
Funny money

Submission to Senate Standing
Committee on Economics inquiry into
foreign bribery

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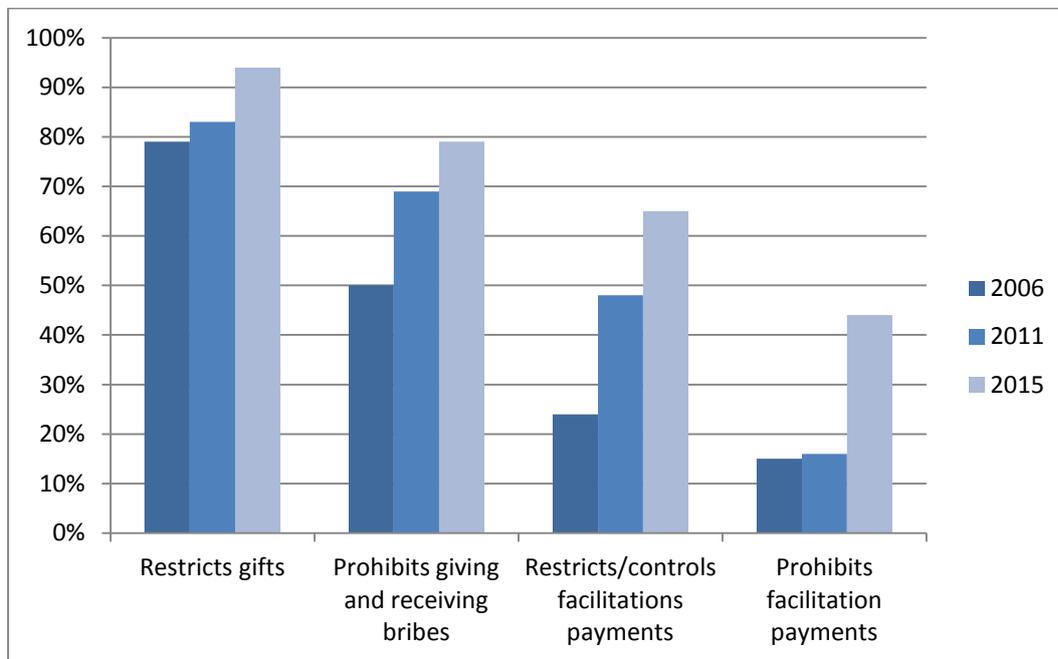
Summary

Australia has a poor record on enforcing foreign bribery and corruption laws, despite major scandals such as those around the AWB in Iraq, Securrency in Asia and BHP in China. It is important that laws and corporate governance arrangements are enforced to minimise the occurrence of corruption and improve Australia’s record of prosecution.

An increasing number of ASX100 companies have operations in countries with a high risk of exposure to bribery – 59 in 2015 up from 38 in 2006. This has contributed to increasing numbers of companies that have governance arrangements that expressly prohibit bribery.

Governance around facilitation payments has been slower to evolve, however. Of the 59 companies with operations in at-risk countries in 2015 only 32 of them prohibited facilitation payments. While many companies have policies in place, over half of the ASX100 still allow these payments, or at least make no public comment on prohibiting them:

ASX100 comparison on gifts, bribes and facilitation payments



Source: CAER analysis

While restrictions on facilitation payments doubled between 2006 and 2011, prohibition of such payments changed by just one per cent in this period, from 15 to 16 per cent of ASX100 companies. There was then a huge increase of companies prohibiting facilitation by 2015, now 44 per cent.

This increase is likely to be largely in response to changes in the UK bribery act relating to facilitation payments. Prohibition of facilitation payments has become an accepted policy approach for an increasing number of Australian corporations, in line with international policy. Action by one country has led to improvements in corporate governance in others. An Australian policy to prohibit facilitation payments would therefore contribute to efforts to stamp out the practice well beyond our borders.

Introduction

The Senate Standing Committee on Economics is investigating Australia's foreign bribery laws and their implementation. The Committee's terms of reference include discussion of the effectiveness of governance arrangements on both bribery and facilitation payments.

This submission contains new data relevant to these points, based on research conducted by the CAER – Corporate Analysis. Enhanced Responsibility, commissioned by The Australia Institute and the Jubilee Australia Research Centre.

CAER is an independent environmental, social and governance (ESG) research house assisting investors in Australia and around the world integrating ESG issues into their investment process. CAER provides analysis on companies operating in Australia and the Asia-Pacific region, collecting information on approximately 300 ESG issues for the S&P/ASX300 and the NZX 50. CAER's research is based on publicly available information gathered from companies, government and NGO sources, as well as via direct communication with companies. CAER is the Australian and New Zealand partner for the global ESG research body EIRIS.

Background

Australia has a poor record of enforcing foreign bribery and corruption laws. A 2012 report by the OECD found that there were "serious concerns that Australia's overall enforcement of the foreign bribery offence to date has been extremely low".¹ This is in spite of the fact that Australian companies are at risk of exposure to corrupt behaviour in their international operations. In Australia, to date, only one foreign bribery case has led to a prosecution and 21 of the 28 foreign bribery cases referred to the Australian Federal Police (AFP) have been dropped without charges.²

The OECD concluded that the AFP needs to take steps to ensure cases of foreign bribery are not closed prematurely and steps need to be taken to ensure the AFP is more proactive in gathering information during the pre-investigation stage of cases.³

This view is also supported by Transparency International who present an annual report on the status of corruption amongst countries that are signatories of the OECD Anti-Bribery Convention. Transparency International recommends that Australia creates a program for combating corruption and publishes clear responses to the recommendations of the OECD 2012 report. Transparency International also expressed concerns about Australian foreign bribery laws noting that "there are significant inadequacies in the legal framework".⁴

Improving foreign bribery laws in Australia is made even more important by the fact that a number of foreign bribery and corruption cases have involved Australian companies.

The Australian Wheat Board (AWB) corruption case, once called the "biggest corruption scandal in Australian history" by Kevin Rudd, is a well-known case of foreign bribery by an Australian company.⁵ AWB was found to have paid kickbacks to the Saddam Hussein regime starting in June 1999 when they were told by the Iraqi government they would have to pay an

¹ OECD 2012 *Phase 3 report on implementing the OECD anti-bribery convention in Australia phase 3 report on implementing the OECD anti-bribery convention in Australia*

² OECD 2012 *Phase 3 report*

³ OECD 2012 *Phase 3 report*

⁴ http://www.transparency.org/exporting_corruption/Australia

⁵ <http://www.smh.com.au/national/scandal-what-scandal-20120606-1zwr.html>

extra 'trucking fee' on any tonne of wheat sold to Iraq.⁶ A 2005 UN Report found that AWB had "sold 6.8 million tonnes of wheat to Iraq for \$US2.3 billion and had paid \$US221.7 million (\$290 million) in trucking fees".⁷ In response to the UN report the Australian Government conducted their own inquiry into the matter, the Cole inquiry. The Cole inquiry found that:

*the Australian Wheat Board and later AWB Ltd accepted the payment of, and then paid, an ongoing fee to the Iraqi Grain Board (IGB) so as to secure contracts in a tender process, and that these payments were made contrary to both the UN sanctions and Australian government policy.*⁸

Following the Cole Inquiry the AFP conducted an investigation into the scandal but no criminal charges were laid against any former employees or directors of AWB.⁹ Former officials of the AWB.¹⁰ received large fines and were banned from holding company positions by ASIC under the Corporations Act.

Since the AWB scandal other corruption cases involving Australian companies have occurred. In 2011 foreign bribery charges were laid against the Melbourne based company Securrency and Note Printing Australia (NPA), a subsidiary of the Reserve Bank of Australia (RBA). These charges were connected to the bribery of public officials in order to secure contracts to produce bank notes in Vietnam, Indonesia, Nepal and Malaysia.¹¹

Another instance of foreign corruption involved BHP Billiton, which was fined \$US25 million by the US Securities and Exchange Commission (SEC) for breaching the Foreign Corrupt Practices Act. In 2008 BHP invited 176 government officials and employees who were "directly involved with, or in a position to influence" its business affairs, to attend the Beijing Olympics at the company's expense.¹² The government officials who accepted the offer were provided with event tickets, accommodation and other activities worth \$US12, 000 - \$16,000 each.¹³ The investigation was carried out by the SEC and then passed onto the AFP. 16 months after the case was referred to the AFP it was closed, prompting claims that the AFP did not properly investigate the case.¹⁴ The AFP launched their own inquiry in 2013 with investigations still ongoing.¹⁵

BHP was also under suspicion for an alleged bribe it made to the Cambodian government in 2006. Anti-corruption campaigners claim that BHP paid \$2.8 million in "tea money" which never appeared on the books.¹⁶

These examples illustrate that Australian companies are at risk of being involved in, or at least exposed to, corrupt behaviour. It is important that sufficient laws and company practices are introduced and enforced to minimize the occurrence of corruption. An improved record

⁶ <http://www.theaustralian.com.au/archive/news/kickback-inside-the-australian-wheat-board-scandal/story-e6frg8no-1111113542684>

⁷ <http://www.theaustralian.com.au/archive/news/kickback-inside-the-australian-wheat-board-scandal/story-e6frg8no-1111113542684>

⁸ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Oil/Report/d02

⁹ <http://www.theaustralian.com.au/business/latest/federal-police-drop-awb-investigation/story-e6frg90f-1225767255737>

¹⁰ <http://www.themercury.com.au/awb-inquiry-to-go-no-further/story-fnj3twbb-1227276940322>

¹¹ OECD report 2012

¹² <http://www.abc.net.au/news/2015-05-21/bhp-billiton-hit-with-fine-over-corruption-allegations/6486036>

¹³ <http://www.theaustralian.com.au/business/news/bhp-fined-us25m-after-olympics-bribery-probe/story-e6frg906-1227362304656>

¹⁴ <http://www.smh.com.au/business/afp-failed-to-probe-bhp-bribery-claims-20130616-2ochj.html#ixzz3jJj42zz3>

¹⁵ <http://www.smh.com.au/business/afp-failed-to-probe-bhp-bribery-claims-20130616-2ochj.html#ixzz3jJj42zz3>

¹⁶ <http://www.smh.com.au/business/bhps-tea-money-missing-in-cambodia-20100514-v4fs.html>

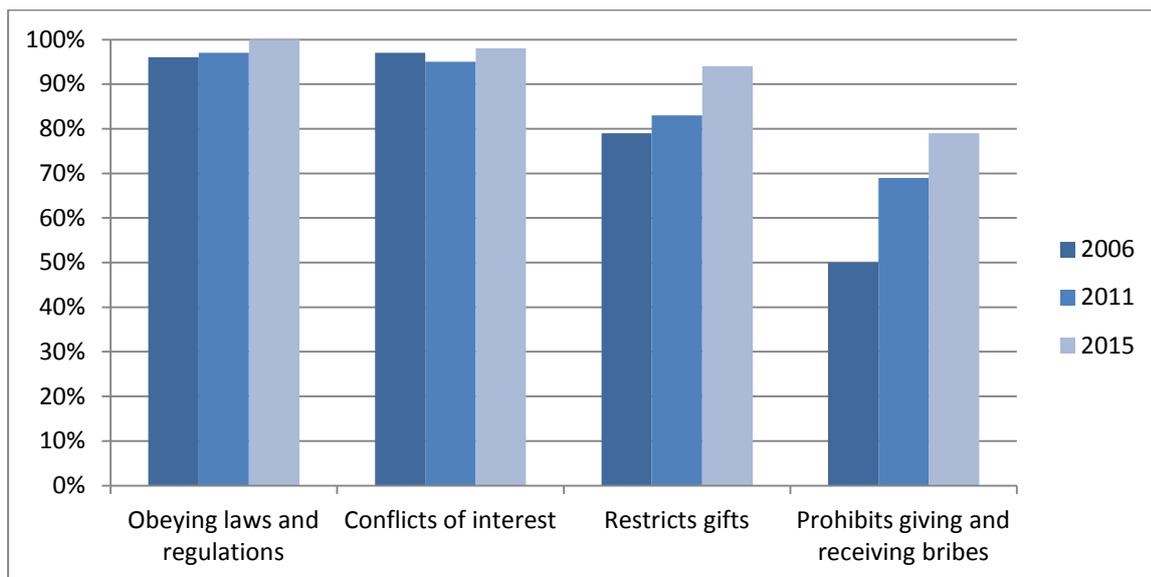
of prosecution in Australia would send an important message that Australia takes the offence of foreign corruption seriously.

ASX100 corporate governance on bribery and facilitation payments

The Australia Institute and Jubilee commissioned research from CAER on the stated governance arrangements on bribery and facilitation payments in ASX100 companies. This research builds on similar research by CAER in 2006 and 2011 and presents a picture of how governance arrangements have changed over time in Australia's 100 largest listed companies by market capitalisation.¹⁷

In 2015, all ASX100 companies have stated policies committing to obey laws and regulations, while 98 per cent address the issue of potential conflicts of interest in their published code of conduct. These conflicts of interest are often directly related to situations where an employee of a company may have divided loyalties to the company and other interests from activities outside of their employment to the company - this could be personal, other business interests, etc. This also often refers to issues such as insider trading. These policies have been in place for some time, with little change over the sample period, as shown in Figure 1 below:

Figure 1: ASX100 comparison on laws, conflicts of interest, gifts and bribes



Source: CAER analysis

Figure 1 shows that while strong governance arrangements around compliance with laws and averting conflicts of interest have been in place for some time, corporate governance around gifts and bribes has been evolving over the last decade. In 2015, 94 per cent of ASX100 companies have policies restricting gifts, up from 79 per cent in 2006.

Policies restricting gifts includes providing guidance on restricting giving and/or receiving business gifts and courtesies to business partners. A prohibition of gifts would be a clear statement in relation to avoiding perceived corrupt behaviour, although there might be reasonable exemptions for small business gifts that are part of a legitimate business

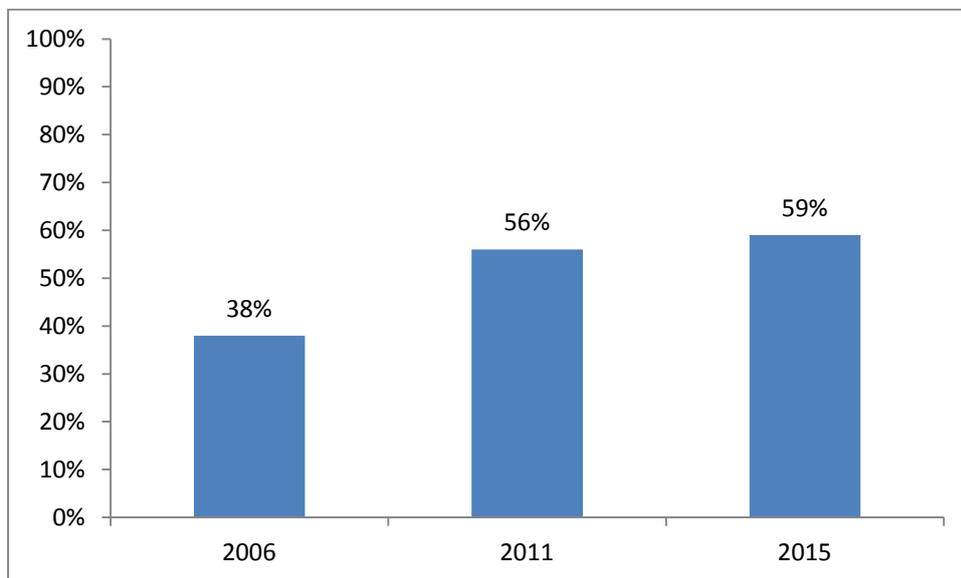
¹⁷ Note that the companies that make up the ASX100 are not always the same companies. Companies move in and out of the top 100 as their share price and volume changes. The three samples here are a comparison of the index at time of research in 2006, 2011 and 2015 and not a comparison of the same 100 companies at different points in time.

exchange, and in some cases particular cultural settings may put employees in a situation where the refusal of gifts, hospitality or entertainment may cause offence.

While governance arrangements relating to gift giving have been common and increasing through the sample period, explicit statements prohibiting bribery are less common, but also increasing. This is likely due to two factors. Firstly, bribery is generally illegal, so a policy requiring strict adherence to a country's laws should also cover bribery. Gift-giving is, however, unlikely to be illegal anywhere and is an integral part of business culture in many countries. Nonetheless, without specific guidance on giving gifts, there is a blurry line as to what constitutes a legitimate business courtesy and when it becomes a bribe. Governance arrangements have long been necessary to avoid corrupt conduct in this grey area.

A second factor behind ASX companies' slower uptake of governance arrangements around bribery is perhaps that many have, until recently, not had operations in countries where bribery is common. Through the sample period, however, the number of ASX100 companies with operations in such countries has been increasing, as shown in Figure 2 below:

Figure 2: ASX100 companies with operations in countries with bribery risk



Source: CAER analysis

Figure 2 shows a jump in the number of ASX100 companies with operations in countries with a perceived risk of bribery. Countries are considered to have a high risk of exposure to bribery based on the Transparency International Corruption Perception Index and the World Bank Governance Indicators.¹⁸

One factor behind the change in Figure 2 is likely to be a larger number of mining companies in the ASX100 during the mining boom. Many of these companies have operations in at-risk countries, and were elevated into the ASX100 as increasing minerals prices pushed up the value of their market capitalisation. Mining companies are also often at risk of exposure to corrupt behaviour due to the necessity of negotiation with governments over access to land, exploration and mining rights, royalties and taxes.

Industries that require extensive government approvals and contracts, such as mining and major construction, often encounter 'facilitation payments' to expedite government action (or

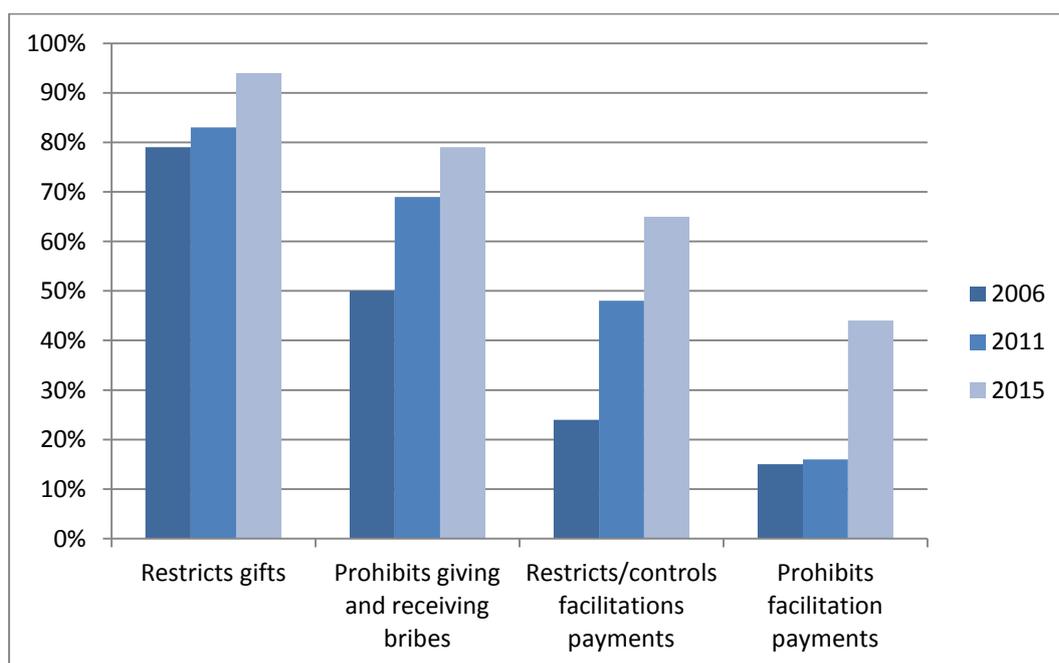
¹⁸<http://www.transparency.org/research/cpi/overview>,
<http://www.transparency.org/research/cpi/overview>

action from some other relevant body). Facilitation payments are defined here as being different to bribes. Bribes are considered to be a payment that affects the outcome of a decision – for example whether a mining licence is granted or which company wins a contract to build a railway. A facilitation payment should not affect the overall decision, but how long it takes for the decision to be made and for related rights to be granted. Put another way, a bribe affects who wins a contract, having profound social, cultural and ecological as well as economic consequences, while a facilitation payment affects how long the contract might take to get signed.

Facilitation payments have been a controversial topic within corporate governance through this period. While there is little disagreement that they are an imposition on business, reduce competition within an economy and can foster corruption, many business leaders have resisted calls to restrict or prohibit them, considering the payments necessary for doing business in some countries. For example, the president of the Australia-Africa Mining Industry Group has said that “making the payments illegal would have a big impact on companies doing business in Africa and affect their ability to attract senior executives who would become personally liable under the proposed laws”¹⁹.

Reflecting this position, far fewer ASX100 companies have governance arrangements around facilitation payments compared to gifts or bribery. Until recently the majority of companies neither restricted nor prohibited such payments, as shown in Figure 3 below:

Figure 3: ASX100 comparison on gifts, bribes and facilitation payments



Source: CAER analysis

Figure 3 shows that ASX100 governance arrangements restricting facilitation payments have become much more common over the last decade, increasing from 24 per cent of companies in 2006 to 65 per cent in 2015. While this increase is encouraging, this leaves a third of Australia’s major companies without such arrangements.

¹⁹ <http://www.afr.com/markets/commodities/metals/miners-reject-anticorruption-reforms-20120229-j3h7u#ixzz3jhoVdGXj>

Most interestingly, Figure 3 shows that while restrictions on facilitation payments doubled from 24 per cent in 2006 to 48 per cent in 2011, prohibition of such payments changed by just one per cent in this period, from 15 to 16 per cent of ASX100 companies. There was then a huge increase of companies prohibiting facilitation by 2015, now 44 per cent.

This still leaves half of the ASX100 that do permit facilitation payments. Worse still, many of these companies are the ones that need them most – of the 59 companies with operations in at-risk countries in 2015 only 32 of them prohibited facilitation payments.

This increase is likely in response to changes to the UK Bribery Act 2010. The UK government changed the act to introduce an offence of corporate failure to prevent bribery. This included a change to no longer allow facilitation payments:

“the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate antibribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing ‘culture’ of bribery and have the potential to be abused”²⁰

The Act is not only applicable within the UK but is applicable if any illegitimate payment can be associated with a UK person or business. For example:

“if an Australian company with registered UK operations was to pay a bribe in South Africa, if even one phone call about the bribe was made in the UK (say from a branch office or by an agent), the company is liable for the act under UK law.”²¹

It appears that Australian companies are aligning their corporate guidance documents with UK requirements, and are increasingly responding to the legal setting internationally. The international legal setting appears to be more influential than the consideration that no longer agreeing to such payments would negatively impact on a company’s ability to compete internationally for business.

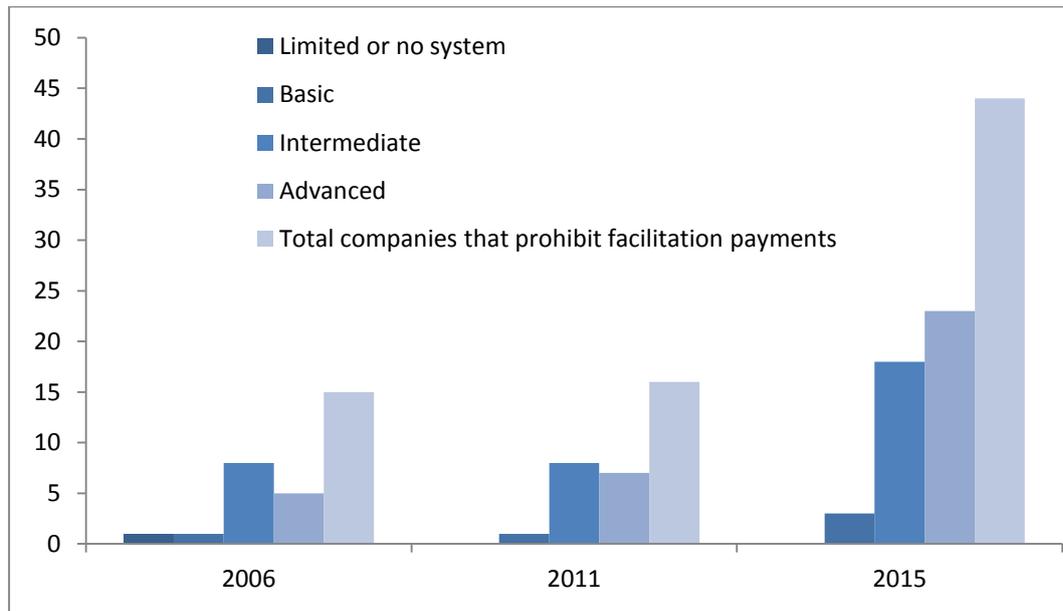
Furthermore, the UK Bribery Act appears to become an example where action by one country has led to improvements in corporate governance in others. An Australian policy to prohibit facilitation payments would contribute to efforts to stamp out the practice well beyond our borders, providing a more level playing field for corporations acting in a globalised economy.

The discussion above refers to companies with stated policies around bribery and facilitation payments. Just as important as whether companies have such a policy is whether they implement it. As shown in Figures 4 below, the numbers of companies with such policies that have governance systems around their implementation is also increasing:

²⁰ <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

²¹ http://www.acsi.org.au/images/stories/ACSIDocuments/generalresearchpublic/11_anti_corruption_bribery_practices_in_corporate_australia.oct_11.pdf

Figure 4: Implementation of facilitation payment policy



Source: CAER analysis

Figure 4 shows that in 2015 over half of companies that prohibit facilitation payments (23 out of 44) have 'advanced' systems to implement the policy. This has increased from 2011 and 2006 where only 7 out of 16 and 5 out of 15 companies had such systems. The levels of implementation displayed in Figure 4 are defined as:

- **Advanced** – has employee training, monitoring systems or whistleblowing procedures, and provides sufficient details on how it implements these rather than just a token acknowledgement.
- **Intermediate** – provides at least some detail on the implementation of systems.
- **Basic** – only makes brief reference to these indicators without providing details.
- **No or limited** – makes no or only a brief reference to implementation.

Conclusion

Australia has a poor record on enforcing foreign bribery and corruption laws, despite major scandals such those around the AWB in Iraq, Securrency in Asia and BHP in China. It is important that laws and corporate governance arrangements are enforced to minimise the occurrence of corruption and improve Australia's record of prosecution.

Corporate governance policies have been improving over the last decade. Nearly all ASX100 companies have policies that expressly require their operations to operate within existing laws, provide guidance around conflicts of interest and gift giving. Companies that prohibit bribery and facilitation payments are also increasing, despite claims from some industry leaders that facilitation payments are a part of business in many places. These policies are also being implemented through increasingly advanced systems and disclosure.

Australian policy makers should be encouraged by these results to strengthen our regulations and laws around bribery, corruption and facilitation payments and to pursue prosecution against those who break them.



About CAER

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