COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

Foreign bribery

(Public)

MONDAY, 7 AUGUST 2017

SYDNEY

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SENATE

ECONOMICS REFERENCES COMMITTEE

Monday, 7 August 2017

Members in attendance: Senators Hume, Ketter, Xenophon.

Terms of Reference for the Inquiry:

To inquire into and report on:

a. the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, with specific reference to the effectiveness of, and any possible improvements to, Australia's implementation of its obligations under:

i. the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and

ii. the United Nations Convention against Corruption (UNCAC); and

b. as part of, or in addition to, paragraph (a), the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including:

i. Commonwealth treaties, agreements, jurisdictional reach, and other measures for gathering information and evidence,

ii. the resourcing, effectiveness and structure of Commonwealth agencies and statutory bodies to investigate and, where appropriate, prosecute under the legislation, including cooperation between bodies,

iii. standards of admissible evidence,

iv. the range of penalties available to the courts, including debarment from government contracts and programs,

v. the statute of limitations,

vi. the range of offences, for example:

A. false accounting along the lines of the books and records head in the US Foreign Corrupt Practices Act,

B. increased focus on the offence of failure to create a corporate culture of compliance,

C. liability of directors and senior managers who do not implement a corporate culture of compliance, and

D. liability of parent companies for subsidiaries and intermediaries, including joint ventures,

vii. measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements,

viii. official guidance to corporations and others as to what is a culture of compliance and a good anti-bribery compliance program,

ix. private sector whistleblower protection and other incentives to report foreign bribery,

x. facilitation payment defence,

xi. use of suppression orders in prosecutions,

xii. foreign bribery not involving foreign public officials, for example, company to company or international sporting bodies,

xiii. the economic impact, including compliance and reporting costs, of foreign bribery, and

xiv. any other related matters.

WITNESSES

ZIRNSAK, Dr Mark, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia

Committee met at 08:34

CHAIR (Senator Ketter): I declare open this hearing of the Senate Economics References Committee for the inquiry into foreign bribery. The Senate referred this inquiry to the committee on 24 June 2015 for report by 1 July 2016. The inquiry lapsed at the end of the 44th Parliament. On 11 October 2016 the Senate agreed to the committee's recommendation that this inquiry be readopted in the 45th Parliament. The committee is to report by 7 December 2017. All correspondence and evidence previously received for this inquiry has been made available to the new committee. This means that submissions already provided to the committee about this issue did not need to be resubmitted. The committee has published 43 submissions so far, which are available on the committee's website.

This is a public hearing, and a *Hansard* transcript of the proceedings is being made, although the committee may determine, or agree to a request, to have evidence heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

If a witnesses objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may also be made at any other time.

I ask photographers and cameramen to follow the established media guidelines and the instructions of the committee secretariat. Please ensure that senators' and witnesses' laptops and personal papers are not filmed.

I now welcome Dr Mark Zirnsak from the Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia. Thank you for appearing before the committee today. I invite you to make a brief opening statement, should you wish to do so, and then we'll open it up for questions.

Dr Zirnsak: Thank you for the opportunity. I welcome this inquiry and welcome the opportunity to appear before it. I suggest to the committee that one of the issues around Australia has obviously been a lack of cases that have been prosecuted on foreign bribery, which I'm sure you are well aware of. It would be good for this committee to get to the bottom of why that has been the case. There can be a number of causes. We do understand that the current Australian law against foreign bribery sets a very high bar for prosecution, which I will return to. Obviously, law enforcement argue that gathering evidence in such cases is quite difficult because of the cross-border nature of the crime. Current Australian law has set a very high bar, which doesn't allow Australia to prosecute compared to the US, for example.

A good case in point would be Alcoa. Alcoa was prosecuted in the US for bribes that were paid in Bahrain, where it was paying an agent who ended up paying allegedly $110 million to Bahraini officials to ensure alumina from Australia was used in the Bahraini smelters. In the case of the US, they were prosecuted for not having in place a system to prevent bribes. That ended up in them having to pay US$238 million in fines. In Australia there was no prosecution because it is my understanding that, under Australian law, the Australian authorities would have to prove that Alcoa intended to pay a bribe—that there was an intention there—and the bribe had an outcome. So you can't prosecute for not having a system in place, which is where the US manages to get a lot of their prosecutions. Finally, there is the question of whether those factors also result in a lack of will from law enforcement to pursue cases as rigorously as they otherwise could. It would be good to explore what causes that.

In terms of reforms, the government has in place a number of things that are currently being considered, which we think are very worthwhile. We would like to see the committee recommend the government proceed to implementation. That would be: changing the offence to allow for a recklessness test on the payment of bribery, so you don't have to prove intention; having an offence for not having a system in place to prevent bribes, which would allow Australia to prosecute in the same way that the US and the UK have been able to do; having whistleblower protection in the private sector—something very important to detecting bribery—and, matched on the flipside of that, having deferred prosecution agreements. Initially we were reluctant to see these, but we have come around to them being an effective tool.

Disclosure of beneficial ownership would also help remove intermediaries where shell companies are used to hide who is actually paying the bribe. Finally, the government did introduce a false accounting offence, but we think there is still a loophole there. We did get advice from Baker McKenzie, which we passed to the government, but in that case the amendment was not made.

Finally, our submissions do dwell heavily on facilitation payments. Our concern here is not primarily that a small bribe might be paid. The issue we found with this is the wider impact. We have had conversations with people who have worked in companies where small bribes are paid, and they indicated that it quickly escalated. The issue is: once you start paying bribes to low-level officials, it's hard to see how you then resist demands for bribes from those further up the chain. So what do you say? The customs official down on the wharf says, 'Well, I want a $50 bribe to move your stuff,' and then their boss says, 'Well, I'd like a $500 bribe,' and so on; it escalates. The employees we've spoken to suggest that is the train that takes place. No company's been able to explain to us, when they pay small bribes, how they then resist the demand. If you can't resist a small bribe, how do you resist the demands for a higher bribe?

There's complete secrecy around this. If companies think this is all okay and using the facilitation payment defence is legitimate, why don't they make it transparent that they've paid the bribes, who they paid them to and what the amount was? Increasingly, as we've demonstrated, there is a declining acceptability of this in corporate Australia. From our count, 71 of the ASX 100 now have a ban on facilitation payments, and pretty much everyone else says you can't make the payment if it's illegal to do so. We're yet to find a jurisdiction where paying small bribes to officials is actually a legal activity, so it's interesting to know where companies actually think they can pay small bribes legally and get away with it.

I'm happy to take questions.

CHAIR: Thank you very much, Dr Zirnsak. I'll kick it off. You've touched in your opening statement on the issue of removing the intentions of part of section 70.2 and changing it to 'recklessly engaging in conduct', which is a lower threshold. On the one hand, that's likely to improve prosecution rates, but it then has the effect of putting us out of step with the UK and the US, and there are some views that we should try to harmonise our legislation in this area across some of the major jurisdictions. How do you think we should weigh up those particular issues?

Dr Zirnsak: Firstly, I don't think it's a replacement. I think you normally would have both categories, so intentionality would normally attract a greater penalty than 'reckless', if the state's able to prove there was an intention to pay a bribe to achieve an outcome, or to pay a bribe even while being uncertain about the outcome, versus simply being reckless in the payments. I think in this case Australia should lead with this. I think it would send a signal to companies about being more cautious when they make payments and about the way they do business. I don't think that creates any significant problem. I have heard from corporates that want to argue that it's more difficult for them to keep control of all their employees, contractors and subcontractors down the chain, but surely you should be accounting for where your money's going at the end of the day, and a defence here would obviously be that you reasonably took steps to know. If someone's clearly gone outside their instructions in deliberate contravention of what you've asked them to do and what they've agreed to do then clearly that would be a defence against a recklessness charge.

CHAIR: What about the proposed removal of the requirement for an official to be influenced in the exercise of their duties?

Dr Zirnsak: Again, that's about being able to lower the bar to make it easier to get a prosecution to take place. Again, given our low rate of prosecution, I think these steps are welcome. Ideally, what you want is to send a strong signal of deterrence. Basically, you really don't want to end up having to prosecute anybody, because hopefully you've deterred them from being willing to engage in this conduct or caused them to take reasonable steps to ensure it's not going to take place.

CHAIR: In terms of the new corporate offence of failing to prevent foreign bribery or having a culture that's led to noncompliance, you talk about the extension of this offence to cover payments to third parties in order to secure government contracts. Can you elaborate on that.

Dr Zirnsak: Yes. The danger that we've seen in the payment of bribes in other cases is the use of intermediaries or third parties, and that was certainly the example that I gave before with Alcoa. The payments weren't made directly by Alcoa to the Bahraini officials; they were through an intermediary. This is common.

Senator XENOPHON: Which gives you a defence, then?

Dr Zirnsak: Correct. You say, 'Well, I didn't know,' so it becomes the Sergeant Schultz sort of defence—'I know nothing; I didn't really know.' But you have a question: did the company take reasonable steps to ensure the agents they're dealing with are actually using the funds in the way they were intended to be used and aren't engaged in bribery? Again, that should form the grounds for a defence. If the company did take reasonable steps to try to prevent bribes being paid and have a system in place, that would be your defence. Again, it allows an out

if you have third parties being able to be inserted into the system and therefore provide a plausible deniability shield against prosecution.

CHAIR: What's your view on the idea of using ISO 37001 as a standard to meet that threshold?

Dr Zirnsak: I think there are a range of guidance materials out there for corporations. With some of the standards what we probably need to see is a test, eventually, and some research to show, depending on what standards people have used and how effective they have been in prevention. I think that's absent at the moment but it's one possible standard that helps people meet reasonable efforts, but there is other guidance material. For example, in our submission we did cite that Transparency International have certainly been prolific in providing lots of guidance material for companies about setting up systems to prevent bribes being paid throughout their chains.

CHAIR: Do you have a view as to which regulator should have the responsibility of overseeing this new offence?

Dr Zirnsak: I thought it still rested with the Australian Federal Police, so I have not really given consideration to whether this should lie with anybody else. It would seem that it would be an Australian Federal Police matter.

CHAIR: ASIC has views about proper culture within corporate Australia, and they have certainly expressed views about that.

Dr Zirnsak: I probably don't feel qualified to, in this case, answer which might be the better regulator and who would have more experience in being able to enforce that kind of cultural change.

CHAIR: Should there be consideration to change advantage in this context to a business advantage? For people who are acting for individual gain, do we need to break the nexus there with the corporation?

Dr Zirnsak: We certainly had a view that it should be wider. The example I am thinking of—and I'm not sure if this is where your question is leading—is the case with Rolls-Royce where a deferred prosecution agreement was recently settled with the UK. Some of the agreed facts were that Rolls-Royce had paid bribes to competitors to put in uncompetitive bids in order for Rolls-Royce to win contracts. That would be an example where the bribe was not paid directly to a foreign official; it was paid to a business competitor, but still with the aim of winning a contract from a foreign government. That would be the kind of thing that we think should still be unacceptable behaviour and treated as criminal behaviour.

CHAIR: I am thinking more of a situation where an individual within a company is acting for individual gain rather than to seek an advantage for the company.

Dr Zirnsak: Then yes. If that is corrupting someone in what should be their proper duties then, clearly, in our view it would still be a matter of bribery and still should be a criminal offence.

CHAIR: On the issue of facilitation payments: you call for the defence to be limited to situations where the payment is not illegal in the foreign country, and in your opening statement you made the point that there are probably not too many countries where it is legal. Others have said it should be removed entirely. What has led you to take your position?

Dr Zirnsak: I did think our recommendation said our preference is to have it removed entirely. If that was not possible straight up we have said then at the very least make it illegal. At the very minimum it should be illegal to pay bribes in places where it is illegal for the bribe to be paid. Australia should not be facilitating the breaking of other people's laws. That would be the logic to that.

The third level on this is to demand transparency. We tried to track this down. We spoke to the Australian Taxation Office about if companies declare their facilitation payments in their tax returns. The answer was 'No'. Effectively, it will be hidden in their other costs. Again, you have no sense of how many of these are being paid or what size they are. If the defence remains, then it should be a requirement to have disclosure, at the very least, to authorities, preferably publicly. If the companies think these are okay to do, I don't see why there shouldn't be public statements about, 'We paid this official this much money to do this,' under the facilitation payment defence. I think it would be a great deterrent against the behaviour, or at least reign it in. It would also mean the foreign government is aware of what is going on, because there is no disclosure from companies paying these bribes to the foreign government that they have made the bribes to the local officials.

CHAIR: The US still allows the defence of facilitation payments. Are there any good reasons why the government should continue to keep this defence?

Dr Zirnsak: In our view, no. The UK's obviously banned it. The evidence we've heard is that for some companies there's a transition period. Obviously, it becomes easier where companies work together. Where an industry agrees no-one's going to pay, it makes it very hard, and the officials normally then give up on seeking the

bribes. The third area we've suggested is that we would hope the Australian government provides more support to companies that don't want to make these small bribes when they're leaned on to do so and to support those companies diplomatically around that resistance. What we tend to hear happen is that, even where a company doesn't want to have to pay the bribe and they might seek assistance from an Australian embassy, they generally don't find that they get support in doing that; they're left to their own devices, to have to resist the payment of the bribe. We think the Australian government should be supporting companies who want to do the right thing in their ethical behaviour.

CHAIR: My next question relates to your proposal about a moratorium on government contracts for a company that is found guilty of foreign bribery. Can you take us through your proposal?

Dr Zirnsak: We certainly have a view that, if a company has engaged in foreign bribery, they should be denied access to government contracts. Again, it would act as a deterrence mechanism. We do know that the World Bank has a disbarment that they've used as an attempt to do that. From memory—I hope I'm going to get this right—GHD got disbarred for a period by the World Bank. I have noted in recent times at antibribery meetings I've been attending that representatives from GHD are now a part of that. It possibly suggests that the company is now taking those concerns more seriously. The case related to, from memory, a situation in Indonesia. The company, in that case, indicated that it was—a rogue employee, I think, was their argument around that case, from the details. I would note at the moment that the Black Economy Taskforce head has suggested—one of the recommendations they've put forward is that the government deny contracts to companies that have engaged in corrupt behaviour. We are not out on our own—

Senator HUME: Proven to have engaged in corrupt behaviour or are suspected of engaging in corrupt behaviour? What is the cut-off point?

Dr Zirnsak: I think the threshold has to be more than mere allegation. I agree, you probably would need to have proof that it happened. Normally, that would be a prosecution, which means it's a tool that's not going to be used—

Senator HUME: A successful prosecution.

Dr Zirnsak: A successful prosecution. My suggestion would be that you would apply it if they've been prosecuted anywhere else in relation to this. The problem with this is that it's such a high bar crime normally to get a prosecution on, and often the problem is that prosecution lags so far behind where the activity actually took place. The standard defence you get from companies is: 'Oh, that was all in the past. We've cleaned up our culture since then.' Then, surprisingly, as they're saying that to you, five years in the future you'll find out they're being prosecuted again for pretty much the same behaviour. I do this because one of my roles within the church, as we engage in construction contracts, is vetting construction companies. With one job we looked at, we had four companies I was vetting and all of them had been prosecuted for bribery in the construction sector. We had to decide which of these was the least worst in terms of the bribery that had been involved around that. Certainly, it sends a signal if government is willing to say, 'If you've engaged in this behaviour, you won't be eligible for government contracts for some period of time.' It needs to be following the prosecution, too, so don't just get this defence of, 'Oh, well, we've cleaned up our systems and we're all good now; it was all in the past,' because you won't really know that. One of the companies we looked at, for example, was sitting on the World Economic Forum task force on bribery at the same time as another part of the company was busy paying bribes. That's either the left hand not knowing what the right hand's doing or it was very devious behaviour indeed.

CHAIR: Just to clarify, apart from a moratorium on, say, supply contracts, do you think this should also apply to concessional loans, grants or other forms of government assistance?

Dr Zirnsak: Yes, it would apply to all government assistance, from our point of view, to act as a strong deterrent. You've probably engaged in the behaviour for a long period of time and probably in a fairly egregious way to eventually have a prosecution against you.

Senator HUME: I have a couple of lines of questioning. You mentioned in your opening statement that, on the issue of deferred prosecution agreements, your thinking has evolved. Can you take us through the evolution of your thinking on that issue?

Dr Zirnsak: Yes. Initially we read the critique, which basically raised concerns that deferred prosecution agreements mean that you see less prosecution. Data was presented to show that, for example, in the US prosecutions have dropped. The figures were 80 per cent prosecutions and 20 per cent settlements, and it flipped the other way to 20 per cent prosecutions and 80 per cent settlements. When we looked at the raw numbers, from memory, in the decade before deferred prosecution agreements were introduced in the US the number of prosecutions of individuals was about 10 per cent and in the decade after it went up to 42 per cent. So what you

saw was a lower proportion of prosecutions, but in fact there was an explosion in the ability to engage in the prosecution of the individuals responsible, because companies were coming forward and giving you the evidence to allow those prosecutions. That's what really flipped us. An environment was created in which we had much more detection and it allowed us more prosecution, and hopefully there will be more deterrents going into the future. As I said, ultimately you'd love to have no prosecutions on the basis that you've deterred that behaviour. That's probably not realistic. Someone is always going to want to break the law, but, ideally, you want to drive it down. That's how our thinking evolved. We're open to this, provided, as with the US system, a deferred prosecution agreement for the company does not give any sort of immunity to the individuals who are involved and there is still prosecution of the individuals who are engaged in the behaviour.

Senator HUME: That's the model that's used in the US?

Dr Zirnsak: That's my understanding of the model that was used in the US. Certainly former Attorney-General Yates issued a memo sending a very clear signal that prosecutors were not to engage in deferred prosecution agreements that gave immunity to individuals and that there should be active pursuit of the individuals. At the end of the day, it's not the company that pays the bribe; its individuals within the company who made the decision, authorised it and made the payment.

Senator HUME: Interesting. Thank you. I want to ask you about the public register set up to reveal beneficial ownership of companies. In your mind, where would that register to be best held and maintained?

Dr Zirnsak: At this stage, it seems to make most sense to have it with ASIC, given ASIC has the current corporate register. From an Australian point of view, it's an expansion of the existing corporate register. We currently have on the publicly record directors' names and their home addresses, which need to be on the register. I'm unaware of any real evidence that it's created any problems. The advantage of having a public register as opposed to a register that only law enforcement authorities can see is that it allows companies to look at whom they're dealing with. In the bribery space, for example, one thing for mining companies is that sometimes the other parties want to insert companies, and they'll try to dig into who's really behind the company that's being inserted into the joint-venture and they won't be able to get to the bottom of it. If we move towards a global system of beneficial ownership disclosure—and in the mining sector that's starting to be achieved through the Extractive Industries Transparency Initiative—you'll give corporates the ability to identify who they're really dealing with, which can be important in preventing bribery and corruption. In addition, in a wider perspective on beneficial ownership, the advantage of having a public register for entities that have a reporting obligation under the anti-money-laundering laws is that it makes their due diligence efforts much easier to pursue. Thirdly, for foreign law enforcement agencies, if you have a private register you'll have to have a whole lot of protocols about foreign law enforcement making requests to access information, whereas if is a public register you're allowing it to be open. You can still have safeguards around if someone has a very legitimate reason as to why their involvement shouldn't be publicly disclosed. The UK, in their public register, has allowed for that, and very few people have been able to show they have a legitimate concern as to why they shouldn't be on a public register.

Senator HUME: What are the hurdles to us establishing such a register?

Dr Zirnsak: As far as I'm aware, given the UK's already done it, I don't think there really are. It's just a matter of the government making the decision to do it. There is the consultation in Treasury at the moment. I think the inclination from the government, as it stands at the moment, is to do it as a private register, but I think the benefits of a public register, with the ability to apply for an exemption, far outweigh any disadvantage to the public register, compared to keeping it for law enforcement authorities.

As I said, it really benefits a lot of businesses. Listening to reporting entities under the anti-money-laundering laws, if the same front company tries it on with several reporting entities, every one of those businesses has to pay for due diligence to try and identify who's behind it. It gives that entity a lot more opportunity to try and find a weakness somewhere in the system, whereas a public disclosure of the ultimate beneficial owners is going to make it easier and more cost-effective for those reporting entities to know who they're dealing with.

Senator HUME: Finally, one of the recommendations you had—and you touched on this before—was to provide greater support to companies being able to resist demands for bribes in any form from foreign officials and that we should seek to work with industry associations in supporting its members to resist demands for bribes. When you say 'supporting' industry associations and 'supporting' industries, what are you specifically talking about? What form is that support?

Dr Zirnsak: It's going to need to be country-specific and appropriate to the culture of the country. For example, if the company comes to the embassy and says, 'This official's made a demand for a bribe,' then it might be appropriate in that jurisdiction for a senior person in the embassy to then approach the government of the

country and say, 'This official has actually made a demand for a bribe. We want it withdrawn' and bring it to the attention of the government in that place. That might result in the prosecution of the official who made the demand for the bribe or for some other disciplinary action to take place. It's that kind of support that might be there.

From industry associations, it would be more the ability to get companies to work together to collectively resist the payment of bribes—for example, companies within a particular jurisdiction working together to say, 'We will collectively refuse to pay bribes.' Generally, the government officials give up demanding bribes if there's a united front across that. So they are the sorts of things. It's also giving companies advice like, 'This is how other companies have successfully resisted the payment of bribes and how they've managed to do that.'

There are two sides to this too, because it's not always a demand of a bribe. Some companies actively go in willing to pay bribes. Again, the Rolls-Royce case recently and the disclosures that were taking place there made it quite clear that this wasn't government officials usually approaching Rolls-Royce for bribes; it was a company willing to actively seek to pay bribes.

On the flip side, often the cases of bribery that come up are, in effect, extortion efforts. We had a case presented to us of a company operating retail outlets in an eastern European country where the officials demanded bribes be paid and, when the bribes weren't paid, the officials turned off the electricity. This was a retail outlet that had freezers, so all the food in the freezers went off. That's basic extortion. That's a lot more an extortion case than a bribery case, in a sense. Its basically, 'Pay us protection money or we'll damage your business.'

Senator XENOPHON: You mentioned that you sought advice from Baker McKenzie to close a loophole in the legislation. Obviously Baker McKenzie don't come cheap. They're an international law firm. Can you provide the committee with a copy of that advice that you received from Baker McKenzie? What did it relate to and why did the government not act on that advice?

Dr Zirnsak: There are a couple things. Firstly, I'd give credit to Baker McKenzie here. They actually gave us very generous rates on this particular piece of advice.

Senator XENOPHON: So it was almost pro bono.

Dr Zirnsak: No; it wasn't quite pro bono, but it was very, very generous discounting on the piece of advice. It related to the recent reforms around the false accounting offence. There were some technical things where they indicated there were some loopholes that they believed were left in the way the legislation was drafted. I'm more than happy to provide the committee with access to that advice. At the end of the day that was also provided to the Attorney-General's Department. They obviously took a different view to Baker McKenzie on this matter. We were at the time certainly persuaded, and we continued to be persuaded, that the legislation should have been stronger in the way that Baker McKenzie suggested.

Senator XENOPHON: If you can provide us with a copy of that advice, that would be helpful.

Dr Zirnsak: I would be very happy to provide that advice.

Senator XENOPHON: In relation to your whistleblower protection laws—and you may want to take this on notice—have you had a chance to look at the whistleblower protection changes in the registered orgs legislation? The joint committee on corporations is looking at that issue at the moment.

Dr Zirnsak: Yes. The changes made in the registered organisations legislation we think were very good. We would love to see a broader scheme applied to private entities—obviously, the private sector generally—and not-for-profits as well. We have no problem at all with it being extended more broadly. We did make a submission to the committee looking at the whistleblower protections and also to Treasury. I do note that there seems to be an awful lot of interest in the space. As far as I understand—and I haven't been through all of the submissions—there is a lot of public support for good whistleblower protection.

Senator XENOPHON: I have two more questions. You have seen the news about the Com Bank's so-called intelligent deposit machines and how they may have been used for money laundering and funding terrorism. Have you given any thought as to how these machines could have been used for the purposes of foreign bribery? Further to that, there is an issue there of chain of responsibility. You've talked about chain of responsibility legislation in terms of foreign bribery. Do you think that that could be replicated in the context of the money laundering and the anti-terrorism-funding legislation? It seems there will be a civil case brought against Com Bank in respect of that.

Dr Zirnsak: I do think that this is a very welcome development in terms of AUSTRAC prosecuting for this. I think it sends a very good signal, hopefully, to entities that haven't taken their anti-money-laundering obligations—

Senator XENOPHON: There was something like $5.9 billion in the last six months. It started off slowly but within three or four years $1 billion a month was going through those intelligent deposit machines.

Dr Zirnsak: Yes, although the allegation around how much of that was money-laundering is obviously a smaller fraction.

Senator XENOPHON: That is right, but there was an exponential increase in these IDMs.

Dr Zirnsak: Yes, and what has been presented would suggest the bank certainly didn't take adequate safeguards around that and, therefore, it is right for the regulator to be taking legal action in this case. So that is very positive. I think this is where there is an interlinking between transnational criminal activity. As you rightly point out, often if we're going to deal with bribery we've got to deal with money laundering and with things that help many crime types like whistleblower protection and like beneficial ownership disclosure. So I think those things are interlinked.

Senator XENOPHON: You can consider that, but that sort of chain of responsibility legislation you foreshadowed could apply here.

Dr Zirnsak: Yes, but I think that already exists in the anti-money-laundering space. In fact, reporting entities have a positive obligation in this case to put in place systems that prevent money laundering. That was my understanding of the basis on which Tabcorp ended up with the $50 million fine. It was their recklessness around enforcing having a system that actually prevents money laundering from taking place. I suspect Com Bank in this case will find that the prosecution—

Senator XENOPHON: But you don't think it's unreasonable that, where there has been a complete systemic failure and almost a reckless disregard for the law, there ought to be criminal liabilities attaching to either directors or senior management in respect of that?

Dr Zirnsak: Yes, I actually think they do. I've become more persuaded of that just having read a very good book by Associate Professor Soltes from Harvard Business School on why they do it. It's a look at white-collar crime. He gives cases of where effectively the company is prosecuted and the individuals don't get the deterrent effect that you are seeking. You need individual accountability. He cites the UBS case. He gives the example of where they got prosecuted—

Senator XENOPHON: Can you give us a reference for that book? It sounds like interesting reading.

Dr Zirnsak: Yes, but, sorry, just to finish this. The day after UBS got done for assisting in tax evasion the people inside the company were busy reassuring investors that it wouldn't mean any sort of change to the company, so you kind of got the sense that it didn't send the ripple effect you wanted, because the penalty levelled on the company didn't affect the individuals who were behind it.

Senator XENOPHON: Finally—and this perhaps segues to our next witness, Nick McKenzie—in your submission you gave examples of foreign bribery cases here in Australia and in the case of Securency you say that the conduct was first discovered by investigative journalists, Nick McKenzie and Richard Baker. With all of the resources that are being thrown at our enforcement agencies—with billions going to enforcement agencies—how is it that a journalist gets the ball rolling and not our enforcement agencies?

Dr Zirnsak: This case was very disappointing—and Nick will be across the detail a lot more than I am. Again, this pointed to the role of whistleblowers being very important. I think we're finally going to court 11 years after the whistleblowers first reported on this. It also points to the failure. That was the point I made before: in the committee getting to the bottom of what has been the barrier to proper investigation of some of these allegations—Securency being a good example of that—it would be very good to know where it is that we need to fix the system. As I have suggested, I think it is a lowering of the legal bar to make prosecutions easier. Hopefully, that will also encourage a great will to engage in prosecution. Once the law enforcement authorities know that they've got a better chance of getting a prosecution, hopefully that will increase their willingness to pursue and put resources into these kinds of cases.

CHAIR: Thank you, Dr Zirnsak.

McKENZIE, Mr Nick, Private capacity

[9:11]

CHAIR: I now welcome Mr Nick McKenzie. Thank you for appearing before the committee today. I invite you to make a brief opening statement, should you wish to do so, and then we'll open up for questions.

Mr McKenzie: Thank you for the chance to appear. I would be delighted to answer any questions. I've devoted a lot of time and brain space to thinking about the problems and issues that confront the committee. Notably, I travelled overseas and met with the FBI, the Department of Justice, the Serious Fraud Office, the National Crime Agency and the OECD about Australia's regime, what was working in overseas jurisdictions and what Australia could learn from those jurisdictions. I did that as part of a Churchill Fellowship and also to aid the committee in this process. I have also had 10 years on the ground dealing with law enforcement and companies in Australia on this very question.

I think the one thing that I could perhaps add beyond what the experts and what the very good witnesses you will have before you have to say is what people are really saying at the mid-level in law enforcement and inside companies—what they're saying when their bosses aren't listening. They tell journalists these sorts of things, and that is quite helpful. It would be wonderful if there were legislative change, but there also needs to be cultural change inside the business community and inside law enforcement agencies and prosecution agencies if we are going to achieve the change that we so hope for. So I would be delighted to take any questions, and I would encourage you to at least read the summary of my report to the committee. It might just prompt some of your thinking.

I would say that there has been a lot of discussion from the Attorney-General's Department about DPAs—deferred prosecution agreements. They are simply one tool in a toolbox. The experience overseas is that they are not a panacea and they should not be promoted as such. There is a great opportunity for reform through this committee process, but that reform will be multifaceted. There should be a number of legislative responses and also prompting discussion in places like the AFP. I think the AFP can do better in terms of really encouraging a cultural and resource application which actually prioritise this. But the AFP will need direction from government on that, and ultimately this all starts and finishes with the question of political will. As I said, I would be delighted to take any questions and take you through my report.

CHAIR: Thank you very much, Mr McKenzie. Your first recommendation in your submission is that we need to acknowledge that we have a problem with our anti-foreign bribery system. I noted that one of the comments made is that the UK National Crime Agency's Jon Benton has said that he believes that a large amount of corrupt Chinese money is flowing into our property market. Would you care to elaborate on that? To what extent do you think that our regulators are on top of that issue?

Mr McKenzie: I think there's obviously a large amount of corrupt funds from China and elsewhere coming into Australia's property market and into our banks, and the movement of that money is being facilitated by lawyers, accountants and people within the property industry. You mentioned the AUSTRAC case against the CBA. It's the classic case in Australia of where there should have been action in this space a long time ago—and there hasn't been—and we all stand back, jaws agape, when finally the regulator does its job. Unfortunately in the space of money-laundering, when it comes to the involvement of banks or corporates, we don't see enough proper enforcement.

In the UK there is a far greater requirement for corporations and lawyers to report suspected money-laundering. We don't have such a system here, and that's one thing we could have. You see, with the AUSTRAC action against the CBA, when our regulators and law enforcement agencies take action, it has an impact. To me it's a clarion call for other agencies to tackle foreign bribery. The point's got to be made: you'll hear a lot about the successes, and agencies will come forward and say, 'We are being successful'—and the AFP is trying. But, unless there are successful charges and prosecutions, we are failing. It's as simple as that. The regime in this country at the moment is an absolute failure.

The Securency-NPA matter—I must be careful because it's before the courts and there are suppressions in place—has been an absolute fiasco in terms of a prosecution, both for the prosecution and the defence. The defence have had to endure years of delays. Our legal system is not well equipped to deal with these sorts of matters. There are a lot of factors at play as to why it's gone so poorly, but it is our first foreign bribery prosecution and, at the moment, it is an absolute disaster.

CHAIR: On the issue of detecting foreign bribery, would you agree that the best way of dealing with that is to have a system which encourages companies to self-report?

Mr McKenzie: A significant complaint I hear from police all the time is: there is no incentive for companies to self-report. Companies will hope to get away with the crime, if they believe it may exist, so we must create a system where companies think there is something in it for them to report. In the UK, where there's a reverse onus test, if bribery is detected at any level of a company, or involving a company agent, the company is assumed to be liable unless it can prove it has a proper governance and anticorruption system in place. That is a terrific legislative tool, and we need that in Australia. It's led to a huge cultural change in the business community in the UK—and elsewhere, because of the extraterritorial nature of those laws.

The whistleblower regime has to be changed in this country—and there's been a lot of talk and a number of committees about that. The only reason the press isn't reporting on this stuff is that whistleblowers do not have faith in the current system. Unless there is a proper whistleblower regime in the private sector we will continue to be a first port of call, or maybe a last port of call, for whistleblowers. An earlier witness mentioned the Securency case. The whistleblowers came to us. They went to the police in the first instance, and their complaints fell on deaf ears. It was only then that they came to us.

Senator XENOPHON: Can you go into more detail on that? They came to you in desperation because the authorities weren't interested?

Mr McKenzie: It was at a different time, when the AFP weren't in the foreign bribery space. Much has changed, and the AFP's improved greatly. Yes, witnesses went to the AFP and they felt like they got a poor hearing. So ultimately they went to the press to have the matter exposed. Had the case not been in the media there would not have been a police response, unfortunately. Things have changed. The AFP has improved markedly.

Again, I would really encourage the committee to think about making recommendations around ensuring the AFP prioritises this area of foreign bribery. Agents who dedicate five, six, seven years of their careers to try and make a case, which they don't make, should still be rewarded for doing that. The FBI does that. The huge change that you see when you're in the FBI or the DOJ—they have agents there who want to make these cases; they want to take them on. The FBI is a great place to be. It's a place where you can advance your career. At the AFP it's still regarded as a bit of a backwater. Agents don't want to take on these cases. They don't want to join the FAC, where the foreign corruption team lies, and that has to change as well.

Senator HUME: How do you change that?

Mr McKenzie: The AFP needs to show leadership. But, in some respects, it's not the AFP's fault. The AFP is extremely stretched. Obviously counterterrorism, quite rightly, is soaking up the bulk of resources. Next comes drug law enforcement. It's too small a country and it's too big a change to have a dedicated serious fraud office in Australia, although that would be ideal.

Senator XENOPHON: Are you saying that we should or shouldn't have a serious fraud office?

Mr McKenzie: Of course we should, but, dealing with political realities and resourcing realities, having another agency is a huge step for a whole range of reasons. One: we have the AFP, who can do a better job. The government sometimes has tied funding, which can be a blessing and a curse. I wonder if we could we have a pool of money for the investigation of foreign bribery alone.

In the UK, the Serious Fraud Office has what's known as 'blockbuster funding'. When there's a big case, they go to the government, knock on the door and say, 'We need X amount of dollars to fund this investigation.' Taking on big corporates is obviously extremely expensive. There probably should be some sort of a system like that in Australia. The head of the UK Serious Fraud Office, David Green, said to me that it's not ideal to go cap in hand to the government, but, then again, what government's going to be brave enough to refuse to hand over a multimillion-dollar funding package in such a case?

At the moment the AFP—though they may say something different here—is, unfortunately, extremely resource stretched. Resources aren't going into this area like they should. That's why we're seeing cases not being made or not being dealt with in a quick and effective fashion. Sometimes it takes six to eight months for a case assessment to be made, and that's before an investigation even starts. By that stage evidence is drying up; the witnesses are forgetting things. So, again, creating a greater sense of priority inside the AFP and ensuring the AFP has the money to do what's required is critical.

CHAIR: You've called for the creation of a foreign bribery task force within the AFP and you've just talked about how that could be funded. In terms of financial crime investigators more generally, do you believe there are appropriate career paths within the AFP?

Mr McKenzie: I think things are getting better, but it's far from ideal. At the moment, the place to make your career in the AFP is not in financial crime, and that really should change. That's a big cultural change. It requires an immense amount of training. It requires recruiting the right sorts of people. In the UK Serious Fraud Office

and at the DOJ and FBI in the US, they have lawyers, accountants and forensic specialists all embedded in these teams and they can make a career at an agency. There's some of that at the AFP, but I think there could be far more. At the moment, this area of the AFP is a diversion from a career. It should be a career in itself; we need specialists in this area. And where's ASIC in this space?

Senator XENOPHON: Is that a rhetorical question?

Mr McKenzie: As far as I can see, publicly, ASIC has just handballed these matters to the AFP. What's the point of having an ASIC with all the expertise—

Senator XENOPHON: So you don't think it's reasonable that they've handballed it in the way they have?

Mr McKenzie: Of course it's not reasonable. There's no point having a corporate regulator—this is the grandest, highest level of corporate crime, when you have a company bribing a foreign president. It should be a priority for our corporate regulator. ASIC will talk about the need for legislative change and the difficulty of sharing information with the AFP. If the AFP taps your phone, that material often can't be supplied to ASIC. There are problems there that need to be overcome. But it's also fair to say that ASIC has sought, at least in the past, to handball these issues because there are other things on its plate. That's been extremely disappointing.

When the AFP makes a corporate crime case, they tackle it like a drug action. There was a recent, very high-profile case involving insider trading. The AFP put bugs in cars, tapped phones and tackled it as if they were going after a mafia of drug traffickers. That is the exception to the rule. We don't see that happening in foreign bribery cases, even though it should be happening. I do hope there are some witnesses who bring that to light in greater depth for you.

CHAIR: You call for a clear mandate for ASIC in this space, in particular, ensuring that civil remedies are available if criminal proceedings stall. Can you to elaborate on that for us.

Mr McKenzie: This all comes down to corporate liability—ensuring companies are held to account. Looking at the UK's Bribery Act, and taking guidance from the reverse onus test around corporate governance, is a critical step. Ensuring directors are held to account for governance failures, which often lead to, or may encourage, foreign bribery—we've had none of that happen.

At the moment, the law is actually quite broad. ASIC is reluctant to investigate because of a lack of precedence and success in these sorts of matters. We have a real problem here with the CDPP. I think it lacks expertise in this area. I hope the CDPP is appearing before your committee. One of the key complaints that I hear informally from the AFP is that matters disappear into that cavern of delay at the CDPP. It takes months to get advice on foreign bribery cases, only to be handled back and to be told 'keep investigating'. One thing that could happen—and I know I'm jumping around here—is to have CDPP lawyers embedded in AFP teams to ensure they are getting the right legal advice from day dot. It would seem to make a lot of sense. Another thing is to ensure that when an investigation begins ASIC is looking at the director's duties and civil liabilities alongside the AFP, which is looking at the criminal aspects, alongside the CDPP, which is saying: 'What do you need to sustain this to make this a successful prosecution?' That's happening to an extent, but it can happen in a far greater way.

We will be here in five years' time discussing the same things unless there is a real system of measurement put into place to say, 'Are the AFP and the other agencies in this space succeeding? How do we measure success? How do we incentivise these agencies to make these cases to bring them home? How we create that culture in the US and the UK which actually makes this a priority?' I think there are questions for all of you, but there is a lot more that we can do in this place to do just that.

CHAIR: A successful prosecution would be a handy place to start in terms of having measures of success. So you're not seeing much evidence of collaboration between the AFP, CDPP and ASIC?

Mr McKenzie: No. I think at the moment, despite, perhaps, assurances you will hear to the contrary, those three entities do operate as silos. Let's bring it home. There's a case that has been with the AFP for six to seven year—Leighton Holdings, now CIMIC. I want to respect the committee process here and not step outside what should be said. But there is a vast amount of evidence that suggests Leighton Holdings engaged in significant, wholescale, major corruption and bribery. The AFP has had that evidence for years. Yet, we remain without a criminal charge from the AFP. What has been happening behind the scenes, as far as I can work out, is there are briefs of evidence compiled in a very slow and steady fashion. They are taken to the CDPP. Advice is given back to the policing agency: 'Fix up this hole. Do this a little better.' I wonder whether we could have had the CDPP put somebody in the AFP from day dot to figure out how to make this case in a far more effective fashion. I know things take a long time. I know we have to wait for other countries to submit evidence back to us. You will hear a lot of excuses around why things take a long time. But this has taken far too long. Ultimately, what we have here is a case of sheer impunity. People who have engaged in significant corruption have got away with it.

CHAIR: In terms of resourcing, you are clearly identifying that as an issue, particularly with the CDPP. How do we ensure that long-term prosecutions are able to be sustained through multiple terms of government sometimes? Do you have views as to the level of resourcing there in terms of foreign bribery?

Mr McKenzie: The AFP's foreign bribery teams are manifestly inadequately resourced. That is simply a fact.

Senator XENOPHON: And adequately trained?

Mr McKenzie: They can be better trained. There are, obviously, some good investigators there doing their best with a poor legislative regime and inadequate resourcing. Compare the AFP's resources to that of the agencies in this space in the UK, the US or New Zealand. New Zealand has a dedicated Serious Fraud Office. If they can have one, surely we can do better. The AFP is still scrimping for money to deal with these sorts of matters.

Senator XENOPHON: Hang on. The Kiwis have one?

Mr McKenzie: The Kiwis have a Serious Fraud Office

Senator XENOPHON: What is their population—about four million?

Mr McKenzie: What that gives is a dedicated focus. We have a bunch of agents, lawyers and accountants in the same task force environment aiming on one thing only, which is making cases. At the moment, you will have an AFP agent who will be there for three to four years, if that, and then move on to the next area of investigation—counterterrorism, or whatever else it might be. There's no doubt though that this is really very poorly resourced, both at the CDPP and the AFP. Both the CDPP and the AFP are under-resourced across a range of areas, but unless government prioritises this and makes an effort to do so, the AFP won't be pulling money out of other crime types to investigate foreign bribery, because it is not a political priority. And, arguably, it's not a priority compared to everything else the AFP is looking at, so they've got a reason for not pulling out resources to this area. But unless we do that we will continue to see significant delays and continue to see criminals get away with bribing people overseas.

CHAIR: Just finally from me: in terms of gathering financial intelligence on foreign bribery and other types of offences, what do other countries do better than us in that space?

Mr McKenzie: Again, I hope AUSTRAC is appearing before the committee here, because we have a dedicated anti-money-laundering and suspicious financial crime agency. It is my understanding that AUSTRAC has done almost nothing in the foreign bribery space except lend its expertise and tools when asked. In other countries there is a proactive system, especially in the UK, of looking at financial transactions to see if foreign bribery is occurring. We don't have that happening in this country and it should be happening. It is not just the AFP which is part of this environment; it should be all of these agencies. To actually understand what AUSTRAC is doing in this space would be very interesting. I suspect they are doing very little, but the other thing is there are many ways we can tackle this problem. It's not just to be through a foreign bribery charge. If foreign bribery has occurred, there is every chance it's gone through a bank, and that bank may not have reported to AUSTRAC as it should. And is there liability for the bank in that environment? Is there liability for a lawyer and an accountant, who has facilitated a transaction which involves foreign bribery? Can we tackle these sorts of crimes in a different way? It is the Al Capone sort of issue: we won't go after the primary offence, but let's look at the other offences at play. And that is not happening to the extent it should be happening in this country at the moment.

Senator HUME: First of all, thank you for your submission. It is a terrific submission and very clear and comprehensive. We were talking to our previous witness about a register of third-party associations that would potentially be kept at ASIC. What is your position on that, the need for that and the logistics around why we haven't got one of those already?

Mr McKenzie: Could you just explain that for me?

Senator HUME: Sorry—the coffee hasn't kicked in, clearly—a public register of beneficial owners of companies.

Mr McKenzie: I think the Panama Papers have shown us that that could be a terrific thing to happen. One needs to understand the reasons why that is not in place and interrogate those. Every law enforcement agency I spoke to overseas was talking about the need for more transparency around beneficial ownership.

Senator XENOPHON: Do other countries have that?

Mr McKenzie: There is certainly move in the UK towards a greater accountability in that space. They no doubt do things better than we do here in this country, but I think the reasons for secrecy are far outweighed by the reasons for transparency. And if we had that, it would serve as a deterrent to financial crime, to taxation and to all sorts of crime types that include foreign bribery, and it should be looked at very, very seriously.

Senator HUME: The previous witnesses suggested that it would also be beneficial to companies in their own investigations they are dealing with and what transactions or deals they're involving themselves in. So it's not just for law enforcement agencies, but a self-regulation as well, which I think is a really interesting point. I understand that there is a desperate need to better resource the CDPP and the AFP if we are going to do this properly, but I have no sense of the dollars that might be involved. Do you have any idea what we might be talking about? I don't know what we are talking about in terms of staff numbers. When you say we need to have more forensic accountants and lawyers involved, I can't envisage the sort of scale of what would be required to make this an effective operation.

Mr McKenzie: It's very good question. I would simply look at that question by asking the agencies overseas how big the SFO in the UK is. I think I have some of those facts and figures in the report. Obviously, they're bigger jurisdictions but the fact of the matter is that there are so many transactions and so many companies in Australia are exposed to bribery and corruption—money-laundering risks—that you can't have too many investigators looking at this space. Ideally, the AFP, ASIC and AUSTRAC would come here and say, 'This is what we need to make this really effective.' I would say this, though: you can do a lot with a few investigators, if you have the right investigators and if you have leadership. You saw with the foreign bribery case involving Securency and Note Printing Australia, that task force was led by a very aggressive investigator, a person called Rowan Pike, who's now left law enforcement. This was someone who attacked the case as if he was doing an organised crime investigation. A senior AFP investigator called Matthew Warren handled an insider trading case in Melbourne—he's with counter-terrorism now at the AFP—and he attacked that case, this is all publicly known, as he would an organised crime investigation. It didn't require a huge number of investigators for a long period of time; it required concentrated use of resources for a short period of time.

But it's not done enough to say: 'Let's tap some phones—within the law, of course—let's put bugs in cars and let's tackle this financial crime as we would a drug-trafficking case.' You can do a lot with the huge powers the police already have. You don't need a king's ransom of resources to do that. You just need the drive, the leadership and the application. That's certainly what's missing. Combining more resources with leadership and aggression in this space, we could do a lot better. I'm sure we would have far more results if those sorts of efforts were applied to all cases.

Senator HUME: Can you explain a little bit about the New Zealand model? As Senator Xenophon said, with their very small population, what exactly are they doing? Where does that agency sit?

Mr McKenzie: The biggest thing in New Zealand SFO has is a dedicated focus. They're looking at mid-tier corruption cases. There is nothing dramatically exciting over there—I spoke at a conference of theirs a couple of months ago. The key thing they have that we don't have is that dedicated focus—a singular agency dedicated to financial crime, bribery and corruption. You have that esprit de corps being formed very quickly amongst these multifaceted investigators and people with expertise who are there to make cases in this crime type. Having that dedicated mind set and that task force mentality is extremely valuable. I saw that in the US with the FBI's foreign bribery teams. Obviously, the Serious Fraud Office in the UK is the best example of an entire agency with 220-odd staff and millions of dollars in funding all dedicated to tackling these financial crime grand corruption type cases. We don't have that in Australia at the moment.

Senator HUME: You're quite disparaging of ASIC's role in all of this. Is the reason they have not participated with more gusto a lack of resourcing or a lack of mandate? What is it that's potentially held ASIC back?

Mr McKenzie: An agency can make its own mandate and that's set by the leadership of the agency. There's just been a tremendous lack of will. They've handed all the complicated cases to the AFP because they don't want to be left with these long-term, resource-draining, lack-of-success matters. That's understandable, but it's not excusable. ASIC is getting better in this space. In the last couple of years, they have been working with the AFP in a better fashion. What I have seen on the ground from when people at a mid-level in those agencies confide to me, I don't see the AFP and ASIC really working together in a truly collaborative fashion; they're still working in silos. ASIC is simply not in this space as it should be and it needs to be encouraged to get into this space. Ultimately, that won't happen unless government sets a mandate for it. The current leadership is not interested.

Senator XENOPHON: I would like to echo Senator Hume's comments about the concise nature of your submission. You had a Churchill Fellowship to look at these issues—has that been published?

Mr McKenzie: I thought the best way to publish it was to submit it to this committee, and so that's how it's been published.

Senator XENOPHON: Okay. Fine. I don't want to repeat what you said, but you wrote an article in Fairfax back in 23 June 2015 along with your colleagues Richard Baker and John Garnaut, who now I think works at the

PMO, saying that the corrupt Malaysia money distorts the Melbourne market and talked about an apartment block near Monash University, where there was bribery involved. I don't know if you remember the story.

Mr McKenzie: I do. I know it well.

Senator XENOPHON: Since I'm still banned from Malaysia, I might as well—you know, in for a penny, in for a pound. I'm not likely to get back in there anytime soon while the corrupt Najib regime is still in power. You've also written that corruption might be inflating property prices. Is this a real issue? This is one of the consequences of corruption, that it actually forces up property prices and makes it harder for Australians to be able to buy into the market. We are described as the Cayman Islands of the Pacific, that we're an easy place to bribe and to put corrupt payments into the property market. Can you elaborate on that?

Mr McKenzie: It's unfortunate that you actually need to link corruption to property prices to make people care about it. Unfortunately, that's the reality in Australia. It shouldn't matter whether property prices are affected by this dirty money coming into our country or not. The fact of the matter is they probably are, although that would require some analysis—more analysis than I've done. We have heard from the national crime authority's John Menton in my report and we know anecdotally that there is a huge amount of capital flight, especially from China. In a fashion, it suggests some of it is tainted money ,and we know a lot of it is being parked in real estate in this country, which may be having an effect on property prices.

Senator XENOPHON: Can you give us an informed estimate? Are we talking about hundreds of millions of dollars or billions of dollars?

Mr McKenzie: We would most certainly be talking about billions of dollars. I'm glad you raised the Malaysian case. Real examples are tremendously helpful for the committee. We gave the AFP what we would say was significant evidence that corrupt Malaysian officials from a sovereign wealth fund called MARA were engaged in a very clear case—

Senator XENOPHON: This isn't the 1MDB scandal; it's another one?

Mr McKenzie: No, it's another scandal. They were engaged in a very clear case of bribery and money laundering involving Melbourne CBD property worth around $100 million. We gave that evidence to the AFP about two years ago, or thereabouts. The AFP conducted raids and seized evidence. As far as I understand, and I would encourage you to seek advice from the AFP about this, the Malaysian authorities simply haven't given the forensic banking information that the AFP require to make its case. The AFP is also confronted no doubt by the legislative impediments in terms of making its case against the property developers in Melbourne who are undoubtedly corrupt—the evidence is simply there; and the Malaysian senior officials who are undoubtedly corrupt—and the evidence is simply there. We saw money moving through offshore bank accounts. We saw admissions in civil cases in the Supreme Court of Victoria, where a developer said, 'Yes, of course there was bribery and corruption.' Yet, this has resulted in not a single charge or civil action. That means that the corrupt players from Malaysia, from MARA, and the corrupt Melbourne property developers have gotten away with very obvious crimes to date, which is an appalling situation. This is a great case study as to why we are not making these cases, yet we can very easily call out corruption and bribery in the newspaper. Yes, ours is a civil standard. We have a defamation standard, a balance of probability standard. But if we can do that without any powers at all, why can't our agencies with their powers make such cases?

Senator XENOPHON: I find it disturbing. Further to the issue of Malaysian corruption, the former Malaysian Prime Minister Mahathir Mohamad spoke to SBS News just a couple of months ago on 13 May and said that Australia is avoiding investigating the Malaysian corruption scandal—this is the one involving the 1MDB state investment fund. So you have a former Prime Minister of Malaysia saying that Australia is not doing what it's meant to do to investigate this and that there are potentially huge funds coming into this country, presumably being laundered through property transactions and forcing up the price of real estate and homes for Australians.

Mr McKenzie: We know that, in the Securency NPA matter, the Federal Police has sought from the Malaysian authorities information to help with that prosecution. The Malaysian authorities have never given that information over. We also know it's been publicly reported that Najib Razak is implicated in that corruption matter, so one can perhaps guess at why the Malaysians aren't handing over that information to the AFP, which the AFP may need to improve their case. At the moment it is fair to say that the agencies involved in this space in Australia, where it touches on foreign leaders, are reticent to stir the pot too much. I really hope you have a look at the Getax case. I think there's strong evidence that—

Senator XENOPHON: Say that again—which case is that?

Mr McKenzie: It's a phosphate company from the Gold Coast. There've been public reports of prime facie evidence suggesting the better part of the Nauru cabinet—certainly some very senior politicians in Nauru—engaged in alleged corruption and bribery. From the intelligence that I've got, there is a reticence about exposing those officials in too great a fashion, because the agencies here are constrained to looking at the Australian parties and are aware that diplomatically it may not be the most sensible thing to do—to tread on those sorts of toes overseas. But that leads to—

Senator XENOPHON: Because the nature of our relationship with Nauru?

Mr McKenzie: Precisely, and Malaysia and elsewhere. Of course, when you have that in the back of your mind as an AFP investigator or someone from another agency involved in this space—'Let's make sure we keep DFAT onside; let's make sure we don't stir the pot too greatly in respect of our relationships with these other jurisdictions'—that will necessarily mean that investigations aren't as full and as accountable as the public may hope.

Senator XENOPHON: Finally, given that it's your view that there could be billions of dollars of corrupt money flowing into Australian property investment from overseas, it would be, at the very least—leaving aside the issue of those corrupt payments and what needs to be done—useful for there to be an analysis as to what impact that actually has on property prices and the distorting effect on the market. I think you've written a story saying that the Melbourne property market's been distorted by some of these transactions. I dare say that will probably be something that will be across the country.

Mr McKenzie: I think that would be extremely useful. I know that the Australian Criminal Intelligence Commission, the ACIC, has done a body of work looking at money entering Australia, including to the property market. You'll need to chase the figure, but I believe an extremely high percentage of funds entering the country involve shelf companies, overseas companies, and we have no idea of the beneficial ownership of this money—where's it coming from or what's it derived from. It's a huge question. What our agencies know at the moment is a drop in the ocean. Again, we can be far more aggressive in this space, but it's going to take money and the government setting the mandate.

Senator XENOPHON: Finally—I put this to Dr Zirnsak as well—in relation to the CommBank's so-called intelligent deposit machines, it started off with a few million dollars a month when they first had that facility back in 2012, but by 2016 there was about $1 billion a month going through those IDMs. Do you think that we ought to be looking at chain-of-responsibility legislation so that bank directors, bank CEOs and senior executives of banks should be subject to criminal prosecution if they've been shown to be recklessly indifferent or have presided over deep systemic failures in terms of accountability for that sort of behaviour?

Mr McKenzie: Your answer there lies in the foreign bribery act in the UK, the Bribery Act. The UK—I think it's the Banking Act—has a reverse onus on banks. If banks engage in money-laundering of this nature and the banks cannot show proper controls in place, just as if a company can't show proper anticorruption controls in place, the bank, the board and the corporate entity is held liable. In this case—

Senator XENOPHON: That would sharpen the thinking of the board and the directors and executives, wouldn't it?

Mr McKenzie: Of course, I can guarantee you. I spoke to people in the CommBank—sources of mine—months ago about the gaps in the governance around this very problem that AUSTRAC has finally put into paper, but everybody knows it's been going on. It's obvious. Law enforcement has known it's been going on for years. It's just that finally an agency's put it onto paper, and we're going, 'Oh, my god!' The reality is this has been an endemic, systemic problem involving, I think, not just the CBA, to be fair, but other banks, for a number of years. It's great AUSTRAC has finally woken from its slumber and taken the bank on.

Senator XENOPHON: You're not suggesting they're like Rip Van Winkle, are you?

Mr McKenzie: I'll leave those suggestions to you, Senator.

Senator XENOPHON: He slept for 20 years. This has only been three or four years.

CHAIR: Thank you, Mr McKenzie, for appearing before us today.

Proceedings suspended from 09:50 to 10:03

LEHMANN, Mr David, Director, KordaMentha Forensic

CHAIR: I now welcome the representative from KordaMentha Forensic. Thank you for appearing before the committee today. I invite you to make a brief opening statement, should you wish to do so, and then we will open it up for questions.

Mr Lehmann: Dear members of the committee, on behalf of KordaMentha I am pleased to be afforded the opportunity of appearing before you today. Our firm's mindset is to responsibly manage the many and complex issues confronting our clients, with a view to creating a better future for them, our firm and its employees. We see corruption generally and foreign bribery specifically as a significant global scourge, one that seems to be continuing unabated and that has wide-reaching negative consequences for mankind, particularly for the poor and less privileged in developing countries.

Bearing these serious consequences in mind, Australia and our corporations have an obligation to adopt responsible business practices here and abroad, not out of fear of regulatory sanction but due to an obligation borne out of the simple belief that it is the right thing to do. Some might say that this is naive, but it was upon this belief that we drafted our submission for your inquiry into foreign bribery and our submission to the Australian Attorney-General's office for consideration of the implementation of a deferred prosecution regime in Australia. The views expressed in our submissions are also borne out of our experience and knowledge of the issue, derived from experience in law enforcement, regulatory and private sector environments here and abroad. It is this collective experience that enables us to appreciate the complexities and challenges not only for companies operating in foreign high-risk jurisdictions but also for our regulators who are charged with faithfully and diligently enforcing our foreign bribery and other legislation.

Human nature shows a propensity to often unlawfully exploit opportunity for self-enrichment. Our views and recommendations are made recognising this. We believe the primary objectives of any legislative change to the Criminal Code should firstly be to create a disincentive for individuals and corporations to indulge in corrupt practices. The implementation of the false accounting provisions in March 2016, with penalties that mirror the foreign bribery offence, should assist to create this disincentive but should also assist regulators to investigate specific allegations with less difficulty. Aside from responsible ethical leaders setting and reinforcing acceptable standards of business conduct, creating an incentive for corporations to implement better, more effective antibribery compliance systems is the key to organisational cultural change. Implementing the proposed offence of failing to prevent bribery of a foreign public official, with its exception of adequate procedures, should go a long way to creating this incentive.

Where the inevitable breaches occur, it will also be important to foster a willingness on the part of corporations to appropriately and effectively investigate alleged bribery and self-report it to regulators when there is evidence to support the alleged misconduct. A deferred prosecution regime in Australia is a means by which to achieve this. In our submission, we have advocated that any regime implemented in Australia be based on the UK model. The reason for this is that we believe that the courts would provide the required level of oversight and rigor in reaching and ratifying agreements. However, we believe these factors can be achieved by the Attorney-General's proposed model dated March 2017.

Further to this, it is our experience, supported by data from organisations such as the Association of Certified Fraud Examiners, that tips or whistleblowing are the most common means by which fraud is detected. Moving forward, we hope for and encourage a change in the attitude of business leaders and the wider community to one that sees whistleblowers as courageous and as people to be admired. Unfortunately, consequences such as bullying, harassment and loss of livelihood are often the norm. As such, we support the introduction of enhanced legislative protections for whistleblowers and the serious consideration of the implementation of a financial incentivisation model for whistleblowers similar to that adopted in the United States.

In summary, the journey for Australia to become a more active enforcer of our foreign bribery legislation has been a long and evolving one. We believe that the legislative changes being considered and other measures recently implemented can only enhance our international legislation in the fight against foreign bribery.

CHAIR: My first question follows on from your last point. How does Australia's failure to address this issue of foreign bribery and the consequent impact on our international reputation manifest itself? Is the fact that we have a system that doesn't really address this particular issue a problem for Australian businesses seeking to work in other jurisdictions?

Mr Lehmann: In terms of doing business, if you're operating in high-risk jurisdictions where this type of behaviour is seen as a common thing, then it's not necessarily going to have an impact on the corporation doing

business there. I think it's perhaps in jurisdictions that have more governance around this issue where it potentially could be more of an issue for a corporation doing business.

CHAIR: I note from your submission that many of the members of your firm have worked in countries where this is a particular issue, so you have firsthand experience of this.

Mr Lehmann: That's right. I was mentioning to my ex-colleague in the back of the room that I've lived and worked in Malaysia for 5½ years. I listened to Nick McKenzie's comments about that particular jurisdiction. It is a place where there is a lot of smoke and mirrors when it comes to addressing this issue. You see lots of announcements by the Malaysian anticorruption commission about the measures that they're taking, but, from my perspective and that of the people you talk to in the street in Malaysia, it's viewed as smoke and mirrors. You won't find any significant politician or parliamentarian caught up in a bribery scandal in Malaysia despite, I would say, a large proportion of the population believing that everyone in politics there is corrupt.

Senator XENOPHON: And the ones who do complain about it are in jail.

Mr Lehmann: Yes—correct. I've spoken to Australian expats who have businesses there and they've indicated to me that they budget for payments to be made so that they continue business and can win contracts in Malaysia. If you're willing to make the payments and indulge in that sort of conduct, your business can run quite smoothly. But, if you don't and if you don't have the right connections, particularly with a bumiputra company or individuals, it's very difficult.

CHAIR: I'm interested in your view on the proposition that, given that Australia has many of its major training partners in jurisdictions where this issue is perhaps problematic, does this go some way to explaining the lethargy in our bureaucracy in terms of dealing with this issue? Is there some sort of misguided view that perhaps the less we do about this the more we can facilitate Australian companies doing well in these types of jurisdictions?

Mr Lehmann: There is a recognition that it happens, but corporations and people with influence turn a blind eye to it. I don't think that in today's environment anyone can deny that it's an issue and it's not happening. The other aspect of that is that, as you all know, our enforcement regime, in terms of dealing with this issue, has been lacking. We've only had two corporate convictions for this particular issue. To say that they're the only two companies that have been involved in this is a nonsense. It's something that companies, boards and the senior management of our corporations have seen as a lower risk in terms of possible regulatory sanctions.

CHAIR: Quite appropriately, in your submission you first turn to the issue of books and records provisions. I am interested in the comment in your opening statement about the legislative changes in March last year in this regard. Do those changes meet your recommendation or is there still some way to go?

Mr Lehmann: I believe they significantly address our recommendation. The difficulty for law enforcement—and this is something that can be related to the FCPA in the US—is that most of the settlements that are reached in the US are to do with not meeting the accounting provisions of the Foreign Corrupt Practices Act. As Nick alluded to in his discussion with you before, when you're investigating these cross-jurisdictional issues it's very difficult to gain assistance to obtain the information that's required for an investigation and potentially a successful prosecution. So, if an obligation is imposed upon corporations to ensure that their books and records reflect the actual transactions that are occurring within their business, that goes a long way to disincentivising corporations to be involved in the conduct, but it also makes it a little easier for regulators to investigate these issues.

CHAIR: In fact, you're calling for the sanctions for breaches in relation to books and records to be equivalent to the bribe paying offence.

Mr Lehmann: And I believe they are. For example, if someone makes a bribe payment and the books and records treat it as a consultancy payment, then the regulator or the person investigating that issue may not necessarily have to rely on evidence that a bribe was actually paid as long as the regulator can show there is evidence to suggest that the entry in the books of the company is incorrect or false. That then serves the purpose of being able to enforce the legislation more effectively.

CHAIR: You're supportive of this proposed new offence of failing to prevent foreign bribery. In your submission, you call out some of the guidance that could be brought about to assist businesses in doing that. Do you have a view about the use of ISO 37001 as a standard there?

Mr Lehmann: A lot of people cynically say that the release of ISOs creates a work stream for consultants like my firm and others in the industry. I don't necessarily think that just because you have an ISO certification means you're making your best efforts to deal with the issues specifically. I think what it gets back to is senior management and the board setting the tone and the culture within their organisation. Look, let's face it: there are

copious amounts of guidance about what compliance programs should look like. You've got the Foreign Corrupt Practices Act resources guide and you've got the UK Bribery Act adequate procedures guidance, and they all talk about the key elements of a compliance program: culture and doing due diligence. I don't necessarily think that having an ISO certification is going to ensure that a company is complying with the legislation, but, by the same token, it's probably a good step in the right direction.

CHAIR: What's your view about the appropriate regulator that should have responsibility for enforcing this compliance requirement?

Mr Lehmann: I think it's probably the AFP supported by ASIC, because ASIC has the duty to deal with false accounting and those types of issues within the corporate environment and under the Corporations Act. I think the Australian Federal Police, because they have the ability to conduct multijurisdictional investigations, are probably the most appropriate regulator to deal with the issue.

CHAIR: The head of ASIC has often talked about changing the culture of corporate Australia, particularly in the financial sector. Although one can't regulate culture, to some extent, there's already a regulator that's looking at this particular issue and different parts of it. You clearly say that they shouldn't be involved in monitoring the procedures and systems that are in place in companies in this area.

Mr Lehmann: No, I think there's a role for them to play, but, if we're talking about the actual investigation of foreign bribery allegations, I think the AFP is probably the most appropriate regulator to deal with that. There should be some cooperation between the regulators. I think there is an overlap there, but I think, primarily, the AFP should take leadership in this, supported by ASIC. I think that would be the most appropriate regime.

CHAIR: You're also supportive of impacts on things like debarment from government contracting as part of a disincentive for dishonesty. Would you care to elaborate on how far you think that should go?

Mr Lehmann: As I mentioned in my opening, a lot of this is about incentive and disincentive. If a corporation is reliant to a large extent on foreign contracts, working in foreign jurisdictions, and there's a possibility of them being debarred for a period of time from undertaking their business, then that creates a real disincentive for corporations to indulge in this type of conduct. It's only one measure. If we're talking about deferred prosecution agreements, there needs to be an assessment on a case-by-case basis of what the most appropriate arrangement would be under these agreements—as I say, case-by-case.

CHAIR: The idea, I think, is for companies to be able to come forward and self-report on this issue, rather than relying on whistleblowers to come forward after the event. What do you think that system looks like where companies in Australia are encouraged to come forward and self-report? What do we need to do to get to that point?

Mr Lehmann: At the moment, companies and their legal advisers are reluctant to come forward because, at the moment, there's a lack of certainty about what may happen. A deferred prosecution agreement where there is a more certain process that can be adopted—and that companies are aware of and know that there is a commitment by the regulators to working with corporations through these issues—would lend itself to an environment which is more inductive for companies to come forward. If there's more certainty about what the process is and what might happen, then therein lies the incentive for people to come forward.

CHAIR: I was looking through the list of companies that allow for the use of facilitation payments. I saw that at least two of the major four Australian banks allow facilitation payments. Do you think there are any reasons as to why that defence should be retained?

Mr Lehmann: Personally, no. As we say in our submission, it muddies the waters somewhat. If you're in, say, West Africa with a mining venture and you're paying facilitation payments to government officials to get things done, the bottom line is that they're bribes—it's just that there's a defence to it. If you follow a certain procedure, then potentially you're not going to be caught up in a bribery issue.

When it comes to the frequency of the facilitation payments that you make, how do you determine what the purpose of these payments are? I find that it's a very, very grey area and, potentially, if a regulator looked at a company who documented their facilitation payments, it could still—on the whole amount of the conduct—amount to a bribery offence. I just think it's very grey.

CHAIR: I agree with what you're saying, but fortunately the US seem to allow this. Do you think there is any prospect of change in that area?

Mr Lehmann: Not that I'm aware of. I gather in Australia that, in the current environment, that's not going to happen either. The mid-tier junior miners have a loud voice when it comes to this, and a lot of them say that they

really cannot do business in places like West Africa without being able to make facilitation payments. It's a very vexed but grey area.

CHAIR: Is that because US companies are leading the charge in that area?

Mr Lehmann: I've no doubt that US companies are paying facilitation payments. As I say, I don't have all the answers on the best way to go but, for my liking, it's a little too grey and companies can still find themselves in hot water, if we have an effective enforcement regime in place.

CHAIR: Just finally, what's your view about ASIC's role in this area at the moment; and how can we improve ASIC's role?

Mr Lehmann: I think this goes back to my earlier point that there needs to be collaboration between regulators. They cannot work in isolation and I think having the fraud and corruption centre is a step in the right direction where you have people from ASIC being seconded and working together closely with the AFP. It needs to be a joint effort, because ASIC looks at different aspects of corporate conduct to what the AFP does. So there needs to be a meeting of minds and collaboration between the regulators about the approach and what should be done.

CHAIR: Thank you.

Senator HUME: Thank you, first of all, for including this copy of the guidance note for the UK's Bribery Act 2010. I found that very informative, and I was particularly interested in its effort to ensure that the act is implemented in a workable way and does not place an unnecessary burden, particularly on small firms that are not well resourced. Do you think this is something that we could, essentially, replicate in Australia? What steps do we need to take in order to replicate this type of approach?

Mr Lehmann: A lot of the time there are things happening around the world which are being done quite effectively in a particular area. Sometimes I think we're slow to adopt what other regimes or environments are using to deal with a particular issue. What we should be doing is leveraging off the guidance that is there already but make it relevant to our corporations, so adopt the best of the best that's going around but have our Australian emphasis on any guidance that's provided to corporations.

Senator HUME: Before I entered parliament, I was a director of two companies. I did the Australian Institute of Company Directors company directors course—it must have been at least six or seven years ago now—and there was a significant emphasis on foreign bribery and corruption for directors at that stage. It was quite terrifying, to tell you the truth, and a lot of us doing the course looked at each other and thought, 'Gosh, this one's going to be really hard to'—we realised that we would be personally responsible for what might be going on somewhere down the bottom of the chain of an organisation that we were involved with. Do you think that the understanding that directors have now is adequate? Do you think that the penalties that are placed on directors, if foreign bribery is occurring in their organisations, are sufficient? If not, for either of those two issues, what more should we be doing in that space?

Mr Lehmann: I think the guidance on and knowledge of this issue is much better, I think. In the past, it has been a risk that probably hasn't been given enough emphasis—and of course this varies from corporation to corporation.

But you touched on it—the key to this issue and many other risk issues for corporations is the level of communication to create awareness with training provided to employees right across the organisation. This gets to creating culture, and the key to it is leadership, with communication training being cascaded down throughout the organisation and, of course, leaders setting the example. I'm not exactly sure what the penalties are for directors. For example, if a corporation was fined or convicted of this offence, it is liable to quite significant penalties now and so I guess it's with that in mind that directors need to take a very proactive view of risk and make sure they have adequate procedures in place within their organisation so that, if someone in a foreign jurisdiction's local management pays a bribe, they can say to the regulator, 'Well, we made our best efforts to implement an effective program and this is the evidence of it.'

Senator HUME: I have a question that may seem bit out there, and so please forgive me. How many people are involved in the KordaMentha Forensic services practice? What sort of skills and experience do they have? Before you answer, let me contextualise the question. Our two previous witnesses suggested that the AFP and potentially ASIC were not sufficiently resourced in this area and yet I have no sense of what it might cost to resource those two agencies appropriately to deal with this issue. I don't know whether there is a shortage of skills for forensic accountants or lawyers who deal in this particular space. I am interested in your organisation's unit and where you are recruiting from. You don't need to tell me exactly their numbers or their salaries, but I'd like a

sense of the level of profession we are dealing with here in order to ensure we can adequately resource our agencies.

Mr Lehmann: Corruption, by its very nature, is about deceptive conduct and so is very difficult to investigate and to enforce. In our forensic practice we have forensic accountants, we have people from law enforcement backgrounds, we have people from technology backgrounds—computer forensic and other forensic technology services. Typically, when we are dealing with an issue like fraud or corruption, it takes a combined effort of the team. It's not just one individual within the team who can effectively deal with the issue. We rely on a very multidisciplinary approach to the issue. We stated in our submission that we thought that for this issue the AFP was under-resourced and we also put forward a proposition for a public-private partnership when dealing with this type of issue. I believe in the UK, the Serious Fraud Office has quite often engaged with the private sector to help them investigate issues. The multimillion dollar question is: what would it cost to build an effective agency to deal with this?

Senator HUME: It is literally the multimillion dollar question. As an idea, what approximately would a forensic accountant with 15 years' experience be paid in KordaMentha?

Mr Lehmann: I'm not a forensic accountant and so—

Senator HUME: I have no idea of whether I'm dealing with someone who is on $80,000 a year or $800,000 a year. I really don't know.

Mr Lehmann: Say you're talking about someone at manager level, you might be looking at—and they certainly wouldn't have 15 years' experience—probably $110,000-120,000 per year. That's a guess, I'm not privy to—

Senator HUME: That's all right. I'm literally trying to work out in my head what it might look like. Thank you.

Senator XENOPHON: You refer to the issues of leadership. We've heard from previous witnesses, Dr Zirnsak and Nick McKenzie, who basically said that there seems to be a lack of will in terms of dealing with these issues. The implication from what Nick McKenzie said was that there are some issues that are just political hot potatoes or are seen as being too contentious, if it involves Nauru of Malaysia. I think to be fair to the AFP, that should be put to them as to whether it is a question of resources or whether there are issues that might impinge on their independence—and I would like to think there aren't. I am trying to establish whether the benchmark legislation that we should be looking at is the US and the UK foreign bribery acts—is that correct?

Mr Lehmann: Yes.

Senator XENOPHON: We are nowhere near that—are we?

Mr Lehmann: No, but this is why we made the recommendations we have, particularly around the failure of corporations to prevent bribery. The UK Bribery Act, I think, is one of the key pieces of legislation. It gets back to creating the incentive for corporations to do the right thing. It's imposing an obligation on corporations to ensure that they have an effective compliance program in place, otherwise that incentive is just not there. Coupled with the lack of enforcement that we've had since the offence came under the Criminal Code—

Senator XENOPHON: It's been largely ineffective—has it not?

Mr Lehmann: Yes.

Senator XENOPHON: Nick McKenzie said that we could look at what they're doing in the UK in terms of a reverse onus of proof. The current issue is the Commonwealth Bank, and eventually AUSTRAC got involved in that. But we are talking about billions of dollars of potentially laundered money that could have gone through those so-called intelligent deposit machines. Do you think a reverse onus of proof to show that if you didn't have the systems in place that there is liability imputed? Ought there be, as in the UK, that criminal level of liability on boards of directors and senior executives, including CEOs, where there is a reckless indifference to dealing with corruption and bribery matters?

Mr Lehmann: To both questions, yes. I believe that's correct. It's such a complex issue and very difficult to deal with. If the penalties imposed upon on an individual and a corporation are significant, therein lies the disincentive to indulge in the conduct. I think having a reverse onus would make it potentially easier for regulators and prosecuting authorities to deal with the issue. I'm sure that even without there being criminal offences for boards of directors, if for example there is a class action against the corporation or the board of directors for a significant breach of this legislation then their civil liability would be quite significant as well.

Senator XENOPHON: But there's nothing like criminal liability that might sharpen the thinking to have systems in place.

Mr Lehmann: I believe so, yes.

Senator XENOPHON: Finally, do you have any comments on the fact that when it came to Securency, despite the fact that we spend hundreds and hundreds of millions of dollars on law enforcement agencies and regulators such as ASIC and the AFP, it took the work of some investigative journalists such as Nick McKenzie and Richard Baker, and presumably others, to dug up this story—something the regulators weren't capable of? I'm not sure if you heard Nick McKenzie's evidence, but I think the whistleblowers actually went to the AFP but the AFP brushed them off. They obviously have a different approach now. Do you want to comment on that?

Mr Lehmann: I followed that story very closely. The evidence that I believe would have been provided by the whistleblower to the AFP should have been compelling enough for them to institute an investigation. The reasons why they didn't do that I'm not privy to, but to me, reading between the lines, it seems that there was a lack of will combined with a lack of ability to investigate that issue.

Senator XENOPHON: Or a lack of appreciation as to the seriousness of the allegations?

Mr Lehmann: Potentially a lack of appreciation of the issues, but a lack of will to investigate. I'm not sure that the resources that were available were adequate enough to investigate it in an effective way. I'm only speculating on this, but, reading between the lines, that is the feeling that I got in following that story.

Senator XENOPHON: You may want to take this on notice, considering the time: have you had a chance to look at the whistleblower protections in the registered organisations legislation that has already been passed and is the subject of an inquiry by the Joint Committee on Corporations and Financial Services?

Mr Lehmann: No, I've not looked at that legislation.

Senator XENOPHON: If you could, and comment on whether you think that's useful. Also, there's been an ongoing inquiry through the Joint Committee on Corporations and Financial Services as part of an agreement with the government to improve whistleblower laws. If you could look at that, that would be quite useful.

Mr Lehmann: Certainly.

CHAIR: In terms of facilitation payments—and you may not be in a position to answer this question—is there any evidence that UK companies are disadvantaged or struggling out there, particularly in the resource area, because of the fact that their jurisdiction has now changed in respect of facilitation of payments and yet Australian and US companies continue to have this—

Mr Lehmann: I'm not aware of that, even though it's something that—they don't have that defence in the UK. I'm sure that there would be UK corporations that are still paying facilitation payments, because I think the department of justice there have indicated that, whilst it is illegal, they probably have bigger fish to fry. There will be companies that are still paying facilitation payments, but I get the sense that they would be very-low-value-type payments—

CHAIR: So there is a calculated risk involved in it?

Mr Lehmann: Yes. It will be interesting to see whether, over the course of time, there are prosecutions for UK companies that are paying low-value facilitation payments based on their frequency and what's being achieved as a result of them. I don't think there's evidence yet to suggest that UK corporations are being disadvantaged by that change in the legislation.

CHAIR: Thanks for appearing before us.

AHRENS, Mr Michael, Director, Transparency International Australia

DAVIES, Mrs Rebecca, Director, Transparency International Australia

[10:44]

CHAIR: I now welcome representatives from Transparency International Australia. Thank you for appearing before the committee today. I invite you to make a brief opening statement should you wish to do so, and then we'll open it up for questions.

Mr Ahrens: I understand that the committee has our submissions to the Attorney-General's Department of 3 and 8 May on the two topics—that is, both the foreign bribery exposure draft and the deferred prosecution agreements paper. They are the two.

As to an opening statement: I listened with great interest to the submission by David Lehmann earlier, and I would, if I could, by shorthand, adopt exactly what he said in his opening statement. That would save a bit of time.

Transparency International, as you may know, is one chapter of about 100 chapters around the world, and dealing with foreign bribery is one of our major initiatives that we feel needs much greater attention than has been deployed to it by the members of the OECD. We have over the years written every year a comparison of what each of the members of the OECD have done. Through lack of funding we had to stop that in the last year, but Australia does not rank well. Our reports and position papers have all been put up on our website, and I invite the committee to look at our website for the submissions that we've made to the government over the years on this and the position papers that we've published.

This issue of dealing with foreign bribery has a history going back to the turn of the century. I've been following it since then, and it has been painfully slow and not easy. We are highly optimistic at this moment that the government will do something along the lines of their exposure draft. We fully endorse what's in the exposure draft, and I, for one, thought that the analysis which was put out in the papers produced by the department is really very good as to what is absolutely necessary in order to deal with this issue as far as Australia is concerned. We've had roundtables and consultations, and the debate that's taken place through that leaves me with the impression that as far as the department is concerned this is really something that they've finally got a whole new approach to dealing with—that what looked to be good in 2000 is really not working, and that therefore we have to grapple with it much more severely.

There are a whole range of issues that need to be dealt with, but in particular there is the reversal of the onus of proof, in the way that the UK has done. In a way, the Americans have gone along that path too, without saying so. The reversal of the onus is an essential plank in order to deal with this. We've taken—and you'll see this in the paper—a pretty strong line on this in terms of the liability factor. What is very clear, to me anyway, is that given the way in which these things happen in the international field, especially in countries to our north, you need to take quite a dramatically new approach in order to deal with them effectively.

KordaMentha produced a very nice analysis of the Rolls Royce case, which I was reading last night. It really struck me how a company like that, with that reputation at stake, was able to keep in place a network of intermediaries and hide behind what they were doing in the over 38 countries in which they operate and over 24 years. It was only, really, the combination of a whistleblower and reversal of onus which forced them to give the full picture well beyond what the whistleblower had reported.

Senator XENOPHON: It was a very ingenious scheme.

Mr Ahrens: It was a wonderful scheme in one way, but—

CHAIR: So full marks for innovation there, are you suggesting, Senator?

Senator XENOPHON: Full marks for innovative evil!

Mr Ahrens: Here was a company which did not need to do this. Their only fierce competitor was an American company that wouldn't have been game. But they kept it in place. That's just one example of, really, the sort of things that will go on. It has been put to me that, 'Sure, this is what happens in Asia. You'll never get rid of it.' I don't believe that. I just point to one thing: what's happening in China at the moment. The next step, I predict, is that China will start to impose those sorts of constraints upon government organisations that operate abroad in very big ways and to make the same rules applicable to them that they put domestically. So we will see a lot of change.

You can also look on our transparency perceptions index about the very high grades that we give to Taiwan, Hong Kong, Singapore. Are they just exceptions? The other countries don't rank at all well—most of the others.

But those three countries, and now with Korea joining up—that's a very good thing. Remember: when you look at that perception index, to score 50 out of 100, as Malaysia does, is not a recommendation. Two-thirds of the countries on that list score less than 50. That's the sort of scale of the problem which, if you come in in a microcosm, you can look at as a perceptions index. We don't do the ratings. We do the statistical analysis to bring them all up into a single rating.

The guidance factor—putting the guidance into the legislation as not a statutory instrument but a guide to the factual determination of improper behaviour—is very important. We have urged, as you will see, that this be produced rapidly. I think in itself, if you get drafts of these things out, they will immediately have an effect upon conduct. It's not absolutely clear how it should be done. Now you have the ISO 37001 out as another set of standards. We have at least three standards now internationally that the government could look at as a set of guidance statements for the practice and procedures. We will be very happy to develop our position about the foreign bribery rules.

Likewise with deferred prosecution agreements, we have a position paper on that. That is reinforced by what Transparency International itself said way back in March 2016, referred to in the position paper that we put out in 2015. No, it wasn't. I'm sorry. That was an earlier one. I got the date wrong there. But Transparency International as an organisation takes the view that deferred prosecution agreements should not be formulated on any basis which is a get-out-of-jail card for corporates. It should be tough; it should be rigorous. There should be a lot of constraints upon it. In particular, we emphatically take the view that there should be a guilty plea as part of it. There should be an admission of liability. It should not be just an agreement on a set of facts without an admission at the conclusion and the entry into a deferred prosecution agreement so that—

Senator HUME: Sorry, Mr Ahrens, on that: which jurisdictions are imposing a DPA well, then? Is it working well in America? Is it working well in the UK? Are you suggesting that we impose a stricter regime here than exists there?

Mr Ahrens: I can't precisely identify that difference, but I do think the principle is right that there should be an admission of responsibility in that document so that it can be enforced if the terms of the DPA are not complied with. I don't know, but I'd be very happy to look that up, as to whether that is—I think that in England they have an agreed set of facts rather than an admission of liability.

Senator HUME: Okay.

Mr Ahrens: Attribution of responsibility to the directors—I'd be happy to answer questions about that in the follow-on. Rebecca?

Mrs Davies: I might just follow on with something that Senator Hume was talking about: the AICD course that you did. I teach in the AICD course, and over each year I might see certainly hundreds if not thousands of directors and potential directors. My sense is that they are perhaps less concerned about it than your cohort might have been, and I suspect that might be because at the time there was more publicity about things like Securency and Rio and so on. It seems to have gone off the radar to an extent. So I think that we can't take it for granted that people are massively concerned about this, which is why, as Mike says, having a guidance note or having some further action, whether it's prosecutions, discussion papers or whatever, is what's going to focus people's minds.

CHAIR: Thank you very much. I will just start with this talk about the culture-of-compliance issue. You talked about the need for guidelines there. This culture of compliance becomes very important. How do we avoid a situation where a company just goes down the track of checking the box, having X, Y and Z in place, and that appears to meet all the criteria, without anything in terms of commitment from management behind that? Do you want to talk to us about that?

Mr Ahrens: Yes. That is a very good question. I have spoken to a lot of the executives who do this sort of training online, and they find all sorts of different ways to pass tests. The tests come out of Switzerland and America particularly. I would defer to Rebecca's view about that. I think it's a big problem, but it has to embody all the ingredients of the UK standard—that is, from leadership all the way through to monitoring and checking. It's very clear to me that, without very personal intervention by leadership—that is, top management—in these things, the flaw that you identify will exist and carry on. That, to me, is why enforcement is so important as well.

Mrs Davies: There have to be consequences. The tick box is absolutely the bare minimum, but, if you tick the box, you behave badly and you are still a corporate hero, then you've achieved nothing. In fact, I think that, as far as corporate culture goes, you've actually done a worse job than if you'd had no training at all, because if people feel that it's just a facade to go through, it's just that tick-box exercise, then why bother? It's just, as Mike says: 'We'll find ways to do the test and pass without really entering into the way we behave.'

Mr Ahrens: Yes. It's clear to me from talking to people who are involved in it much more closely than we are—because we are not investigators; we are not in that side at all. The position's come up that people very rarely are bad apples as a single entity. People who've been involved in these investigations say that almost inevitably there is a group—

Senator XENOPHON: A culture.

Mr Ahrens: a pattern—well, I'm not sure about 'culture'. Pinning down the 'culture' word is a bit tricky, but at least almost always, from a single person, in order to be more than an incident, comes a group or a pattern within at least a subgroup. And that's where these courses have to be assessed in terms of being able to nip it in the bud so it doesn't grow from an incident into something that is quite serious. That stems right back to the Wheat Board case. You see, they all knew. They all knew what was going on and how it was farcical, but no-one was prepared to speak up. That's why the whistleblowing thing is absolutely important as part of this.

CHAIR: Do you have a view as to which regulator should have responsibility for enforcing the compliance here?

Mr Ahrens: Absolutely. They have to be better. Sorry, I mistook the question.

CHAIR: Which regulator should have responsibility?

Mr Ahrens: Which regulators? It has to be the FAC, in the Federal Police, unless you set up a special body. The SFO in the UK is clearly getting runs on the board. But they have to be specialists. What dismays us is that it's not just a matter of the money; I think it's more the prospects of promotion for the forensic accountants and experts.

Senator HUME: I think that that was what I was trying to get to with the gentleman—whose name escapes me for the moment—from KordaMentha. Is this an area of such expertise and held in such high regard within his unit that it's going to be very hard to replicate within the Public Service, if you like, as something that people would aspire to join? Has it got enough prestige for somebody with that level of qualification and skill set, who would normally be paid much more in the private sector, for instance?

Mrs Davies: One would hope it shouldn't, because there are people who are very skilled, very expert, who are driven by wanting to do good by the community.

Senator HUME: There are three of them sitting here!

Mrs Davies: Absolutely! So I believe in that. I'm an optimist from that point of view. But, as we're saying, it is a special kind of job. One of the challenges, I suppose, for having it within the AFP is that, quite rightly, the AFP has some other pretty serious things that it has to do. As Mike said, who at the end of the day is going to get promoted to be the head of the AFP? Is it someone who's been involved in antiterrorism or someone who's involved in antibribery? Well, you can answer that question fairly easily. So a separate office? Possibly.

CHAIR: You mentioned that international standard that's come into play now. Do you have a view as to whether that stacks up with the other guidances that we've now seen out there?

Mr Ahrens: Absolutely. And that, we suggest, is the next immediate step that ought to be taken—to formulate it. We say that it should in fact be a replica of what the UK has, as a first step, because it's much more important to have uniformity of approach. We don't want too many companies thinking, 'Well, we can comply with this country and that country.' At the moment, they seem to have got a combination of the UK and the US approaches pretty synchronised, and the Australian should not differ too much from that.

CHAIR: In terms of facilitation payments, you say this should be removed. We heard from Mr Lehmann just before about the extent to which Australian companies are competing out there with US companies and UK companies as well that might still be going down this track. Can you tell us why you think the defence should be removed?

Mr Ahrens: First of all, it's not at the top of our agenda; grand corruption is much more at the top of our agenda. For facilitation payments, we think it is crazy to have that very technical defence written into the act. It could easily be abolished. We could take the bold step that the UK took. I do not think it would make a lot of difference to any respectable company. Sure, there are red envelopes given at times at parties in certain countries, we all know that; but whether you have it in defence or at all, the way it is framed or eliminated, we think it is much better that it be eliminated.

Mrs Davies: It enables a prosecution to be run where a large number of small facilitation fees are made as evidence of something that is wider, whereas if you leave it there, you cannot easily have that prosecution.

CHAIR: Dr Zirnsak was saying facilitation payments at the low end breed the culture that opens people up for it.

Mrs Davies: And chances are a prosecutor is unlikely to prosecute someone who has given someone $25, one would think.

Mr Ahrens: It is very interesting to see in the exposure draft that the words 'no matter how insignificant' have been put in as a technical drafting matter.

CHAIR: Enforcement is vital; we can have all sorts of wonderful legislation, but if it is not enforced, companies will not change their behaviour. Do you have a view as to the level of resources that might be required? Is it a question of resources or is it a question of will that has been failing us in the past to get some runs on the board?

Mrs Davies: I think it is both.

Mr Ahrens: We need both, absolutely—much more than we have had deployed. The priority that needs to be given to it is something we have been waiting for a considerable time to see deployed. It is amazing how those millions of dollars seem to be swallowed in the resources of the Federal Police. I was amazed by the ATO fraud allegations—and fraud, to us, is in a different category or subgroup from corruption. There were 300 Federal Police officers involved in that one ATO exercise over three months. I don't know, perhaps they have special skills.

CHAIR: Do you have any views about the resourcing that is available at the CDPP level? Do you have any views about the improvements that might be necessary there?

Mr Ahrens: No. We have met some at the roundtable discussions. They seem to be very talented and very dedicated people. We are suggesting in our position paper on DPAs that they be kept in the forefront of any negotiations for a deferred prosecution agreement. Certainly, without them it wouldn't be working.

CHAIR: Do you have a view about the regulators in general? Do you think there is a culture of risk aversion, a fear of failure, involved there, born perhaps of the inadequacies of the legislation?

Mrs Davies: It tends to vary between regulators and it tends to vary between leaders of regulators. You will sometimes find a time when regulators are led by someone who takes an activist view and is prepared almost to stretch the limits to see whether prosecutions can be run, and then sometimes you have people who are risk averse. So perhaps government can send a signal that they consider this to be a really serious issue. In a sense, the KPI for the leaders of the regulators is that we want to see some prosecutions. Obviously, I am not saying people should be prosecuting people just for the hell of it; but our sense from all the work we have done is that, if you looked, you would find.

Senator XENOPHON: Thanks very much for your submission and the work that you do. You have been here for all of the hearing today? You have been here for the earlier evidence today?

Mr Ahrens: Only since—

Senator XENOPHON: Dr Zirnsak gave some interesting—

Mr Ahrens: I have read with great admiration what Dr Zirnsak writes, and Nick McKenzie's slideshows have to be seen to be believed.

Senator XENOPHON: You think reverse onus of proof would be a definite path forward?

Mr Ahrens: Yes.

Senator XENOPHON: We have heard recently about Commbank and the so-called intelligent deposit machines. Nick McKenzie referred to it as 'AUSTRAC got out of their slumber and finally took action'. We are talking about billions of dollars going through the intelligent deposit machines and a concern that some of that could have helped to launder the proceeds of crime—drug running—and also to fund terrorism offences. In that case the current law is that Commbank will face significant penalties but only civil penalties. Do you think we need to overhaul the law so that directors and senior executives, including CEOs, could face criminal penalties if they have a reckless disregard for having in place a system that could deal with corrupt payments and corrupt behaviours?

Mr Ahrens: We've gone public since this came to the fore. We want to get behind greater regulation of the anti-money laundering regime. What has come to light in respect of the teller machines was an absolute shock to me. Of course, we have not heard from the bank about their position, and it is important to let it all play out. Your specific question was about whether I think it should be part of an overall review of that—

Senator XENOPHON: What do you say about the Attorney-General's review into foreign bribery laws? Have you been participating in that?

Mr Ahrens: Yes.

Senator XENOPHON: You made submissions in respect of that?

Mr Ahrens: Yes.

Senator XENOPHON: Are you hopeful that that review may lead to useful reforms?

Mr Ahrens: Oh yes, in terms of foreign bribery, absolutely. I am very confident that the minister will now pick up what has been done and go forward with those regime changes in relation to foreign bribery.

Senator XENOPHON: I asked these questions of Nick McKenzie earlier. He has written stories about the Melbourne property market potentially being distorted by some of these corrupt payments and money flowing in. He, with other reporters, reported a couple of years ago on an apartment block near Monash University which involved a foreign corrupt payment, a bribe, of several million dollars to some relation officials. Have you looked into what the effect on our local economy and property market could be with these corrupt payments coming into Australia? Nick McKenzie is suggesting it could be in the billions of dollars. Have you looked into the effect that that could have on individuals, young couples and people from all walks of life who are trying to get into the Australian property market who are at a disadvantage because of corrupt funds coming into this country?

Mr Ahrens: Overall, I can't assess it. But one particular thing that has caught my attention is the continuation of golden visas—that is, the $5 million and $15 million acceleration for—

Senator XENOPHON: I thought it was just $5 million. There is a $15 million one as well?

Mr Ahrens: There is a $15 million 'special'.

Senator XENOPHON: A special offer, is it?

Mr Ahrens: That means you don't actually give the money to anyone, you just invest it. The Productivity Commission has come out and said that should be abolished, because even the Productivity Commission had not realised that, once that money is put in and the visa's accelerated, they get a permanent residence visa straight off, bang. It seems to me unclear, and I looked right into it and made a submission to the Productivity Commission. Is it favouritism that allows these things to go forward? They are almost all Chinese applicants, and that enables them, of course, to buy many more properties. The difficulty with the processing of these applications by Austrade and so on is to find out where the money is coming from.

Mrs Davies: We've certainly taken the view that people like real estate agents should be under the same sorts of reporting obligations as banks are, because clearly—

Senator XENOPHON: These sound like questions on notice or estimates questions, which my adviser Rex Patrick always gets excited about. I think there are some questions on notice coming on.

Mrs Davies: The other small thing I note is that it always intrigues me at that Sydney Airport, at the international airport, at the luggage area where you collect your baggage, there are advertisements, mostly in Chinese, for very expensive motor vehicles with special cash deals, so you wonder about that.

Senator XENOPHON: Your Chinese is better than mine, clearly.

Mr Ahrens: There's some excellent material put out by Transparency International UK on this issue, in relation to the huge amount of investment in expensive properties in London from Russians and others, coming through shell companies. This is a very interesting initiative. You raised earlier the question about funding for ASIC. ASIC ought to be funded with a system which enables the determination of source of funds and who are the ultimate beneficial owners.

Senator XENOPHON: That's something that Nick McKenzie and, I think, others have raised. Are there other countries going down the path of trying to establish beneficial ownership or not?

Mr Ahrens: The UK have, yes. They've put theirs out, and they're reviewing it now for a second version. Very few companies have objected at all, and the ones that did object seem to have shell company issues, with finding out who's behind those. Who owns what in this country? We have made no progress towards an initiative about that. It seems to me that the funding of ASIC would be essential to enable that to happen.

Senator XENOPHON: Thank you.

CHAIR: Thank you for appearing before us today.

PULVIRENTI, Mr Mark, Partner, Control Risks

[11:17]

CHAIR: Thank you for appearing before the committee. I invite you to make a brief opening statement should you wish to do so, and then we'll open it up for questions.

Mr Pulvirenti: Thank you. Good morning. I'd like to thank the committee for the opportunity to appear before you this morning. I welcome this inquiry into foreign bribery and hope that it ultimately leads to Australia as a jurisdiction becoming better able to properly address instances of foreign bribery.

By way of initial background to provide the committee with some context to my comments here today, I can advise that I appear today as a partner of Control Risks, an independent global risk consultancy practice with 2,500 employees operating through our global network of 36 offices. For 42 years we've worked with our clients to help them manage political, integrity and security risks in complex and hostile environments around the world. We support clients by providing strategic consultancy, expert analysis and in-depth investigations; handling sensitive political issues; and providing practical on-the-ground protection and support.

Personally, I am a chartered and certified forensic accountant and I lead Control Risks' compliance, forensics and intelligence practice for the Australia-Pacific region. Over the past 24 years, I have lived in four countries and worked on matters on the ground in more than 25 jurisdictions across the Asia-Pacific, Europe and the Americas. I returned to Australia in 2014. I specialise in financial crime, compliance, investigation and dispute matters, with a particular specialty in bribery and corruption. Over the past decade in particular, I have led or otherwise held senior positions in relation to half a dozen large global corruption related investigations, driven predominantly by US regulators, going back to the Siemens investigation in 2007-08, for which I was based in Munich, Germany.

Over that time, I have worked with multinational corporations in performing regional and global corruption risk and compliance assessments and worked with clients to implement remedial compliance measures designed to proportionately, using a risk based approach, prevent, detect and respond to instances of foreign bribery. Over the past three years, since returning to Australia, I have also worked with corporates and counsel in this country in relation to several ongoing AFP investigations related to foreign bribery.

I offer my comments today not as a lawyer but as a senior and globally-experienced forensic accountant who has worked closely with clients and their lawyers over the past decade in responding to allegations of bribery. Since my original submission to this committee on 24 August 2015, I have made further submissions to the Minister for Foreign Affairs in relation to Australia's foreign policy white paper in February of this year, and two submissions to the Attorney-General's department in relation to proposed amendments to the Criminal Code Act and the proposed introduction of deferred prosecution agreements, or DPAs, both in May of this year.

I welcome both the opportunity to provide you with my original submission for this inquiry and for the opportunity to appear before you today to assist in the process of improving Australia's approach to foreign bribery. In terms of some of the more particular issues presently to hand, and by way of summary, I welcome the introduction in March of last year of false accounting provisions into the Criminal Code, the establishment of the Fraud and Anti-Corruption Centre and, more recently, announcements of further funding over the coming years to boost that centres resources. I welcome the Attorney-General's department's recent proposed amendments to the Criminal Code, particularly around changes to wording such as 'not legitimately due'. I support the introduction of the new offence, based on the fault element of recklessness. I commend the introduction of a new failure-to-prevent corporate offence, similar to the relevant provisions contained in the UK Bribery Act, together with an adequate procedures defence.

I commend the introduction of a deferred prosecution agreement regime. I stress, however, that in order for DPAs to appear attractive to companies there needs to be an otherwise very real risk of successful prosecution involving greater penalties than would be available via a DPA. In an environment in which prosecutions are difficult and rare, DPAs will not succeed. I welcome the current review of whistleblower protection and possibly incentives. This is a critical area that currently poses a significant barrier to many instances of foreign bribery being reported to relevant authorities. And, finally—and perhaps the only area in which we appear to be at some odds with the government's current position—facilitation payments defence, for reasons I am happy to elaborate on. I would now be more than happy to answer any questions the panel may have.

Senator XENOPHON: Chair, could we get a copy of Mr Pulvirenti's opening statement if that is possible?

Mr Pulvirenti: Certainly.

Senator XENOPHON: I want to ask some questions. If we could get that now, it might be useful.

CHAIR: Yes. Are you happy to table that, Mr Pulvirenti?

Mr Pulvirenti: Certainly. I am sorry that I only have one copy though.

Senator XENOPHON: There is a photocopier somewhere here.

CHAIR: Thank you very much, Mr Pulvirenti. I might just start by drawing on your considerable international experience and ask the open question of whether Australia is a bit of a soft touch when it comes to things like dirty money coming into the country? We have heard some views that this is happening with money going into the property market, and our legislation seems to be behind the curve in terms of corruption although I picked up that you have identified a couple of positive steps in the last couple of years that you just mentioned. But perhaps I could get your initial impressions.

Mr Pulvirenti: Yes, certainly. I think the short answer to your questions is, yes, it is a bit of a soft touch. I think in relation to Senator Xenophon's questions to earlier witnesses, particularly in relation to foreign money coming into this jurisdiction, there is certainly at least anecdotal evidence of moneys flowing into this jurisdiction the origins of which are not known and which are having effects in this economy, the very least of which is increase in property prices and those sorts of things. The fact that parties such as real estate agents, for instance, who tend to be stakeholders in many of these transactions and who are receiving funds from overseas, are not required to report or at least perform due diligence on the source of the funds coming into their account is a considerable weakness and one that should be addressed.

CHAIR: Is this addressed in other jurisdictions?

Mr Pulvirenti: I am not exactly aware of any analogous situations. Certainly, I think the review of the positive reporting requirements around folk such as lawyers, accountants and real estate agents is a positive one and one that should be given full force, particularly for real estate agents, who may not be held to the same professional standards by way of self-reporting bodies like the Law Society and the Institute of Chartered Accountants, for instance. I think there really needs to be some sort of element of requirements upon those organisations.

CHAIR: I think it was Mr McKenzie's submission where he referred to some of the opinions of the UK regulators to the effect that Chinese money is coming into our property market and that we do have a problem. What evidence do you see of our regulators looking into that and seeking to address it?

Mr Pulvirenti: The only evidence I've seen from time to time has been particular high-end properties, harbourfront properties et cetera, that have been challenged by authorities and the parties given orders to sell and those sorts of things. I think they are sporadic. I haven't seen any evidence to suggest that this is a consistent approach being adopted by the government.

CHAIR: Are you supportive of a change to the culture of compliance within businesses, but you make a distinction between an integrity-driven approach and a compliance-driven approach. Can you elaborate on that.

Mr Pulvirenti: Yes, certainly. I think the introduction of a compliance culture is an essential one. We've seen the culture change in the UK really since the introduction of the Bribery Act there, as it is given as a defence to the strict liability corporate level offence of failing to prevent bribery. Where you have that sole defence being the demonstration of an adequate compliance program and certainly a culture within the organisation, I think that has had the effect of sharpening the minds in this regard. Certainly we work with clients and we talk about an integrity culture and we talk about a compliance culture.

An integrity culture is driven by a focus on excellence and a high level of internal ethical standards that are put forward by the leadership within an organisation. It encourages a shared commitment across the organisation to put these values in place, and it is really leadership driven across the organisation. The compliance culture is really the stick end and it is really a focus on conforming to rules. It's driven by the enforcement of externally imposed laws, for instance. So one is being pushed along and the other one is being dragged along. We see that more of our successful clients have an integrity culture, which really permeates through the organisation because you have those key people at leadership positions.

CHAIR: But if your firm is running the ruler over a set of internal programs, how do you determine whether a firm is adopting a check-the-box, compliance-based approach as opposed to one where there is genuine management commitment to improved anticorruption mechanisms?

Mr Pulvirenti: There are a number of ways that we would look at it. We see three predominant sources of evidence: people, documents and data. We talk to people throughout the organisation and we don't limit those discussions to the board of directors or to senior management; we try to get a cross-section across the organisation of all people at various levels, including those at the coalface. You then get a more realistic view as to the extent to which employees dealing with these issues on a day-to-day basis have knowledge of these requirements and whether they are trained, whether the messages are being communicated to them and whether they are aware of

policies and procedures et cetera. We then look to certain documents and whether there are policies in place and procedures and controls in place to prevent certain things from happening. And then we can test some of those controls by way of data analytics and various other tests across the organisation to measure the extent to which the message put forward, typically by senior management, that, 'Yes, everything's fine; we have policies and we're all good,' is really creeping through the organisation as a whole.

CHAIR: In your submission, you give an example of Morgan Stanley.

Mr Pulvirenti: Yes.

CHAIR: In the US case, there was a lot of weight placed by the regulator on the systems that were in place there within that company.

Mr Pulvirenti: Correct. Morgan Stanley was perhaps the poster child for declinations of prosecution. Up to that point, we'd heard a lot of stories around prosecutions, and this was really the first one to suggest that, for a company that can demonstrate a culture within the organisation that really takes appropriate steps within the risks that they face, if proper procedures and adequate procedures are being taken, then the authorities are less likely to prosecute.

CHAIR: Also, with facilitation payments, you're fairly unequivocal about the fact that those should be removed as a defence? Just drawing again on your international experience, you make the point in your submission that in most jurisdictions those types of payments are illegal anyway; therefore, whilst the US system doesn't rule out facilitation payments per se, US companies shouldn't be involved in illegal activities. Can you just elaborate on the complexities of that and why it's important for facilitation payments to be eradicated?

Mr Pulvirenti: Yes, certainly. There are a number of points in relation to why I say—and I am unequivocal in my position—that the defence of facilitation payments should be removed from the Criminal Code. We see facilitation payments as bribes, period. This is a position that's shared by the UK Serious Fraud Office, which states in its guidance that a facilitation payment is a type of bribe and should be treated as such. We see a lot of our larger clients which are already subject to various international high-water marks, including the UK jurisdiction, already preventing these sorts of payments from being made. In our experience, companies that do allow facilitation payments in Australia do not actually maintain the various detailed records that are required by section 70.4 of the Criminal Code, thereby rendering that defence of little consequential value. I'm not aware of any other countries outside of, as you've mentioned, Australia and the United States that allow facilitation payments.

The one point I would make in relation to the US position is: even if a facilitation payment is made and might be legal under the antibribery provisions of the FCPA, it is still likely to be illegal from a books-and-records-provisions perspective because typically these sorts of payments are still misrecorded. So, in a jurisdiction in which you have effective false-accounting provisions, which the US has had, it has got by in dealing with facilitation payments by way of the false-accounting provisions.

CHAIR: Why don't they bite the bullet on this issue?

Mr Pulvirenti: I don't know.

Senator XENOPHON: Chair, can I just ask a direct supplementary to your line of questioning. Are you saying that, even given that facilitation payments are still allowed, they may still fall foul of other provisions of current legislation in Australia? So there's a question mark in that the facilitation payment might be legal, but, in terms of the false-accounting provisions, it might fall foul of that?

Mr Pulvirenti: Correct.

Senator XENOPHON: That begs the question of what the chair has asked: why not just bite the bullet and get rid of them—

Mr Pulvirenti: Absolutely right.

Senator XENOPHON: as a defence?

Mr Pulvirenti: Correct. I will just make the last couple of points in relation to facilitation payments because, in our view, we hear a lot, particularly with small or medium miners, that, 'We can't operate in jurisdictions such as West Africa.' But really it's a fallacy in our view to suggest that businesses need to pay facilitation payments in order to get things done, because I think, as one of the witnesses this morning mentioned, once you make one small payment to a foreign government official, they then get a sense that your organisation is prepared to pay them, and it's a 'give them an inch and they'll take a mile' type of thing.

Finally, we just consider that the government sends a very mixed message, to say to the community that facilitation payments are okay—effectively saying, 'You can bribe someone as long as it's a small amount,' which really sends a very mixed message, and one that I don't think is a proper one.

CHAIR: I'm going to invite you to give the AFP a free character assessment, given that you've worked over the past three years with corporates and counsel in relation to ongoing AFP investigations. Just in a constructive way, what do you see as the shortcomings? How can we improve our rather lacklustre performance?

Mr Pulvirenti: My view is that quite often it's very easy to throw rocks at the AFP. They are quite often the first target for many people who want to criticise them. I've met a good number of the AFP officers involved with foreign bribery. There are some very impressive individuals in that organisation. I'm sure there has been a significant amount of improvement over the years, and we've heard this morning the allegations regarding Securency and NPA that were first taken to the AFP and then perhaps were not given the hearing that they might have received today. I think, honestly, if similar allegations were made today, the AFP would give them a very different viewing from what they might have done six or seven years ago.

The AFP officers that I've dealt with certainly do the best they can with what they have, in terms of resources and that sort of thing. I think the difficulty with the AFP is that this is but one of many areas on which it has to focus, and a lot of officers that get involved with foreign bribery investigations are still subject to this rotation in the organisation whereby they move from one area to another to another, as their careers progress, and, where you have investigations that are dragging on for six or seven-plus years, you're going to have a rollover of AFP officers involved and, where officers have to come in late in the day, it takes them some time to find their feet, where you've got a very large and complex investigation, so you might start to lose momentum there. It is a frustration, I'm sure, for all concerned, that officers are still rotating, because I think it's fair to say that perhaps some of the most experienced foreign bribery officers in the AFP are no longer working in the bribery space—they've moved on to other areas, and you have others coming through.

CHAIR: So is there an argument for a dedicated task force for financial crime and these types of offences?

Mr Pulvirenti: Ideally, I think you would need a dedicated organisation. Again, I heard the question this morning as to which regulator it should be, and which party et cetera. If we look at the US particularly, you have the Department of Justice and the FBI investigating criminal aspects of the investigation, and then you have the SEC pushing civil remedies against issuers—basically, companies that raise equity and file reports with the SEC. So it's not necessary, I think, to have one organisation looking at it, but there will be different aspects that give rise, as a result of foreign bribery issues. I do think you need a single dedicated criminal investigation body in this country, and then ASIC will, I'm sure, be able to follow up with civil remedies against directors and those sorts of things for breaches of duties.

CHAIR: What about current levels of collaboration between the regulators and the agencies? Do you have any views about that?

Mr Pulvirenti: I don't have any particular views. There are times when, I guess, with everyone, I ask the question, and I wonder. I welcomed, at the beginning, the introduction of the FAC, and I think that is a good step, but I think you probably need a dedicated body, where it is a career-advancing situation for officers and investigators. Again, the point's been made this morning that you do need a variety of skill sets in an investigation, from the capturing of evidence—electronic evidence in particular—from forensic specialists through to forensic accountants and seasoned investigators. It's not necessarily one size fits all. You're going to need a cross-section of expertise in that dedicated centre.

Senator XENOPHON: Thank you very much for your submission and your evidence today. Can you elaborate further on your opening statement on the introduction of a new offence based on the fault element of recklessness? How would that work? Does it apply in other jurisdictions? How do you think it would improve the prospect of prosecutions when it comes to these sorts of offences?

Mr Pulvirenti: I certainly am supportive of the new offence based on the fault element of recklessness. I'm not sure that it has the complete support of parties that have been involved with the roundtables et cetera.

Senator XENOPHON: Tell us how it would work. How would you see it working?

Mr Pulvirenti: I see it working in a similar way to a failure-to-prevent offence where an organisation allows a payment to be made and intent can't necessarily be proved but, in the circumstances, it was reckless for the amount to have been paid.

Senator XENOPHON: It's potentially a civil prosecution of CommBank. In that case you had the so-called intelligent deposit machines. They started off slowly. In the first months or so, a few million dollars went in—$70 million or $80 million—but, when it was in full flight three or four years later and the word had got around,

presumably a billion dollars a month was going to the intelligent deposit machines in breach of AUSTRAC requirements or anti-money laundering and anti-terrorism financing legislation. Could that sort of approach also apply in those cases, where you actually put the onus on an institution, a bank or an entity to have proactive safeguards in place to prevent that sort of offence occurring?

Mr Pulvirenti: Absolutely, without question.

Senator XENOPHON: And should it involve criminal liability?

Mr Pulvirenti: Yes, it should. We see this in the UK at the moment with the section 7 failure-to-prevent principle whereby, if something of that nature happens, there is a strict liability, corporate-level offence for which the only defence is the ability to demonstrate that adequate procedures to prevent those things from happening were put in place. In essence, it reverses the burden of proof. It puts it back onto the organisation to demonstrate that proper practices and procedures were put in place to try and prevent it. You're not going to always mitigate 100 per cent, but, certainly in the circumstances, on the risks that a certain business faces, proper procedures should be put in place and, if they're not, those criminal charges at the corporate level should stand.

Senator XENOPHON: Is this on the agenda for the Attorney-General's review? Are they looking at the reverse onus of proof?

Mr Pulvirenti: They are looking at introducing a failure-to-prevent offence, yes.

Senator XENOPHON: Effectively it reverses the onus of proof, so there's a question as to whether it should go further—in terms of the money laundering—to capture those offences, although there might be an interplay between whether foreign bribery and corrupt payments were involved in that money laundering.

You may want to take this on notice on whistleblower protections. Presumably you've got a pretty busy practice with what you're doing, but I invite you to look at the legislative amendments in the last year to the registered organisation legislation and the subsequent inquiry of the Joint Standing Committee on Corporations and Financial Services, which is looking at expanding that to the corporate and public sectors. I'd be very grateful if you could even have a cursory glance at that and make some comments in a supplementary submission. That would be very useful because it contains a number of measures from the guidance of Professor AJ Brown, who's a foremost expert on whistleblower protection in this country and, indeed, internationally.

Mr Pulvirenti: Yes.

Senator XENOPHON: I invite you to do that. In your submission, on the third page, you've also said:

> … Australia is not without legislative provisions that require corporations (and directors) to maintain proper books and records. We have not, however, seen any evidence that these provisions are being utilised by the Australian Securities and Investments Commission (ASIC) specifically in relation to corruption-related matters, nor that these provisions are being actively enforced more generally.

Well, a pretty depressing paragraph in your submission, because you're saying that even if there are provisions in place, they are not being enforced.

Mr Pulvirenti: Yes is the short answer. My understanding is that those provisions do exist. I have read other submissions—from memory, it was the Attorney-General's Department's submission or it might have been the Law Council of Australia's submission—that spoke further as to that point in terms of the number of cases that might have been looked at under those provisions. One point I would make in relation to the whistleblowing provisions, and certainly I am more than happy to take a look at that legislation and provide that supplementary submission, is that there is much talk around the US approach to whistleblowers through the Office of the Whistleblower, operated through the SEC. There is also talk about the incentives or bounties that are paid—

Senator XENOPHON: I invite you to look at that because it might be quite relevant to the work that you're doing. There's been a lot of discussion there——and the final report of that joint committee, chaired by Mr Irons MP, hasn't come out on that. I'm not sure if you were here when Nick McKenzie was giving evidence before.

Mr Pulvirenti: Yes.

Senator XENOPHON: I'm trying to sheet this home that it does have a corrosive effect on our society, these sorts of corrupt payments; the fact that it could be actually skewing property markets around the country. Nick McKenzie said potentially billions of dollars of corrupt money has come into this money into the property market. Do you have any knowledge of that, any views or any work that you've done in relation to that that would add further light on that?

Mr Pulvirenti: Not specific work in terms of analysis of the effects that money has had.

Senator XENOPHON: Should it have been analysed?

Mr Pulvirenti: I'm sure it should be. Certainly, anecdotally, I've seen suggestions put forward that the money coming in is having that impact on property prices, and I don't doubt that. Certainly, I wouldn't disagree with Nick's assessment that it would be in the billions of dollars. I couldn't imagine it being anything less. If I could add just the last point on that whistleblowing issue and the US's approach through the Office of the Whistleblower and the incentives that are offered. We've seen the BHP case involve a report made to the SEC in the US. In around, I think, from memory, September October of each year, the Office of the Whistleblower issues its annual report.

Senator XENOPHON: Is this in the US?

Mr Pulvirenti: In the US. It provides a breakdown of the statistics of the reports being made to it. I don't have it here in front of me today, but the report that came out in October or so last year made reference to the fact that there have been 52-odd reports made from Australia. So you have the better part of one issue a week being reported to the SEC in the US—

Senator XENOPHON: from Australia?

Mr Pulvirenti: From Australia. So, where you have an environment—

Senator XENOPHON: We're not getting 50 cases investigated by Australian authorities—well, we're not seeing 50 prosecutions a year here.

Mr Pulvirenti: Correct. That's one of the issues and why whistleblowers are so important: the barriers that currently stand in terms of how whistleblowers are treated. I know one of the Securency whistleblowers in particular and I know the issues that he's been through. It's been widely reported with other whistleblowers that once they do blow the whistle, they are often removed from their positions, they face lengthy litigation and they face the prospect of not working again in the industry et cetera. There is no incentive whatsoever for a whistleblower in this country to come forward, and it's a very sad thing because there are many issues that are happening that are just not being reported. When we start seeing issues reported to the US in the numbers that we're starting to see, that is concerning because we're effectively handing over responsibility for investigations to a foreign government.

Senator XENOPHON: There's a perception that Australia is seen as a soft touch, and I think the chair's alluded to that. If we have a reputation that the laws are weak and the enforcement is weak, that begs the question as to whether the laws are strong but the enforcement is weak. We don't have a dedicated, serious fraud office like the UK, for instance, and in other jurisdictions. We have a situation where good AFP officers get trained up to deal with these issues but then get rotated somewhere else. Are we a bit of a magnet in the Asia-Pacific for dirty money?

Mr Pulvirenti: I think we've seen that. I think we've seen—

Senator XENOPHON: So the answer is yes?

Mr Pulvirenti: Yes. I think there's little doubt about that.

Senator XENOPHON: And there's some irony to that. We're supposed to be a jurisdiction where we have strong, transparent institutions and where property rights are honoured. The paradox is that that's probably one of the reasons why dirty money, corrupt money, comes into this country. Thank you very much for your submission. It's been very helpful. If you could answer those whistleblower matters, that would be terrific.

Mr Pulvirenti: Certainly.

CHAIR: In terms of money coming into the property market, we've seen local banks scaling back their lending to foreign investors and we now see Chinese banks coming into Australia, apparently filling the void there. Do you have a view about the risks associated with that?

Mr Pulvirenti: I don't have a view in particular in relation to the foreign banks setting up here. One thing I would say is that those that typically seek to place money into this jurisdiction have enough of it whereby the borrowing aspect probably doesn't come into play. They're paying cash for these properties. So, whilst it's a good thing to see banks scaling back lending, I don't think that's having an enormous effect on the money coming into the country.

CHAIR: That seems to coincide with the Chinese banks coming in and making themselves available to fill that gap, which is circumventing some of the steps being taken to increase the stability of the property market.

Mr Pulvirenti: Possibly.

CHAIR: Thank you for your evidence today.

Proceedings suspended from 11:52 to 12:50

McGIRR, Mr Matthew, Policy Adviser, Australian Institute of Company Directors

PETSCHLER, Ms Louise, General Manager, Advocacy, Australian Institute of Company Directors

CHAIR: Welcome. Thank you for appearing before the committee today. I invite you to make a brief opening statement, should you wish to do so, and then we'll open it up for questions.

Mr McGirr: Thank you for inviting for the AICD to appear today. As the committee would expect, at the Australian Institute of Company Directors we are committed to excellence in governance. Our membership of more than 40,000 includes directors and governance leaders from business, government and the not-for-profit sector. We fully support the government's aim of combatting bribery of foreign public officials. Foreign bribery stifles economic development, fair competition and the rule of law. It also erodes confidence in competitive markets and stifles investment and entrepreneurialism in export markets.

We appreciate that it has been a difficult task for the Australian Federal Police and the Office of the Commonwealth Director of Public Prosecutions to investigate and prosecute foreign bribery offences, as prosecutions are complex and protracted. This is one factor in why there have been very few prosecutions in Australia since the current foreign bribery laws were introduced in 1999. The AICD welcomes the government's efforts to improve the legislation regarding Australia's foreign bribery offences, and we want to help ensure that any legislative changes are effective, clear, balanced and, to the extent possible, consistent with existing regulation.

With this objective in mind, the AICD has a number of points in our submission. The AICD acknowledges that changes to Australia's foreign bribery laws are needed. That is why the AICD agreed with the government that the legal test that is used to determine what is a foreign bribe—the 'not legitimately due' test—needs to change. However, we recommended against the government adopting the concept of improper influence as suggested in the Corporations Act. While this concept can be found in some relatively limited state and Commonwealth statutes, it has never been judicially considered, and nor does it arise in the Criminal Code in any other context, as far as we are aware. Given this, the court would need to rely on the ordinary meaning of the phrase. In practice, this means that there would be little certainty to the courts and business regarding the meaning of improper influence, at least until a significant body of case law emerges subsequent to its introduction. Given the complexity of these cases, that could be some time.

Instead, the AICD recommends the adoption of a test of dishonesty. The concept of dishonesty is well-known and understood in Australian criminal law and would provide the greatest level of certainty to those dealing with foreign officials and prosecutorial authorities alike. We also support the extension of the definition of a foreign public official to include candidates for office. However, the AICD has some concerns in relation to the proposed failure to prevent offence. The AICD acknowledges the role of companies and their directors in establishing proper systems of control and compliance to prevent bribery from occurring. However, the proposed offence reverses the onus of proof, imposes absolute liability, pierces the corporate veil and requires a legal burden to be satisfied by the company to escape liability.

Accordingly, we are concerned that this may go too far. In particular, we are concerned that the proposed legislation purports to pierce the corporate veil. It is the view of the AICD that the corporate veil should be lifted only where there is a compelling justification. In some corporate groups a parent company has very limited control over the day-to-day management of the subsidiary. You might even see the situation where policies that are adopted by the parent company may be deemed unsuitable by the directors of the subsidiary and rejected.

For this reason, the AICD would suggest that any failure to prevent offence be constructed so that it would impose liability on a parent company for the conduct of its subsidiary only where elements of control and fault are established. Second, the offence requires a company to satisfy the legal burden that it has adequate procedures in place to prevent the commission of a foreign bribery offence. This is combined with a reverse onus of proof and absolute liability. The AICD is concerned that the legal burden of proof will place an unnecessarily onerous burden of proof on corporations. Given that the purpose of the offence is to encourage corporations to adopt processes to prevent bribery rather than to simply punish corporations for the wrongdoing of their associations, the AICD recommends imposing the evidential burden rather than the legal burden in this circumstance. The AICD is also concerned that the failure to prevent offence when triggered by the proposed recklessness-based offence discussed in the consultation paper potentially amplifies the uncertainties associated with recklessness-based offence. If that doesn't make sense, I can explain it.

Finally, the AICD does not support the creation of a foreign bribery offence based on the fault element of recklessness. We are concerned that that proposal would broaden the scope of Australia's foreign bribery regime beyond that required by the relevant OECD convention. We welcome your questions.

CHAIR: I first want to go to the issue of failing to prevent foreign bribery and the new corporate offence. You've given only qualified support for that, and you've expressed concerns about subsidiaries and parent companies being liable. I'm just concerned that with that approach we set ourselves up for failure if parent companies are not liable, and you talked about the control test being applicable. Don't we allow a situation whereby parent companies can wipe their hands of what subsidiaries are doing and there's a wink and a nod going on? How do we avoid that scenario?

Mr McGirr: I think from our perspective the relevant liability should be attributed to the company that has the fault at play. So, if the subsidiary has committed the elements of an offence, it is that subsidiary that should be liable, not necessarily the parent. I suppose that's our perspective on that issue.

CHAIR: What if the subsidiary is not a substantial entity—that there are devices in place to protect the parent company from liability and it's an artificial arrangement? I understand that you have a reluctance to pierce the corporate veil, but companies can have sophisticated approaches, and we need to be aware of that.

Mr McGirr: Yes. I think the response from me would be that that could be dealt with if you had a control and fault element in the offence if it were to pierce the corporate veil. Otherwise you would run the risk of inappropriately allocating that liability. Now, in the sense that a corporation uses a subsidiary as some kind of sham, you would expect—we haven't considered this issue in great length—that in some circumstances elements of control would be there, for the very reason that the subsidiary was constructed essentially to avoid some sort of liability. But we haven't really looked at that specific issue in great depth—that is, the issue of where the subsidiary is constructed, if you like, simply to avoid liability.

CHAIR: How would you see that control arrangement or test working?

Mr McGirr: That's something we didn't necessarily look carefully at, the way that it would be constructed in the legislation. So we were making our submission on a principles basis, that the element of control should be there. As to how that control is constructed in the legislation, we'd need to further look at that issue carefully, because, as you can imagine, it can be a complex issue.

CHAIR: You talked about the evidentiary burden rather than the legal burden. Can you just explain the distinction you are making there?

Mr McGirr: Yes. As far as we understand it, the legal burden requires the company to satisfy the court that on the balance of probabilities it has taken the steps required under the legislation, whereas the evidentiary burden only requires the company to provide evidence to the court which suggests a reasonable possibility that the matters that were required to be done were done. Essentially, it would enable the company to more readily prove that it had systems in place in the event of a failure to prevent offence, to avoid liability.

Our submission is that within the context of the offence being an absolute liability offence and a reversal of onus-of-proof offence you would be in a situation where this particular crime, as it is constructed in the exposure draft, would be a particularly harsh law on corporations. They would be required to establish, on the balance of probabilities, that they had systems in place, which is the civil burden.

CHAIR: Okay. How do you respond to other stakeholders who have said that this is an issue that's so serious that it is necessary to pierce the corporate veil, as the US jurisdiction has done? How do you respond to that?

The AICD's position is that we believe there does need to be change made to the law in this space. That is why we support the change to the test. However, we don't believe it's necessary to go to the extent that is proposed in the exposure draft in relation to the construction of the failure-to-prevent offence.

But I think we are all on the same page in the sense that we believe this needs to change. I think that these technical details are things that people with reasonable minds might differ on, but the AICD believes that some of the changes suggested will achieve a better outcome for prosecutions in this area without the need for too onerous an offence placed on corporations. We are trying to achieve the balance, I think, in our position and in our thinking here.

Ms Petschler: And I think, if I could add, our view is that if the failure-to-prevent offence were included on a reverse-onus-of-proof basis as proposed, but with that evidentiary burden as opposed to the legal burden, then that would still be a very serious offence with a substantial burden of proof on the corporation. Combined with the other offence proposals that are suggested that would definitely be a significant improvement from where we are now, from a prosecution point of view.

CHAIR: I have put the same question to a number of witnesses, in terms of establishing a system for a culture of compliance. Do you have a view about the international standard in this area as providing a threshold for the standard?

Ms Petschler: As a mandatory threshold, or as a good guide?

CHAIR: In terms of it being mandatory, yes.

Ms Petschler: I think our view on that is that we would like to take that on notice, if we could, just to have a closer look. At the AICD we are certainly very clear in our education material and in our engagement with directors and members around the importance of a culture of compliance. International standards can be one of those useful frameworks. We do find there are many different frameworks that may be appropriate to different organisations, so my hesitation would just be in terms of a mandatory guide through one of those particular international instruments.

From memory, and I will confirm this, I believe that our module that looks at foreign bribery does reference the international standards as one potential guide for directors. We will confirm that on notice.

CHAIR: And do you have a view about which regulator should have responsibility for enforcing the compliance requirement?

Mr McGirr: No, we haven't taken a view on that.

CHAIR: Just moving onto your views about the question of the replacement of 'not legitimately due' with 'improperly influenced' 'within the foreign bribery offence: your view here is at odds with some of the other stakeholders. As I understand it, the approach that others are supporting is more consistent with what is occurring in other jurisdictions internationally. Would there be a danger if we went down a different track that this would cause some issues? One of the objectives is to have a bit of harmonisation going on in this area.

Mr McGirr: From our perspective it was more important that directors and companies knew exactly what the law was, if there were the changes made. The issue is that on a superficial level harmonisation is attractive, but in fact in Australian law the introduction of an improper influence test might take quite a long time to establish what that actually means in practice. One of the problems with this jurisdiction and this particular crime is that there hasn't been any case law to assist in interpreting the offences. We came to the view that the dishonesty test in the offence, as opposed to essentially introducing a new concept, would be good, because it would remove some of the uncertainty. It would introduce a concept that is well-known in Australian law while still achieving what we need to achieve under the OECD convention. That was our perspective. We did see that the improvement suggested in the draft legislation had some merit in the sense that it was consistent with the UK, I believe. But on balance, we thought that most quick and efficient way to achieve a good law in this area was to simply use dishonesty, which is so well known and so well tested by the courts.

CHAIR: Can you tell us why you prefer the Peters dishonesty test rather than the Ghosh test?

Mr McGirr: The Peters test is preferable in our view because it is simply an objective test. The Ghosh test is quite convoluted, in our view. It requires a court to be satisfied that the conduct was dishonest by the standards of ordinary persons and also that the person knew that the conduct was dishonest by the standards of ordinary persons. So there's that two-part test. Even saying it makes me confused. The Peters test, which simply requires the court to be satisfied that the conduct was dishonest by the standards of an ordinary person—in Australia, we might add—is a satisfactory and clear test. I understand it's also consistent with the test of dishonesty in section 184 of the Corporations Act. I would finally add that there has been some judicial commentary in relation to the Ghosh test which points out its problems and its confusing nature for juries. So in short, when you're trying to instruct the jury as to the dual-part test, it's quite a difficult task. That's our position. We think that that would be the clearest way forward.

CHAIR: What's your view about the treatment of facilitation payments?

Mr McGirr: We don't have a view on that at present. We acknowledge that there is a trend against facilitation payments globally, but we haven't taken a view on that specifically.

Senator XENOPHON: Thanks for your submission. We've heard evidence today, and you may have seen some of the submissions—I guess in some respects your opening statement goes against the grain of some of that evidence, in terms of not going down the path of having an improper influence test. Section 184 of the Corporations Act is about good faith, use of position, use of information criminal offences. What are you saying? Are you saying that there ought to be—I've just brought it up now. It relates to recklessness, intentionally dishonest and failure to exercise their duties in good faith and for a proper purpose. That is narrower, isn't it, than the improper influence test that's been suggested?

Mr McGirr: I think it would depend on the way that you framed the improper influence test. Arguably, it's narrower. We haven't taken a specific view on that. We would have to look at that question a little more closely.

Our view is really more focusing on the clarity rather than the narrowness and openness of the test. The idea is that you want to capture the offending conduct as well as possible.

Senator XENOPHON: We've heard witness after witness today, including Nick McKenzie, who broke these stories on Securency, following whistleblowers going to the Federal Police, who for whatever reason did not seem to have sufficient interest in it. It had taken two or three journalists working very hard to break open something that other agencies, ASIC, the AFP and others, didn't. I think Mr McKenzie said that the AFP has had a real improvement there, which is obviously very pleasing. But Australia is fast getting a reputation for being a magnet for corrupt money, for money associated with bribery and corruption, being a magnet for the Asia-Pacific because our laws are so lax compared with other countries. Doesn't that mean that not having an improper influence test really makes it easier or allows that to continue, that magnet for dirty money coming into this country.

Mr McGirr: Our response to that would be that to the extent that the existing test—the not legitimately due test—is not helpful and needs to be changed, and to the extent that the fact that it isn't helpful and the fact that there haven't been sufficient prosecutions in this area is indicative that there does need to be a change—but we don't necessarily agree that that follows, that you require an improper influence test as opposed to a dishonesty test.

Senator XENOPHON: Isn't one of the issues here that a dishonesty test requires some level of intent, doesn't it?

Mr McGirr: Yes.

Senator XENOPHON: Isn't the point of overhauling these laws to ensure that parent companies are taking responsibility for the control and fault of their subsidiaries, because the evidentiary standard is too high? The AFP and the Commonwealth Director of Public Prosecutions both agree that it's too difficult to prosecute.

Mr McGirr: In the revised improper influence test you would still need to establish intention on the intention-based test, as I understand. But if the recklessness test were to be brought in, that would lower the mental element of that offence. Yes.

Senator XENOPHON: So you oppose a recklessness test?

Mr McGirr: Yes, we do.

Senator XENOPHON: You are talking under parliamentary privilege. We have a situation where the Commonwealth Bank is in strife over 53,000 cases of breaching our laws in terms of money laundering and counter-terrorism offences, in terms of the financing of terrorism. We know that when those so-called intelligent deposit machines started off, they got $89.1 million over the first six months from January to June 2012, but from June to November 2016, when the word had got out, $5.81 billion had gone through those machines. We've seen reports in the Financial Review today that they can trace at least $44 million for drug syndicates using that. Why shouldn't the directors and senior executives of an institution be criminally liable with a reverse onus of truth provision similar to what that they have in the UK? Are you opposed to that as well? It's all part and parcel of the reforms that we're alluding to.

Ms Petschler: I think in that instance it's the anti-money-laundering legislation framework that's alleged to have been breached.

Senator XENOPHON: But the principles are the same. Other witnesses today were asked, in terms of foreign bribery and corruption, if there aren't controls in place and proper risk systems in place—we heard from witnesses, Mr Pulvirenti from Control Risks earlier today, to say that we have very weak risk controls here. Surely there must be a point when directors have to be responsible, both civilly and criminally, for not having systems in place. The reverse onus of proof would apply in this sort of situation as it does in the UK in terms of their antibribery and foreign bribery and corruption laws. Are you familiar with the UK laws on reverse onus of proof?

Mr McGirr: In the failure to prevent offence?

Senator XENOPHON: Yes, but what's the view of the AICD? Do you support or oppose that?

Mr McGirr: We've taken the view that we have concerns about the way this specific offence has been constructed in the draft. We would like to see a more balanced approach. If you were to construct an offence and you were attempting to construct an offence that was the most harsh you could possibly construct in the criminal law, this would be the one you would construct because it requires you to satisfy—I suppose the one thing you could do that is further is to impose the beyond-the-reasonable-doubt element on the defence. I think our view is we would like to see this offence reflect a balanced view so that companies can establish that they have done the right thing—

Senator XENOPHON: So you oppose the reverse onus of proof system in the UK?

Mr McGirr: No, we haven't taken a view on the UK's approach.

Senator XENOPHON: That is emerging as a key issue in this inquiry. Can you at least take that on notice for AICD to consider that, because that is a very important issue that would impact on directors? The UK approach seems to have had a very dramatic change in the way that corporations and corporate governance and risk management takes place in terms of these sorts of offences.

Ms Petschler: We would be happy to look at that. I would make a couple of additional points. This is a corporate offence. As our submission to the Attorney-General's Department said, we are naturally hesitant around reverse onus of proof because of rule of law. Our suggestion is if that—

Senator XENOPHON: You are opposed to it?

Ms Petschler: We are naturally hesitant around reversing the onus of proof. Our suggestion in our submission to the Attorney-General's Department recommended that, if that is the path that the government chooses to go down, instead of the legal burden being attached to the defendant it be an evidentiary burden. We believe that would, in fact, incentivise corporates more effectively to be able to demonstrate fulsomely the compliance systems and arrangements that they have in place. As I mentioned earlier, it would still be a very serious offence that internal compliance frameworks would need to be constructed around.

Senator XENOPHON: The fact is the US deals with these sorts of foreign bribery cases. The evidence we heard earlier today is that they are getting, on average, one complaint a week emanating from Australia in relation to these sorts of offences, but it seems that our authorities, or our laws and our enforcement regime, are quite poor in comparison to the US and the UK. Does that concern you—in terms of corporate governance and the role that directors can have to say we need to tighten this up so we don't have this corrosive effect of dirty money and bribes being involved in the way that corporations do their business?

Ms Petschler: I think absolutely that the AICD—and I do believe all stakeholders are united in the view that our laws need to be tightened and improved. Our suggestions are around the construction of some of the proposed offences. Certainly, from the point of view of the directors' mindset and the approach that the AICD takes in terms of our education function, it's very much focused on ensuring that the seriousness of foreign bribery and the importance of culture settings are in place, and are very much front of mind for directors.

Senator XENOPHON: If you could take on notice what your specific views are on the reverse onus of proof. You may want to look at the *Hansard* of today when it comes out in the next few days. Also, could you take on notice whether you have spoken to your UK counterparts about how they deal with it. Clearly, they have had to change their behaviour so that there is a degree of responsibility on the part of directors, or a greater degree of responsibility than we seem to have here.

CHAIR: I have a follow-up question on the issue of facilitation payments. I note that you haven't adopted a view about that. Looking at your submission which went to the Attorney-General's Department, you make the observation that many corporations are involved in legitimate relationship building activities, including hospitality. You make that comment in the context of the new offence based on recklessness. It would seem that facilitation payments are pretty central to the issue that we're trying to come to grips with. It might occur at the less egregious end of the spectrum, but, nevertheless, it's part of the culture. Is that something you can take on notice as well in terms of having a position on the facilitation payment matter?

Mr McGirr: Absolutely. We're happy to look at that. I should add that we confined our remarks on hospitality in relation to that recklessness point. We weren't making a comment about facilitation payments or, indeed,—

CHAIR: Yes, I understand, but I am just interested in the fact that you noted that. I do appreciate that this is part and parcel of the corporate world. I'm just wondering whether your members are having to deal with that. In terms of ethical standards, this must be something that you as an organisation have to deal with, so I'd be very interested in your position on that. Thank you.

Senator XENOPHON: Thank you very much for your evidence.

WYLD, Mr Robert R, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee

[13:21]

CHAIR: Welcome.

Senator XENOPHON: Mr Wyld, was your law firm founded in Adelaide?

Mr Wyld: Indeed, but it's slightly larger than Adelaide now.

CHAIR: Thank you for appearing before the committee today. I invite you to make a brief opening statement, should you wish to do so, and then we'll open it up for questions.

Mr Wyld: I don't need to say anything more than what's in the supplementary submission that has been provided to the committee. The supplementary submission went through our committee's original submission that was some two years ago, and we've looked at the various recommendations that our committee made. We have updated this committee on the developments that have happened over the last two or so years and raised, towards the end of our supplementary submission, what we think some of the outstanding issues that still remain are. Beyond that, I'm happy to take questions, if you have them, on our original submission and the supplementary submission.

CHAIR: So you're tabling this supplementary submission today?

Mr Wyld: Correct. I believe it was forwarded to your secretariat on Friday. It took a little while to produce last week. I'm happy to take anything on notice if there are questions that you might want to consider further.

CHAIR: Firstly, can you take us through your opinion on the changes to section 70.2—changing 'intention to influence a foreign public official to recklessly engage in such conduct'? There are some divided views on that.

Mr Wyld: Our submission to the Attorney-General's Department broadly accepted and agreed with the proposed changes. There are some issues that we raise, particularly about the use of the terms 'improperly influence' and 'dishonesty'. While we can see some merit in both terms, for some present certainty we tended to favour the use of the concept of dishonesty, as that is known under Australian criminal law. Having said that, there is, again, the question of whether we want to maintain that known term and await a High Court determination of what 'improperly influence' means, which ultimately will have to happen at some point in time. But, in broad terms, the committee supports the proposed amendments to section 70.2.

CHAIR: We've just heard from the AICD on this particular matter. Did you hear the concerns that they expressed in relation to this?

Mr Wyld: I did. It seemed to me there were a number of concerns that related to the proposed corporate offence, that related to the underlying predicate offences of both intentional and reckless bribery, which then trigger the company being liable on a strict basis for the conduct of other people, particularly subsidiaries, agents, consultants and people who act for in the company's name; whether the corporate veil should be pierced and how and to what extent people, if I can call it loosely, in the supply chain from a parent down to somebody in the field doing something should be held responsible.

Our committee's view is that for too long corporate structures have been used to effectively hide and facilitate conduct which is improper. That's not to say that in a vast majority of sound commercial transactions there cannot be, and in fact should be and is, a proper relationship of parent, subsidiaries, regional entities, joint ventures, other companies and agents and incorporated associations, which act perfectly legally and do so quite properly. But, unfortunately, the complexity of the type of foreign bribery that we continue to see internationally is facilitated and generated by opaque financial and corporate structures. Unfortunately, the reality is unless you start having a philosophy that you pierce and are able to pierce that veil in a manner that targets that sort of behaviour, we think it will not change.

I think there is some broad principle basis upon which the government needs to make a decision as to whether this is an important enough topic to depart from the usual rule that, as the AICD said quite correctly, the party who did the conduct should be held responsible. In broad terms we agree with that. But I think in this area there is a sound policy reason which our committee believe justifies a departure from that rule and therefore holding accountable those in the chain who are engaged with, have knowledge of or participate in that type of conduct.

My personal experience, having worked in this area for over 25 years across the world, is that unless you change that sort of structure, unless you change the ability of regulators to pierce the veil and to hold those accountable who will create structures, sometimes set up quite legitimately and then for whatever purpose or whatever reason misuse or abuse, then this will simply not be addressed by the corporate world.

CHAIR: Or particularly in the situation where you have common directors on a subsidiary; the board was a subsidiary company.

Mr Wyld: Correct. One of the common issues is that companies will inevitably try and divorce their structures in a way that they look and feel and sound completely independent. Sometimes that succeeds; other times it doesn't.

Senator XENOPHON: It's an artifice; isn't it, sometimes?

Mr Wyld: Sometimes it is exactly an artifice, and that is the very reason why these structures are often created. I think you do need a sound, principal reason in these circumstances to justify that, and I think it exists.

CHAIR: In respect of the new corporate offence failing to prevent foreign bribery, I understand you are supportive of that but note that the definition of 'associate' is important. You suggest we follow the definition of 'associated person' from the UK legislation.

Mr Wyld: Yes, that's correct. I think from recollection, the way it was drafted in the draft bill potentially does not capture some entities or people who might effectively engage in conduct on behalf of or for the relevant company. Our concern was the way, after long deliberation, the section 7 offence was created in the United Kingdom, that if we are looking for a sense of uniformity in terms of how we are to capture companies and how we are to capture the conduct within groups, then consistency in that respect is quite important. Again, from my experience in dealing with this issue in the United Kingdom, United Kingdom companies or companies internationally that are subjected to UK law will continue to apply that view. They will apply the UK law and they will treat their own internal procedures as having to comply with the UK law. If there is any difference which suggests they can get off more lightly, I think that won't work in the United Kingdom.

CHAIR: What's your view on the appropriate standards or guidances to apply to the threshold for setting up a culture of compliance? Do you have a view about the international standard ISO 37001?

Mr Wyld: I do. It is a quite detailed and technical standard. The ISO standards themselves are very thorough and very detailed, and they're quite expensive and time-consuming for companies to undertake the process and comply with them. They are, as the AICD said quite correctly, a number of standards and guidances that are published by various organisations, both governmental and NGO, which set out in broad terms very similar types of proactive steps companies should and could take and can take to address their risk profile, wherever that is. The draft bill suggests that the minister must issue a guidance on what are, in effect, to be regarded as adequate procedures. When you look at the United Kingdom draft guidance, it is, on its terms and principles, quite broad and states concepts that would be well known to almost any compliance and ethics officer and probably any well experienced director, in terms of how an internal company culture of ethics and compliance should be addressed. I'm not sure you can go into too much detail, because the more detail you have the more prescriptive it becomes and then it becomes a tick-the-box mentality—'I've done this and done this and therefore I have adequate procedures.'

Senator XENOPHON: It becomes self-limiting, doesn't it?

Mr Wyld: Correct, Senator. I think it's far better to have broader concepts and to address the fundamental issues of behaviour and characteristics. One of the things that Richard Alderman, the former director of the Serious Fraud Office in the United Kingdom, said when he was in office was that he regarded the most fundamental change as being what he described as a self-reinforcing cycle of behavioural change. To engage in that behavioural change is not only the hardest thing to do but I think you need some pretty robust laws to encourage it.

CHAIR: Such as the reversal of the onus of proof. That would provide some incentive.

Mr Wyld: Correct. Nothing in my experience, having advised companies, and individual directors and officers when the companies are separately represented, focuses the mind on legal liability issues. Evidentiary issues can be important, but there's nothing that focuses the mind other than, 'Am I legally liable or am I not?' and 'How do I answer this?' That's what can change behaviour.

CHAIR: What role do you think ASIC has, if any, in changing this culture?

Mr Wyld: In our experience, ASIC has tended in this area to leave it to the AFP to deal with. Traditionally, it's a criminal offence. It involves a criminal investigation. Since the national Fraud and Anti-Corruption Centre was established in Canberra, there is a much better level of coordination, cooperation and secondment between officers of the Commonwealth entities that are part of that centre, including Tax, Customs, Immigration, AUSTRAC, the AFP, ASIC and APRA. To that extent, it can continue to play an important role and, ultimately, if criminal liability cannot for whatever reason be established, then ASIC clearly has a role in looking at the

obligations of directors and officers, as they demonstrated perhaps slowly but in a complicated way in the AWB cases, which late last year led to Mr Flugge being found in breach of his statically obligations and subject to a penalty. There is one case continuing against Mr Geary, which is subject to an appeal. I think they do play a role, but in our experience it's not the primary role.

CHAIR: In terms of the foreign bribery offence proof standard, we heard from the AICD, and their view is that the dishonesty approach should be preferred and they preferred the Peters test over the Ghosh test. Have you got a view about that?

Mr Wyld: In our submission to the Attorney-General, we tended to favour present certainty because it has been set by the High Court and it is the required test under—

Senator XENOPHON: Which test is that?

Mr Wyld: The Peters test. It has been set out by the High Court. It has been set to apply under the Criminal Code to certain identified offences. Ultimately, the way the draft bill is presently drafted there will, inevitably, be many years before there is going to be resolution as to what that, in fact, means, even though to implement it as a matter of general principle might look and sound to be consistent with other jurisdictions, particularly the United States. But think, in a sense, we're a bit fluid on this. We can see benefit, on the one hand, with some sense of certainty that criminal lawyers know and understand presently. But, on the other hand, there can be benefit in, ultimately, making a decision as a matter of principle by government to change it to be consistent and accepting that there, frankly, will be a degree of uncertainty that will not be helpful to companies and will not be helpful, particularly, to individuals who have to look at questions of personal and corporate reliability. But that's the nature of reform.

CHAIR: What about the facilitation payment issue? Do you have a view about changes that are required there?

Mr Wyld: They should be banned. The committee has said they should be banned, and we see no reason why they should be supported.

Senator XENOPHON: No exceptions?

Mr Wyld: No exceptions.

CHAIR: Does it surprise you that quite a large number of companies in Australia still accept them?

Mr Wyld: It does. I have had experience in having to look at whether something that a company quite readily tries to call a facilitation payment is, in fact, a facilitation payment. In the vast majority of cases I have looked at, they are not facilitation payments. Therefore, the defence is simply meaning. It does not apply. There are many cases I have seen where they are, effectively, payments requested by threat against a person—often implied, rarely expressed. They, again, are not facilitation payments. Most likely, if any question was raised, there would be some defence about whether this payment was an extortion or a threat against someone's liberty. They should not be held liable for paying it. Incidentally, the records that companies are required to keep to justify a facilitation payment have rarely been seen, in my experience. I have heard from some of the large accounting firms that they have, in fact, seen payment registers and records which, in broad terms, satisfy the criminal code—I think it is 70.5 or 70.6 of the criminal code—which sets out what the record must say and do. And it must be signed by a person, but rarely is it. Therefore, it would not even satisfy that test.

CHAIR: I think what you just said, in your experience, is: with what are claimed to be facilitation payments, when one examines the books and records closely—

Mr Wyld: When you examine the books and records for a company and you actually go in and ask questions about what it was, why it was requested, how it was paid, who requested it, what the processes were and how regular the payment was—is it a one-off or is it a frequent payment?—you find that they don't fall within any definition of a facilitation payment, even under the statute in terms of the relevant types of payment that it ostensibly permits or, indeed, under the American view, which is almost to treat it even more narrowly.

CHAIR: One of the recommendations in your supplementary submission is to introduce a substantial internal controls offence as a stand-alone offence.

Mr Wyld: That's an offence that has been in the civil part of the Foreign Corrupt Practices Act in the United States for a long time. It is where the United States SEC, the Securities and Exchange Commission, can move against a company when the Department of Justice is satisfied there is no criminal offence. Invariably, the way that law is drafted is one of strict liability. So if, in fact, the records are inadequate and do not from recollection show a fair and true disposition of the company's assets—their own adequate controls—therefore there is a liability.

In some senses, it may well be that the new corporate offence of failing to prevent foreign bribery goes part of the way to, in fact, address that issue in terms of the organisation and the records of the controls the company has. If, by definition, it has no control, supervision or oversight of the expenditure of its assets and its money, it's hard to say that it has any adequate procedures in place full stop. But the way the present proposed corporate bribery offence is drafted is directed solely at foreign bribery and not at anything more broadly. The US one can capture more broad conduct.

CHAIR: Do you have a view about the false accounting provisions that were introduced into the Criminal Code in March of last year?

Mr Wyld: Yes, the committee made submissions on those, and it supported their introduction. In the committee's view, there was a gap in the Commonwealth laws in this area. They'd been extensively covered by state laws for a number of years, with some authorities and a number of cases in different states dealing with false accounting. In our experience, it is an area where payments are made that are effectively a bribe. If not the destruction, you certainly have, potentially, the alteration and, almost definitely, the concealment of documents or material—the passing of a benefit from one party to another or the causing of a loss by the company paying the money—to effectively secure the benefit you're seeking. That offence, in our view, was needed to supplement the existing offences more broadly in financial crime and not just limited to foreign bribery.

CHAIR: Do you have a view about the sanctions associated with offence of those new provisions?

Mr Wyld: We think the sanctions are appropriate at the moment. They reflect the primary foreign bribery offences. They're similar to the cartel offence provisions. They were recently considered by the Federal Court in the Nippon case on the import and export of motor vehicles coming into Australia. I noticed Justice Wigney, in that case, and the parties themselves looked at those offence provisions—the layered process of a maximum fine three times the benefit value or 10 per cent, or five per cent in our case, of turnover.

Senator XENOPHON: Did you say it was 10 per cent or five per cent?

Mr Wyld: It's 10 per cent in the cartel case, but under the proposed new laws there's going to be 10 per cent and five per cent, because you've got the intentional offence and the reckless offence, and therefore the penalties come down. It's the same with the false accounting—you have intentional or reckless conduct, and the offences are half for recklessness. I think it is a benefit to have that, but it's not clear how they'll be applied to companies, because there have been no cases. Justice Wigney's case, which was published last week in the Federal Court, is the first time in the cartel context that similar penalties have been looked at.

CHAIR: What are your views of the regulators that we've had? I know they've had issues with the legislation, so one can understand some of the issues. What's your view on the culture of the regulators? Are they too risk-averse?

Mr Wyld: Our submission in August 2015 said they were. Mr Bromwich—now Justice Bromwich of the Federal Court—who was the Commonwealth Director of Public Prosecutions at the time, took issue with our point on that submission and wrote a fairly robust letter back to the committee secretariat rejecting that submission. I accept his view about that, but I think, in reality, it is a difficult area. Having practised in this area, here and more so internationally, over many years, I recognise that. I think the real issue about regulators, their culture and how they behave is that there is no one agency responsible for it in this country. That is a topic that seems to be neglected. You've got skills within the AFP, ASIC, the tax office and AUSTRAC, but you don't have a stable, standard, dedicated agency or body of people who look at this and this alone. You do in a number of other countries, particularly the United Kingdom and New Zealand. They have their serious fraud officers, who are trained as lawyers, prosecutors and investigators, and they're dedicated to that task, rather than coming in and out of cases. What I have seen over many years is change in personnel because of the demands. Demands are natural in an organisation like the AFP and ASIC and the ATO. People come and go, priorities come and go, and the focus comes and goes, depending upon what is happening in the real world and what the politics of the day demand. But what that means is that you do not have a body of knowledge and skill that remains.

One of the things that Nick McKenzie, the Fairfax journalist who I believe appeared this morning, said in his paper that he wrote two years as a result of his Churchill Fellowship, which I think was part of his submission to this committee, was that in interviewing agents from the American and the English authorities, they were astounded that the agents and people they dealt with in Australia on foreign bribery had many other responsibilities and accountabilities. They were astounded that they would be one day dealing with immigration crime and bikie gangs and Customs and border issues, and yet, at the same time, they had to deal with complex issues of foreign bribery.

Senator XENOPHON: And when they get that expertise, they are then rotated into counterterrorism or something involving crimes against children or some other serious issue.

Mr Wyld: It disappears, correct.

Senator XENOPHON: They get to a stage of expertise and then they get moved on.

Mr Wyld: Correct. That is a real structural weakness that ultimately, we think, will continue until it is addressed. The reflection of that is that the business world, the legal world, people like me who represent companies, represent individuals, will look at things with a fairly jaundiced eye and say, 'Well, really, what is going to happen? What is the risk of a prosecution? What is the likelihood of this happening? How complex is it? How difficult is it? Who's doing it? How long will it take?' And those issues all play out in terms of a scenario. Do you cooperate? Do you not cooperate? Do you stay silent? Do you wait and hear? What is the real risk of something coming out? In many cases, the risk may be quite small and, therefore, business, unfortunately, will say, 'We have now factored in the risk criteria of this behaviour as low.' And while that remains, the appetite to spend money to deal with it will not be high.

CHAIR: I take it you remain supportive of a single agency to deal with complex—

Mr Wyld: Yes; the committee does.

CHAIR: I was looking at your supplementary submission. You take note of the recent Ernst & Young Asia-Pacific fraud survey, which says that 35 per cent of respondents said it was common practice to use bribery to win contracts, and that's up from 14 per cent in 2013.

Senator XENOPHON: It's not a very good trend, is it, Chair?

CHAIR: Not a good trend, and—

Mr Wyld: It could, partly in defence of the figures, be that people are more conscious of it, people are more aware of it. Social media and the traditional media have a much greater willingness, interest to cover it, and perhaps there's a greater audience for people who read it and, therefore, it is covered. But it is an alarming trend. That's just in Australia, from my recollection of those figures.

Senator XENOPHON: They are more willing to admit it, at the very least.

Mr Wyld: Perhaps, Senator.

Senator XENOPHON: Thank you for such an erudite submission and for your evidence today. Further to the chair's line of questioning, on page 6 of the committee's submission, it said:

> At present, it is the Committee's experience in Australia that many corporations see the cost of compliance as too high (therefore they lobby for less regulation or compliance rules), the risks of prosecution as minimal to low and the return of profit (on securing that one contract deal) as too large to ignore.

That's the nub of the issue, isn't it?

Mr Wyld: Yes.

Senator XENOPHON: We heard evidence from Nick McKenzie earlier today. He's done investigative reports on one particular property deal where there was bribery involved that used Malaysian money from the corrupt Najib regime in Malaysia. I say that because I'm still banned from there; I don't expect to be let back in any time soon. He thinks that billions of dollars are flying into this country to buy property, so money is laundered through property deals, which, in turn, is having an impact on property prices in Australia. Is that the sort of end game; is that one of the consequences of corruption—that is, that it can actually have a palpable effect on property prices, for instance?

Mr Wyld: I think the palpable effect of corruption, assuming it happens less one-off and more in a systemic and long-term way, is that it certainly distorts economies and distorts marketplaces. There's no doubt that from some countries there have been public reports of large flows of money going around the world, and there are certainly favoured jurisdictions. Traditionally they were parts of the United States, ironically enough, and parts of some well-known European cities. London and Paris were particular favourites. But in fact we were. If you believe and look at some of the work Professor Jason Sharman has done at Griffith University in terms of the flow of money and look at some of the experiences that came from the Sweep task force in Papua New Guinea some years ago, in which a gentleman called Sam Koim was the chair before he was removed by the current and recently re-elected Prime Minister, there is an alarming amount—

Senator XENOPHON: There's some conjecture about the election process though.

Mr Wyld: I'm not commenting on the election process; I'm just saying that he was recently re-elected as a matter of fact. But there certainly has been conjecture of a large amount of money coming into Australia. Again,

in my view, that's partly a reflection of a perception overseas about what will happen if money corruptly obtained comes into Australia. Will people go after you? Will people look at it? Will people seize it? Will people use the Australian Federal Police and the proceeds-of-crime facilities that they have to find offences, recognise offences, work with national governments and seize money? That, as I understand it, has occurred, but I suspect it's only the tip of the iceberg.

But, to come back to your original point, there's no doubt that the flow of corrupt money around the world is vast, and whatever comes into Australia certainly has an impact in the marketplace. Quite what that impact is I don't know. Some may say it distorts the property market, because too many people with too much money that they're not entitled to come and buy property in another country—Australia. They do so in the name of husbands, wives, children and relatives. They use it for a legitimate purpose: siblings are studying, members of the family are living here, some may be residents and some may be citizens. All of that may of itself be legitimate, but the real question is what the source of the money is, and in many countries it's very hard to find that out—or at least definitively find it out—unless that country is working with Australia. I know that has happened extensively between Australia and China and involves the AFP, but what the consequences are in terms of volume and transactions I don't know. They might be better placed to comment on that.

Senator XENOPHON: The issues of facilitation payments and our false-accounting provisions have been raised. I think Mr Pulvirenti from Control Risks referred to this in his evidence before lunch. It seems to be a case where you made a facilitation payment, which is not illegal under current Australian law but could be a breach of the false-accounting provisions that were passed last year. Is that something that you could reflect on?

Mr Wyld: It could because the false-accounting offences apply to any transaction. They're not limited to foreign bribery, so the mere fact is that you have a financial transaction that is not an offence under section 70.2 now or as it may be amended but the false-accounting offences have a much broader impact. I think that, as both ASIC and the AFP said when the laws were enacted, they are general laws, they apply across the board and we will treat them as one of our arsenal of offences we can look at if there is any financial misconduct full stop.

Senator XENOPHON: I go back to an issue traversed with the AICD, which is that in the UK they have an essentially reversed onus of proof so that directors and senior executives can be culpable in these offences. There's a positive duty to avoid—

Mr Wyld: There's a positive duty on the company.

Senator XENOPHON: There's a positive duty on the company to avoid that. Do you think that would be a useful approach here in Australia? We don't have that at the moment.

Mr Wyld: Yes, we support the proposed offence which has the effect of reversing the onus of proof. We think it's important enough in this area for it to be justified.

Senator XENOPHON: And we need a dedicated agency, don't we?

Mr Wyld: Yes.

Senator XENOPHON: The fact that we have so many different agencies and a revolving door of who's responsible for what makes us a bit of a magnet for money laundering and these sorts of corrupt payments coming into this country.

Mr Wyld: It will certainly help contribute to an impression that we don't treat it seriously and we perhaps treat other things more seriously, and therefore people will continue to look at Australia in a way that they traditionally have done.

Senator XENOPHON: Which is a magnet for dirty money coming to the country?

Mr Wyld: It may well be.

Senator XENOPHON: You were very diplomatic in the way you answered that!

Mr Wyld: I am trying, Senator. Perhaps I don't have the luxuries of being a senator!

Senator XENOPHON: I wouldn't call it a luxury right now. Thank you; your evidence has been very helpful.

CHAIR: One of your recommendations is for a national anticorruption plan. What would be the benefits of such a plan?

Mr Wyld: I think, from recollection, that was raised in our first submission back in 2015, when there had been an earlier government administration—possibly, I think, the opposition party at present—that proposed such a plan. It sort of lapsed. I think now, to be fair, the current government has had and put on place—I've forgotten the name of it; it's in our submission—a whole-of-government approach to looking at a number of issues of transparency, corruption and fraud. That, I think, has, in a sense, overtaken our original submission in 2015.

CHAIR: Thank you very much, Mr Wyld.

Mr Wyld: Thank you.

GAME, Mr Tim, SC, Co-Chair, National Criminal Law Committee, Law Council of Australia

GOLDING, Mr Greg, Chair, Foreign Corrupt Practices Committee, Business Law Section, Law Council of Australia

MOLT, Dr Natasha, Senior Legal Adviser, Legal Policy Division, Law Council of Australia

[13:56]

CHAIR: I now welcome representatives from the Law Council of Australia. I invite you to make a brief opening statement, and then we will open it up for questions.

Mr Game: We thank you for the opportunity to speak today. We support the legislation and other measures that effectively address foreign bribery and corruption, and such measures do assist in ensuring the integrity and transparency of international business contracts and in preventing the exploitation of vulnerable economies and people. This is consistent with Australia's obligations under international conventions and law and our participation in the G20 Anti-Corruption Working Group and Action Plan.

At a practical level, parties seeking to comply diligently with foreign bribery obligations face significant hurdles in seeking to identify their legal obligations and appropriately document their compliance with these obligations. We therefore suggest that any amendments to our foreign bribery should, to the degree possible, be consistent with the position taken in the United States and the United Kingdom. We have provided you with two submissions. We've provided you with an assistance from our Business Law Section—that's Greg Golding's section—and that was in August 2015, and we've provided you with a more recent report that addressed the draft legislation. In terms of addressing you today, we have some specific issues that we wanted to raise in respect of the legislation. Some of them might be described as pernickety, but they are detailed kinds of things that may—

Senator XENOPHON: I love pernickety.

Mr Game: I know, Senator. Some of them you may find helpful, and I'm happy to address those at any time. Greg has a broader knowledge of the area, and he's happy to talk to the broader issues. I am as well, but that's our kind of remit. If you would like me to speak to some of the issues?

CHAIR: Fire away.

Mr Game: We deal with some of them in in our submissions but it's worthwhile having the draft with you at the same time. If you have the old legislation, it's worthwhile having it. If you go to bribing a foreign public official, there is a provision at the moment, which is 70.2(1). This has brought into it the notion that those payments can be, they used to say, not legitimately due, so those payments in (a) can actually be legal payments.

Then the idea is introduced of the intention of 'improperly influencing' a foreign public official. We'd like to raise for your consideration whether or not 'improperly' is a word that is going to work. The reason we say this is that when one talks, for example, about improper use of position in the Corporations Act there is usually a fiduciary duty in place against which you can measure the impropriety. There is a real difficulty of measuring, so it would just be left to a jury to decide if that was an impropriety. That is a problem because there is no resting duty with the person that is doing the thing in the first place. That other person, as you know, that could just be their agent and that could be a corrupt agent. There is a problem there that needs to be addressed. Our suggestion is that you use the language of dishonesty. You would have to pick up the Criminal Code definition of dishonesty—you have to explicitly pick it up. That is the Ghosh test, which is dishonest by ordinary standards and known to be dishonest. So you would look at indicia of what the person was doing. Juries do decide those issues all the time, so that would actually work.

CHAIR: Not the Peters test?

Mr Game: The Peters test has gone, federally, and the Peters test has gone in New South Wales. The Ghosh test is in the code. The Peters test by ordinary standards does not have the subjective element. There is no legislative reason why you would have to adopt the Ghosh test, I am just saying that is what the definition is in the code. But it has to be explicitly picked up. If you just use the word 'dishonesty', nothing will be picked up, so you would probably go back to Peters.

CHAIR: If you had your choice between the two, which would you go with?

Mr Game: I think it is better to go with the Ghosh test, for consistency. The problem with this sentence is this: you have lost your object. In the previous one it talked about benefit 'not legitimately due to the other person', then obtaining or retaining 'a business advantage that is not legitimately due to the recipient', but you've lost the object because you have retained business or an advantage. So you need to have an object of that sentence. This may be intentional—now it would just be for anyone if you don't put it in—but I found it hard to

work out what that advantage could be if it was not a business advantage, but subsection B is a new provision, and so it says particular business or particular advantage. If you don't have an object and you've just got no particular advantage, you've made it too open-ended at that point. That is a drafting matter, it is not a major matter of policy. Covering this whole area is this question about whether or not you should consider civil penalties for certain breaches. Civil penalties operate according to a different onus of proof and so forth, and there is far less stigma attached to a civil penalty, obviously.

So we come to the recklessness provision. It is ultimately a matter of policy and we can only assist you in how you deal with this, but we are troubled by a recklessness provision. The UK has the next provision I am going to come to, but the UK does not have a recklessness provision. If you have a payment that is due and you're reckless that it will improperly influence someone, so it could be due legally and you're reckless, and then you go to section 70.2B, it may be a customary payment. If you look at B, there is no result—that's just a contemplated thing. You've got no physical element to that fault element.

Senator XENOPHON: So are you saying if you're reckless on a customary basis it is not necessarily reckless?

Mr Game: I am saying that you have a problem, and I am saying that you actually have to deal with this problem. If you look at B as a statutory exercise, you don't have a physical element. The recklessness is about a state of affairs—it's something in the person's mind. Say, for example you said, 'Section 5.4 of the code applies to this,' that part of the code applies to results, and that is importing another element. That would make it work. So section 5.4(2), in respect of results, says:

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

There you have actually built some substance into the provision. But that would be adding to the provision something that it doesn't have at the moment. If you specifically imported it then you could actually make it work.

But there is a problem about this that one has to think about in terms of corporations. If you have a middle-level management person and they are reckless, and they satisfy the Criminal Code in terms of their recklessness, then the corporation will be liable for that offence. There is a risk of overcriminalisation in that respect but, again, that is a matter of policy for you. I'm really here to tell you what it means if you have a provision that works like this. We do have concerns about it, because people making payments that are due and who have private thoughts about the nature of the payment but are reckless in that sense—if you pick up the code and talk about 'unjustifiable to take the risk' then you are feeding a little more into it and then you get that idea. But one has to understand the corporate liability provisions of the code, then one to do work on this and make the corporation liable. That is what we say about that.

We also see in terms of backdrop that, yes, there are drafting problems with section 70 subsection 2, but much of the problem with these cases has been, shall we say, with the evidence as much as with the statutory provision. These things happen in foreign countries and they happen in places where corruption is rife, where it is very difficult to collect evidence and so forth—take Iraq, where everybody at a certain time was dealing with potentially corrupt parties. The point of this legislation is to put business on an even and non-corrupt basis wherever they deal. But there is a limit as to how far you can actually take this in terms of penalising the corporations.

We come to this 'failing to prevent bribery' provision. What happens here is the definition of 'associate'. That can pick up a dodgy agent in a foreign country—subsection (d) of the definition picks that up. This is an entirely regulatory offence, because it attaches absolute liability to the corporation unless they can satisfy not just an evidentiary onus but a persuasive onus. If one is going to penalise this conduct, one has to penalise it at a significantly lower level than one does the other conduct. It's a bit like the difference between goods in custody and stealing, and yet the penal provisions for this are pretty much the same as the penal provisions—

CHAIR: But this is an offence?

Mr Game: Yes, quite. But the thing is that the corporation is made liable by the other person's conduct, full stop. They have to bring themselves out of it by persuasive onus, which is in subsection (5).

CHAIR: But is it the reversal of the onus of proof that exercises the minds of the company?

Mr Game: Yes, it does, but I'm raising for you whether or not it would be more appropriate to have an evidentiary onus and then a persuasive onus sitting where it lies. If you're going to have a persuasive onus on the defendant, then you should recognise that this is a state of criminality that is satisfied as an absolute offence. That

should be reflected in penalty, because it's a far less serious offence. I would look at that provision and I would think I'm looking at a regulatory offence, but then I get to the end and I see you can get fined a tenth of the company's turnover. That could be hundreds of millions of dollars.

Senator XENOPHON: So it's quite discordant, from your point of view, in the way that it's been weighted?

Mr Game: Yes. To me, that's looking like a summary offence. If that's how you frame it, you have to look at what is the legal extension that you rely on when you try and work out what the penalty should be. There's a thing about this reversing onus that one should recognise, which is this: normally, one talks about due diligence internally, shall I say. But this is due diligence about the associate of the first person, and that's external. It's not going to be easy for a corporation to establish adequate procedures to prevent the commission of the offence by the associate. I'm not saying it's impossible to do, but it's going to be externally driven. It's going to be driven by the person whom you employ as your agent to deal with whoever are the people you're contracting within the foreign country.

The other thing I would say about these penalty provisions is: these annual turnover provisions came originally, I think, from trade practices legislation. It can be quite distorting when it comes to a court to have a company say it's committed an offence, the benefit of which can't be calculated. Let's say the benefit's between $5 million and $10 million, but it can't be calculated. You immediately go to the turnover, which might be $1 billion. I think sticking these annual turnover provisions into these penal provisions—it's been done by the draftsperson, but one needs to think about what its ramifications are because when you get to court, it hurts—I'm not saying it shouldn't hurt, but it hurts—and it hurts potentially in a distorted way because it might be a minor infringement by a large corporation, or a major infringement by a small corporation. That doesn't necessarily work with those provisions. Those are my opening comments about the statutory provisions.

CHAIR: Mr Game, I think you've probably addressed a number of my questions. You've identified some issues on the issue of failing to prevent foreign bribery. Are you familiar with the UK legislation? Does it have the same issues?

Mr Golding: It's very similar. I have a couple of additional points in relation to the failure to prevent a bribery offence. As I'm sure you're aware, the UK legislation had a very long gestation period. It started with a scandal involving BAE in the mid-2000s. It ultimately found its way into the legislation in 2010, and it only became effective two years later. There was a very intensive process that led to the introduction of that legislation. Here, there was no foreshadowing of this sort of offence in the draft legislation when it came out. It's certainly an innovative approach. But we would like more time, because our jurisdiction is not the same as the UK. It is inconsistent with general criminal policy to impose a reverse onus of proof in a situation like this. If you refer to our submission around the reference to *Policy statement: rules of law principles, March 2011*, principle 3, we would say it is inconsistent with law reform policy in this area.

CHAIR: What page are you on there?

Mr Golding: Page 5 of our submission. The other point about reasonable procedures is in the absence of setting out guidance as to what reasonable procedures are, in a similar way to the hallmarks document that exists in the US and the practice document that exists in the UK, it is very hard for companies to adopt the required standard of conduct. Certainly there are a couple of reasons there. We would like for consultation. We would like a better debate as to why the reversal of onus of proof is necessary in conjunction with all the other changes that are going on in this space right now. We would like, if it were to be adopted, promulgation guidelines as to what it means.

CHAIR: In terms of the guidelines to inform companies about the types of systems they should put in place, do you have a view about the international standard that—

Mr Golding: The US hallmarks document and the UK principles are a very good starting point. I should also mention that major Australian companies do conduct themselves as though they are bound by the US and the UK standards. If you talk about the ASX 100, you'll find most of those entities conduct themselves in accordance with the UK and US standards now. The main impact of this type of legislation in terms of practice will really be the next level of operation in Australia, I would put it to you.

CHAIR: I was referring to ISO 37001. Are you familiar with that?

Mr Golding: Yes. That was only promulgated at the end of last year. There are very few companies globally that are currently certified under that standard. It's a very good standard, but internationally it is very early days with that standard.

CHAIR: Do you have a view as to which regulator should have responsibility for enforcing the compliance requirement?

Mr Golding: That's a very difficult issue. I don't think it's as black and white perhaps as the prior person suggested. He and I probably share different views on this. The Australian Federal Police, in one sense, is a logical regulator for this sort of thing. The problem with the Australian Federal Police is its historic lack of experience in dealing with corporate crime or corporate criminality. The gains that have been made in recent years, I think, are quite profound—the additional funding, the centre of excellence within the Australian Federal Police, the devotion of further resources. There are lots of criticisms you can of course make, in particular Senator Xenophon's comment about people cycling through this area rather than developing expertise. It's clear that the uncovering of this sort of criminality is a difficult process. The OECD average is seven years of investigation. Obviously, if you have the AFP cycling out every three years, it's just very difficult. I think if we look back in a decade, we'll have probably realised that there have been quite profound changes going on in this space. But probably if we sit here in 2017, we won't have seen the results of it yet. But I'm personally confident that the AFP could be made to work in this area; it just requires resources and dedication.

Mr Game: Could I just mention one thing about that: the AFP have investigative powers under part IB of the Crimes Act, which put them in a quite different position to other investigative agencies. I don't know that it would necessarily be a desirable thing to arm another agency with those powers simply for the purposes of them being able to investigate this kind of conduct—if you can do it through that which you've got, which is the body that is given those investigative powers. They are investigative powers that can be exercised in a particular way, because they can be utilised in a particular way, which is for the purposes of obtaining evidence, not for the purposes of obtaining information.

Senator XENOPHON: Surely you could have a dedicated serious fraud office—

Mr Game: You could, absolutely.

Senator XENOPHON: with those powers incorporated in it.

Mr Game: You could—no problem.

Senator XENOPHON: This is not a criticism of the AFP per se, but we don't have a great track record: two prosecutions in 15 years, and none of them successful, to date.

Mr Game: This is another conversation, but we have this uneasy situation whereby we have a whole bunch of investigative agencies that sort of lurch into prosecutions by referrals to the DPP, and we don't have—

Senator XENOPHON: Lurch is an appropriate word, I think.

Mr Game: Lurch is an appropriate—I shouldn't use that word. I don't know whether I should withdraw that word!

Senator XENOPHON: No, don't withdraw it; I like it!

Mr Game: Anyway, that's the way it is, and we haven't really sorted out the criteria upon which, for example, something is a civil penalty or a criminal prosecution, when it's on the margins. Likewise, we have this issue whereby we have people who have one set of powers doing an investigation and providing material to people who have a different set of powers. And the AFP, who have evidence-obtaining investigative powers, may never actually get involved with the case at all, if it's, say, a corporation. So that is a broader problem. I don't know whether you want to hear from us about deferred prosecution agreements?

CHAIR: Yes.

Senator XENOPHON: Yes, please.

Mr Game: We've provided you with a submission, and we attended a roundtable earlier this year.

Senator XENOPHON: That was through the Attorney-General's office process?

Mr Game: Yes, that's right. That was quite a useful process. We think it is to be encouraged, but it needs to be done in a totally transparent way so that you don't end up with unequal justice—some people getting it here and other people not getting it there.

Senator XENOPHON: That's a broader issue with plea bargaining, though, is it not?

Mr Game: It is a broader issue with plea bargaining. There are also some quite nuggety problems about what goes on during the disclosure phase before you enter into this thing. If it involves an admission of guilt that's going to be a problem, but there are these things called enforceable undertakings that ASIC has, for example, where you have statements of concern. So you could have a recognition that the prosecutor has a concern that an offence has been committed and the person enters into the undertaking. You have those sorts of problems and you've also got this problem where the investigator is getting provided with this material and then the party concerned finds out something worse that's happened. Creating the system by which this thing is managed is

something that really requires quite careful thought, because you are talking about a lot of interchanges and relationships.

Senator XENOPHON: It actually goes beyond the enforceable undertakings as we now have them, with the ACCC and with ASIC, does it not?

Mr Game: Yes, absolutely. I'm just giving that as an example. One of the other issues is this: a corporation is providing material and the corporation also has its own disclosure obligations, so you have the ASIC side of it—if this is a corporation that is doing this, you've got policing but you've also got corporate responsibility aspects that are going to be sitting there alongside what's going on.

Senator XENOPHON: Are you talking about the continuous disclosure obligations with ASIC?

Mr Game: Yes, that's what I'm talking about.

CHAIR: In your submission you talk about the need for a clearer and more transparent set of criteria.

Mr Game: Perhaps we should take out the word 'clearer', and make it 'clear', because we haven't got to that point yet.

CHAIR: Clearer than the UK model. What do you mean there?

Mr Game: You're not going to say I can't remember.

CHAIR: That is on page 9 at the bottom of the page. On deferred prosecutions agreements it says:

Deferred Prosecution Agreements … preferably based on the UK model … with a clearer and a more transparent set of criteria to allow corporations to be satisfied a DPA will be the outcome of the investigation when approaching the regulatory body.

Mr Golding: What we're trying to get out there is that we really need a game-changing environment in Australia in terms of coming forward on this stuff.

Senator XENOPHON: Wasn't it just more reputation, do you think? We seem to be a magnet in the Asia-Pacific region for dirty money coming into this country.

Mr Golding: We've certainly heard that debate, and Jason Sharman's book released earlier this year on that topic is interesting reading. That isn't an issue of foreign corrupt practices as such. It's a question of the AML aspects of money coming into Australia. I put it to you that it's a slightly different issue. It's a serious issue that needs to be dealt with or debated, but it isn't the issue that we're talking about here.

Mr Game: I've found the reference. It was in the 2015 submission. I was looking at the submission that you may not even have that we made in respect of the model for deferred prosecution.

Senator XENOPHON: It's in that as well.

Mr Game: If I could conceptualise the situation: a responsible corporate body finds that in one of its subsidiaries there has been considerable malfeasance, and wants to disclose it. One needs to be able to say, what are the criteria upon which this will be dealt with by way of a deferred prosecution, both for the purposes of assessing whether it's appropriate and enabling the corporation to make its own decisions about what it does. The corporation that finds those things out will have its own obligations to disclose them in any event. A corporation does not have a privilege against self-incrimination. So there will be other obligations that kick in, which are always there. But one needs to be able to imagine and then identify what these criteria are upon which end offences in respect of which deferred prosecutions agreements are given, and whether they are restricted to corporations.

One of the things listed, for example, is fraud. Tax offences are charged as fraud under sections 135 to 137 of the Criminal Code. You would need to pick out whether you want to give them to tax offences. You're going to get an awful lot of people coming forward trying to get deferred prosecution agreements for tax fraud. So one needs to actually work out what kind of crimes, upon what criteria, upon what disclosure bases. Working that out is not an easy thing, and deciding whether to give it needs to be—it's such a major thing. We say it should really be approved by an independent body. There was some suggestion of a retired judge. We thought maybe an administrative body would do that. But whatever it is, it has to be set against a set of criteria, and it has to be capable of being judged and criticised. People would be able to say, 'Look, we don't agree' or 'We do agree' or 'That was bad'. People need to be able to see what it is. It needs to be transparent in that sense. In terms of the whistleblower legislation, we think it's long overdue and one needs to see it—

Senator XENOPHON: The registered organisations legislation contained a number of amendments on whistleblower protection, which the joint standing committee on corporations are now looking at, to extend that to

the corporate and public sectors. If possible, could you consider, on notice, the usefulness of that? There is another parallel inquiry occurring at the moment in respect of that.

Mr Game: Certainly.

Senator XENOPHON: I don't have any further questions, Chair. I think it has been a very comprehensive submission, and to some degree it's hypothetical until we actually see the legislation that lands in the parliament, either in this parliament or the next—whenever the next election is.

Mr Game: The critical thing is that the whistleblower needs to hit a safe haven when they provide information. That is the critical thing.

Senator XENOPHON: Yes.

Mr Golding: The OECD data suggest that approximately a third of foreign corrupt practices investigations come out of whistleblowing, so whistleblowing is an important adjunct to—

Senator XENOPHON: The trending observation that Nick McKenzie, the Fairfax investigative journalist, made is that the reason they broke the Securency story, a major story, was that the whistleblower went to the AFP but they didn't appear to be interested and they then went to journalists to break the story.

Mr Golding: Yes. Whistleblowing to journalists, of course, is the worst outcome for corporates. It should be dealt with by regulators and the companies themselves.

Senator XENOPHON: But if the regulators failed to act—

Mr Golding: Precisely.

Senator XENOPHON: there's no choice.

Mr Golding: Therefore we strongly support the reform of whistleblowing legislation.

Senator XENOPHON: If you could take on notice to look at what the registered organisations legislation—

Mr Golding: Yes. We have made submissions on that topic in support of comprehensive corporate whistleblowing reform—as soon as possible.

Senator XENOPHON: Yes, you have. Thank you.

CHAIR: Thank you very much for appearing before us today. That concludes today's hearing. On behalf of the committee, I'd like to thank all those who've made submissions and sent representatives here today for their cooperation in this inquiry.

Committee adjourned at 14:32