissions, p. 105.

¹⁶ Transcript, 30 March 1998, p. 35.

¹⁷ Transcript, 17 April 1998, p. 208.

An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e, on a basis which is substantially equivalent to that of private enterprise...¹⁸

6.27 Mr Dunstan said that the difficulty had arisen from the use of the phrases 'special legal rights' and 'a special legal status' in paragraph (c) of the definition. He suggested that it should be examined to use the concept in the Commentaries. It could then be broadened so that only public officials are meant, and to exclude many Chinese companies.¹⁹

6.28 Mr Broome of the NCA said that the fundamental question in paragraph (a) of the definition was the threshold, as governments could well be able to exercise control over companies with far less than 50 per cent ownership. The real question, he added, was whether the company was private, a mix or a separation. In many jurisdictions, it would be a private corporation with no government ownership, or direct involvement at all, which will operate in a very official way.²⁰

6.29 **Foreign public official.** Mr Willis of the Law Council of Australia was of the view that there could be benefit in making clear that an official could come from any of the arms of government, including judges. The latter are defined as 'foreign public officials' in Article 1.4 of the Convention.²¹

6.30 Associate Professor Carney also noted that this definition did not clearly spell out all the categories of public officials encompassed by the Convention's definition in Article 1.4(a). He believed that subclause 14.1(8), paragraph (c) of this definition, covered Heads of States, Ministers, heads of government departments, judges and other judicial officers. He pointed out that specification of holding a position under 'a law' might preclude officials whose positions were created by convention or custom.²²

6.31 To rectify these difficulties, he suggested that the definition in subclause 14.1(8) could begin with that from Article 1.4(a) of the Convention, adding that it includes the existing provisions. Officers of the legislature should be added to the last category in the definition, which he believed should be relocated higher

¹⁸ *ibid.* Exhibit No 5. See paragraph 35 of the EM.

¹⁹ Transcript, 17 April 1998, pp. 208-209.

²⁰ *ibid.*, pp. 281-282.

²¹ Transcript, 16 April 1998, p. 158.

²² Submissions, p. 10.

in the list if not at its top. Alternatively, the definitions could expressly refer to all the positions mentioned by Associate Professor Carney, because the Bill needs to be as clear as possible to deter bribery.²³

6.32 Dr David Chaikin agreed that judges should be in the definition, and added that the provision should be widened to include members of legislatures and the executive of a nation should also be included.²⁴

6.33 While the definition was acceptable if restricted to those in official positions, Mr Broome thought it was 'a shame' that the Bill only applied to foreign public officials in relation to foreign public enterprises. He said that it was not too hard to identify jurisdictions where corporations would not fall within this definition. He assumed a hypothetical Pacific country where the government was characterised by the close involvement in business of people very close to those in power. If those corporations were not caught by this legislation, it would be 'a fairly obvious shortcoming' because he saw their activities as almost amounting to official corruption in the sense that the Bill uses it.²⁵

6.34 With reference to this definition, AGs noted that the drafting of subclause 14.1(1) was intended to cover such payments as nepotism or to officials' families.²⁶

6.35 **Duty.** Associate Professor Carney noted that the definition of duty in subclause 14.1(8) was confined to an official who holds himself/herself out as having an authority, duty, function or power. It does not deal with the possibility that an intermediary might make a representation for a bribe.²⁷

Conclusions

6.36 The Committee considers that greater clarity in the definitions would enhance the prospects for the Bill's effectiveness. No new definitions were suggested. Given the defined scope of the Bill, some otherwise worthwhile comments on particular definitions cannot be pursued.

²³ *ibid*, pp. 10-11.

²⁴ Transcript, 17 April 1998, p. 237.

²⁵ *ibid*, pp. 281-282, 271.

²⁶ Transcript, 11 May 1998, pp. 343-344.

²⁷ Submissions, p. 11.

6.37 Valid concerns were expressed about the following definitions:

- the scope of 'benefit';
- 'benefit' and the use of 'undue' in subparagraph 14.1(b);
- the need for clarification of 'improper advantage';
- the scope of 'foreign public enterprise', and
- the need to include further categories of officials, such as judges, in 'foreign public officials'.

6.38 'Facilitation benefits' are defined in the Commentaries to the Convention and, although the issue is addressed in subclauses (7A) and (7C), they are not defined in the Bill. These benefits will be considered in Chapter 9.

6.39 The Joint Standing Committee on Treaties recommends that the definitions included in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be re-examined with a view to ensuring that, consistent with the scope of the proposed legislation, these definitions are comprehensive and that they are expressed with the greatest possible clarity to ensure certainty in the proposed Bill.

CHAPTER 7

JURISDICTION

Provisions in the Convention and in the Bill

7.1 Articles 4.1 and 4.2 of the Convention state:

Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official , according to the same principles.

7.2 The Commentaries to the Convention allow OECD members to interpret the territorial basis for jurisdiction broadly. The OECD's **Agreed common elements of criminal legislation and related action**, in the Recommendations of its Council, stated that:

The territorial basis for jurisdiction should be interpreted broadly so that extensive physical connection to the bribery act is not required.¹

7.3 In subclause 14.1(3), the Bill provides:

This section applies to conduct both within and outside Australia unless the conduct referred to in paragraph (1)(a) occurs wholly outside Australia. For this purpose, such conduct is taken not to occur wholly outside Australia if:

(a) in a case where subparagraph (1)(a)(i) or (ii) applies-the benefit was received in Australia; or

(b) in a case where subparagraph (1)(a)(iii) or (iv) applies-the benefit would have been received in Australia.

The issues

7.4 In examining the question of jurisdiction, the Committee considered the following matters:

¹ Exhibit No 5, p. 3, Exhibit No 3, p. 6. Transcript, 9 March 1998, p. 9.

- whether the jurisdictional requirement for a territorial nexus with Australia would be conducive to the objectives and purpose of the Bill;
- whether the objectives and purpose of the Bill would be more readily achieved by the adoption of nationality, or perhaps a combination of both territoriality and nationality, as the basis for the exercise of jurisdiction,
- the implications for the administration of justice if nationality were to be adopted as the preferred basis for jurisdiction.

Any recommendation for extension of jurisdiction has implications for the treatment of ancillary offences to the primary offence, which will be considered in Chapter 8.

Approach in the Bill

7.5 Common law jurisdictions generally take the approach that jurisdiction should be exercised on a territorial basis, and that there must be some nexus or connection between the relevant crime and the territory of the country. Where jurisdiction is exercised on the basis of nationality, commission of a crime does not require a territorial connection with the prosecuting jurisdiction. A person who has committed an offence merely has to be a national of that country to attract the jurisdiction.²

7.6 Thus, if a national commits a criminal offence outside that country and returns to it, that country can exercise jurisdiction and try the person for an offence against national law, even though the offence did not have any other connection with the relevant country.³

7.7 AGs drew attention to another difference between the two jurisdictional bases. Inquisitorial civil code jurisdictions do not have to comply with the same technicalities of the rules of evidence as apply under the adversarial common law systems, which can make it difficult to prove an offence to the required standard. While a mixture of the principles of both approaches might be seen as an easy way to solve problems of jurisdiction, AGs stated that technical difficulties would reduce practical enforcement of the law.⁴

² Transcript, 30 March 1998, pp. 21, 22.

³ *ibid*, p. 22.

⁴ *ibid*, p. 22. Transcript, 11 May 1998, p. 320.

7.8 The Bill therefore takes the traditional territorial approach to jurisdiction of common law countries, and section 14.1 requires a territorial connection or nexus with Australia or its territories for the offence of bribing a foreign public official to occur. While it was unusual for Australia to legislate on a nationality basis, Mr Dabb did not believe that using either nationality or territoriality, or both, would give rise to particular difficulties, as there was agreement that Australia had power to legislate to criminalise the conduct of its nationals outside Australia.⁵

7.9 Mr Dabb also confirmed that, if the Bill dealt with conduct entirely beyond Australia, it was not necessary that its provisions exactly reflected the terms of the Convention. The Bill could depart from or contain provisions different to the terms of the Convention and yet be valid.⁶

7.10 Mr Meaney stated that the adoption of nationality as a basis for the exercise of jurisdiction in the *Crimes (Child Sex Tourism) Amendment Act 1994* had not been considered in the drafting of the present Bill because this approach was not thought to be appropriate.⁷

7.11 Mr Potts of DFAT noted that the approach taken in the Bill was consistent with 'normal Australian common law practice'. He stated that there would be opportunities to assess its effectiveness in both the OECD and national contexts. If the Bill was found not to be achieving its purpose, consideration could be given to broadening its coverage to address extra-territorial offences.⁸

Territoriality

7.12 Mr Davis of the Australian Chamber of Commerce and Industry (ACCI) expressed objection in principle to the extra-territorial application of domestic laws, which in its view was likely to create 'many potential difficulties' for commerce and industry. The Chamber believed that governments do not have the right to impinge on the national sovereignty of other nations.⁹

⁵ Transcripts: 9 March 1998, pp. 14-15, 30 March 1998, p. 21, 11 May 1998, pp. 320, 328, 321.

⁶ Transcript, 11 May 1998, p. 329.

⁷ Transcript, 30 March 1998, p. 22. For convenience, the term 'child sex tourism legislation' will be used hereafter to denote the *Crimes (Child Sex Tourism) Amendment Bill 1994*.

⁸ Submissions, p. 141, Transcript, 6 April 1998, p. 83.

⁹ Submissions, p. 95, Transcript, 30 March 1998, p. 42.

7.13 Dr Webster of the Institution of Engineers Australia (IEA) observed that many Australian organisations operating overseas had organisational or legal frameworks which connected the overseas organisation to Australia. He referred to the importance of internal checks and balances, and reference of some decisions back to head office. These, he believed, would dictate whether jurisdiction was an issue in a particular case. If the matter related to a wholly-owned subsidiary overseas which operated without reference to an Australian head office the position would be different, and he was not sure whether the legislation would be helpful. Dr Mair of the IEA was also aware of likely financial constraints for police in investigating allegations of bribery overseas.¹⁰

7.14 Mr Dunstan of Allen Allen & Hemsley referred to the difficulties which could face Australians working overseas, possibly for non-Australian corporations, who could be put in an impossible situation should jurisdiction be based on nationality. Such persons could commit a crime against Australian law if they worked for a corporation of a second country where it may not be illegal to bribe another person in a third country. A similar situation could also arise for the large number of Chinese who have come here, obtained Australian nationality and returned to their countries of origin to work.¹¹

7.15 These were seen as 'untenable' positions for those individuals who might be expected to be involved by their non-Australian employers in illegal activity, which could make them almost unemployable throughout a number of Asian countries.¹²

7.16 While Mr Brazil of Allen Allen & Hemsley was aware of the advantage of using nationality in the legislation, he did not believe that the territorial connection should be dropped. He saw that the Bill's main focus, particularly in terms of its most effective area of operation, was in relation to Australian corporations operating overseas.¹³

7.17 Under Article 4(3) of the Convention, where a person is subject to more than one jurisdiction, it would be left to the Parties to determine which was the most appropriate forum for prosecution. Mr Ahrens of Baker & McKenzie pointed out that, apart from this broad statement, the Convention failed to

¹⁰ Transcript, 30 March 1998, p. 77.

¹¹ Transcripts: 17 April 1998, pp. 213, 214, 11 May 1998, p. 327.

¹² Transcript, 17 April 1998, pp. 213-214.

¹³ Transcript, 11 May 1998, p. 327.

provide any guidance about the way implementing legislation was to operate in practice. One consequence could be overlapping criminal jurisdictions.¹⁴

7.18 Mr Ahrens noted that the EM indicated an intent that conduct should only constitute the primary offence if it was planned to occur in Australia, and not solely abroad.¹⁵

7.19 Mr O'Keefe, Commissioner of ICAC, was satisfied with the territorial approach to jurisdiction in the Bill. In his view, there would invariably be a person or an entity in Australia with a connection to the proscribed conduct. If not, then that conduct is not adversely affecting this country. Even if there are only agents involved, or a holding company or subsidiary companies, there will be something which will bring the conduct back to Australia.¹⁶

Nationality

7.20 Dr David Chaikin argued that the jurisdictional scope of the offence in section 14.1(3) should be changed so as to rely on the nationality principle. Precedents for this could be found in legislation on war crimes and terrorism, and particularly in the *Crimes (Child Sex Tourism) Amendment Act 1994*. This criminalised intercourse with a child under the age of 16 years while outside Australia, and created a series of offences applying to classes of persons such as tour operators. It applied to Australian citizens and residents, Australian corporations or any other corporate body whose principal activities are carried out in Australia.¹⁷

7.21 Dr Chaikin asserted that, if Australia did not enact legislation based on the nationality principle, it was clear that the Government considered international bribery a less serious international problem than the matters referred to in the previous paragraph. Further, the argument that Australia did not usually rely on the nationality principle ignored growing international concern about international corruption, and the fact that the USA which is also a common law country has relied on this principle to criminalise bribery.¹⁸

7.22 He believed that the scenario, where an Australian company would attempt to bribe a person overseas and place money in an Australian bank

¹⁴ Submissions, pp. 145, 147.

¹⁵ Submissions, p. 149.

¹⁶ Transcript, 17 April 1998, p. 290.

¹⁷ Submissions, p. 2. See section 50AD of the Act.

¹⁸ *ibid.* The US is in the process of amending this legislation further: see Exhibit No 40.

account, was 'not typical ... quite unusual'. He saw the Bill as conservative in that it seeks to comply with the Convention in minimalist terms by giving undue emphasis to protecting Australian businesses from any competitive disadvantage arising from the Bill. He referred to the other international conventions into which Australia has entered in areas dealing with international criminal activity, saying that in such conventions it was usual to create the widest possible jurisdiction.¹⁹

7.23 He also drew attention to what he saw as a flaw in Article 4 of the Convention, which dealt with jurisdiction and obliged Parties which do not prosecute on the basis of nationality to consult about the most appropriate jurisdiction. On that basis, he believed that Parties should be prepared to extradite their nationals for bribery. Dr Chaikin observed that offenders cannot be extradited unless there is dual criminality: unless the matter is criminal offence in both Australia and the other country, for example.²⁰

7.24 Finally, he argued that, although corruption was secret and difficult to uncover, Australians and Australian corporations had national and public interest obligations which flowed from taking advantage of their nationality.²¹

7.25 Mr Rooke of Transparency International Australia (TI) agreed that the distinction which required a territorial connection, even a nominal one, with Australia for an offence to be committed, whereas carrying out the same transaction in a neighbouring country would not be, was 'totally artificial'. He was also aware that the collection of evidence and prosecution will be difficult. Even if there were a telephone call from Sydney, for example, initiating or approving the offer of a bribe, this would not be an easy offence to enforce.²²

7.26 Dr Camillo Premoli believed that Australia could afford to be quite stringent and occupy the 'moral high ground' and was in favour of a nationality nexus in the legislation.²³

7.27 Mr Peter Butler and Ms Gayle Hill drew attention to the fact that, in certain exceptional circumstances, the territorial nexus for criminal offences had been considered inadequate and the circumstances sufficient to warrant a different approach. They also referred to the *Crimes (Child Sex Tourism) Amendment Act 1994*, and to the US Foreign Corrupt Practices Act (FCPA)

¹⁹ Transcript, 17 April 1998, p. 234, 235, Submissions, p. 2.

²⁰ Transcript, 17 April 1998, pp. 235-236.

²¹ *ibid.*

²² Transcript, 16 April 1998, p. 178.

²³ Transcript, 17 April 1998, p. 229.

which made it an offence for an entity to offer bribes to foreign public officials, regardless of the geographic location of the bribe, if the entity has issued securities registered in the US or one which is a 'domestic concern'.²⁴

7.28 It was their view that the US situation should be preferred to the jurisdiction conferred by the Bill, and they referred to the precedent in the child sex tourism legislation. They believed that the Bill must cover offences committed wholly outside Australia by people or entities which have a substantial connection with this country.²⁵

7.29 Bribery, like child sex tourism, is an offence most likely to occur wholly outside Australia. Most States/Territories have legislation to deal with bribery committed outside their jurisdictions. To be effective, Mr Butler and Ms Hill argued, the Bill implementing the Convention also ought to go further than existing laws. Mr Butler agreed with Mr Dabb, noting that it was hard to prove the elements of an offence where those elements had been committed overseas.²⁶

7.30 They regarded bribery of foreign public officials as serious enough to fall within the same exceptional category as child sex tourism. They therefore recommended that jurisdiction for the offence, and ancillary offences, be founded on 'any of territory, nationality, residency, place of incorporation or business operations'.²⁷

7.31 Mr Butler said that if the Bill became law in its present form, only operating where the conduct complained of was at least partly in Australia, this provision would make it ineffective. He referred to a number of examples of extra-territorial legislation, noting that the High Court had upheld their constitutionality. He said that by definition, if not in practice, extra-territoriality was the Bill's main purpose.²⁸

²⁴ Submissions, p. 161. A 'domestic concern' is defined in the US legislation as (a) any individual who is a citizen, national, or resident of the US, and (b) any corporation, partnership, joint-stock company, business trust, unincorporated organisation, or sole proprietorship which has its principal business in the US, or which is organised under a State law, or a territory, possession or commonwealth of the US. See Exhibit No 8, p. 358, and comments at Transcript, 11 May 1998, pp. 323, 326.

²⁵ Submissions, p. 161.

²⁶ *ibid*, Transcript, 11 May 1998, pp. 325, 320. See the Report by Mr Butler: *The Legality of Foreign Bribes Under Australian Law*, September 1995, for Transparency International Australia (Exhibit No 10).

²⁷ Submissions, p. 162.

²⁸ Transcript, 11 May 1998, pp. 307, 310.

7.32 The Australian Society of CPAs recommended that the legislation should have extra-territorial effect, so that bribery was regarded as an offence irrespective of the geographical location of the activity.²⁹

7.33 Mr Brian Hurlock did not understand why the Bill went 'to such lengths' to exclude the bribery, or attempted bribery, of foreign public officials by Australians where there was no direct link with Australia or its territories. He referred to the child sex tourism legislation, saying how important it was to have countries like Australia make its citizens responsible for such offences. He believed that Australia should be doing its utmost in the fight against corruption.³⁰

7.34 He believed Australia would comply more with the spirit and intent of Article 4.2 of the Convention if it were to make its citizens fully liable for their actions overseas.³¹

7.35 The Law Council of Australia recommended that the Bill should extend to conduct by Australian citizens and permanent residents wherever it occurred, so that no connection with Australian territory should be necessary. The application of the legislation should be on a nationality basis, which the Council saw as a universally accepted basis of jurisdiction at international law. It did not see this as an objectionable assertion of extra-territorial jurisdiction, and believed that it would not give offence or raise any inconsistency with respect to Australia's objections to what are sometimes seen as excessive extra-territorial claims made by the USA.³²

7.36 The Law Council stated that, if the Bill did not extend to conduct overseas in this way, its effectiveness would be materially compromised. In particular, Mr Willis said, the requirement in subclause 14.1(3), that at least some of an act occur in Australia, would severely limit the Bill's effectiveness and leave very practical situations ungoverned by legislation.³³

7.37 Mr Thomas Bartos drew attention to the provision in Article 4.2 of the Convention, which obliged Parties to take such measures as may be necessary to establish jurisdiction over their nationals abroad where those Parties have jurisdiction to make such prosecutions. He drew attention to the NIA which

²⁹ Submissions, p. 61, Transcript, 16 April 1998, p. 126.

³⁰ Submissions, pp. 81-82.

³¹ Transcript, 16 April 1998, pp. 161, 166.

³² Submissions, p. 170.

³³ *ibid*, Transcript, 16 April 1998, pp. 149, 155.

stated that as Australia did not apply its general criminal law to conduct of Australian citizens outside this country, 'we are under no obligation to do so' for the offence created by the legislation.³⁴

7.38 He believed that the most reasonable interpretation of the obligation in Article 4(2) was that Parties must exercise jurisdiction over their nationals abroad, unless the general principles of their legal systems actually imposed a limit on doing so. There is no such restriction in constitutional or common law in Australia to prevent nationals being prosecuted for offences committed abroad. Nationality is an accepted basis for jurisdiction under customary international law, and he referred to the child sex tourism legislation as amply demonstrating Australia's legal competence to exercise jurisdiction over the conduct of its nationals abroad. Mr Bartos recommended implementation of measures for the prosecution of Australians who commit offences under the Convention outside Australia.³⁵

7.39 Mr Allan Asher and Mr Robin Brown believed that, in principle, a domestic law which makes an action by an Australian citizen a crime should also apply to taking the same action outside Australia. The Bill did not therefore go far enough. They also believed that it did not meet the spirit of the Convention in that, because the Bill was an amendment to the Code, jurisdiction was limited to what was provided in the Code. They thought this was something of a technicality, and were not clear why Australia should not implement the Convention in full through a special piece of legislation.³⁶

7.40 Mr Asher and Mr Brown believed that the territorial limitation in the Bill was not in accordance with an understanding of 'universal ethical responsibilities'. If these are considered to be universal, they should apply to Australian citizens, regardless of whether the offending conduct occurs on Australian territory or not. They drew attention to the precedent in the child sex tourism legislation, and pointed out that such 'exceptions' would soon become normal as Australians grappled with their new-found status as global citizens. Thus, Australia should be setting a benchmark of credibility in this matter.³⁷

³⁴ Submissions, p. 74, referring to p. 3 of the NIA. Transcript, 6 April 1998, p. 107.

³⁵ *ibid*, pp. 74-75, Transcript, 6 April 1998, p. 107.

³⁶ Submissions, pp. 136-137.

³⁷ *ibid*, p. 137, Transcript, 6 April 1998, pp. 101, 102.

7.41 They also believed that relying on Australian companies to leave a paper trail as the basis for subsequent prosecution was naive, suggesting that these companies would ensure that there was no connection with Australia. Thus, they said, it would be easy to evade the legislation's grasp.³⁸

7.42 Mr Asher and Mr Brown referred to the conduct of wholly-owned subsidiaries and the need to provide certainty for Australian business. They suggested that extending jurisdiction to nationals would provide that certainty: engaging in corrupt conduct would lead to apprehension.³⁹

7.43 Mr Broome of the NCA believed that the territorial approach was defensible but that, as the world became more global, it was harder to draw lines around an island. Australian corporations are now international companies in a global market. Payments can be made without any territorial link, and were increasingly likely not to have one in the future. He asserted that, in this regime, the only corporations which would be caught taking a proscribed action would be the unlucky or the stupid ones. He added that, once a nationality nexus was available, he believed that more resources could be sought to enforce the legislation.⁴⁰

7.44 Mr John McFarlane was aware of the developments in Australian adherence to international treaties and conventions in the past few years. He was attracted to jurisdiction for the offence on a nationality basis, and referred to the child sex tourism legislation as an example of relevant legislation.⁴¹

7.45 The St James Ethics Centre noted that one of the reasons given for requiring that some part of the offence must occur in Australia was a concern that full extra-territorial jurisdiction would be at odds with the general principles of Australia's legal system. It suggested, however, that some potential offences by their very nature required this full extra-territoriality. It cited the child sex tourism legislation as an example for this purpose, noting that, if an offence were only to be committed when it occurred partly in Australia, that legislation would be self-defeating. Finally, it suggested that if the spirit and the letter of the OECD Convention was to be met, the jurisdictional provisions of the Bill needed to be re-considered.⁴²

³⁸ Submissions, p. 137.

³⁹ Transcript, 6 April 1998, p. 101.

⁴⁰ Transcript, 17 April 1998, p. 279.

⁴¹ Transcript, 6 April 1998, p. 120.

⁴² Submissions, p. 58.

7.46 Dr Andrew Brien did not believe that the jurisdictional basis in the Bill was adequate because nationality alone might not be effective: citizenship, place of residence or incorporation of a business might also be needed to retain a broad range of possibilities to deal with the offence.⁴³

Other views

7.47 The Australian National Audit Office (ANAO) expressed concerns that the territorial approach to jurisdiction may limit the scope of the Bill, because it seemed possible that activities which fall within the principles established by the Convention may escape prosecution.⁴⁴

7.48 For Mr Schramm of the Australian Federal Police (AFP), territoriality was not as central an issue as whether, in pursuit of evidence for possible prosecutions, there was a mutual assistance arrangement with a relevant country, whether the rule of law was the same in both countries, and the question of access to material evidence.⁴⁵

7.49 Above all, the AFP was concerned about the resources which would be available to implement the provisions of the Bill. Its experience of extra-territorial legislation, where most of an investigation is conducted overseas, has been that such investigations are difficult to undertake and can be extremely demanding of human and financial resources.⁴⁶

7.50 Professor Charles Sampford observed that the concepts of both nationality and territoriality were under increasing question in a global world. Within the ethical framework which he believed should govern the operation of the legislation, he did not believe that either approach to jurisdiction was particularly satisfactory.⁴⁷

7.51 Associate Professor Jennifer Hill drew attention to the responsibility that, once a separate legal entity existed, parent companies had for the actions of their employees under the Code. Subsidiaries would provide a buffer and protection under the proposed legislation, and she said that some people felt

⁴³ Transcript, 11 May 1998, pp. 297-299.

⁴⁴ Submissions, p. 56.

⁴⁵ Transcript, 30 March 1998, pp. 50-51.

⁴⁶ *ibid*, pp. 53-55, Submissions, p. 30. The NIA states that costs of investigation and prosecution of offences will be met from within existing funds, and that AGs will also meet extradition and prosecution costs from within existing funds.. The issue of resources will be considered in more detail in Chapter 12.

⁴⁷ Transcript, 17 April 1998, p. 262.

that this was wrong. Use of a wider jurisdictional basis would, however, make it difficult to oversee the operations of all companies overseas. She also believed that it would be difficult to get corporations to create, and adhere to, ethical standards governing operations overseas.⁴⁸

Conclusions

7.52 Jurisdiction was one of the two major issues in this inquiry on which a considerable amount of time was taken up at public hearings and in discussion. It is the central issue on which the effectiveness of the Bill will be judged.

7.53 Once it is accepted that the conduct sought to be proscribed is essentially international criminal activity that is likely to take place wholly outside Australia, the question is whether imposing a territorial nexus as a precondition to the exercise of jurisdiction over such an offence will render the legislation ineffective and unenforceable.

7.54 We have concluded that, to ensure that the objectives and intent of the Bill are met, it is necessary that the focus of the legislation be reflected in the exercise of extra-territorial jurisdiction.

7.55 We have also concluded that the objectives of the Bill would be more readily achieved if jurisdiction for the offence of bribery was based on nationality, and that this basis should be defined as widely as possible to include any of territoriality, nationality, residence, place of incorporation or business operation.

7.56 The Committee has concluded that, notwithstanding the acknowledged difficulties attendant upon gathering and adducing admissible evidence, if jurisdiction for the offence were to be exercised on the basis of nationality:

- the objectives and purpose of the Bill would be accommodated more effectively;
- the inherent likelihood of the offence being committed wholly outside Australia would be recognised,
- Australia will have implemented legislation to give effect to the letter and the spirit of the Convention.

⁴⁸ *ibid*, p. 251.

7.57 The Joint Standing Committee on Treaties recommends that the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be amended so that the basis for the exercise of jurisdiction in relation to the proposed offence is extended to include any of territoriality, nationality, residence, place of incorporation or business operation.

CHAPTER 8

ANCILLARY OFFENCES

Provisions in the Bill

8.1 The Bill includes provisions for ancillary offences of attempt, complicity, incitement and conspiracy to bribe a foreign public official at subclauses 14.1(9) to (12) respectively. AGs stated that it was clear that the Convention envisaged that these offences would be covered in enabling legislation. As they have already been included in the Code, the provisions in the Bill reflect jurisdiction based on a territorial connection with Australia.¹

Reasons for these offences

8.2 These offences are explicit in Article 1.2 of the Convention and the effectiveness of the Bill would be markedly reduced without them. There would be little point in having this legislation if these standard offences were omitted, regardless of which jurisdictional path was chosen for the Bill. Without such offences, there would be no means of prosecuting, for example, someone who attempted unsuccessfully to bribe a foreign public official, or a person who instructed or conspired with another to commit the primary offence. In considering these offences, the jurisdictional issue dealt with in Chapter 7 will be revisited to some extent.

Issues

8.3 The issues raised by the inclusion of the ancillary offences in the Bill are whether:

- the provisions will be effective, and
- a change to the jurisdictional basis for the primary offence would impact on the effectiveness of these offences.

¹ Transcript, 9 March 1998, p. 9.

Views of witnesses

8.4 Mr Thomas Bartos noted that the offence of bribery of a foreign public official, set out in subclause 14.1(1) of the Bill, conformed with the generally accepted territorial basis of jurisdiction in Article 4.1 of the Convention. This states that:

Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.²

8.5 While subclause 14.1(3) required the offence to be 'in whole or in part' in Australian territory, Mr Bartos believed that the offences of complicity in bribery did not adopt this territorial nexus as did the primary offence. He stated that the Bill clearly extended to non-Australians acting wholly outside Australian territory as accomplices in bribing foreign officials. The EM claimed that Article 1.2 of the Convention justified this broad jurisdiction over a complicity offence because the primary offence would be committed wholly or partly outside Australia.³

8.6 Mr Bartos believed that this interpretation was not consistent with the Convention's terms, and was of doubtful validity under international law. Article 1.3 referred to 'complicity in' the bribing of a foreign official as an offence and, if an act of complicity did not fall under Article 4, a Party to the Convention could not exercise its jurisdiction over that offence.⁴

8.7 Complicity to bribe is prohibited under the Convention and is an offence in the Bill, and Mr Bartos stated that both the primary and such a secondary offence required a jurisdictional connection. Accordingly, the Bill may breach the terms of Article 4 to the extent that it applies to offences based on complicity which are committed by non-Australians wholly outside Australia. Article 4(2) allowed jurisdiction to be exercised where complicity-based offences are committed wholly outside Australia by Australians.⁵

² Submissions, p. 73.

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*, pp. 73-74, Transcript, 6 April 1998, p. 110.

8.8 Mr Bartos recommended that:

- Australia seek an amendment to the Convention extending a Party's jurisdiction to acts of complicity which are wholly outside its territory; or
- the Bill should introduce a territorial nexus requirement for complicity offences committed by non-Australians, or
- the Bill should only extend to complicity offences wholly outside Australia if they are committed by Australian nationals.⁶

8.9 The St James Ethics Centre shared some of Mr Bartos' concerns, pointing out that subclause 14.1(1) of the Bill created an offence, unless it occurred wholly outside Australia. If a bribe were paid and received outside Australia no offence would be committed, irrespective of whether the benefits received by the payer flowed directly or indirectly back to Australia. The intention behind the Convention could far too easily be evaded in this way.⁷

8.10 The Centre believed that subclauses 14.1(9) to (12) of the Bill appeared to modify this limitation for the ancillary offences in the Code, and that it did so would seem to establish extra-territorial jurisdiction. The principal offence, to which these ancillary offences must relate, must occur partly in Australia and it would be easy to evade these offences by ensuring that no part of the benefit was paid in Australia.⁸

8.11 Most forms of bribery involving foreign officials are such that no connection with Australia needed to occur. The Centre therefore stated that the provisions in the Bill need to be reconsidered to conform with the spirit and the letter of the Convention.⁹

8.12 One way to address this problem would be to specify that an offence has occurred if the person offering the bribe, or causing it to be offered, directly or indirectly receives all or part of the benefit in Australia. Such an approach, the Centre argued, had the added advantage of satisfying a presumption of avoiding wherever possible 'full extra-territoriality'.¹⁰

⁶ Submissions, p. 74.

⁷ *ibid*, p. 58.

⁸ *ibid*.

⁹ *ibid*.

¹⁰ *ibid*, p. 59.

8.13 Mr Peter Butler and Ms Gayle Hill stated that the Bill focused on the location of conduct as the basis of jurisdiction, providing that conduct which was the subject of the offence must occur wholly or partly within Australia. They observed that this severely limits the application of the Bill, and created a loophole for easy avoidance.¹¹

8.14 They recommended that the jurisdictional basis for the proposed offence and associated ancillary offences be extended and founded upon any of territoriality, nationality, residence and place of incorporation or business operations. While the Bill, by definition, was extra-territorial in its application Mr Butler agreed that this was not necessarily so in practice.¹²

8.15 He was not confident that the ancillary offences would be caught if bribes were to be paid in a particular way: for example, by withdrawing funds from an account in Australia and going overseas to pay someone to do/not to do something. If none of the conduct was illegal, it could not be an offence under either the primary offence or the ancillary offence(s).¹³

8.16 Mr Dabb agreed that, if an agreement to bribe and all the aiding, procuring and advancing of the matter took place overseas, then that transaction would be beyond the reach of any ancillary offence in Australia.¹⁴

Summary

8.17 The AGs representatives agreed with other witnesses that, if the elements of what might be an ancillary offence to the main offence all took place overseas, then the Bill would not achieve its purpose.

8.18 The St James Ethics Centre argued that the provisions of the Bill should be changed to specify that an offence has occurred if all or part of the benefit from a bribe has been received in Australia. Whether such a change would ease the burden of proof for the offence is another matter.

8.19 Mr Bartos had concerns about the ancillary provisions being inconsistent with the Convention. He doubted the validity of the EM's interpretation of jurisdiction for an offence committed outside Australia by a non-Australian. His

¹¹ *ibid*, p. 159.

¹² Submissions, p. 162, Transcript, 11 May 1998, p. 308.

¹³ Transcript, 11 May 1998, pp. 308-309.

¹⁴ *ibid*, p. 325.

concerns were consistent with those he expressed about territorial jurisdiction in the Bill, on which these ancillary offences are based.

8.20 He suggested three possible solutions to resolve the problems he saw in this area of the Bill. The first was to amend the Convention to extend a Party's jurisdiction to acts of complicity which are wholly outside its territory. This may not be a practical option, as agreement to vary the Convention's terms may not be easily negotiated with the other Parties and the other five interested nations.

8.21 His second solution was to introduce a territorial nexus requirement for complicity offences committed by non-Australians. It was not clear how Australian jurisdiction could be exercised over non-Australians operating wholly overseas.

8.22 His other solution was that the Bill should only extend to complicity offences wholly outside Australia if they are committed by Australian nationals. This was consistent with his views on territoriality, and one which we also support.

8.23 The EM states that the ancillary offences in the Bill are linked to provisions in the Criminal Code to ensure that, when they occur overseas, these offences relate to conduct included in the primary offence which has a territorial link with Australia.

Committee views

8.24 The ancillary offences are integral to the objectives of the legislation, and we are not convinced that the provisions in the Bill as presently drafted will be effective. We have recommended in Chapter 7 that the basis for jurisdiction in relation to the primary offence be extended to include any of territoriality, nationality, residence, and place of incorporation or business operation. In conformity with this recommendation, we believe that jurisdiction for ancillary offences should also be exercised on the same basis to make the Bill more effective.

8.25 The Joint Standing Committee on Treaties recommends that the ancillary offences set out in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* be redrafted so that the basis for the exercise of jurisdiction in respect of ancillary offences be any of territoriality, nationality, residence, place of incorporation or business operation.

CHAPTER 9

FACILITATION BENEFITS

Definition

9.1 Facilitation benefits are defined in the Commentaries to the Convention as payments made in some countries 'to induce public officials to perform their official functions, such as issuing permits or licences'. Facilitation benefits are generally illegal in the foreign country concerned. The Commentaries also state that 'small' facilitation benefits are not made to obtain or retain business or other improper advantage. They are not therefore to be treated as an offence under Article 1 of the Convention, or in any enabling legislation.¹

9.2 The Commentaries add, however, that 'this corrosive phenomenon' should be addressed by such means as support for good governance programs. Criminalisation 'does not seem a practical or effective complementary action'.²

9.3 As with most of the conduct which could lead to the commission of an offence against this Bill, facilitation benefits are most likely to be provided overseas. They are generally small amounts to ensure, for example, that an official carries out the task she/he is otherwise required to do, or ensure that the official attends the work place to perform an official function. This is usually quite different in character to making what could be a much larger payment as a bribe to obtain or retain an advantage in business.

9.4 There are many, less formal descriptions for such benefits, including 'grease payments', 'coffee money', 'oiling the wheels', and there are many different circumstances surrounding these benefits.

Provisions in the Bill

9.5 The term 'facilitation benefits' is not defined in the Bill. Mr Dabb of AGs stated that the provisions addressing these benefits in the Bill were simply intended to reflect the position in the Commentaries that facilitation benefits should be excluded from the offence. The Convention prohibits benefits that have the following characteristics:

¹ Exhibit No 5, paragraph 9, p. 2.

² *ibid.*

- those made with the intention of obtaining or retaining business, and
- those made to obtain or retain an improper advantage in the conduct of business.

Facilitation benefits are not made for either of these purposes.³

9.6 At subclauses 14.1 (7A) and (7C), the Bill includes two alternative approaches which may be used to deal with facilitation benefits. These formulations provide specific defences for such benefits which recognise that the focus of the offence is designed to prohibit 'very large scale bribes' or 'grand' corruption. As the Minister for Justice also pointed out, small facilitation benefits were matters which might be better left to local authorities to police rather than law enforcement authorities of other nations, and this approach was recognised in the Convention.⁴

9.7 Subclause (7A) provides as a defence to a charge that the benefit was less than a threshold amount (yet to be specified). Alternatively, subclause (7C) provides as a defence that the benefit was of a 'small' value. Whether a benefit was 'small' in the circumstances would be left to prosecutorial discretion. The defendant bears the evidential burden in respect of both alternatives proposed in subclauses 7(A) and 7(C). (See subsection 13(3) of the Criminal Code.)⁵

9.8 Another way of dealing with facilitation benefits would be to omit any reference in the Bill to such benefits, and rely on prosecutorial discretion whether or not a particular case would warrant investigation and be brought to trial. AGs stated that the legislation would be valid without any of the subclauses in the Bill.⁶

An alternative approach

9.9 An alternative scheme for dealing with facilitation benefits can be found in the US *Foreign Corrupt Practices Act of 1977* (FCPA), as amended in 1988. The amendment provides an exemption to the primary offence for facilitation benefits.⁷

³ Transcript, 11 May 1998, p. 329.

⁴ Transcripts: 9 March 1998, p. 3, 30 March 1998, p. 30.

⁵ Transcript, 9 March 1998, pp. 9-10.

⁶ Transcript, 30 March 1998, p. 28.

⁷ See Exhibit No 8 and Exhibit No 33. Transcript, 11 May 1998, p. 335.

9.10 The provisions of this legislation will not apply to any facilitating or expediting payment to a foreign official, political party or party official if the purpose is to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official. The FCPA provides that:

(3)(A) The term 'routine governmental action' means only an action which is ordinarily and commonly performed by a foreign official in:

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.

(B) The term 'routine governmental action' does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business or to continue business with a particular party.⁸

Issues

9.11 The following issues were considered:

- Whether the Bill should exempt facilitation benefits from the scope of the offence.
- If so, whether the preferred course is to nominate a threshold amount or, alternatively, to describe the exempted benefit as 'small' in quantum or nature.
- Whether it would be desirable to make no provision at all and to remove facilitation benefits from the Bill, on the basis that small infringements are unlikely to be prosecuted in any event.

⁸ Exhibit No 33, pp. 1416, 1419.

- Whether facilitation benefits would be dealt with more effectively by a different approach such as characterising the purpose of the benefit, for example to secure routine governmental action. This is provided in the FCPA.

AGs views

9.12 Mr McDonald of AGs pointed out that facilitation benefits were bribes and, regardless of size, probably illegal in every country, but they were not intended to be caught within the offence created by the Bill.

9.13 Mr Dabb argued that the provisions in the Bill were simply intended to reflect the thought in the Commentaries that there were facilitation benefits which might otherwise be caught, but that were to be removed from the offence. He quoted from the Commentaries, referring to its treatment of Article 1.1 which provided for the offence of bribery of a foreign public official to be created:

Other improper advantage refers to something to which the company concerned was clearly not entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.⁹

9.14 He said that it was clear from what the intent of Congress was in the FCPA that routine governmental actions had to be 'small' because they were only for things like licences or permits to which the person offering the benefit was entitled. He emphasised that these payments were made for non-discretionary, routine governmental actions. Matters such as gaining or retaining business and improper advantage were not relevant.¹⁰

9.15 Mr Dabb distinguished between different kinds of discretion, saying that a discretion to grant a permit to import a bulldozer to clear areas of a forest was clearly routine. Whereas, obtaining a permit for an environmental clearance to clear a rain forest should probably not be excluded from the offence.¹¹

9.16 There was discussion with AG's witnesses in the context of prosecutorial discretion and whether facilitation benefits should be an exemption to the

⁹ Transcript, 11 May 1998, pp. 329-330, referring to Exhibit No 5, p. 1.

¹⁰ Transcripts: 9 March 1998, p. 13, 11 May 1998, pp. 329, 330.

¹¹ Transcript, 11 May 1998, p. 330.

offence, as opposed to a defence. As Mr Dabb observed, it was ultimately a question of who needs to prove what.¹²

9.17 On the question of onus of proof involving a claimed facilitation benefit, Mr Meaney pointed out that as the intention behind a payment is something peculiarly within the knowledge of the defendant, it is appropriate that such a person should carry the onus. This is consistent with the principle applied by the Senate Scrutiny of Bills Committee. He added that for the prosecution to have to prove the state of mind of defendant in a foreign country beyond reasonable doubt is totally different to the burden on the defendant to adduce evidence to raise a reasonable doubt.¹³

9.18 Mr Meaney also put forward the suggestion that, notwithstanding the attractions of the purposive approach, there may be merit also in capping the amount or value of a transaction as the threshold for a facilitation benefit. Mr Brazil from Allen Allen & Hemsley pointed out, however, the obvious difficulty of capping a transaction where the benefit can be paid by instalments. He also drew attention to the impact of currency fluctuations which might turn a transaction which is a facilitation benefit one day into a prohibited bribe the next.¹⁴

Views of other witnesses

9.19 Mr Thomas Bartos observed that the Bill's exclusion of these benefits from the scope of the offence exposed a 'very serious' definitional problem, in that drawing a line between what would amount to a bribe and what was a facilitation benefit may be extremely difficult. It was his view that the Bill's approach was not satisfactorily linked to the Convention, which does not mention such benefits. Neither that document nor its Commentaries are helpful in explaining the concept, thus the Bill's provisions may be 'too vague and unwieldy' to be effective in practice.¹⁵

9.20 He believed that the focus in the EM was on whether there should be a benchmark figure. This approach was seen to be inconsistent with a point made in the Commentaries, but not in the EM, that an offence of bribery may occur:

¹² *ibid*, p. 331.

¹³ *ibid*.

¹⁴ *ibid*, pp. 333, 334.

¹⁵ Submissions, p. 71.

irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.¹⁶

9.21 Mr Bartos commented that instead of the size of the benefit, the purpose of the benefits seemed to be of significance, and pointed out that the Commentaries mentioned small facilitation benefits in the context of what amounted to an improper advantage in Article 1 of the Convention.¹⁷

9.22 He suggested that a distinction could be made between inducing public officials to perform their duties and inducing them to breach their duty and confer an advantage. He also believed that, if the Bill was not redrafted, the formulation of subclause (7C) was preferable to that of subclause (7A) because:

- nominating a fixed sum which will amount to a benefit might not always be possible;
- the benefit may be very arbitrary when measured across different currencies, and
- using 'small value' instead of a fixed amount provided greater flexibility for courts to decide cases in accordance with the Convention and Australia's obligations under it.¹⁸

9.23 It was also possible that, because the DPP had a discretion about prosecuting a case, there was no need specially to include any reference to these benefits in the Bill. Given this discretion, Mr Bartos considered the provisions were superfluous, and removing them would have the benefit of discouraging attempts to argue whether borderline conduct was a facilitation benefit rather than bribery.¹⁹

9.24 TI believed that facilitation benefits were outside the scope of both the Convention and the Bill. While it did not condone such benefits, they needed to be tackled at a domestic level in each country. Facilitation benefits were not of a magnitude to distort international trade and were not the issue on which the Convention should focus. TI took the view that the Convention was a particular milestone which would be good to achieve and, if it was not possible to get an

¹⁶ *ibid*, quoting Exhibit No 5, paragraph 7, p. 2.

¹⁷ Submissions, p. 71.

¹⁸ *ibid*, p 72.

¹⁹ *ibid*.

ideal solution on facilitation benefits in this document, there will be other stages in the reform process.²⁰

9.25 TI's preferred solution was prosecutorial discretion, combined with guidance as to what constituted a facilitation benefit. It noted the specific exception for such benefits in the 1988 amendments to the FCPA, and referred specifically to the definition of 'routine governmental action' in those amendments.²¹

9.26 TI also drew attention to the prohibitive costs of prosecuting bribery cases and what it saw as a proper focus on large bribes. Assuming that resources would not be devoted to prosecuting cases involving small bribes, and if this intention was made clear by prosecutorial authorities, the inclusion of subclause (7A) in the Bill was unnecessary.²²

9.27 DFAT noted the difficulty in arriving at an agreed definition of a facilitation benefit. It also believed that leaving the treatment of these benefits to prosecutorial discretion would be sensible, allowing each case to be assessed on its merits and according to the amount of money involved. The provisions in the Bill were therefore, in its view, unnecessary.²³

9.28 The ACCI asserted that the provisions of subclauses (7A) to (7C) reversed the onus of proof and were therefore inconsistent with the Australian common law system. As a matter of principle, the Chamber rejected any such attempt to reverse the onus of proof in criminal law matters, believing that the burden of proof 'must be carried exclusively' by the prosecution.²⁴

9.29 The MCA could not see how a single amount could be included in the legislation which would cover all the 'legitimate' facilitation benefits. Prosecutorial discretion would not provide certainty about the legality of their actions, and would lead to anomalies and distortions. It suggested use of the US mechanism which, it stated, allowed such benefits as a defence against prosecution for corruption.²⁵

²⁰ Transcripts, 16 April 1998, pp. 181, 182, 192.

²¹ Submissions, pp. 20-21. See Exhibit No 33, pp. 1416, 1419.

²² Submissions, p. 21.

²³ *ibid*, p. 140, Transcript, 6 April 1998, pp. 85, 86.

²⁴ Exhibit No 21, p. 6.

²⁵ Submissions, pp. 194-195. Ms Hill pointed out that facilitation payments were an exemption from the primary offence in the US legislation: see Transcript, 11 May 1998, p. 335.

9.30 Dr David Chaikin was one of a number of witnesses who recommended the approach in the US FCPA. He saw its provisions for the defence of a payment for a routine governmental action as far simpler and more certain than those in the Bill. He was concerned about including these benefits as a criminal offence. The difficulty of prosecuting would be great because of the difficulty

of locating and presenting evidence, and would trivialise the legislation. He believed that it would be better not to have any prosecutions at all, rather than to focus on the trivial.²⁶

9.31 There was no need to draw a line on the amount or circumstances of these benefits if there were no stipulations in the Bill. They only presented a problem if the defence was used to avoid detection or successful prosecution for bribery or corruption. He referred to the US legislation, saying that the exception provision inserted in 1988 had not been a problem in the operation of the FCPA.²⁷

9.32 Dr Chaikin was also one of a number of witnesses who referred to the American system of approaching the Department of Justice to obtain a ruling whether a proposed transaction would contravene the legislation. Clearance of transactions in advance provided the legal certainty corporations and their legal advisers needed. Such 'safe harbour' provisions would be useful for Australian businesses and already existed in the operations of the Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC).²⁸

9.33 The Law Council of Australia supported the inclusion of subclause (7C) in the Bill. It believed that 'minor' benefits should be excluded from the Bill, in accordance with the Convention and the FCPA, because:

- in numerous countries, it would not be possible to do any business without minor facilitation benefits to petty officials;
- such benefits ultimately cause less harm and distortion than grand corruption, and
- the US and OECD models each recognise and allow for the same factors.²⁹

9.34 One of the Law Council's recommendations, tentative because of the difficulty it posed, was to exclude such small benefits without more precise definition in the legislation. It noted that, as drafted, the framing of the Bill was an appropriate further limitation on facilitation benefits: other small benefits calculated to obtain or retain advantage in the conduct of business were still

²⁶ Submissions, pp. 2-3, Transcript, 17 April 1998, pp. 240, 242.

²⁷ Transcript, 17 April 1998, p. 242. See Exhibit No 33.

²⁸ Transcript, 17 April 1998, pp. 242-243. 'Safe harbour' provisions will be further considered in Chapter 13.

²⁹ Submissions, pp. 170-171.

capable of offending against the legislation. It believed that this tentative recommendation was preferable to fixing a specified amount or leaving the matter to prosecutorial discretion, because:

- it would be impossible to specify a single amount for all circumstances in all the different countries in which Australians invest and do business;
- it did not believe this was a proper or rational basis on which to legislate for a criminal offence, and
- leaving the matter to the discretion of prosecutors was likely to be uncertain and unsatisfactory, and would place undue burdens without providing material guidance for Australian citizens and businesses.³⁰

9.35 The Law Council also recommended that consideration be given to combining the US approach with the emphasis in the Commentaries to the Convention: that benefits which are exempt should be both of 'small' value and made for facilitating something routine to which the person paying the amount is entitled. It was aware that this approach raised the issue of whether Australian courts would be willing to follow US precedents in this matter.³¹

9.36 Mr O'Keefe, Commissioner of ICAC, was of the view that use of the description 'small' was probably undesirable, and that it would probably be better to nominate an upper limit, such as 'less than \$A100'. Prosecutorial discretion causes problems, and can adversely affect respect for the legal system, because:

- it gives rise to uncertainties;
- it is capable of politicisation, and
- it is capable of giving the appearance of politicisation, particularly when nothing is done, suggesting that protection is being given.³²

³⁰ Submissions, p. 171, Transcript, 16 April 1998, pp. 149-150, 155.

³¹ Submissions, p. 171, Transcript, 16 April 1998, pp. 151-152, 154.

³² Submissions, p. 67, Transcript, 17 April 1998, p. 288.

9.37 He stressed the need for 'zero tolerance' of corruption, and pointed out that it was desirable that this legislation be taken seriously if Australia is to be a commercial centre for its region, and it must show that it takes things like bribery seriously.³³

9.38 Mr O'Keefe said that use of the term 'facilitation benefits' in the US legislation had caused him to favour a nominal figure such as \$100 for a single payment. In his view, if there were further benefits, each of \$100, a court would look at the cumulative circumstances. He was one of the witnesses who believed that transparency in these transactions should be required. Companies should be required to report in their annual reports on facilitation benefits, to whom they have been made and the amounts involved.³⁴

9.39 While the submission from Associate Professor Jennifer Hill dealt primarily with corporate criminal liability emanating from a bribery offence, she also discussed facilitation benefits, and the issue of transparency in particular. She said that people with whom she had discussed the legislation wanted to know how these benefits were covered. She was troubled that only some of them could be accepted, but that such distinctions seemed to be the commercial reality.³⁵

9.40 With reference to prosecutorial discretion, Associate Professor Hill observed that prosecutors do not want to undertake cases they are going to lose. Further, because they do not want to bring on petty cases by reduction, they will bring on a few large bribery cases.³⁶

9.41 She was in favour of transparency for facilitation benefits, but was not sure whether companies would balk at disclosure through annual reports. She supported the use of company telephone hotlines which would allow employees to seek advice about the appropriateness of a payment they had been asked to make. Ultimately, she believed, internal mechanisms of this sort as part of corporate compliance principles would dictate what a 'small' benefit was.³⁷

9.42 Associate Professor Hill also pointed out that, if anything under \$100 was a facilitation benefit, an employee would not be checking in advance whether or not to make such a payment. The Bill could retain the primary exception to the offence of making such a benefit involving a rather vaguer notion of 'small' to

³³ Transcript, 17 April 1998, p. 289.

³⁴ *ibid*, p. 288. Transparency will be further considered in Chapter 13.

³⁵ Submissions, p. 155, Transcript, 17 April 1998

³⁶ Transcript, 17 April 1998, p. 255.

³⁷ *ibid*, pp. 252-253.

propel business, rather than to gain it or to gain an unfair advantage. In such a case, there might be an argument that to satisfy compliance principles, in each case employees should be checking what they could pay.³⁸

9.43 She expected companies to become tougher and more serious about bribery because they will be worried about their reputations and their criminal liability.³⁹

9.44 On the issue of transparency, the Chairperson of the National Crime Authority (NCA), Mr Broome, said that it was his belief that there were major Australian companies that did not hide substantial illegal conduct in their books. Such conduct was there for all to see because that was the way that these firms did business, so that there could be transparency at the same time that there was impropriety.⁴⁰

9.45 Mr Brian Hurlock observed that, unavoidable as many facilitation benefits were, the payer was still party to an act of corruption which, even in the most corrupt countries, was liable to legal sanctions. In including these provisions in the Bill, Australia was being forced into an act of compromise in the amendment to the Code which sought to combat corruption. He said that it was ironic that a piece of essentially anti-corruption legislation contained an exemption for an activity which could be described as 'just a little corrupt'. At the same time he accepted the need for pragmatism, but with some caution.⁴¹

9.46 The Overseas Service Bureau (OSB) has sometimes been inconvenienced by its policy of not acceding to requests for these benefits, especially in gaining visas for its Australian Volunteers Abroad (AVA) program. Its response has been to seek to improve its relationships with the governments and the officials involved. Because of the standing of the program, it has been possible to have the payment set aside in ways other individuals or organisations may find impossible.⁴²

9.47 Telstra did not believe that the best way of dealing with these benefits was to include a defence for them in the Bill. It would be better to characterise them as an exception to the offence, and Telstra noted that this was consistent

³⁸ *ibid*, p. 253.

³⁹ *ibid*, p. 255.

⁴⁰ *ibid*, p. 276.

⁴¹ Submissions, p. 84, Transcript, 16 April 1998, p. 161.

⁴² Submissions, p. 113, Transcript, 16 April 1998, pp. 139-140, 145-146.

with the position in the FCPA. The purpose for which the payment is made should be the determining factor.⁴³

9.48 Ms Gray did not favour the inclusion of defences for these benefits, and believed that this matter was best dealt with by prosecutorial discretion. Apart from some concern whether the US legislation conforms to the provisions of the Convention, she expressed the view that the FCPA was easier and more specific to interpret, and to prosecute. She also drew attention to US system of issuing advisory opinions.⁴⁴

9.49 Mr Schramm of the AFP was aware of the different social norms which might apply overseas, leading to the use of consultants or agents to get business done. He supported the need to know what was the purpose behind a benefit, and noted the difficulty of making judgements about such benefits without full knowledge in each case. Mr McFarlane agreed that the purpose for which it was made should be used to distinguish between a benefit which was a 'reasonable' and one which was not due.⁴⁵

9.50 Mr Kovic of the ATO gave details of forthcoming legislation to amend the law and remove tax deductibility for bribes. He stated that it was not appropriate for tax law to use subjective words such as 'small', as does the Commentaries to the Convention, to describe a facilitation benefit. The ATO could not be expected to determine the size of a 'small' facilitation benefit, as decisions on such matters would be made in court. The ATO drew a distinction between a small benefit from a large company which might not be considered small if the same amount if paid by a family company. It added that, if a limit was placed on these benefits, several each less than the threshold amount could be made to expedite an action without exceeding it.⁴⁶

9.51 The ATO favoured the US approach, with its emphasis on the purpose of a benefit and routine governmental actions. It did not want Australian businesses disadvantaged by comparison with US businesses because of Australian revenue laws.⁴⁷

9.52 The IEA was aware of the difficulties of doing business overseas, and thought that a more flexible definition of facilitation benefits was preferable than simply 'small'. Dr Webster distinguished between a payment which was

⁴³ Submissions, p. 133.

⁴⁴ Submissions, pp. 24-25, Transcript, 17 April 1998, pp. 217-218.

⁴⁵ Transcripts: 30 March 1998, p. 56-57, 6 April 1998, p. 123.

⁴⁶ Submissions, p. 93.

⁴⁷ Submissions, p. 94, Transcript, 30 March 1998, pp. 61-62.

designed to obtain a competitive advantage and one which was made as a routine if regrettable part of getting a project completed. He also distinguished between the need to disclose \$100 paid to have details of a tender altered, whereas it should not be necessary to disclose paying the same amount to have a telephone connected early.⁴⁸

9.53 He was aware that payment to a foreign public official to do something which was a breach of that person's responsibility was bribery. A facilitation benefit was paying an official to expedite an action which she/he should do and would be done anyway.⁴⁹

9.54 Mr Asher and Mr Brown recommended that the legislation should not exclude any benefits but should provide for a 'rebuttable presumption', so that the payment was not considered to be a bribe unless the payer could show that it was a facilitation benefit covered by the Convention. Mr Asher said that this could be done by showing, for example, that an official took an amount from every bill of lading which came through a port. While this was unacceptable, the Bill was trying to strike down the way an official may be suborned and paid to favour one person over another.⁵⁰

9.55 Mr Asher added that the 'rebuttable presumption' would give a prosecutorial authority the perspective to concentrate on those cases which were damaging trade. He was conscious of the needs of Australian business, and did not think that they should submit to rules which meant business could not be done elsewhere. He accepted also that giving certainty to business through clear means of avoiding the law had public policy consequences.⁵¹

9.56 Allen Allen & Hemsley strongly supported the proposal to 'legalise' small facilitation benefits. It said that this acknowledged the function of such benefits in some societies and the reality that such benefits were routinely made by many businesses in Asia. The firm was not enthusiastic about fixing a dollar limit and was unconvinced by the use of the term 'small value' in the legislation.⁵²

9.57 This firm was attracted to the US approach which excluded such benefits which were designed to expedite the performance of routine governmental actions, striking at the purpose of a benefit rather than its amount, and

⁴⁸ Transcript, 6 April 1998, pp. 71-73.

⁴⁹ *ibid*, p. 79.

⁵⁰ Submissions, p. 138a, Transcript, 6 April 1998, p. 99.

⁵¹ Transcript, 6 April 1998, pp. 99-100.

⁵² Submissions, p. 105, Transcript, 17 April 1998, p. 206.

excluding from criminality acts which officials should do in any event. Mr Brazil pointed out that the FCPA included an exemption to the primary offence which works and observed that it should be the model Australia should test for its effectiveness.⁵³

9.58 He was pessimistic about the utility of including a threshold amount for a facilitation benefits in the Bill, referring to the use of instalments for benefits and the impact of currency variations which could affect how effective a payment might be.⁵⁴

9.59 Professor Sampford supported intent, rather than a monetary limit, and disclosure of benefits, noting the element of duress in payments which could not be seen as grand corruption of the type at which the legislation was aimed.⁵⁵

9.60 The Australian Society of CPAs took the view that all facilitation benefits should be outlawed, regardless of size. It also stated that an attempt to include a monetary value in the legislation would create distortions because of currency fluctuations. For accountants, materiality was important, and the Society did not believe that simply by legislating all facilitation benefits would be identifiable.⁵⁶

9.61 Associate Professor Gerard Carney noted that the provisions suggested in the Bill to exclude facilitation benefits were conditioned to operate when subparagraph 14.1(1)(c)(ii) applied: when there was an intention to obtain or retain an improper advantage. Yet the NIA observed that facilitation benefits were those which did not involve any intention to obtain any improper advantage, but were simply paid to induce the performance of the official's official function. To avoid this inconsistency, he suggested confining the exclusion of facilitation benefits to those paid to receive 'an insignificant improper advantage'.⁵⁷

9.62 Dr Brien drew attention to two problems in the Bill:

- relating to subclause (7A), because an amount which is a facilitation benefit in one country may be a bribe in another, and

⁵³ *ibid*, p. 106, Transcripts: 17 April 1998, p. 206, 11 May 1998, pp. 334-335.

⁵⁴ *ibid*, p. 334.

⁵⁵ Transcript, 17 April 1998, p. 261.

⁵⁶ Transcript, 16 April 1998, p. 129.

⁵⁷ Submissions, p. 10.

- relating to subclause (7B), because the value of a benefit in the Australian dollar will vary against another currency because of exchange rate variations.⁵⁸

9.63 He gave an example of a situation where the provisions of a contract were twisted to produce a bribe which would not have been caught by the Bill. He suggested that it ought to address such issues as constructing a situation where there was an opportunity to make possible undue benefits, and business practices which allow for such benefits to be made. The Convention should be re-negotiated with these matters in mind. Within Australia, it should be left to juries to decide whether a benefit was a bribe, a corrupt payment, or a facilitation benefit.⁵⁹

9.64 Dr Brien pointed out that bribes can be hidden in the form of 'business courtesies'. These can take many forms, including meals, entertainment, fares, use of vehicles, accommodation, seminars, etc. He observed that the Convention may need to be renegotiated and the proposed legislation amended to make it mandatory that such benefits are recorded.⁶⁰

9.65 Mr Butler and Ms Hill recommended that facilitation benefits be:

- an exception rather than a defence to the primary offence;
- defined in terms of securing routine governmental actions, rather than to obtain or retain an improper advantage in business, and
- defined as 'small' without specifying a monetary threshold, but with the express requirement of justifying the circumstances for the exercise of prosecutorial and judicial discretion.⁶¹

9.66 Ms Hill noted the use of the term 'facilitation benefits' as a euphemism for a bribe, and the difficulty of specifying a monetary amount. She noted that it was going to be very difficult to prosecute matters of a lesser nature. The Bill should more closely follow the US legislation in providing an exception, rather than carving out a defence and requiring a person to discharge an evidentiary burden of establishing that the benefit fell within the defence set out in the Bill.⁶²

⁵⁸ *ibid*, p. 119 Transcript, 11 May 1998, pp. 296, 305.

⁵⁹ *ibid*, pp. 120-121.

⁶⁰ Submissions, p. 122.

⁶¹ *ibid.*, p. 159.

⁶² Transcript, 11 May 1998, pp. 312-313.

9.67 She added that the intention of the Bill was also to pick up the offences of duress and coercion under the Code.⁶³

9.68 Mr Butler also referred to the difficulty of defining 'small' and said that, if the word were to be used in the legislation, the actual amount in particular cases would vary depending on which country or economy was involved. He noted that, if making a facilitation benefit was an exception to the offence, the onus of proof would be on the accused and he asserted that juries could be convinced that a benefit was other than small in the particular circumstances.⁶⁴

Conclusions

9.69 We are aware, that as with jurisdiction, the issue of facilitation benefits was one of the most conceptually difficult in the Bill. Whether it is the idea of facilitation benefits themselves, the use of the word 'small' to describe them, business courtesies, or the purpose of a benefit, there are definitional problems which are likely to impact on the effectiveness of the enabling legislation. This has implications for Australian firms which will require certainty in this matter. The effectiveness of the legislation may also, in part, be judged on whether our recommendations are adopted.

9.70 The evidence presented by almost all witnesses discussed these complex issues in detail. None of the options presented in the Bill were greeted enthusiastically, faults were found with each and there was no overall agreement on which should be preferred.

9.71 Facilitation benefits will generally be made overseas to officials who may be dependent upon such benefits to supplement their livelihood in a culture where corruption and bribery is not only tolerated but provides an expected fee for a service. The Committee has carefully considered the draft options put forward for consideration, as well as the alternative approach taken in the FCPA where the focus is on the purpose of the benefit and the effect is to secure a routine governmental action.

9.72 On balance, the Committee is attracted to the purposive approach for facilitation benefits as a defence to a charge under the Bill. The Committee acknowledges that, in theory, it is easy enough to distinguish a bribe made to obtain or retain an improper advantage in business, and payment of a small

⁶³ *ibid*, p. 312.

⁶⁴ *ibid*, p. 314.

amount to secure an outcome to which the payer is entitled in any event such as the connection of a telephone line. In practice, the distinction can become blurred.

9.73 As Mr Dabb pointed out, the defining characteristic is whether the decision-maker can exercise, or is required to exercise, a discretion in making the decision. Once again, in theory it is relatively easy to distinguish between what may be a small enticement to 'jump the queue' for connection of a telephone on the one hand, and exerting influence to be the preferred tenderer in the award of a major construction contract. In practice, however, there can be room for the exercise of discretion in what, on the face of things, are the most routine of actions.

9.74 Mr Dabb illustrated this difficulty by reference to the exercise of different types of discretion. While the grant of a permit to import a bulldozer to clear areas of a forest may be routine, the purpose for which the bulldozer is required and the necessary environmental clearances to permit it to be used for such a purpose are probably not something to which an applicant is automatically entitled. Other examples come to mind: approval for use of a building as a theatre may be routine if zoning permits it, but not if the building does not comply with safety standards.

9.75 He also pointed out that an essential concept underpinning facilitation benefits is the notion of 'smallness', and that the payment is for non-discretionary acts of government where the payer gets what he or she is entitled to and no more.

9.76 Obtaining an improper advantage refers to something to which an organisation was clearly not entitled. Even though the issue of a permit to operate a factory that fails to comply with statutory requirements may be routine, the discretion behind it is clearly not routine but an inducement which in these circumstances would be for the purpose of obtaining an improper advantage.

9.77 The Committee is cognisant of the probability that a purposive approach to facilitation benefits will result in the High Court being asked to interpret the content of a routine governmental action defence.

9.78 Bearing all these matters in mind, the Committee is not attracted to leaving the issue of facilitation benefits to prosecutorial discretion, simply on the basis that certain actions are not worth pursuing, or that it would be too expensive or too difficult to prosecute.

9.79 From the evidence before the Committee, it is clear that Australian firms doing business overseas will need to provide facilitation benefits in order to carry on business. It flies in the face of reality to expect all such activity to cease when the Bill is enacted, and it is totally unsatisfactory for Australian organisations potentially to be exposed to a criminal conviction however small the benefit may be.

9.80 The Committee favours a legislative approach that will spell out in the clearest possible way that a person is not guilty of an offence if the purpose of facilitation benefit was to secure or expedite a routine governmental action. A purposive approach leaves open to prosecution as bribery, matters such as very large payments, or if the underlying decision is to award new business, or to continue a business relationship, or if it relates to the terms on which business is conducted.

9.81 The Committee is fortified in its view that a purposive approach would best meet the objectives of the Bill by the comments of Mr Brazil. He noted that the one country, the USA, that has legislation in this area includes a facilitation benefit exception that works and, in his view, for that reason it has to be the number one model to be examined.

9.82 Evidence received by the Committee urged us to consider whether ‘business courtesies’ should be specifically addressed within the scope of the Bill. Extending business courtesies will usually not be illegal either in Australia or overseas, and is an unexceptionable part of carrying on business.

9.83 The Committee accepts, however, that business courtesies could amount to bribery if, for example, extensive entertainment, free travel and accommodation afforded a foreign official were used in an attempt to obtain or retain business or otherwise gain an improper advantage. On the other hand, parting with a carton of beer or providing a free lunch to ensure that a document is processed expeditiously is trivial and clearly comprehended as conduct that would fall short of the offence.

9.84 In the Committee’s opinion, the purposive approach recommended for adoption in the Bill can be called in aid to distinguish those business courtesies that may in exceptional circumstances amount to an illegal bribe from a permissible facilitation benefit. Moreover, the purposive approach to characterising facilitation benefits to secure routine governmental action will also allow a prosecutor to consider whether cumulative payments of small amounts, for example to a particular official, are truly for the purpose of securing non-discretionary, routine governmental action, or whether bribery has occurred.

9.85 The Committee is therefore satisfied that business courtesies and the treatment of a series of small payments can be adequately addressed within the scope of the Bill, provided that a purposive approach is adopted for the treatment of facilitation benefits.

9.86 The Committee considers that transparency requires the disclosure of all facilitation benefits and this issue will be considered in more detail in Chapter 13. The Bill provides two options for the treatment of these benefits, but is silent on whether they should be revealed in firms' accounts. We consider that, if it is necessary for individuals or firms to provide facilitation benefits for a legitimate purpose, those benefits should all be recorded. There should also be an appropriate penalty for non-compliance with an obligation to record facilitation benefits which will be considered in Chapter 13.

9.87 **The Joint Standing Committee on Treaties recommends that:**

- **neither of the options put forward in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* to address facilitation benefits be adopted;**
- **the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* adopt in lieu a purposive approach to facilitation benefits in terms similar to those included in the US *Foreign Corrupt Practices Act of 1977*, and**
- **payment or provision of a facilitation benefit to secure a routine governmental action be a defence to a charge under the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*.**

CHAPTER 10

PENALTIES

Penalties in the Bill

10.1 AGs advised that the penalty in the Bill for the offence was imprisonment for ten years, and a Note under subclause 14.1(1) drew attention to section 4B of the Commonwealth *Crimes Act 1914* which allowed a court to impose a fine instead of imprisonment, or in addition to imprisonment. The fine for an individual would therefore be \$66,000 and \$330,000 for a corporation.¹

Issues

10.2 In considering the penalties provided in the Bill, the Committee considered the following matters:

- whether these penalties are set at an appropriate level;
- whether the anomalies between the provisions in the Bill and offences under the Crimes Act should be addressed, and
- whether confiscation of assets should be included as a penalty for a conviction.

Views of witnesses

10.3 Mr Peter Butler and Ms Gayle Hill stated that the penalties provided in the Bill were 'relatively light'. They said that those under the US legislation were \$US100,000 for an individual and up to \$US2 million for a corporation. Under the FCPA, multiple convictions can also lead to racketeering charges which entail even more hefty fines, including imprisonment.²

10.4 They said that these penalties seemed inadequate when compared to those in other domestic legislation. Under the *Trade Practices Act 1974*, an individual may face a penalty of up to \$500,000 and a corporation between \$750,000 and

¹ Transcript, 30 March 1998, p. 26.

² Submissions, p. 165.

\$10 million for a breach of Part IV of that Act. Mr Butler added that because of the seriousness of the offence, the penalties for business organisations and individuals should be in line with such corporate legislation.³

10.5 Dr David Chaikin noted the need to ensure consistency with other laws considered to be of similar gravity in the penalties applicable to the offence.⁴

10.6 Ms Robyn Gray drew attention to the different penalties proposed under the Bill and those in the NSW legislation. Offences under Part IVA of the *NSW Crimes Act 1900* attract a maximum penalty of imprisonment for seven years. This discrepancy will not exist after NSW adopts the Criminal Code but, as has already been pointed out, the currently different penalties created the potential for an anomaly if two parties were to be tried together or separately under different legislation.⁵

10.7 Mr O'Keefe, Commissioner of ICAC, suggested that consideration should be given to confiscation of assets as a penalty for the offence. While this only occurred in a limited number of cases, such as proceeds of crime applications money from drug cases, the fact that it did made it harder for those who engaged in this activity to get any benefit from it. He saw this as an effective deterrent, as 'the word got around'.⁶

10.8 As a result of his recommendation that Australian organisations' business courtesies should be declared and included in a register, Dr Brien suggested that there should be penalties for non-disclosure of such payments, without specifying the type or amount.⁷

10.9 Mr Broome of the NCA linked difficulties in enforcing the legislation, and the ease with which funds can now be moved globally, with the idea that low fines will ensure disclosure of payments. It was easy to hide the activities which this legislation sought to control. He also suggested that the obligations in the Corporations Law to report financial transactions accurately and properly had not worked effectively in the past. It was his view that similar provisions would not work appropriately in this legislation.⁸

³ *ibid*, Transcript, 11 May 1998, p. 344.

⁴ Transcript, 17 April 1998, pp. 246-247.

⁵ Submissions, p. 24, Transcript, 17 April 1998, p. 222.

⁶ Transcript, 17 April 1998, p. 291.

⁷ Submissions, p. 122, Transcript, 11 May 1998, p. 302.

⁸ Transcript, 17 April 1998, pp. 271-272.

10.10 If the auditors of Australian firms were not able to discover many of the events of the 1980s, Mr Broome doubted that the AFP and others, without increased resources, would be able to detect this offence unless whistleblowing or increased intelligence was available.⁹

10.11 He thought that the maximum corporate fine was based on the conversion of the gaol term in the Crimes Act into a maximum fine. He pointed out that it was conceivable that the kind of bribes which could be involved in this offence would almost certainly exceed the maximum penalty prescribed in the Bill. For those who are involved in this activity, Mr Broome suggested, the penalty would then become another part of the price a person might be prepared to pay for the overall benefits of the crime.¹⁰

Conclusions

10.12 If the bribery of foreign public officials demands creation of a criminal offence, the penalties for that offence must reflect the seriousness of the breach. The linkage of penalties in the Bill to the *Crimes Act 1914* is convenient and consistent, but not obligatory. We are of the view that the penalties in the Bill are set at an inappropriately low level, and believe that they should be replaced with penalties similar in magnitude to those provided in the *Trade Practices Act 1974*.

10.13 The Joint Standing Committee on Treaties recommends that the penalties prescribed in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* should be increased to provide for the imposition of a fine instead of imprisonment, or in addition to imprisonment, similar in magnitude to the term of fines prescribed in the *Trade Practices Act (1974)*.

10.14 It would defeat the intention of the Bill and reduce its effectiveness if the inconsistencies between its provisions and those in State legislation, such as the NSW *Crimes Act 1900*, were not addressed. While this matter will be resolved when the Model Criminal Code is adopted by that State, when the Bill is enacted, there will be potential for different penalties to apply for a conviction in different Australian jurisdictions for the same offence.

10.15 The Joint Standing Committee on Treaties recommends that the Minister for Justice consult with the Attorney-General for each of the

⁹ *ibid*, p. 272.

¹⁰ *ibid*.

States and Territories concerning inconsistencies that may need to be addressed between the provisions in the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* and in relevant legislation of the States and Territories.

10.16 Confiscation of assets acquired from the proceeds of crime has been thought to be an appropriate consequence of a conviction for a number of criminal offences, such as dealing in drugs. We are of the view that the penalty regime in the Bill would be improved by a provision for confiscation of assets which have been acquired from the proceeds of bribery.

10.17 The Joint Standing Committee on Treaties recommends that the penalties for the offence of bribery created by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* should include confiscation of property acquired from the proceeds of the bribery.

10.18 Facilitation benefits were considered in Chapter 9, together with the proposition that transparency in dealing with these benefits requires disclosure in accounts. If such an obligation were to be imposed, the penalty for non-disclosure would also require consideration.

10.19 The Joint Standing Committee on Treaties, having concluded that payments to secure routine governmental action should be an available defence to a charge of bribery under the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*, and that there should be an obligation to record such payments in the accounts of organisations, recommends that the Minister for Justice consider the feasibility of imposing a penalty in the Bill for non-compliance and the penalty that should be imposed.

CHAPTER 11

GOVERNANCE ISSUES

Governance

11.1 The term ‘governance’ has many varying meanings in different contexts. One meaning which is useful for the Committee's purpose is: ‘the manner in which power is exercised in the management of a country's economic and social resources’. Further to that definition, the four basic elements of good governance are:

- accountability-making public officials answerable for government behaviour and responsible to the entity from which they derive their authority;
- participation-accepting that people are at the heart of the political process;
- predictability-the existence of laws, regulations and policies to regulate society, and their fair and consistent application, and
- transparency-the availability of information to the general public, and clarity about government rules, regulations and decisions.¹

11.2 Good governance therefore means much more than simply regulation of business or public sector management. It goes to the heart of the processes of administering nations with the wishes and needs of the people as the reason for government.

Good governance programs

11.3 Australia's development assistance funding includes about \$A400 million through good governance projects administered by the Australian Agency for International Development (AusAID). As a result of a review of development assistance, these programs have been grouped together systematically. AusAID has gathered a range of projects under the following categories:

¹ Adapted from Asian Development Bank material. See Exhibit No 43, pp. 1, 4, 5, 6, 7.

- legal sector reform, including reform of constitutional law and legal and judicial systems and police and prison systems;
- public sector reform, including public sector management, public finance and state businesses;
- economic policy reform, including macro-economic policy, trade policy, investment policy, financial sector policy and industry policy, and
- civil representation, including national human rights institutions, NGOs and international organisations, electoral agencies, the establishment of ombudsman structures and media.²

11.4 These projects are administered in a range of South East Asian, Asian African, Pacific and Middle Eastern countries. Our near neighbours, Papua New Guinea (PNG) and Indonesia, as well as important regional powers such as China, also receive Australian assistance via governance projects. Information on the range of these projects is set out in Appendix 7.³

11.5 Perhaps most importantly, good governance has been given a specific sectoral focus in AusAID's overall program, in addition to areas such as agriculture, health, education, etc.⁴

Issues

11.6 The conduct of Australian firms following the passage of this legislation will be crucial to its effectiveness in combating corruption. The Bill creates a criminal offence of bribery of foreign public officials but, when enacted, it will have implications for employees of Australian firms and for the firms themselves. In considering this subject, the following matters are relevant:

- whether corporate codes of conduct would assist Australian firms to implement the legislation, and

² Submissions, p. 202.

³ See Submissions No 27a (*passim*). While the projects set out in Appendix 7 are not described in great detail, a clear picture emerges of the range of work which is being undertaken.

⁴ Transcript, 6 April 1998, pp. 90-91.

- what additional measures should be taken, and by whom, to ensure that Australian firms identify and address corporate governance issues, for the benefit of those firms and for Australia's reputation as a country opposed to corruption.

11.7 It is difficult to quantify the impact of good governance programs in Australia's overall development assistance program. We considered whether these programs were likely to assist in informing other nations about Australia's beliefs and practices concerning the need to eliminate all forms of corruption.

Corporate codes of conduct

11.8 Mr Dabb of AGs pointed out that the legislation used the criminal law and contained a criminal prohibition which first sought an individual who had committed the proposed offence. While there was some emphasis on prosecuting corporations and making them liable to criminal penalties as a further step, as the legislation was constructed its main focus had to be on the criminal liability of the individual. Under the US legislation, the enforcement strategy was very much aimed at corporations and they undertook programs to modify corporate cultures to avoid offending the provisions of that legislation.⁵

11.9 He added that the Australian legislation did include an element of attention to aspects of conduct which were 'on behalf of the corporation', whether the person was a high officer or an employee, or even a person whose only relationship with the corporation was for the purpose of a particular transaction.⁶

11.10 Mr Rooke of TI noted that some of Australia's largest companies had welcomed the legislation and, indeed, expressed the view that it should be stronger. He said that it appeared that some parts of the business community was already working towards being in position to deal with the implications of the legislation.⁷

11.11 In particular, Telstra had developed an ethics clause which would be included in all contracts with suppliers, and with joint venture partners and local agents. BHP has introduced a process where its employees discuss the subject of bribery with suppliers and explain the company's position of opposition to

⁵ Transcript, 11 May 1998, p. 323.

⁶ *ibid*, p. 324.

⁷ *ibid*, pp. 345-346.

corruption, as set out in the company's code of conduct. It had also introduced procedures for facilitation payments, a subject which was considered in Chapter 9.⁸

11.12 Mr Broome of the NCA said that fundamental issues of corporate governance were questions of how companies behave and what was their ethical behaviour. He saw transparency as an essential step in trying to achieve improved corporate cultures. If external auditors were prepared to report conduct which they find to be improper, this provided an external check and balance. It was also necessary to have a process in which those who behaved appropriately obtained the benefits of their activities, so there must be strong economic incentives for companies. The best discipline on corporations was the actions of shareholders, and they will only respond when they see a demonstrable outcome in terms of share values or dividends.⁹

11.13 The Australian Society of CPAs referred to the difficulties encountered by auditors:

- the current provisions of section 289 of the Corporations Law require the keeping of books but do not ensure bribes will be identified;
- there are inadequate provisions to indemnify accountants/auditors who notify breaches of the law for actions for breaches of confidentiality, and
- the lack of an international accounting standard in Australia for dealing with the payment of bribes and their treatment for audit purposes.¹⁰

11.14 The IEA has a Code of Ethics and an active process of continuing professional development, designed to help members adapt their skills and capacities to new professional challenges. The Institution was aware of good practice moving towards checks and balances so that, for example, managers offshore did not have autonomy to make some payments without authority from their Australian head offices.¹¹

⁸ *ibid*, p. 346.

⁹ Transcript, 17 April 1998, pp. 277-278.

¹⁰ Submissions, pp. 61-62, 64, Transcript, 16 April 1998, pp. 126-128.

¹¹ Transcript, 6 April 1998, pp. 70, 74.

11.15 Mr Asher and Mr Brown recommended that corporations should adopt compliance programs to put into effect the Convention's requirements, and that Government agencies should assist them to do so. In 1997, Standards Australia introduced an Australian Standard for compliance programs. It has been a 'smash hit, with more and more organisations taking it up. The Standard deals with how corporations can implement, monitor and act upon compliance issues internally. Means of measuring compliance and ensuring that there were chains of command and systems within corporations to deliver it do exist.¹²

11.16 They expressed the view that the International Standards Organization and the OECD would also take it up, as providing some objective means by which it can be said that a corporation was taking serious action to implement this Standard rather than simply having good intentions.¹³

11.17 Together with Mr O'Keefe of the ICAC, they stressed the need to build up the self-regulatory infrastructure in Australia's trading partners. Mr O'Keefe also drew attention to some large Australian corporations in NSW which had codes of conduct they were serious about enforcing. These organisations had audit divisions, corruption prevention divisions and offices and sections with the power to ensure that codes were being enforced. These larger bodies gave leadership to smaller ones, and he believed that such an approach could work against bribery of foreign public officials as effectively as it had in that State.¹⁴

11.18 These codes, he stated, needed to be both aspirational and proscriptive. It was important to address aspirational matters before specifying the way development applications, for example, should be handled. Such codes should then say what behaviour was not acceptable, and include the penalties that would apply.¹⁵

11.19 TI supported the approach in BHP's code of conduct which absolutely prohibited bribes. It also included an exemption for facilitation payments, but only on the basis of complicated approvals and recording of the payments.¹⁶

11.20 Associate Professor Jennifer Hill drew attention to the flow-on effects of changes to principles of Australian corporate law when applied to the proposed offence of bribery of a foreign public official. She noted that, under Part 2.5 of the Code, corporations may themselves be criminally liable for bribes paid by

¹² Submissions, p. 138, Transcript, 6 April 1998, pp. 97, 103.

¹³ Transcript, 6 April 1998, p. 97.

¹⁴ *ibid*, Transcript, 17 April 1998, pp. 285, 286, 292.

¹⁵ Transcript, 17 April 1998, p. 293.

¹⁶ Transcript, 16 April 1998, p. 183.

their employees if it can be shown that the practices and policies of the company did not discourage such conduct. In examining a company's culture, it would also be possible for a court to examine the 'unwritten rules' if these were inconsistent with formal compliance documentation. Impressive rhetoric would be no protection if it could be shown that non-compliance was actually expected. Nor would turning a blind eye insulate companies from criminal liability.¹⁷

11.21 She observed that the practical effect of the introduction of this offence will be that Australian companies will need to demonstrate that they have in place effective anti-bribery compliance systems, which they will also need to enforce. She was also aware that some large Australian companies did not seem to know how to protect themselves from that criminal liability.¹⁸

11.22 Associate Professor Hill noted that compliance systems had been set up in companies in such areas as trade practices, the environment and sexual harassment, and these offences were already triggering their internal mechanisms. As will be seen in our consideration of transparency in Chapter 13, she also supported use of hotlines to check compliance with company policies.¹⁹

11.23 Ms Gayle Hill also addressed corporate criminal responsibility. She said that the Code included provisions which looked at the culture within a corporation, and whether or not it failed to create and maintain a corporate culture which required compliance with the relevant provisions. Ahead of the legislation, her firm had been advising clients that they ought to be putting codes of conduct in place. This would involve including, in documentation for any joint venture, provisions which require the joint venture partner to comply with certain standards of conduct and provide compliance certifications periodically throughout the project, and perhaps at key milestones. Thus Australian partners could discharge their legal compliance responsibilities.²⁰

11.24 Dr David Chaikin referred to the new international business morality, one that meant that bribing was not acceptable because institutional investors did not want to invest in a company engaged in this activity. He spoke of the need to set up compliance systems in Australian companies operating overseas, whether they were engaged in environmental pollution, breaching another

¹⁷ Submissions, pp. 153-154.

¹⁸ *ibid*, p. 154, Transcript, 17 April 1998, p. 48.

¹⁹ Transcript, 17 April 1998, pp. 250-251, 252-253.

²⁰ Transcript, 11 May 1998, p. 318.

country's

laws, adhering to corporate law responsibilities in this country or another. If these were established in a responsible manner, that would perhaps be a defence to a charge of bribery.²¹

11.25 He also thought that there should be some 'safe harbour' provisions because he was aware of the impact of the distance in terms of policy and control if subsidiaries, or even subsidiaries of subsidiaries, were involved in a transaction. If the law was to be extended, there was a need for some defence.²²

11.26 Mr Ahrens of Baker & McKenzie observed that Australia should be concentrating time and attention on the cost and complexity of compliance programs so that, when our companies do business overseas, they know what is legal and what is not. Each program would have to involve a number of areas, going routinely beyond continuing education for relevant executives. They would have to include careful screening of and instruction to all employees, agents, intermediaries and other third parties, as part of the 'due diligence' process.²³

11.27 He drew attention to his firm's experience with trade practices legislation: if employees at any level were caught out, the compliance program was deemed to be ineffective. No matter how much effort had been put in, there would be a conviction and, while the penalty might be reduced because of the existence of such a program, it was a difficult situation for a corporation. Australian corporations could anticipate the need to establish their own definite and detailed compliance programs, going beyond statements of corporate policy on compliance. The trade practices experience was a pointer to the difficulty of ensuring that all international operations complied with the law and operated on an ethical basis.²⁴

11.28 It was the view of the St James Ethics Centre that, where a corporation allowed a culture to develop, in which the payment of bribes was expected, tolerated or made virtually necessary to achieve business objectives, the corporation should be held jointly liable with any employee who committed the proposed offence. If found guilty, it should be subject to significant fines. While the Centre did not have a firm view on the point, it could also be argued that directors should share personally in this liability.²⁵

²¹ Transcript, 17 April 1998, pp. 239, 245.

²² *ibid*, pp. 245-246. 'Safe harbour provisions will be considered in the section **AGs rulings** in Chapter 13.

²³ *ibid*, p. 210, Submissions, p. 146.

²⁴ Transcript, 17 April 1998, pp. 210-211, Submissions, p. 146.

²⁵ Submissions, p. 59.

11.29 The Centre urged, in the strongest possible terms, the corporations, (and directors if included), be able to offer as an absolute defence, evidence of the fact that they had taken active, real and sensible steps to create a corporate culture in which the payment of bribes to foreign public officials was not acceptable. These steps would need to go beyond merely publishing a statement or code forbidding such practices. Directors would also need to demonstrate that the corporation's policies, systems and practices were designed to prevent this behaviour from occurring. Without being specific, the Centre believed that a corporation's commitment would be evident in its recruitment, remuneration, training and performance evaluation practices.²⁶

11.30 This approach would help off-set the danger presented by foreign companies wanting to use the proposed legislation as an unfair competitive weapon. The Centre believed that the defence it had recommended would offer considerable protection to Australian companies subjected to vexatious complaints by foreign competitors.²⁷

11.31 Dr Brien noted that the NIA stated that there was no need for a new domestic agency in Australia, as a result of implementing the Convention. He believed that it was difficult to see how it could be implemented faithfully without an agency, perhaps reporting to the Parliament, to monitor compliance by Australian and foreign businesses, and the effect of the Convention and the legislation on business domestically and internationally.²⁸

11.32 He also believed that the legislation should only become law with the provision to Australian business of assistance to develop anti-bribery or anti-corruption programs to improve its level of ethical governance. Otherwise he asserted, while many would comply, some adept businesses would seek to circumvent the legislation.²⁹

11.33 The Committee notes that few of the many Australian businesses who were approached by letter forwarded submissions to this inquiry. In spite of several approaches, BHP did not forward a submission or give evidence at a public hearing and Telstra only provided a submission. This is a matter of concern, as we are of the view that these organisations, and others who did not participate at all, could have made useful contributions to our deliberations.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*, p. 118, Transcript, 11 May 1998, p. 299.

²⁹ Submissions, p. 123, Transcript, 11 May 1998, p. 299.

Good governance programs

11.34 DFAT believed that implementation of the Convention and the legislation will, by the example it sets, strengthen the hands of those in other countries who seek to improve governance and stamp out corruption. Increasing the focus on bribery will have an effect on the ability of corporations from countries who are not OECD members to gain commercial advantages through bribery. If corruption could be reduced or eliminated, the competitive environment for business could only be improved.³⁰

11.35 AusAID saw anti-corruption measures in terms of an overall package of good governance, which was the process which promoted governments making good decisions. Its underlying assumptions were that development depends on good policies and the proper allocation of resources. The OECD, the World Bank, the Asian Development Bank and other bilateral agencies had programs which promoted good governance.³¹

11.36 Within the various categories of projects set out earlier in this Chapter, Australia's development assistance programs addressed good governance in a number of ways, including:

- educating civil servants to work within ethical parameters;
- encouraging partner countries to remove administrative mechanisms, such as export licences, which are fertile grounds for corruption;
- media training;
- support for legal systems
- assistance to police forces, and
- promotion of democratic institutions through electoral assistance.³²

11.37 AusAID provided a list of the good governance projects current in the 1997/98 Financial Year. Although spread between categories and spent in a large number of countries, it totalled \$A498 million. Information on these projects is included in Appendix 7.³³

³⁰ Submissions, p. 140, Transcript, 6 April 1998, p. 140.

³¹ Transcript, 6 April 1998, p. 82.

³² *ibid.*

³³ See Submission No 27a for the detailed information.

11.38 The OECD had recommended that its members include anti-corruption clauses in procurement contracts, and this has been done by AusAID.³⁴

11.39 The Australian Trade Commission (Austrade) pointed out that eligible expenditure for its projects excluded bribes of any kind. In particular, bribes are not eligible expenditure for the Export Market Development Grants (EMDG) scheme.³⁵

Views of witnesses

11.40 Mr Britton of OSB was aware that good governance was critical to educating people of other nations to the reality that Australians do not get involved in bribery, but that this was a very long-term process. He suggested that, on the basis of the Bureau's experience, when the emerging middle class of a country felt that bribery was unacceptable, changes would occur. In its training programs, for its own volunteers and for other companies with whom it worked, OSB therefore advised people working overseas to acquire knowledge of the relevant social norms as soon as possible. Mr Hackett thought that Australia's good governance programs stand us in good stead in those countries where they were in place.³⁶

11.41 Mr Asher noted AusAID's focus on these programs and pointed out OECD's interest in corporate governance and building up the institutions of civil society as a vital way of eliminating corruption. He asserted that the Bill was silent on such mechanisms which can give force and effect to laws.³⁷

11.42 He suggested that, in AusAID projects which exceeded \$A5 million, part of the project audit and assessment mechanism should be submission of a compliance statement. Some checking of particular transactions would also be needed, together with assessment of such features as to whether there was encouragement of complaints via the mechanism of rules for whistleblowers. The Australian Standard for compliance programs, referred to in the previous section, could be used in these processes.³⁸

³⁴ *ibid*, p. 82.

³⁵ Transcript, 6 April 1998, p. 92.

³⁶ Transcript, 16 April 1998, pp. 138-139, 144.

³⁷ Transcript, 6 April 1998, p. 97.

³⁸ *ibid*, pp. 103, 104, 97-98.

11.43 On the basis of his experience, Mr Hurlock believed that fostering people and non-government organisations in developing countries was vital. This could be done through visits and scholarships, and by trying to influence university courses in economics, business and law. He suggested that this effort should be carefully targeted, as 'throwing money' at problems can make situations worse. He also recommended liaison with those high-profile citizens in developing countries who had an interest in democracy, believing that working with them and hoping to influence governments in the longer term was worthwhile.³⁹

Conclusions

11.44 Codes of conduct will be required to assist Australian individuals and business organisations under this legislation, and it was reassuring to be informed of a number of their considerations before the Bill is finalised. It is equally a matter of concern that some significant corporations chose not to contribute to this inquiry, although invited to do so.

11.45 In this difficult area, the Committee considers that there should be 'safe harbour' provisions and, specifically, scope for rulings for the benefit of both business organisations and individuals such as are already found in both trade practices and taxation law. These rulings, and transparency, will be addressed in Chapter 13.

11.46 The specific scope of the Bill and difficulties in investigating alleged offences, which were addressed as part of Chapter 10, may assist individuals and business organisations to evade its provisions. But, just as knowledge of the legislation itself may prevent the impugned conduct, so the existence of codes of conduct may change the culture in which an organisation does business that will prevent offences from occurring within those firms.

11.47 Companies and the individuals that operate overseas will need to be aware of the provisions, and the implications, of the proposed legislation. It will be important to ensure that these provisions are understood. It would be useful if information sessions were held jointly by Government and peak business bodies to determine the effectiveness of disseminating information on the legislation. Such sessions would also assist with education about the provisions of the Bill, and could include such bodies as the ACCI, the Business Council of Australia, the Minerals Council of Australia and the Australian Chamber of Manufactures.

³⁹ Transcript, 16 April 1998, pp. 165-166.

While such sessions would clearly be to the benefit of all those on whom this legislation could impact, there needs to be some assessment of likely costs and their potential usefulness.

11.48 The Joint Standing Committee on Treaties recommends that the Minister for Justice examine the viability of undertaking an education campaign with peak industry bodies such as the Australian Chamber of Commerce and Industry, the Business Council of Australia, the Minerals Council of Australia and the Australian Chamber of Manufactures to inform Australian firms of the provisions of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*.

11.49 Dr Brien's suggestion about a monitoring agency was in our view somewhat premature, having regard to the specific scope of the proposed legislation.

11.50 We consider that the matters raised by the Australian Society of CPAs are very important in the context of codes of conduct. Although auditors and accountants have a central role in the affairs of Australian businesses, the Society's suggestions also fall outside the present scope of this legislation. We are supportive of measures to identify bribes in accounts and to develop international accounting standards, as well as to provide adequate indemnification of auditors for reporting breaches. It is our view, however, that such issues should be taken up, at the first instance, in other professional forums.

11.51 The good governance programs now given such priority by AusAID are of immense, long term importance. While such programs can be costly and their benefits are hard to quantify, they are often vulnerable to removal from programs in times of financial restraint.

11.52 When this legislation is enacted, it will be important that countries in the region and other nations in which Australians work are made aware that this country does not tolerate corruption, and that it has legislation which criminalises bribery of foreign public officials.

11.53 As set out in Appendix 7, Australia already administers a wide range of good governance projects with many countries. It is unlikely that either the focus or the material in these projects deals adequately with the principles on which this Bill is based. All current projects will need to be examined to ensure that material on Australia's views on the bribery of foreign public officials, as reflected in the Bill, are included.

11.54 The Joint Standing Committee on Treaties recommends that the Minister for Foreign Affairs request the Australian Agency for International Development to undertake an audit of its good governance programs to ensure that the objectives underpinning the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* are adequately incorporated in relevant development assistance projects.

CHAPTER 12

RESOURCE ISSUES

12.1 The Minister for Justice pointed out that, because it will be expensive to investigate and prosecute offences under this legislation, the focus of law enforcement will be on 'very large scale bribes', or 'grand' corruption. The NIA for the Convention stated that costs of investigation will be borne by the AFP, and prosecution by the DPP, both from within existing funds. Costs of making or receiving requests for extradition or other assistance for investigations and prosecutions of the offence established in accordance with the Convention will be met by AGs, also from within existing funds.¹

12.2 Initially, allegations of bribery will need to be investigated overseas and this will be expensive. No additional resources will be available to investigate possible offences or, subsequently, to try cases.

Issue

12.3 The implementation of the Convention through the Bill raises the issue of whether its effective implementation will be adversely affected by the resources which will be made available for investigation and enforcement.

Costs of investigation and prosecution

12.4 Mr Schramm stated that the success of the legislation would rest heavily on the AFP's capacity to respond promptly and effectively to any allegations of bribery of foreign public officials. It has found that investigations relating to extra-territorial legislation, or where the majority of an investigation is conducted overseas, are difficult to undertake and can be extremely demanding of both human and financial resources. Extensive travel can be required and officers must be supported, sometimes in expensive accommodation.²

12.5 The AFP is required to conduct a wide range of investigations into crimes against the Commonwealth. It stated that, in recent years, demands on resources had outstripped the organisation's capacity which had led to the introduction of more flexible operating arrangements. It believed that this legislation had the

¹ Transcript, 9 March 1998, p. 3.

² Submissions, pp. 89-90.

potential to impact further on the AFP and, it added, further consideration may need to be given to the impact this would have. It believed that it would need to consider the costs of investigations.³

12.6 Mr Schramm said that resources for an investigation of an alleged offence against this legislation would be given a high priority. The needs of such an investigation would have to be assessed against other competing priorities, and other investigations might have to be put aside to proceed with a bribery matter.⁴

12.7 The AFP provided details of the likely costs of an investigation of a possible offence under the proposed legislation which indicated that, following inquiries in Australia, a three week inquiry in a South East Asian capital would incur costs of about \$A32,000. Total costs, including returning witnesses to Australia for a trial were therefore 'more likely to be in the range of \$A50,000 to \$A100,000'.⁵

12.8 AGs was fully aware of the high cost of investigation and prosecution. It pointed out that the Convention and the legislation were only designed to catch 'grand bribery', and that investigators will not be sent overseas to look at \$A50 bribes. It was emphasised that there were great difficulties and costs in investigating conduct in another country, even with the cooperation of local authorities. Mr Dabb confirmed that, assuming witnesses could be compelled to come to Australia to give evidence, the cost of bringing them here for trials could be enormous.⁶

Views of other witnesses

12.9 Dr Andrew Brien noted that investigation and prosecution of allegations was likely to be enormously expensive and embarrassing to both the accused and the foreign government whose official is alleged to have been involved in bribery. He noted that 'deep pockets' could be used to prevent convictions and that, in particular, the possible costs the diplomacy involved in implementing

³ *ibid*, p. 90, Transcript, 6 April 1998, pp. 52, 119.

⁴ Transcript, 30 March 1998, p. 54.

⁵ Submissions, pp. 199-200. These figures were based on two AFP investigators travelling business class, accommodation, meals, incidental and general administration costs, together with costs for two witnesses to travel to Australia for committal proceedings. Similar costs would be incurred to bring witnesses back for a trial.

⁶ Transcripts: 9 March 1998, p. 12, 30 March 1998, pp. 22, 35, 11 May 1998, pp. 320-321, 323.

the Convention had not been included in the NIA. He saw the Bill as a possible further source of expenditure on public funds which might fail to produce a clear benefit out-weighing its costs.⁷

12.10 Mr Thomas Bartos also raised the issue of enforcement and the resources it needed, saying that there was nothing in the Bill which extended the obligation to enforce its provisions to any specific organisation. There seemed to be an assumption that the DPP would undertake prosecutions, but the NIA contained little information on investigations.⁸

12.11 Mr O'Keefe noted that resources would always be an issue, and that consideration should therefore be given to self-regulating mechanisms in business operations. Mr Broome referred to the existing networks of mutual assistance in criminal matters and extradition, but was aware that the process of implementing this legislation would always be resource intensive.⁹

12.12 Mr Davis of the ACCI expressed a view that the DPP would be concerned at the cost of prosecutions. For this reason, he thought it likely the DPP would suggest the use of exemptions, with the financial burden of carrying the onus of proof shifting to business to prove absence of guilt. He was concerned about such a possibility.¹⁰

Conclusions

12.13 There can be no doubt that, on the basis of the information provided by the AFP, investigation of selected, alleged breaches of the legislation will be expensive, and the AFP recognised the need to order the priority to be given to investigations. It is not possible to predict how many investigations would need to be undertaken.

12.14 While Mr Bartos' comment about enforcement and resources related particularly to facilitation payments, it referred to the DPP's policies on prosecutions for the offence. While it is not possible to estimate how many prosecutions will occur, it is likely that significant, additional costs will be incurred by that body.

⁷ Submissions, pp. 117-118, 123.

⁸ Transcript, 6 April 1998, p. 109.

⁹ Transcript, 17 April 1998, pp. 285, 282, 279.

¹⁰ Transcript, 11 May 1998, p. 342.

12.15 Mr O'Keefe touched more on codes of corporate conduct than on issues of resources. If effective codes were introduced and implemented, the need for enforcement of the legislation would probably decline.

12.16 Whether the predictions made by Mr Davis and Dr Brien will materialise remains to be seen, but it would be unfortunate to have the effectiveness of the legislation limited by a shortage of resources for investigation and/or prosecution. It could be seen to reflect on Australia's commitment to the Convention. For the legislation to be effective, both investigation and prosecution must be adequately resourced.

12.17 We doubt that resource issues for the investigation or prosecution of alleged offences against the legislation have been adequately addressed. It is not possible to guess how many investigations, at what cost, will be required per year, nor how many prosecutions will follow.

12.18 The Bill proposes to establish a serious criminal offence and could have potentially serious financial implications for the investigating and prosecutorial agencies. It is unusual to put forward a proposition that costs likely to be incurred by agencies cannot be quantified, but demands at some time in the future must be met from within 'existing resources'.

12.19 There would be little purpose in making a recommendation about the resources which might be needed or available to cover these possible needs before enabling legislation has been finalised, or passed. We believe, however, that effective implementation of this legislation will impose additional burdens on investigating and prosecutorial agencies. These organisations will need to keep costs of their activities to implement the legislation under review.

12.20 We also believe that Australia's commitment to the OECD Convention will be judged, at least in part, on its commitment to making the legislation effective. The Bill is an important measure to combat bribery. It is just as significant as a symbol of this country's commitment to the implementation of such measures as the Convention as part of an international response to an increasingly global problem. It is therefore vital that sufficient resources are provided to make it effective.

12.21 The Joint Standing Committee on Treaties recommends that the Director of Public Prosecutions and the Australian Federal Police keep under review costs incurred in implementing the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998* to ensure that funds required for investigation and prosecution of alleged offences are adequate.

CHAPTER 13

OTHER ISSUES

13.1 During the inquiry, a number of other, significant issues were raised which merited consideration. Inter-relationships exist between a number of these matters, as well as with others which have already been considered, including:

- transparency;
- legal and technical cooperation;
- tax deductibility for bribes, and
- rulings by the Attorney-General.

Transparency

13.2 In Chapter 11, transparency was included as one of the four elements of good governance. It was defined as the availability of information to the general public and clarity about government rules, regulations and decisions.¹

13.3 Transparency in matters relating to the Convention and the Bill related to the development of corporate cultures in Australian companies which operated overseas, and to the disclosure of bribes made in order to carry on business overseas.²

13.4 While disclosure of these payments may be desirable, in reality the only payments that are likely to be disclosed are those which in the eyes of an organisation would not breach the provisions of the Bill.

Issue

13.5 The Committee gave consideration to whether transparency in accounting and disclosure of the payment of bribes would assist in eliminating corruption.

¹ Exhibit No 43, p. 7. The other elements were accountability, participation and predictability.

² There is a link between transparency and facilitation payments; the latter were considered in Chapter 9.

Views of witnesses

13.6 Mr Dabb of AGs expressed the view that a system which worked on disclosure to function properly might be on a rather insecure basis. Particularly in relation to facilitation benefits, some such benefits could be extortion rather than bribery which were not within the definition of ‘improper advantage’ and should not be caught by the law.³

13.7 He added that it might be possible for the DPP to adopt a system of looking favourably on corporations which declare payments, as a sign that they were not made with dishonest intent. He also drew attention to the US system which had its own law and accounting standards which were separate from a criminal offence.⁴

13.8 Mr Davis of the ACCI stated that the Chamber had been calling for transparency for many years and that, while it did not defend corruption, the proposal to disclose payments was an area with which it had difficulties. In particular, he expressed concerns about the creation of criminal offences and the shifting of the onus of proof from the prosecution.⁵

13.9 The Australian Society of CPAs pointed out that there was no accounting standard in Australia dealing with the payment of bribes and their treatment for audit purposes in companies' accounts. Corporation law required that accounting standards be complied with, but there was no standard which required separate reporting of bribes. The Society believed that the Convention should address the need for an international accounting standard.⁶

13.10 The Australian Accounting Research Foundation drew to our attention the range of measures underlying the financial information disclosure provisions of the Corporations Law. It stated that the objectives of the financial reporting and audit provisions were broader than the prevention of omissions and falsification of accounting records and financial reports.⁷

13.11 Dr Mair of the IEA thought that transparency was very much to be encouraged because corruption, or unethical practice, could only survive in hidden transactions. He was not in favour of recording small facilitation payments because of the paper work involved, but the Institution's approach

³ Transcript, 11 May 1998, p. 332.

⁴ *ibid.*

⁵ Transcripts: 30 March 1998, p. 37, 11 May 1998, p. 340.

⁶ Submissions, p. 64, Transcript, 16 April 1998, p. 128.

⁷ Submissions, pp. 127-128.

was one of ensuring that individuals entering into a transaction were aware of their ethical foundation. Some existing practices were not good business or professional practices.⁸

13.12 TI was in favour of disclosure and noted that BHP, while it absolutely prohibited bribes, had an exemption scheme based on approvals and recording of facilitation payments.⁹

13.13 Mr Dunstan of Allen Allen & Hemsley suspected that it would be difficult for BHP to list the foreign public officials it had bribed because to do so would open its officials to immediate imprisonment in their jurisdictions.¹⁰

13.14 Associate Professor Jennifer Hill supported transparency, but noted that it was a difficult provision to include in legislation. She was unsure whether corporations would balk at inclusion of figures in annual reports, and referred to corporate compliance principles. She was in favour of hotlines, so that overseas employees could be given advice on whether particular payments were allowable, noting that if facilitation payments were made it would be difficult to show a corporate culture which did not tolerate them.¹¹

13.15 Professor Charles Sampford supported full recording of payments, noting that duress would probably be involved in many payments. He believed that those who were pushing for higher standards within the international community with government support should hold discussions with business to develop ethical codes and internal practices.¹²

13.16 Mr Broome of the NCA stated that unethical business behaviour, payment of bribes and inducement to corruption were inextricably linked to the lack of financial transparency, and the undermining of both private and public institutions which can flow from it. He did not believe that a \$12,000 fine under the Corporations Law would ensure corporations' books would disclose payments, adding that it 'only has to be said to be shown to be a joke'.¹³

⁸ Transcript, 6 April 1998, p. 73.

⁹ Transcript, 16 April 1998, pp. 182-183, 184.

¹⁰ Transcript, 17 April 1998, p. 214.

¹¹ *ibid*, pp. 252-253, 255.

¹² *ibid*, p. 261.

¹³ *ibid*, pp. 272, 269-270.

13.17 He noted that some Australian companies did not hide substantial illegal conduct in their accounts. Transparency was an essential step in trying to achieve corporate cultural outcomes, and he suggested that auditors had not been very successful in discovering illegalities.¹⁴

13.18 Mr O'Keefe, Commissioner of ICAC, referred to 'zero tolerance' of corruption and believed that companies should be required to report on facilitation payments, to whom and how much.¹⁵

13.19 Dr Andrew Brien was aware that it was unrealistic to expect total disclosure of payments, and did not see how asking people to do so, or making a law, would produce that outcome. He stated that, because undue benefits can be hidden by benefactors, the Convention may need to be re-negotiated and the Bill amended so that it was mandatory that all business courtesies were recorded.¹⁶

13.20 He also suggested that while some US corporations take a zero tolerance approach to small payments, others maintain a register of them. Maintenance of a register would be the beginning of an effective audit, monitoring and implementation procedure, especially if there were penalties for non-disclosure according to defined requirements.¹⁷

13.21 Mr Brian Hurlock distinguished between legal commissions and bribery which was coded as commissions, and supported declaration of bribes. Mr Britton of OSB was also in favour of a process which would allow the declaration of expenses incurred. He saw this as bringing these payments into the open, and acknowledging that there were differences in doing business and getting things done in different places.¹⁸

13.22 Mr Butler and Ms Hill recommended that the legislation should include as a separate offence the failure to record accurately bribery payments in company accounts. They noted that this was a recommendation of the OECD Council, provided for in Article 8 of the Convention, and that the EM stated that accounting requirements were already contained in Corporations Law. They submitted that this provision should be included in the Bill as it was in the US

¹⁴ *ibid*, pp. 276, 277.

¹⁵ *ibid*, p. 289.

¹⁶ Submissions, p. 122, Transcript, 11 May 1998, p. 297.

¹⁷ Transcript, 11 May 1998, pp. 302-303.

¹⁸ Transcript, 16 April 1998, pp. 163, 141.

legislation, which also included an offence for not maintaining accurate records. Alternatively, there should be express reference in the Bill to the relevant provisions of the Corporations Law.¹⁹

Conclusions

13.23 The Committee concluded that disclosure of all payments in the nature of bribes which have been made by businesses is consistent with the overall objective of reducing corruption. We have already recommended that the Minister for Justice consider the feasibility of imposing a penalty for non-compliance with an obligation to record payments and, if so, the penalty which should be imposed.

13.24 The Joint Standing Committee on Treaties recommends that the Minister for Justice examine the benefits and practicalities of introducing a requirement that payments of bribes be disclosed in business accounts.

Legal and technical cooperation

13.25 The ACCI believed that a better approach to corruption than the proposed legislation was what it called 'legal and technical cooperation'. It envisaged this working through national development assistance programs, through:

- development of best practice/model legislation for combating all forms of corruption at root cause in host countries, and
- provision of training for all elements of the criminal law chain in those countries: police, lawyers and judges.²⁰

13.26 As part of its good governance programs, AusAID would therefore provide draft model legislation and train appropriate personnel, although ACCI did not see easy solutions in parts of Latin America or the Middle East. It did not see Australia carrying out this program by itself, but in cooperation with a number of other countries. It might be possible to solve problems before they emerged in the Pacific islands, so that some worthwhile things were possible in our neighbourhood.²¹

¹⁹ Submissions, pp. 159, 165, Transcript, 11 May 1998, p. 315. See Exhibit No 3, Section V, p. 3.

²⁰ Submissions, p. 96. Governance issues have been dealt with in Chapter 11.

²¹ Transcript, 30 March 1998, pp. 40- 41.

Views of other witnesses

13.27 Mr Asher and Mr Brown noted that some commentators had suggested that, rather than sign the Convention, Australia should provide law enforcement assistance to countries where bribery was a problem. It seemed ‘disingenuous’ to them to support measures for other governments to catch Australian citizens bribing foreign public officials, while objecting to Australia attempting to stop such activity itself.²²

13.28 Dr Brien said that, if the Bill became law, he saw it as forming part of an overall program of educating officials from developing countries, something which Australia has been doing for a long time. He believed that this was a good thing, and one that was in our national interest.²³

Conclusions

13.29 In Chapter 11, we have expressed the view that AusAID's good governance programs encouraged other nations and individuals to practice good governance and that further action in this area, beyond normal monitoring and review, is not practical. It would, of course, be a matter of concern if these worthwhile programs were curtailed in the course of further financial stringencies. They make a valuable contribution in the countries where they are operate and, in the context of the Convention, are consistent with the positive role taken by Australia to address corruption.

Tax deductibility for bribes

13.30 The ATO proposes to introduce legislation which will exclude the tax deductibility of amounts paid by way of bribes. Deductibility of such payments was removed from the Convention as a result of a Recommendation of the OECD Council in 1996.²⁴

Issues

13.31 In some countries, as was observed by several witnesses, facilitation benefits are regarded as an essential part of getting business done, and have

²² Submissions, p. 137.

²³ Transcript, 11 May 1998, p. 300.

²⁴ Transcript, 9 March 1998, p. 8, Exhibit No 3, p.7.

been recognised as legitimate business expenses. Without the proposed change to taxation law, Australian businesses could claim legitimate taxation deductions for expenses incurred in respect of payments that would be made illegal by the proposed legislation.

13.32 The Committee considered whether the impact on business of removing deductibility of bribes should override Australia's need to make a firm statement about the unacceptability of bribery of foreign public officials.

Bribes and tax law

13.33 In its submission, the ATO pointed out that tax law policy did not differentiate between legal and illegal income or expenditure. Taxation law is not concerned with the ethics or the morality of how income is generated, or the reasons for incurring expenses. Under section 8(1) of the *Income Tax Assessment Act 1997*, deductions are allowable for outgoings necessarily incurred in the gaining or producing of assessable income, or the carrying on of a business for the purpose of gaining or producing assessable income. This is provided that the outgoing was not of a private, capital or domestic nature.²⁵

13.34 The ATO has prepared the *Taxation Laws Amendment Bill (No 5) 1998* for introduction into Parliament, using the Convention as a guide to define the scope of the change so that:

- the description of the offence in Article 1 will be used as the basis for defining a bribe for taxation purposes, and
- the amendment will take into account the exclusions in the Commentaries to the Convention which permit 'small' facilitation payments which are legal in the foreign public official's country. Such payments would continue to be deductible where they satisfy the requirements of section 8(1) of the Income Tax Act.²⁶

13.35 Mr Kovic advised that payments made as bribes are generally disguised in company accounts under such headings as 'commissions' or 'consultancy fees'. How they are treated in those accounts would not be a relevant consideration for the ATO unless such payments were illegal. It might,

²⁵ Submissions, p. 92, Transcript, 30 March 1998, p. 58.

²⁶ *ibid*, p. 93, Transcript, 30 March 1998, p. 58.

however, be drawn to the attention of the AFP. After the amendment is passed, such payments would be included in the list of those items that cannot be claimed as legitimate expenses.²⁷

13.36 The ATO stated that it would not want to introduce an amendment to the tax laws which took a firmer stance on allowable deductions than that permitted by the United States' revenue legislation. The Tax Office proposed that the changes to the legislation would probably be applied to the 1999/2000 financial year, as they would not be retrospective.²⁸

Views of other witnesses

13.37 Mr Davis of the ACCI noted the proposal to end the tax deductibility of bribes was a logical consequence of the provisions of this Bill.²⁹

13.38 The Australian Society of CPAs and the Law Council of Australia supported exclusion of any deductions for bribes or corrupt payments, or reimbursement of amounts spent by other people.³⁰

13.39 TI advocated proceeding with the removal of tax deductibility at the same time as criminalisation of the offence of bribery, and was critical of the ATO's approach in not considering tainted sources of revenue or of income, describing it as 'bad'.³¹

13.40 Dr Chaikin argued for the prevention of deductibility of payments incurred through bribes in taxation law, and questioned whether the ATO would inform other authorities about such illegal payments as it might find.³²

13.41 Mr Broome of the NCA noted the Government's intention to remove tax deductibility, saying it was 'absolutely appalling' that illegal payments in Australia and other countries could be regarded as legitimate deductions.³³

²⁷ Transcript, 30 March 1998, pp. 59, 64.

²⁸ Submissions, p. 94, Transcript, 30 March 1998, p. 63.

²⁹ Transcript, 30 March 1998, p. 46.

³⁰ Transcript, 16 April 1998, pp. 126, 128, 149, 150, Submissions, p. 170.

³¹ Transcript, 16 April 1998, pp. 183-184.

³² Transcript, 17 April 1998, pp. 241, 242.

³³ *ibid.*, p. 273.

13.42 In the context of his recommendation of an implementation strategy for the Bill, Dr Brien was sceptical of the effect of the forthcoming tax legislation. He suggested that, without some bureaucratic support, both this Bill and the amendment to the tax law would be ineffective.³⁴

13.43 Mr Butler and Ms Hill recommended that Commonwealth legislation removing tax deductibility of all bribes, including facilitation payments, should be enacted without delay. They expressed the view that the removal of deductibility ought not depend on a successful prosecution.³⁵

Conclusions

13.44 In their submissions and oral evidence, a number of witnesses proposed that tax deductibility for bribes be removed from Australian taxation law. The ATO submission stated that the *Taxation Laws Amendment Bill (No 5) 1998* which will take this action was to be introduced into the Parliament in May 1998. On 31 March 1998, the Committee wrote to the Treasurer, expressing the view that this legislation should not overtake its deliberations.

13.45 On 26 June 1998 the Assistant Treasurer replied, noting that while the taxation amendment will in part reflect the OECD Convention, it was independent from the Convention and the proposed amendments to the Code necessary to give effect to it. Aware of the Committee's interest, particularly in how facilitation benefits were treated, the Assistant Treasurer provided a copy of the tax amendment which he said would be 'released as an exposure draft shortly'.³⁶

13.46 This amending taxation legislation can only add to the picture of Australia as a country opposed to corruption. We unreservedly support the introduction of this legislation into the Parliament concurrently with the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*.³⁷

Rulings by the Attorney-General

13.47 A number of witnesses, including Ms Gray, referred to the provision of advisory opinions by the US Department of Justice on whether or not some

³⁴ Transcript, 11 May 1998, p. 303.

³⁵ Submissions, p. 166.

³⁶ *ibid*, p. 224.

³⁷ *ibid*, p. 94.

proposed conduct would infringe against the provisions of the FCPA. Once provided, that opinion creates a rebuttable proposition protecting individuals or firms from future prosecution when it engages in the conduct. This approach is sometimes referred to as 'safe harbour' provisions. She suggested that, from the point business of view, introduction of such an approach in Australia would be very desirable.³⁸

13.48 Mr Brazil of Allen Allen & Hemsley questioned whether there was scope for the provision of such rulings by the Attorney-General's Department. He referred to similar rulings by the ATO and the ACCC and suggested that, although it had not been widespread, there was merit in the practice.³⁹

13.49 Dr Chaikin also outlined the US provisions, adding that he thought it would be useful if there were such safe harbour provisions in Australia. This mechanism would allow, for example a check on the independence and objectivity of in-house advice. He noted that US laws in bribery matters were detailed and complex than Australia's.⁴⁰

13.50 Ms Hill observed that although there were procedures for seeking opinions about proposed transactions under the FCPA, it had not been used much since 'about 1980'. US corporations were concerned that to disclose what they were proposing to do could trigger an investigation of their conduct.⁴¹

13.51 In their supplementary submission, Mr Butler and Ms Hill gave a number of additional reasons, drawn from a US authority, for the lack of use of this procedure:

- seeking an opinion tends to force an applicant into structuring a transaction conservatively, thereby reducing the need for an opinion at all;
- it is likely that the opinion will relate to conduct which is part of ongoing and prior transactions, and the US company may be reluctant to expose existing transactions to the scrutiny of the Justice Department;
- the actual opinion will often contain information which will enable parties to be identified;

³⁸ Transcript, 17 April 1998, p. 224.

³⁹ Transcripts: 17 April 1998, p. 207, 11 May 1998, p. 335.

⁴⁰ Transcript, 17 April 1998, pp. 242-243.

⁴¹ Transcript, 11 May 1998, p. 341.

- time constraints may preclude seeking an opinion;
- foreign persons may be reluctant to abide by requests for written certifications and representations;
- corporations often prefer to rely on the advice of counsel that proposed conduct is permissible. This advice can be persuasive in demonstrating that a defendant lacked the requisite intent to have violated the FCPA. In addition, professional legal privilege will attach to the opinion, and
- in the event that the Justice Department does not approve a transaction or the request is withdrawn to avoid a negative opinion, the practical result is likely to be that the transaction will be withdrawn to avoid an investigation.⁴²

13.52 Mr Dabb of AGs said it would be necessary to identify an agency prepared to take on the role of providing such rulings. He noted that the DPP did not normally give rulings in advance of whether conduct would amount to criminality. The introduction of such a process, he warned, might involve adding to the bureaucracy. He also recommended including ‘safe harbour’ provisions in the legislation, defined as precisely as possible, as a defence for paying facilitation benefits.⁴³

13.53 In a general way, Mr Dabb expressed reservations about transferring aspects of the US system to an Australian context. He pointed out that, in interpreting legislation, US courts were strongly influenced by what is ‘a sense of the Congress’.⁴⁴

Conclusions

13.54 Mr Butler and Ms Hill provided a useful insight into the reasons for the lack of use of the US system of seeking opinions from the Department of Justice on proposed transactions under the FCPA. The Committee, however, has concluded that there could be considerable advantages in introducing the US approach in providing ‘safe harbour’ provisions, so that individuals and firms could assess the legality of proposed conduct against independent advice.

⁴² Submissions, p. 223.

⁴³ *ibid*, pp. 335, 341.

⁴⁴ *ibid*, p. 337.

This may have implications for other areas of regulation and the Australian legal system.

13.55 These aspects would need to be explored to ensure there was sufficient expertise and resources in all relevant areas to manage the possible additional workload which might be created. While a mechanism for providing rulings and the operation of safe harbour provisions would need to be underpinned by legislation, there may be cost effective ways of implementing an advisory service.

13.56 The Joint Standing Committee on Treaties recommends that the Minister for Justice examine the scope for making available rulings on whether future conduct would infringe the provisions of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*.

CHAPTER 14

SUMMARY AND CONCLUSIONS

The global problem of corruption

14.1 Corruption is a major global problem which takes many forms, including extortion, nepotism, cronyism, bribery and money laundering. It can be active or passive, ranging from active involvement to 'turning a blind eye'.

14.2 The effects of corruption include distortions to trade, reduced economic competitiveness and fraudulent enrichment of elites in developing countries. It can extend to impacts on fragile economies and systems of government, and has played a part in causing the many problems currently found in Asian and South East Asian nations.

14.3 In some cultures there is an attitude that the payment of small fees for minor services such as the granting of licences or connection of telephones, is expected and accepted, so that it is often difficult to carry on business without providing these benefits. In these cultures, larger payments can also be expected for business advantages in such matters as the letting of contracts or concessions. Providing benefits to facilitate routine actions, called facilitation benefits, needs to be differentiated from payments of substantial amounts, or grand corruption, which has the potential to distort competition and, ultimately, impact on every aspect of life in a nation.

14.4 The World Bank has estimated that \$US80 billion per year flows from industrialised to developing countries in bribes every year, when net flows of direct investment, trade and development assistance total only \$US180 billion per year.

The OECD and the Convention

14.5 The OECD takes the view that corruption is best addressed by the actions of groups of nations determined to reduce its impact. The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* represents a valuable starting point for a multi-lateral action against global corruption. Bribery of foreign public officials in international business transactions is but one manifestation of corruption. While the OECD is also working on other related areas of corruption, this Convention does not address other facets such as bribery of commercial entities.

14.6 The OECD has only 29 members, but these include the US, Japan, France, the UK and New Zealand, and five other countries have indicated an interest in ratifying this Convention. It not only makes the views of these 34 nations on the issue of corruption clear, but is also a statement of support for the activities of those business organisations, individuals and groups who oppose corruption in all its forms.

14.7 This is not a large group of nations, however, and it does not include many developing nations, any members of ASEAN nor any of the smaller Pacific nations. The Convention's effectiveness will increase with the number of such nations which ratify it, and Australia's support can best be demonstrated by encouraging both ASEAN members and the nations in its region through diplomatic channels to ratify the Convention and pass complementary domestic legislation.

14.8 Article 15 is framed to ensure as far as possible that the Convention enters into force generally by 31 December 1998. It provides that the Convention will enter into force on the 60th day following the date on which five of the ten nominated and largest members have deposited their instruments of acceptance, approval or ratification.

14.9 The Committee commends the view that recognises that corruption can only be dealt with effectively by a broadly-based and coordinated multi-lateral approach. Appendix 5 shows that progress is being made on the drafting, introduction and implementation of the necessary domestic legislation.

Australia's draft implementing legislation

14.10 Australia's draft legislation implementing the Convention, the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998*, was referred to the Committee by the Minister for Justice for examination with the Convention. The Bill creates a criminal offence for a conviction for bribing a foreign public official and imposes a penalty of imprisonment for ten years. The *Crimes Act 1914* allows a court to impose a fine instead of imprisonment, or in addition to imprisonment.

14.11 'Foreign public official' is defined as widely as practicable because of the different government structures in various nations. Officials of international organisations are included, in addition to such groups as members of legislatures and the police and the military.

14.12 The Bill provides that a person is guilty of the offence of bribery of such an official if a combination of the following elements is proved:

- providing or causing a benefit to be provided to another person;
- the benefit must be undue, and
- provision of the undue benefit must be with the intention of influencing the exercise of official duties, to obtain or retain business, or to obtain or retain an improper advantage in the conduct of business.

14.13 The Bill provides for two defences against an alleged offence. It includes the defence of lawful conduct in the foreign officials' country, and a Table prescribes the method by which the applicable law is determined. The source of that law will vary according to the official's connection with the foreign government or international organisation. The Commentaries to the Convention make the intention clear that the infringing conduct should not be an offence if the advantage was permitted under the law of the official's country.

14.14 The second defence provided in the Bill is that a benefit which was provided was a facilitation benefit. The Commentaries also state that facilitation benefits are not intended to extend to an offence which is international in character, and is primarily aimed at larger bribes which may distort international trade.

14.15 Consideration of the draft Bill raised two issues of conceptual difficulty which were central to its scope and objectives. These were jurisdiction for the offence created by the Bill and the treatment of facilitation benefits.

Jurisdiction

14.16 The offence applies to conduct within and outside Australia, unless providing or offering the benefit occurs wholly outside Australia. That is, it proposes a territorial nexus so that, to establish an offence, there must be a territorial connection with Australia or its territories.

14.17 Once it is accepted that the conduct sought to be proscribed is essentially international criminal activity that is likely to take place wholly outside Australia, the question is whether imposing a territorial nexus as a precondition to the exercise of jurisdiction over such an offence will render the legislation ineffective and unenforceable.

14.18 In an increasingly globalised world, it is our belief that the effectiveness and enforceability of the legislation would be reduced if jurisdiction was limited to only partial extra-territoriality. The Committee believes that the objectives of the Bill will be met more effectively if there is extra-territorial jurisdiction defined on as wide a basis as possible. We have therefore recommended extension of jurisdiction for the proposed offence to any of territoriality, nationality, residence, place of incorporation or business operation.

14.19 The collection of evidence and the burden of proof to establish a conviction for offences committed overseas will remain difficult and expensive. The Committee acknowledges these difficulties, but considers that they are similar to those of the *Crimes (Child Sex Tourism) Amendment Act 1994* which also involves extra-territorial application.

14.20 The draft Bill also includes ancillary offences of attempt, complicity, incitement and conspiracy where they relate to conduct proscribed in the offence which occurred or was planned or expected to occur in Australia. These offences to the primary offence are integral to the legislation, and the Committee has recommended that jurisdiction for ancillary offences should be defined on the same extra-territorial basis as for the primary offence.

Facilitation benefits

14.21 Facilitation benefits are excluded by the Commentaries to the Convention. The treatment of these benefits Bill raised a number of conceptual problems in our consideration of the draft Bill. It provides alternative defences to the primary offence:

- that the amount of the benefit was less than a threshold amount, yet to be specified, and
- a formulation which would leave the decision about a particular benefit to a jury by specifying that the benefit was ‘small’.

14.22 On balance, the Committee did not favour the option of providing a threshold amount for a facilitation benefit. There is an obvious difficulty in capping a transaction where the benefit may be paid by instalments. Moreover, the vagaries of currency fluctuations might turn a transaction which is a permissible facilitation benefit one day into a prohibited bribe the next.

14.23 Moreover, the Committee was not attracted to leaving facilitation benefits to prosecutorial discretion on the basis that the benefit was ‘small’ and not

worth pursuing, or that prosecution would be too difficult or too expensive to pursue a relatively minor offence. Another criticism of this option was that a small payment in some circumstances may be a large benefit in others.

14.24 An alternative approach can be found in the US *Foreign Corrupt Practices Act of 1977*. Based on a purposive approach, this provides an exception to a charge of bribery if the benefit was paid for the provision of a ‘routine governmental action’, such as the connection of a telephone or provision of a document, to which the payer was entitled in any event.

14.25 There is a difference between provision of a benefit involving the exercise of a discretion which leads to obtaining or retaining business or which confers an improper advantage, and payment of a small amount to secure the performance of a routine governmental action. There may also be a difference between the effect of one small payment and a number of small payments which added together may not be ‘small’ and could amount to a considerable sum. The Committee therefore considers that the principle of the purpose for which these payments were made is a valid criterion to distinguish whether a benefit is to facilitate a routine, non-discretionary governmental action, or whether the purpose could be characterised as bribery to obtain or retain business or to secure an improper commercial advantage, involving the exercise of discretion on the part of the official.

14.26 It is clear that many Australian business organisations and individuals have to provide facilitation benefits to carry on business overseas, and the Committee accepts that there should not be potential exposure to criminal convictions for such conduct. The legislation should therefore spell out as clearly as possible that it is the purpose for which a benefit is provided which could make it illegal, rather than the amount.

14.27 The Committee was urged to consider whether ‘business courtesies’ should be specifically addressed in the Bill. The provision of business courtesies is usually not illegal in Australia or overseas, and they are an unexceptionable part of doing business. However, in exceptional circumstances, business courtesies could amount to bribery if, for example, extensive entertainment, free travel, and accommodation were used in an attempt to obtain or retain business or otherwise gain an improper advantage. The purposive approach recommended for adoption in the enabling legislation can be applied to distinguish those business courtesies which may, in such circumstances, exceed a permissible facilitation benefit and in truth amount to a bribe.

14.28 The Committee is therefore satisfied that business courtesies and the treatment of a series of cumulative, small payments can be adequately

addressed within the Bill, if a purposive approach is adopted for the treatment of facilitation benefits.

14.29 The Committee also gave consideration to whether provision of facilitation benefits should be an exception to the primary offence, as in the US Foreign Corrupt Practices Act, or whether it should be an available defence to a charge under the Bill. On balance, we are of the view that, as the intention behind the benefit is within the knowledge of the defendant, it is appropriate that the defendant should bear the onus of proof, as proposed in the Bill.

Transparency

14.30 Transparency has been defined as one of the four elements of good governance, and generally involves the availability of information to the public. In the application of the Convention through Australia's draft implementing legislation, it refers to the disclosure in firms' accounts of bribes paid in order to carry on business overseas. The Committee considered that the disclosure of all payments in the nature of bribes by business is consistent with the objective of reducing corruption.

14.31 It therefore recommended that the Minister for Justice consider the feasibility of imposing a penalty for non-compliance with an obligation to record such payments. It also recommended examination of the benefits and practicalities of introducing a requirement for the disclosure of the payment of bribes in business accounts.

Penalties and State/Territory legislation

14.32 The draft enabling legislation creates a criminal offence for a conviction for the bribery of a foreign public official. The penalties for such a conviction need to reflect the seriousness of the offence. Compared with the penalties in the *Trade Practices Act 1974*, the penalties for both individuals and business organisations seem to be set at an inappropriately low level. The Committee has therefore recommended that penalties for the offence be increased to levels commensurate with those in the *Trade Practices Act 1974*.

14.33 Evidence was given as to the effect of inconsistencies between the Bill and State legislation, so that there is potential for different penalties to apply in different Australian jurisdictions for the same offence. This should be addressed through consultations between the Minister for Justice and the Attorneys-General of the States and Territories.

Confiscation of property

14.34 As confiscation of property acquired from the proceeds of illegal activities areas has been seen as an appropriate penalty in other areas, the Committee considers it would be appropriate if such a provision was included in the Bill. It would be another means of making it clear that the Australian people regard bribery as a serious matter.

Codes of conduct and good governance

14.35 A number of major Australian business organisations, some which already have corporate codes of conduct in place, chose not to participate in this inquiry. All Australian businesses and individuals that operate overseas will be affected by this legislation when it is enacted. There may be difficulties in complying with its provisions for many of these businesses and individuals if there were not some education about its provisions. The Committee has recommended that the Minister for Justice should examine the viability of an education campaign, involving peak industry bodies and the Government, informing Australian firms about the Bill's provisions.

14.36 From the evidence available to the Committee, the current range of good governance programs coordinated by AusAID cover a wide field in many different countries. We consider that there should be an audit of the content of projects to ensure that the purpose and intentions of the *Criminal Code Amendment Bill (Bribery of Foreign Public Officials) Bill 1998* are included in appropriate programs.

Resources

14.37 Bribery of foreign public officials will almost always occur overseas, and it is expected that the cost of investigation and prosecution of alleged offences will be both difficult and expensive. The NIA states that both activities will be funded from within existing resources. If insufficient funds are provided for these activities, the message Australia seeks to send through the ratification of the Convention and enactment of the legislation will be weakened. The Committee considers that investigating and prosecutorial authorities must keep resource issues under review to ensure that they are able to carry out the objectives of this legislation.

Tax deductibility of bribes

14.38 Until the *Taxation Laws Amendment Bill (No 5) 1998* is enacted, payments of bribes are tax deductible expenses. It would be anomalous if these expenses remained legitimate deductions after the enactment of the legislation which implements the Convention. The Committee is of the view that this is yet another means of showing that Australia's views on corruption and its practices in combating it are synchronised, and we support introduction of both pieces of legislation into the Parliament concurrently.

Rulings on the legislation

14.39 A number of witnesses referred to the ability of the US Justice Department, under the provisions of the FCPA, to give rulings on the legality of a proposed action by a business organisation. They suggested that consideration should be given to the introduction of similar rulings in Australia, noting that they already existed in trade practices and tax law. This mechanism might have resource and other implications for other areas of regulation and for the Australian legal system.

14.40 While this system may not have been used often in the US, it may be a way of providing the safe harbour provisions for Australian business organisations which were sought by a number of witnesses. The Committee believes that the matter deserves further examination, and has recommended this course to the Minister for Justice.

Conclusions

14.41 The OECD Convention represents an important first step against global corruption, as so many witnesses pointed out. While it is limited in its scope, it nevertheless is the beginning of a multi-lateral movement against international bribery. The draft enabling legislation which the Committee has examined demonstrates in a positive manner Australia's commitment to this cause.

14.42 Without the weight of the commitment of many more nations, however, the effect of the Convention and any enabling domestic legislation will be limited. The Committee has therefore recommended increased participation in the Convention be encouraged through diplomatic channels.

14.43 We consider that the various recommendations we have made will make the Bill more effective and enforceable.

Findings

14.44 The Joint Standing Committee on Treaties recommends that:

- *Australia sign and ratify the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and*
- *the Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998 be amended in accordance with the recommendations set out in this Report, and*
- *the Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998 be introduced into the Parliament as soon as practicable.*

W L Taylor MP
Chairman

APPENDIX 1

SUBMISSIONS RECEIVED

1. Dr David Chaikin
2. Dr C Premoli
3. Westpac Banking Corporation
4. W D &H O Wills (Australia) Ltd
5. Associate Professor Gerard Carney
6. Australian Transaction Reports and Analysis Centre
7. Transparency International Australia
8. Ms R L Gray
9. Australian National Audit Office
10. The St James Ethics Centre
11. Australian Society of Certified Practising Accountants
- 11a.
12. Independent Commission Against Corruption (NSW)
13. Smith & Bartos
14. Charter 89 Society (Mr B J Hurlock)
15. Australian Federal Police
- 15a.
16. Australian Taxation Office
17. Australian Chamber of Commerce and Industry
18. Allen Allen & Hemsley
19. Professor Charles Sampford

20. Overseas Service Bureau
21. Dr Andrew Brien
22. Mr John McFarlane
23. Australian Accounting Research Foundation
24. Mr Michael Suss
25. Telstra
26. Mr Allan Asher and Mr Robin Brown
27. Foreign Affairs and Trade Portfolio
- 27a.
28. Baker & McKenzie
29. Associate Professor Jennifer Hill
30. Mr Peter Butler OAM RFD and Ms Gayle Hill
- 30a.
31. Law Council of Australia
32. Asia/Pacific Group on Money Laundering Secretariat
33. Minerals Council of Australia
34. Australia Burma Council
35. The Treasury.

APPENDIX 2

WITNESSES AT PUBLIC HEARINGS

Monday, 9 March 1998, Canberra

Senator the Hon A Vanstone, Minister for Justice

Attorney-General's Department

Mr G McDonald, Senior Adviser, Criminal Law Reform

Mr C Meaney, Assistant Secretary, International Branch, Criminal Law Division

Department of Foreign Affairs and Trade

Mr J Hart, Executive Director, Treaties Secretariat

Mr J Woods, Manager, Director, OECD Resources and Coordination, Trade Negotiations Division

Monday, 30 March 1998, Canberra

Attorney-General's Department

Mr G McDonald, Senior Adviser, Criminal Law Reform

Mr C Meaney, Assistant Secretary, International Branch, Criminal Law Division

Australian Chamber of Commerce and Industry

Mr B Davis, Director, Trade and Policy Research

Australian Federal Police

Mr D Schramm, Director International

Mr E Tyrie, Director National

Australian Taxation Office

Mr S Kovic, Executive Officer

Monday, 6 April 1998, Canberra

Institution of Engineers Australia

Dr I Mair, Past President

Dr J Webster, Chief Executive

Department of Foreign Affairs and Trade

Mr G Clark, Manager, Legal and Risk Manager, Austrade

Mr K Donaghue, Acting Director, Governance Group, AusAID

Mr M Potts, Assistant Secretary, Trade Policy and Industries Branch

Mr J Russell, Assistant Director General, Contract Services Group, AusAID

Mr J Woods, Director, OECD, Resources and Coordination, Trade Negotiations Division

Smith and Bartos

Mr T Bartos, Partner

Australian Federal Police

Dr A Gordon, Special Adviser

Mr J McFarlane, Special Adviser, Officer of Deputy Commissioner

Private Citizens

Mr Allan Asher

Mr Robin Brown

Thursday, 16 April 1998, Melbourne

Australian Society of Certified Practicing Accountants

Ms K Gibson, Chair, Ethics Centre of Excellence

Mr N Walker, National Councillor

Overseas Service Bureau

Mr P Britton, Director, Program Development and Public Affairs

Mr T Hackett, Training Consultant

Law Council of Australia

Mr P Willis, Chair, International Trade and Business Committee

Transparency International Australia

Mr H Bosch AO, Chairman

Mr P Rooke, Chief Executive

Private Citizens

Mr B Hurlock

Mr M Suss

Friday, 17 April 1998, Sydney

Allen Allen & Hemsley

Mr P Brazil, Consultant

Mr J Dunstan, Partner

Baker & MacKenzie

Mr M Ahrens, Senior Partner

National Crime Authority

Mr J Broome, Chairperson

Independent Commission Against Corruption

The Hon B O'Keefe AM, Commissioner

Private Citizens

Ms R Gray

Dr C Premoli

Dr D Chaikin

Associate Professor J Hill

Professor C Sampford

Monday, 11 May 1998, Canberra

Attorney-General's Department

Mr G Dabb, First Assistant Secretary, Criminal Law Division

Mr C Meaney, Assistant Secretary, International Branch, Criminal Law Division

Mr G McDonald, Senior Adviser, Criminal Law Reform

Australian Chamber of Commerce and Industry

Mr B Davis, Director, Trade and Policy Research

Allen Allen & Hemsley

Mr P Brazil, Consultant

Transparency International Australia

Mr P Rooke, Chief Executive

Private Citizens

Dr Andrew Brien

Ms G Hill

Mr P Butler OAM RFD

APPENDIX 3

EXHIBITS

1. 'Problems in Recovering Corruption Proceeds Abroad: the Marcos Experience', by Dr David A Chaikin, (a paper delivered at the 2nd Asia Pacific Forum on Fighting Corruption, 10-12 November 1997, Manila).
2. 'Extraterritoriality and the Criminalization of Foreign Bribes', by David Chaikin in **Corruption: The Enemy Within**, edited by Barry A K Rider, (Kluwer, 1997), pp. 285-301.
3. Combating bribery in international business transactions: Recommendation of the Council, including (Annex) the Agreed common elements of criminal legislation and related action (adopted by the OECD Council on 23 May 1997).
4. OECD initiatives to fight corruption: Note by the Secretary General to the OECD Council at Ministerial level, 26 May 1997.
5. Commentaries on the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted by the Negotiating Conference on 21 November 1997.
6. Text: United Nations Declaration Against Corruption and Bribery, 18 December 1996.
7. Text: *Business Accounting and Foreign Trade Simplification Act* (USA legislation).
8. Text: *Foreign Corrupt Practices Act of 1977* (USA legislation). See also Exhibit No 33 below.
9. Discussion Paper: **Model Criminal Code, Chapter 3: Conspiracy to Defraud**, Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, June 1996.
10. Report: **The Legality of Foreign Bribes under Australian Law**, September 1995.
11. Material supplied by Mr Brian Hurlock.

12. (The Institution of Engineers Australia) Forum on Corruption in International Procurement: **Summary of Outcomes from Forum Discussions.**
13. Paper by Mr Ray Bange, IEAust Fellow: **Procurement, Profits and Probity: the Challenge to Professional Responsibility.**
14. Information from the Attorney-General's Department about the status of anti-bribery legislation in other OECD countries.
15. 'US to submit legislation on OECD Bribery Convention in April', from *Inside U.S. Trade*, March 20, 1998, p. 14.
16. Some examples of what the draft Bill will cover, prepared by the Attorney-General's Department.
17. 'Revising our strategies imperative in the uncertainty of a post-Cold War world', by John McFarlane in *Security*, No 51, June 1996, pp. 37-48.
18. 'Organised Crime and Drug Trafficking: A Security Issue or a Law Enforcement Issue?' by John McFarlane: a paper delivered at the Annual Conference of the Asia-Pacific Center for Security Studies, November 3-6, 1997, Honolulu, Hawaii.
19. 'Bribery in International Business Transactions: A Recommendation of the OECD Council'-A Commentary by the Australian Chamber of Commerce and Industry, April 1995.
20. 'The OECD Convention on Combating Bribery of Foreign Public Officials': An Analysis and Commentary by the Australian Chamber of Commerce and Industry, October 1997.
21. 'Inquiry into the *OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions* and Related Australian Legislation', Australian Chamber of Commerce and Industry, March 1998.
22. 'The Foreign Corrupt Practices Act: Some Recent Developments including the OECD Convention on Combatting Bribery of Foreign Officials', by Robert J Gareis, January 1998.
23. 'Appendix B: US Examples' (supplied by McKenzie & Baker).
24. 'Criminal Liability of Corporations-Australia', by J Hill and R Harmer in **Criminal Liability of Corporations** edited by H de Doelder and K Tiedemann (Kluwer Law International, 1996).

25. Code of Ethics, 1994, The Institution of Engineers Australia.
26. 'Should Foreign Bribery be a Crime?', by Fritz F Heiman (Chairman of Transparency International-USA).
27. **The TI Source Book: National Integrity Systems**, edited by Jeremy Pope (Transparency International, Berlin).
28. TI Corruption Perception Index 1997
29. 'Implementation of the 1997 Revised Recommendation and the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*': Report of the Committee on International Investment and Multinational Enterprises to the OECD Council meeting at Ministerial level.
30. 'Corruption and organised crime: Lessons from history', by Margaret E Beare in *Crime, Law and Social Change*, Vol 28, No 2, 1997, pp. 155-172.
31. 'Corruption Rules the World', by David Pryce-Jones in *The American Spectator*, Vol 30, No 12, December 1997, pp. 22-28, 84.
32. 'OECD Bribery Convention', in **ACCI Review**, April 1998, pp. 5-7.
33. Text: *Foreign Corrupt Practices Act Amendments of 1988* (US legislation). See also Exhibit No 8 above.
34. **Commonwealth Procurement Guidelines: Core Policies and Principles, March 1998**, Department of Finance and Administration.
35. *Acceptance of Gifts and Other Benefits*: Chapter 14 of **Guidelines on Official Conduct of Commonwealth Public Servants**, Public Service and Merit Protection Commission (1995).
36. Communique: OECD Council Meeting at Ministerial Level, Paris, 27-28 April 1998.
37. **Extortion and Bribery in International Business Transactions: 1996 Revisions to the ICC Rules of Conduct**, International Chamber of Commerce.
38. **Steps Taken and Planned Future Actions by each Participating Country to Ratify and Implement the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*** (information as at 1 April 1998, or as indicated).

39. 'Criminalising Foreign Bribery: Opening Remarks'-Speech by the Hon Senator Amanda Vanstone, Minister for Justice, at a Conference organised by Transparency international Australia, 30 April 1998, Sydney.
40. Material relating to the US *International Anti-Bribery Act of 1998*, supplied by the (Australian) Attorney-General's Department.
41. **Preparing Employees for overseas assignments**, Overseas Service Bureau.
42. 'Tax Treatment of Bribes in OECD Member Countries' (update to 5 April 1998).
43. Extract from **Governance: Sound Development Management**, Asian Development Bank, August 1995, pp. 1-8.

APPENDIX 4

MEMBERSHIP OF THE OECD

Australia	Belgium-Luxembourg (4.4%/5.4%)
Austria	Mexico
Belgium	Netherlands (4.5%/5.6%)
Canada (5.1%/6.3%)	New Zealand
Czech Republic	Norway
Denmark	Poland
Finland	Portugal
France (7.7%/9.5%)	South Korea (4.5%/5.6%)
Germany (14.1%/17.5%)	Spain
Greece	Sweden
Hungary	Switzerland
Iceland	Turkey
Ireland	United Kingdom (6.7%/8.3%)
Italy (6.2%/7.7%)	USA(15.9%/19.7%)
Japan (11.8%/14.6%)	

The first figure above is the ten largest countries' share of total OECD exports for 1990-1996 (1990-1995 for South Korea), as set out in the Annex to the Convention. The second is the share of the combined total exports of those ten countries for 1990-1996 (1990-1995 for South Korea) which represented 81% of the previous figure.

Article 15.1 of the Convention refers.

APPENDIX 5

FOREIGN BRIBERY LEGISLATION

[Compiled from information available to the Attorney-General's Department at 28 April 1998]

Countries	Governmnt decision only	Still drafting legislation	Bill drafted but not introduced	Draft Bill introduced	Legislation in place	Facilitation benefits defence provn.
Austria			✓			No
Belgium			✓			
Bulgaria		✓				
Canada			✓			
Chile					new legis not necessary- already covered by Criminal Code & the Administrative Statute	?

Czech Republic				✓		Unknown (Czech officials unable to comment)
Denmark		✓				
Finland		✓				
France			✓			?
Germany				✓		No
Greece			✓			
Hungary		✓				No
Iceland		✓				?
Ireland		✓				
Italy		✓				
Japan			✓			No
Korea			✓			No (under review)
Mexico		✓				No
Netherlands		✓				will exclude from offence (2 options - defn of

						offence to exclude 'small payments' or include a defence where small payments involved)
New Zealand	✓					No
Norway			✓			
Poland		✓				Undecided
Spain			✓			
Sweden		✓				No
Switzerland	✓					officials unable to comment
Turkey		✓				
UK					✓ (existing anti- corruption legislation complies with Convention - additional legislation not	existing legisn not specifically distinguish between facilitation payments & other payments

					necessary	in relation to bribery
USA (amendments to existing legislation			✓			Yes

APPENDIX 6

INTERDEPARTMENTAL WORKING GROUP

INDIVIDUALS AND ORGANISATIONS CONSULTED

Australian Chamber of Commerce and Industry

Australian Chamber of Manufactures

Australian Coal Association

Australian Council for Overseas Aid

Australian International Projects Group

Australian Mining Industry Council

Australian Wheat Board

Council for International Business Affairs

Metal Trades Industry Association

St James Ethics Centre

Telstra Corporation

Transparency International Australia

Mr Peter Butler OAM RFD

APPENDIX 7

AUSTRALIA'S GOOD GOVERNANCE PROGRAMS

Through the Australian Agency for International Development (AusAID), Australia provides a range of good governance programs in a number of different countries.

AusAID has gathered a range of projects under the following categories:

- legal sector reform, including reform of constitutional law and legal and judicial systems and police and prison systems;
- public sector reform, including public sector management, public finance and state businesses;
- economic policy reform, including macro-economic policy, trade policy, investment policy, financial sector policy and industry policy, and
- civil representation, including national human rights institutions, NGOs and international organisations, electoral agencies, the establishment of ombudsman structures and media.¹

There are also good governance programs in the health, education, environment and infrastructure categories.

The following examples have been selected from the material provided by AusAID, to give an indication of the range of programs and the number of different countries where they are undertaken.

Constitutional law reform projects include assistance to Fiji with drafting changes to its Constitution, provision of assistance to South Africa in democratisation, governance and public sector development, and continuation of the services of a constitutional expert to advise Uganda on the development of its Constitution.²

¹ Submissions, p. 202.

² *ibid*, p. 203.

In the area of legal and judicial systems, projects target legal assistance and training, including judicial training and education in China, to provide a functioning legal system, effective judiciary and a just police force in the Palestine territories, and support for the consolidation and publication of statutory and case law in PNG.³

A project in the police and prison systems category targets the judicial police of the Royal Cambodian Police to prepare basic daily operating procedures, equipment to reinforce training and capital works to upgrade participating prisons, selected police stations and courts.⁴

For some Pacific nations such as Kiribati and the Federated States of Micronesia, in the public sector reform category, ad hoc training and attendance at seminars and small consultancies are provided to increase the efficiency and accountability of government. In India, there is a project which aims to strengthen the management capacity and efficiency of its national and state public sectors.⁵

The public finance programs have a Pacific focus, with one project to assist the Ministry of Finance of the Solomon Islands in resolving problems being experienced with its accounting system, and another assisting the Government of Tonga with the reform of its budget process by providing an appropriate information technology system.⁶

In the state businesses category, there is a program with China consisting of short term training in key management disciplines for senior managers from state-owned enterprises across a range of sectors.⁷

In the macro-economic policy category, a project with Samoa aims to provide technical support for monitoring and reviewing institutional strengthening projects in Customs, the Treasury and the Trade Promotion Unit.⁸

The trade policy category includes continuation of courses run by the Centre for International Economics since 1989 in a range of Asian, Pacific and African countries, such as Indonesia, PNG, Laos and Zambia. These courses aim to

³ *ibid.*

⁴ *ibid*, p. 204.

⁵ *ibid*, p. 205.

⁶ *ibid*, p. 207.

⁷ *ibid*, p. 208.

⁸ *ibid*, p. 209.

familiarise senior officials from developing countries with trade policy analysis techniques and the use of these techniques to promote transparent trade policies.⁹

In the investment policy category, a short term review of the finance sector in Pakistan was undertaken in 1998 to improve its foreign investment environment.¹⁰

In the financial sector policy, a regional project assists the Association of Development Finance Institutions in the Pacific (ADFIP) in providing training for middle level managers in member institutions.¹¹

The emphasis in enterprise development policy sector of the industry policy category is on assisting Pacific countries, and PNG and Mekong Basin countries, with the development of their private sectors. This category also includes a range of projects which focus on competition policy development in the Philippines, labour market policies in Thailand, agricultural projects in Indonesia and Malaysia, transportation projects in Indonesia and a feasibility study on energy policy options in ASEAN countries.¹²

In the civil representation category, programs to assist national human rights institutions include a focus in countries such as Indonesia and Mongolia on the operation of Australia's Human Rights and Equal Opportunity Commission.¹³

The focus in the NGOs and international organisations category includes programs for vulnerable women (China), for blind people (Fiji) and monitoring the conditions of political prisoners in Indonesia.¹⁴

In the electoral agencies category, there are programs for Fiji (to educate its public to responsibilities under the new Constitution) and Cambodia (to transmit awareness of the professional administration of an election).¹⁵

The ombudsman program in PNG provides assistance with the planning, organising and monitoring of its work by upgrading the work of its staff.¹⁶

⁹ *ibid*, p. 210.

¹⁰ *ibid*, p. 211.

¹¹ *ibid*, p. 212.

¹² *ibid*, pp. 212-214.

¹³ *ibid*, p. 215.

¹⁴ *ibid*, p. 216.

¹⁵ *ibid*, p. 217.

¹⁶ *ibid*, p. 218.

Through the Commonwealth Media Development Fund, training, workshops and other professional development assistance is provided to media personnel and associations in developing Commonwealth countries.¹⁷

Other projects in the health, education, environment and infrastructure categories include good governance programs.

In the health category, in Vanuatu there is a project to assist with a review of key health sector policy issues, undertake workforce analysis and other activities to upgrade the planning and operational capacity of the Department of health and its hospitals.¹⁸

In the education category, there are projects in PNG directed towards increased access by women to education, institutional strengthening of the Department of education and curriculum reform.¹⁹

In the environment category, a project in Tonga provides funding for a feasibility study to review all aspects of environmental management in that country, to improve its environmental monitoring and administrative capacity.²⁰

In the infrastructure category, projects are administered in China (urban water management), Fiji (a geophysical survey), Pakistan (a telecommunications project) and Sri Lanka (geological survey and Mines Bureau strengthening).²¹

¹⁷ *ibid.*

¹⁸ *ibid*, p. 219.

¹⁹ *ibid*, pp. 219-220.

²⁰ *ibid*, p. 220.

²¹ *ibid*, p. 221.