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Editor

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Victoria University's College of Law & Justice, which has sponsored the Journal for the past five years, has completed a memorandum of agreement with the Chinese Northwest University of Law and Political Science. The Law Schools of both Universities will jointly host the Journal under its new name of *Journal of Law and Governance*. The Journal will continue to be listed with EBSCO.

I wish to thank the founding Editors, Professor Ronald Francis, Associate Professor Arthur Tatnall and Dr Kumi Heenetigala and all the Members of the Review Board and those experts in their field who contributed so much to the Journal during its first ten years.

With the change in name, it is timely to refresh the Board. The Journal is seeking a new Editor and inviting new and old Members to join a new Editorial Board. People who are interested in applying for these positions are invited to send an application with a CV to the Editor: Professor Anona Armstrong (anona.armstrong@vu.edu.au) College of Law and Justice, Victoria University.

All articles published in this journal are subject to a process of blind review by at least two reviewers before selection for publication by the Editorial board.

Submissions are welcome for research articles of between about 5,000 and 10,000 words in any area relevant to the journal's wide coverage. Potential articles should, in the first instance, be sent to: Kumi Heenetigala, Victoria University: kumi.heenetigala@vu.edu.au

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Contents

Editorial

This year, 2015, the Journal of Law and Governance, (formerly the Journal of Business Systems, Governance and Ethics), celebrates its tenth anniversary. The first issue of the journal examined board effectiveness; this second issue is focused on the relationship between the law and governance standards for accountability. Accountability and transparency depend on adequate disclosure of information. Of course, this raises the potential conflict between government security and transparency of information, an issue addressed in this journal.

The papers for Volume Ten of the Journal were sourced from papers presented to the Governance and Law Conference held at Victoria University in 2015. Papers were both invited and peer reviewed.
The papers in this issues form a nice contrast between those speakers involved in ensuring public integrity standards and the views of those endorsing public disclosure of governance information.

Invited papers reproduced here were presented by the Commonwealth Ombudsman, Mr. Colin Neave and and Ms Karen Volpato from the Australian Institute of Superannuation Trustees.

Mr. Colin Neave's paper argues that governance and good leadership are related and that the two public sector organisations, the Commonwealth Ombudsman's Office and the Merit Protection Commissioner, are responsible for ensuring that the APS values, employment principles, and ethical standards are adopted by the APS leadership. He describes the Ombudsman's role, what he means by good governance and effective leadership and why that leads to good governance.
While the Ombudsman investigates complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government or Agency, the Merit Protection Commissioner investigates breaches of the APS Code of Conduct.

Changes to superannuation regulation is an Australian Government priority. Karen Volpato's paper emerged as a consequence of the response of the Australian Institute of Superannuation Trustees (AIST) to The Australian Government's recently issued discussion paper on the Superannuation Industry in Australia. She argues that superannuation trusts do not have shareholders, and therefore the application of governance practices such as those espoused by the ASX are not appropriate. In particular, independent directors are not required and that the present board of superannuation trusts, comprising representatives of employers and employees(members) should not be changed. she argues that more important than the independence of the Trustees are their skills and competence.

The following peer reviewed papers addressed international issues of whistleblowing and transparency in international trade relations and budget documents. Following the disclosures by Julian Assange of WikiLeaks and Anthony Snowden in the US, whistleblowing and its consequences have become major local and international issues. A paper by Rix, questions the extent to which the Australian Security Intelligence Organisation's (ASIO) approach to corporate governance, that is its lack of transparency, emulates that of an organisation in the wider public service. ASIOs main role is to gather information and produce intelligence that will enable it to warn the Government about activities or situations that might endanger Australia's national security. Rix argues that "The little information available regarding corporate governance is evidently part of an exercise in glib public relations". He believes that secrecy may be necessary, but that an effective and comprehensive approach to corporate governance is essential for a high performing and ethical organisation. Such an approach requires high standards of leadership and management, disclosure and a culture and commitment to integrity, ethical conduct and accountability. But, ASIO is governed by secrecy and secrecy precludes the opportunity to evaluate it against these criteria. Instead, Rix assesses the degree of disclosure by examining the ASIO strategic plan, annual reports and ASIOs response to Snowden. His conclusion was that ASIO lacks a comprehensive robust oversight and accountability framework.

Dussuyer, Armstrong and Smith reported the results of their research into whistleblowing in Australia that was made possible by a grant from the Australian Institute of Criminology and the help of STOPLine, an independent provider of services for the receipt of disclosures relating to corruption, criminal activity, serious misconduct or improper behaviour in the workplace. Their paper reports the results of interviews conducted with a self-selected sample of whistleblowers who contacted STOPline. The preliminary results indicate that for whistleblowers the experience is usually negative. They become the 'victims' of a range of harms, including loss of employment, bullying and harassment and emotional distress. The results have implications for the successful operation of the new disclosure laws introduced by the Australian and State Governments.

Legislation to encourage whistleblowing in Asia is still a new and sensitive area for investigation. In this next paper, Suyarto, Armstrong and Thomas describe a framework for investigating the 'intention to whistleblow'. Drawing on previous research and the Theory of Planned Behaviour they developed a model which investigates the relationships between individual values, attitudes and perceived behavioural control, corporate culture and a person's intention to whistleblow should misconduct occur. They also are interested in how confidential or anonymous a disclosure should be and what should be the preferred whistleblowing process.

Wang and Ramaswamy take up the issues of transparency in international trade. They argue that transparency is a fundamental principle of international trade, and an antidote to corruption and the distortion of trade. The authors introduced the APEC Model Charter on transparency and analysed transparency provisions in both the World Trade Organisation (WTO) and Asia-Pacific trade agreements. Their conclusion were that transparency in these trade agreements play a significant role in building confidence, trust and trade.

The four 2015 issues of the journal address board effectiveness, governance issues within the private sector, public sector governance and corporate social responsibility and ethics. The Editorial Board hopes that the inclusion in Issue number 1, of a paper in Chinese and English, will extend the range of the Journal and the contributions from our readers.

Comments from our contributors are welcome as are applications to join the Editorial Board. My sincere thanks are extended to the Board Members, reviewers and especially to Dr.Kumi Heenetigala for her assistance in managing the journal and its publication.

Professor Anona Armstrong AM
Editor

How the Ombudsman Provides Leadership to the Public Sector Enterprises

Colin Neave
Commonwealth Ombudsman, Australia

Introduction

I would like to acknowledge the traditional owners of the land on which we meet, and pay my respects to their elders, both past and present.

I propose to talk, along with Annwyn Godwin, the Merit Protection Commissioner, about how strong leadership works hand-in-hand with good governance.

Annwyn and I felt it was appropriate, given our respective roles and experiences, to jointly address the topic from a public sector point of view.

We hope our presentation gives you an insight into how our two organisations are emphasising the importance of leadership within the Australian Public Service, in order to promote good governance in that Service.

There are many synergies between Annwyn's organisation and mine.
Annwyn will elaborate on her role during her presentation, but essentially she and her staff provide assurance, in key areas of the Australian Public Service employment framework, that the APS Values and employment principles are being applied effectively by agencies.

These key areas are a fair system of review of employment decisions and actions, ethical standards, and merit-based employment decisions.

The Merit Protection Commissioner may also conduct an investigation into whether an APS employee has breached the APS Code of Conduct.

My office considers and investigates complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department or agency.

We also monitor the operations of law-enforcement agencies such as the Australian Federal Police, and manage the Public Interest Disclosure scheme, which in itself is part of an integrated approach to promoting ethical values in the Commonwealth public sector. So while we are both, in the simplest terms, complaints agencies, we also both have a strong focus on promoting ethical behaviour, accountability, fairness and integrity – and championing leadership.

During my part of the presentation I will cover four topics:

- The Ombudsman's role
- What is governance?
- How can agencies better utilise evidence or business intelligence to improve governance?
- What is effective leadership and why is it important for good governance?

Ombudsman's role

Ombudsman institutions have been established in Australia for, in some cases, more than 40 years. They handle complaints against every tier of government – state, territory and local – and against various service providers in the private sector.

This experience engenders an expertise in complaint handling and in assessing complaint-handling systems.

The notion is now embedded in Australia that people have a right to complain against government, without hindrance or reprisal, and to have their complaint resolved on its merits according to the applicable rules and the evidence.

The Commonwealth Ombudsman has no power to force an agency to change a decision or provide a service and must rely on agencies to cooperate to resolve problems. However, the majority of recommendations we make are accepted by agencies.

Industry ombudsmen have determinative powers.

As the Ombudsman I may choose to use my 'own motion' power to initiate an investigation. I will often exercise this power following receipt of several complaints about the same issue, indicating a recurring problem.

An own motion investigation can look comprehensively at the scale of a problem, the likely causes and possible remedial action, either specifically in an individual case, or generally by a change to legislation or administrative policies or procedures.

Own motion investigations that result in published reports have become increasingly important, with the uptake of recommendations producing measurable improvements to government administration and service delivery.

It is through reports (own motion and other reports) that ombudsmen, in effect, promote good governance, accountability and transparency. Through oversight of government administration and service delivery, we contribute to improving accountability and good governance in three main ways:

1. *Resolving individual disputes*. By investigating complaints from individuals, ombudsmen safeguard citizens against government interference with individual liberties and give them a voice to complain where they would otherwise fear to do so. [1] Ombudsmen are often the only avenue readily available to individual citizens seeking recourse on matters of maladministration or official misconduct that affect their everyday lives. Because ombudsman services are free, they are particularly valuable to poor, marginalised and vulnerable people.
2. *Investigating systemic problems*. We have the power to investigate broad issues on our own initiative. Problems that may affect many members of the public can be fixed through an ombudsman investigation, followed by publicity for the findings, reporting to the Parliament and subsequent implementation of the recommendations.

[1] John Walters, The role of the Ombudsman in promoting and protecting human rights – should it become a national human rights institution?', Speech delivered at the 2012 IOI World Conference

3. *Improving public sector performance*. This works in two ways: directly, where the information from complaints about areas of poor service delivery is fed back to agencies from the ombudsman; and indirectly, where the potential oversight of each decision by the ombudsman is an incentive for public servants to improve the quality of their actions and decisions.

We can add a fourth element: monitoring law enforcement agencies for their compliance with the relevant legislation.

That then is a brief overview of what my office does.

What is governance?

Many have worked on defining governance.

In researching this presentation I was intrigued by what Canada's Institute on Governance has to say about it. The institute says that most definitions of governance rest on three dimensions:

- authority
- decision making
- accountability.

Each of those characteristics, you will note, applies equally to a public and a private sector organisation or venture.

Another definition that struck me was the *GoodGovernance.org* site from Victoria. It states that:

> "Good governance is about the processes for making and implementing decisions. It's not about making 'correct' decisions, but about the best possible process for making those decisions.

Note the point they make that it's not necessarily about making the *correct* decision, but about having the best possible *process* in place for making it, which is a critical point for a government agency.

The website goes on to say that the characteristics of good governance are:

- accountability
- transparency
- responsiveness
- equitability and inclusiveness
- effectiveness and efficiency
- it follows the rule of law
- it is participatory.

So governance is actually a series of mechanisms, but none of those mechanisms matter without effective and engaged leadership.

So the logical next question is, what is good leadership?

It's a topic in which I have a particular interest in and have been talking about in various fora over the past few years, especially since I became Commonwealth Ombudsman.

That's because, in my experience, organisations that are well led have fewer complaints, or handle complaints well.

Leadership is a concept that is difficult to define and even more difficult to measure.

In the simplest terms, it is generally regarded as influencing others – formally or informally – to accomplish a task. It provides direction, encouragement and inspiration to motivate a team to achieve organisational success.

Most of us in the public sector don't get to spend much of our working life focusing on leadership. In fact we will often be promoted or appointed to a leadership role based on our subject matter knowledge.

Generally we are specialists – lawyers, HR people, policy experts and so on – who rise to positions of responsibility and leadership, often without much specific instruction in leadership.

But as agency heads or CEOs or managers, it is a very important aspect of our roles.

Poor governance can lead to agencies encountering an increasing number of cases of fraud and corruption.

Good leadership, as I will explain further in a moment, promotes better administration, which in turn makes agencies more resistant to corruption.

How can agencies better utilise evidence or business intelligence to improve governance?

It has been said many times in my office – complaints from members of the public are a strategic resource.

One way in which agencies can take advantage of this free resource is to shift their attitude towards complaints.

That means making it easy for people to make complaints and ensuring that complaint-handling processes are not only set up to effectively resolve issues for individuals, but to help identify systemic administrative problems as, or ideally before, they arise.

It is worth asking, why have a complaints system? I suppose there are at least two answers to that.

The first is, for efficiency's sake. A complaints system provides a framework for dealing with complaints and contributes to continuous improvement. It can help preserve working relationships with individuals, and, often, it helps prevent disputes escalating into major problems for an agency.

The second reason is, quite simply, because we have a moral imperative to do so. The community has a right to use government services and a right to complain if those services are poor or inadequate.

The consequences of failing to deal with complaints is confirmed by consumer research showing that it is more profitable for a business to keep and deal with its dissatisfied customers, than to have them take their dissatisfaction elsewhere.

This lesson applies equally to government agencies, where dealing with a complaint in a professional and courteous manner at the outset can prevent prolonged, entrenched correspondence with the complainant later on.

Drawing attention to system problems at an early stage can avert costly and damaging mistakes and disputes.

There are further interesting facts about unhappy customers. Again these statistics are mainly relevant to commercial enterprises, but they apply equally I think to the public's interaction with government organisations.

Research shows that:

- for every customer complaint there are 26 other unhappy customers who haven't complained. So the actual complaint is just the tip of the iceberg
- 96 per cent of unhappy customers *don't* complain, but 91 per cent of those will simply leave and never come back
- a dissatisfied customer will tell between nine and 15 people about their experience – the power of word of mouth
- a customer is four times more likely to defect to a competitor if the problem is service-related than price-or product-related. An important point to note: it seems service is more important than price or range
- it costs six to seven times more to acquire a new customer than retain an existing one.

However, on the reverse side, research shows that customers who get their issue satisfactorily resolved tell four to six people about their experience, and dissatisfied customers whose complaints are taken care of are more likely to remain loyal satisfied customers.

The point is, we all make mistakes. Errors, misunderstandings, client dissatisfaction and unexpected problems happen in all administrative systems.

It is how we manage those mistakes that defines us as an organisation and determines if we will continue to have "return business".

It is fair to say that up to about 20 years ago, most APS departments and agencies looked upon complaints as a nuisance.

I am pleased to say things have changed substantially. Agencies now accept that complaints are a predictable and necessary part of business, and are taking the issue more seriously.

Most Australian Government agencies now have well-developed complaint-handling systems in place, and they treat complaints as a valuable source of information for continuous business improvement.

And that makes good sense. Agencies should embrace feedback, whether it's from the public, its minister or an organisation like mine.

What is effective leadership and why is it important for good governance?

As I mentioned earlier, I have been prompted to contemplate the topic of leadership because, over the past two or so years in my organisation, it has become clear that we needed to work, ourselves, on 'leadership'.

This is not surprising given the structural changes we have undergone over time and the long periods during which senior positions were filled temporarily. This state of affairs is common in the public sector at present.

So I have given a lot of thought to the issue and have come up with what I consider to be the essential features of good leadership in a public administration organisation such as mine.

It seems to me there is no single, magic leadership quality, but rather a collection of attributes. I will step you through my top 10.

First and foremost is a commitment to ***openness***, perhaps not surprising in an integrity role such as ours, but not always easy in practice.

To be as fully informed as possible about the challenges being faced as an ombudsman, and to be frank and open about what an office might be engaged in as a result, is critical. There is a need to share information about those challenges with staff.

Implicit in the word openness is the concept of ***honesty***. The term being 'frank and open' comes to mind.

It is a principle with which I do my best to comply and, indeed, we all should be frank and open with each other: leaders with staff and staff with each other, and leaders with other leaders, whether in government or private sector organisations.

All the easier, then, to be ***decisive*** – to make decisions in full knowledge of all the relevant facts and with the benefit of full and frank discussion. That does not lead to quick decisions, but it does mean being prepared to make a call.

Leaders are also ***courageous***. This, of course, does not mean making foolhardy decisions but, rather, decisions are made in circumstances where the phrase 'damned if you do and damned if you don't' is relevant.

Courage to accept risk is an attribute of a good leader. Decision-making courage is demonstrated where a decision is made which is likely to be unpopular, but, on balance, and factoring in all the possibilities and permutations, that decision is for the best.

Leaders accept ***responsibility***. When public criticism is the result of a decision, we take responsibility for it even though it might have been made on the advice of someone reporting to us.

And of course, when a decision is made which leads to praise being handed out, it is most important that we share the glory for an excellent result with those who have contributed. Very few good results (if any) occur as a result of the actions of one person.

Good leaders also ***communicate*** clearly, mindful that what they say minimises the risk of misunderstandings.

And, most importantly, good leaders clearly state what they think the general direction is, providing an essential framework for all those who work with them to operate effectively.

Flexibility is important, and ***consistency***.

Sometimes it is necessary to make a very quick decision which turns out to be wrong in the circumstances. Good leaders correct the decision as soon as they can and do not feel bound by a decision which clearly has an adverse result as far as the organisation is concerned.

Good leaders are also genuinely ***interested*** in the affairs of the people with whom they work.

All of us in life face challenges at home as well as at work, and a leader who inspires loyalty and commitment in staff, will demonstrate empathy for an employee who might for any number of reasons be experiencing difficulties.

This is part of the fabric of values within any organisation, but perhaps even more so in an organisation like mine that stakes its reputation and authority on its own actions.

Leaders also demonstrate a degree of ***selflessness***. What does that mean?

Where an organisation has a clear set of objectives within a published and agreed strategic framework of which those objectives are part, then any deviation from that strategic framework would be seen as a 'sometimes' commitment to an organisation.

That deviation from the overall direction of the organisation is not the characteristic of a good leader.

So the personal interests of a leader must not adversely affect the way in which an organisation performs its role. Any personal interest must always be subsidiary to the direction of the organisation.

You may ask, then, how do those attributes flow through the APS? How does my office exhibit leadership within the APS?

Well, my office has shifted its focus to working more with departments and agencies – to influence them to treat people fairly through our investigations of their administration.

This approach makes much more sense in the current environment than a traditional positional approach. That is, we now look at issues systemically rather than as individual problems, in the vast majority of the cases with which we are involved.

It is an approach that allows us to demonstrate more of a leadership role in public administration.

We have made greater use of own motion investigations as a means of encouraging agencies to tackle the underlying causes of administrative problems.

We also now spend much more time analysing complaint trends to identify emerging issues, helping agencies to develop prevention strategies at an early stage.

And, importantly, we try wherever possible to highlight lessons learned from individual cases through the use of better practice guides, cases studies and recommendations that can be applied in different settings – including for ourselves.

Although a large part of our work will always be assessing and investigating individual complaints, I believe our future relevance depends on our ability to intelligently use the information gained through that work to build the capacity of agencies to effectively manage complaints themselves.

Conclusion

To conclude, there is no doubt that one of the biggest challenges facing the APS at the moment is leading people through a difficult and extended period of change.

It is times like these that true leaders step up and shine.

But we need to be conscious that leadership is more than managing and it's much more than just ensuring we comply with rules and regulations and frameworks. Good leadership is about providing a working environment that encourages and makes it safe for people to report acts of fraud and corruption. It is also about engendering a culture that resists corruption, and instead promotes ethical behaviour, accountability, fairness and integrity, thus enhancing governance.

Thank you for your time and attention.

Is ASIO's Corporate Governance an Oxymoron?

Mark Rix
University of Wollongong, Australia

Abstract

This paper investigates corporate governance in the Australian Security Intelligence Organisation (ASIO), Australia's domestic intelligence agency. The paper seeks to determine and understand the extent to which ASIO's approach to corporate governance emulates that of organisations in the wider public sector and the private sector. This examination of ASIO's corporate governance considers the organisation's purpose, functions and extraordinary powers focusing on the importance of secrecy to achieving its objectives. The paper will also assess whether it is appropriate to attempt to assess ASIO's corporate governance in the same terms, and according to like standards, as are used to evaluate governance in 'normal' or 'regular' public and private sector organisations. Finally, the paper provides an overall evaluation of ASIO's approach to corporate governance and considers how this approach affects the organisation's treatment of its stakeholders and the extent to which it serves their interests.1

Key Words
Australian Security Intelligence Organisation, corporate governance, security and secrecy, oversight and accountability

Introduction

This paper investigates the question of whether corporate governance principles and practices that apply to most organisations in the private and public (and, not-for-profit) sectors are also applicable to intelligence agencies like the Australian Security Intelligence Organisation (ASIO). ASIO is Australia's domestic intelligence agency. Of course, ASIO is a part of the broader Commonwealth public sector but its functions and extraordinary powers set it well apart from agencies, departments and the like belonging to the 'regular' public sector.[2] These distinguishing functions and powers have a distinct tendency to make questions about the corporate governance of ASIO seem futile and on the face of it even a little absurd. Like most other aspects of ASIO, its corporate governance is a closely-guarded secret with any information and documentation that could be useful or revealing accordingly receiving a very high level of classification. The little information regarding its corporate governance that is available in the public domain is essentially part of an exercise in glib public relations including modish references to 'outreach' and 'stakeholder satisfaction', and trite corporate branding of the 'our work', 'our values' and 'our performance' kind.[3] In any event, ASIO's extraordinary powers and the extraordinary secrecy surrounding the organisation give questions about its governance, and performance in protecting Australia's national security, a great significance with

[1] ASIO is formally designated 'Australia's national security intelligence service' and, according to its website, is 'the only Australian intelligence agency which both collects and assesses security intelligence.' ASIO operates under the direction of the Director-General of Security who is directly responsible to the Commonwealth Attorney-General <www.asio.gov.au>.
[2] For an investigation of ASIO's functions and extraordinary powers, including the secrecy surrounding them, see M Rix, 'Security without secrecy? Counter-terrorism, ASIO and access to information', in D Baldino (Ed), *Spooked: The Truth about Intelligence in Australia*, NewSouth Publishing, Sydney, 2013, pp 240-263.
[3] ASIO, Strategic Plan 2013-16, pp 1-4 <www.asio.gov.au/Publications/Strategic-Plan html>.

an urgent need for convincing answers. Naturally, this does not entail that these questions will be at all easy to answer. But, it does mean that it is nevertheless important to ask them and seek whatever answers are able to be uncovered. It is pretty obvious that reaching any understanding of ASIO governance requires some knowledge of the organisation's purpose and powers and the importance of secrecy in the performance of its mission and exercise of its powers. Left open is the question of how in any case its performance in protecting national security is to be evaluated when its operations are shrouded in secrecy and underwritten by legislation that protects this secrecy. The legislation imposes harsh penalties for, amongst other things, unauthorised disclosure of information regarding ASIO's operations, the identity of ASIO employees or 'affiliates', and the detention and questioning of suspects *and* non-suspects while they are held in detention and for some time afterwards. This raises a potentially intractable obstacle for an investigation of ASIO corporate governance: secrecy could well be a necessary, if not altogether sufficient, condition of ASIO undertaking its mission to protect Australia's national security. It is a moot point whether secrecy makes it impossible to know whether this is or is not the case. However, assuming for the moment secrecy *is* a necessary condition of ASIO performance then it follows that if ASIO and its activities were not shrouded in a thick blanket of secrecy then it couldn't even begin to set about protecting Australia's national security which is its overriding purpose. It would fall at the first hurdle because on this score at least openness and transparency would prevent it from undertaking almost any effective activities or operations towards achieving this purpose and therefore completely undermine its performance. And, if secrecy is necessary for ASIO's successful performance in protecting national security, this would effectively put a definitive stop to any attempt to evaluate its performance, and the governance arrangements behind it, in a meaningful and informative way for to do so would be utterly futile and ultimately fruitless. Paradoxically, of course, secrecy makes such a conclusion an almost completely unfounded one. This is also the case with the opposite or any other conclusions.

This paper is based on the premise that an effective, comprehensive approach to or system of corporate governance is essential for high-performing, responsive and ethical organisations in both the private and public sectors. Such a corporate governance approach or system would at a minimum embody high standards of leadership and management including disclosure, transparency and accountability, complementary principles underpinning and governing the performance of staff and how they conduct their operations, and an overall culture of integrity, decency, ethical conduct, responsibility, and accountability. In addition to these values, principles and practices, effective corporate governance requires a genuine commitment from an organisation and its leaders, managers and staff to openness and honesty, transparency and disclosure. These should be the values at the core of an organisation's culture. Much more could of course be said about what else comprehensive corporate governance entails, including sound risk management policies, an effective whistleblower policy with assured whistleblower protections, a real commitment to corporate social responsibility, and a sincere, respectful engagement with stakeholders and dedication to serving their interests. But the point here has simply been to establish the underlying principles, values and practices which together comprise robust and comprehensive corporate governance for almost any organisation from either the private or the public sector. Armed with these insights into what corporate governance is and should be, the paper investigates corporate governance in ASIO seeking to determine and understand the extent to which its approach or system emulates that of its counterparts in the private and public sector.

Examining early conceptions of corporate governance, the next section provides an overview of the principles and practices that underpin corporate governance and argues that the stakeholder model or theory is, despite its shortcomings and with insights drawn from enlightened shareholder theory, one of the more useful amongst a range of alternative theories for investigating and understanding corporate governance ASIO-style. The following section investigates corporate governance in ASIO examining ASIO's mission, functions and powers with a focus on the importance of secrecy to the effective performance and successful achievement of its mission to protect Australia's national security. Included here is an assessment of ASIO's response to the Snowden disclosures. Then, an investigation of ASIO's oversight and accountability framework is undertaken evaluating how secrecy affects the framework's effectiveness. The concluding section provides an overall evaluation of ASIO's approach to corporate governance and considers how this approach affects the organisation's treatment of its stakeholders and

how well it serves their interests. This is of considerable interest and concern because ASIO's most important stakeholders are the Australian people including *their* security and the rights and freedoms it is claimed that they have and should be able to enjoy. This assessment of ASIO's governance will briefly consider whether secrecy contributes to or detracts from its performance in protecting national security so that these stakeholders are able to exercise and enjoy their freedoms and rights.

Corporate governance: principles and practices

The importance of the theory and practice, discipline or subject, of corporate governance is captured in this enduring and influential definition:

> Corporate Governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.[4]

Cadbury extends this definition by asserting that disclosure is the foundation of any system of corporate governance because it is this which is the 'basis of public confidence in the corporate system'. In his view, corporate governance is also based on the principles of transparency, accountability, fairness and responsibility which are all 'universal in application'.[5]

It is certainly clear that, for Cadbury, corporate governance is not simply about maximising shareholder value but with maintaining a balance between often inconsistent economic and social, individual and communal goals and with reconciling to the extent possible the competing interests of different stakeholder groups. The corporate governance system should not only promote the efficient use of resources but also hold corporations, their owners and those who lead and direct them responsible and accountable for how well resources are managed. Thus, sustainability and corporate social and environmental responsibility, and ethical business practice are also consistent with, if not core components of, Cadbury's conception of corporate governance. It should be equally clear that his conception is highly applicable to corporate governance in the public and not-for-profit sectors where key stakeholders whether they are called voters, taxpayers, citizens or members take the place of and in many respects have similar rights and responsibilities to the shareholders of publicly-listed companies.

Writing at about the same time as Cadbury Brian Cheffins, SJ Berwin Professor of Corporate Law at Cambridge University, observed that the discipline or subject of corporate governance 'draws from a variety of fields other than law, including economics, ethics, accounting and finance' and that understanding the issues involves therefore requires students (and practitioners) to acquire 'some familiarity with the concepts, assumptions and vocabulary of these various disciplines.'[6] Studying, and indeed practising, corporate governance should accordingly be based on an awareness and understanding of the economic, political, social and cultural context within which publicly-listed companies and other organisations operate. And, in an early account of the continuing debate about whether shareholder value or stakeholder interests should take precedence in corporate governance regimes, Cheffins also noted that 'whereas some prefer to confine discussion by focusing on ways to improve the return shareholders receive, others treat all corporate stakeholders, including employees, suppliers, customers and even society at large, as being part of the corporate governance equation.'[7] While it is obvious that Cheffins was especially concerned with the governance of publicly-listed companies his conception of corporate governance is, like Cadbury's, readily applicable to the corporate governance of public sector organisations and non-profits.

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[4] Sir Adrian Cadbury, Foreword, MR Iskander & N Chamlou, *Corporate Governance: A Framework for Implementation*, World Bank Group, Washington DC, 2000, p vi. Sir Cadbury, formerly Chairman of the famous chocolate family's firm and later of Cadbury Schweppes, has long been a strong advocate of the importance of corporate governance and of meaningful corporate governance reform. In 1991, he was appointed Chair of the UK Committee on the Financial Aspects of Corporate Governance which in 1992 produced the Cadbury Report and Code of Best Practice.

[5] Cadbury, above n 5, at p v.

[6] BR Cheffins 'Teaching Corporate Governance' (1999) *Legal Studies* 19 515 at 520.

[7] Cheffins, above n 7, at 524-525.

It is clear from the comments of Cadbury and Cheffins that what has become variously known as the stakeholder model, theory or philosophy of corporate governance has had a long and significant influence on the development of the subject or discipline of governance and on governance practice. As suggested above, this enduring influence has helped to ensure that corporate social and environmental responsibility and ethical business practice evolved as key principles and aspects of both governance theory and practice. Advocates of stakeholder theory contend as Cheffins suggested that directors and the corporations they oversee are responsible and accountable to a range of stakeholders other than shareholders, the many groups and individuals affected by their decisions, behaviour and operations. Responsibility and accountability are or should be 'the price society demands for the privilege of incorporation, granting shareholders limited liability for the company's debts.'[8] One of the main difficulties encountered by advocates of stakeholder theory is in deciding how to balance the often competing interests of different stakeholder groups when it is almost always impossible to maximise or at least adequately satisfy all stakeholder interests at the same time.[9] A key question emerges from this difficulty focusing on director and management accountability: in seeking to serve the interests of different stakeholders, whose interests should be given priority and how can directors and managers he held accountable for favouring certain stakeholder interests over others? This also leaves unanswered a similarly awkward question about how director and management performance should be evaluated and rewarded. As Bob Tricker suggests, enlightened shareholder theory (or, enlightened shareholder value)—a sort of hybrid of stewardship theory and stakeholder theory—can go some of the way in resolving these dilemmas. The theory acknowledges that over the longer term shareholder value can be increased or sustained only by satisfying the interests of key stakeholders.[10] The practical application of enlightened shareholder theory is not without its own difficulties and challenges but it is beyond the remit of this paper to explore these any further.

Despite its evident shortcomings, stakeholder theory continues to be influential in the development of corporate governance theory and practice. This influence is a product of its insistence that corporate directors have important responsibilities and accountabilities beyond simply serving the interests of shareholders by creating and increasing long-term profitability and wealth. The notion of corporate social (and, environmental) responsibility and the kindred 'ethical business practice' have both grown out of this recognition. In taking their broader responsibilities and accountabilities seriously, and modifying their behaviour and operations in accordance with these, directors and corporations can be granted what is widely referred to as a 'social licence to operate'. For John Morrison, Executive Director of the Institute of Human Rights and Business, the 'social licence' concept is even more important and useful than that of 'corporate social responsibility' which can be perfunctory, self-serving and little more than an exercise in reputation management and brand enhancement. Because business can never award itself a 'social licence', being given such a licence by affected communities and constituencies requires that business activities and operations enjoy 'sufficient trust and legitimacy, and [have] the consent of those affected.' In managing social, environmental, political and legal risks, businesses can't by themselves decide how much prevention, deterrence or mitigation is sufficient. Stakeholders and other rights-holders should be involved in setting 'thresholds of due diligence' (in other words, audit, oversight and accountability mechanisms) even if these have already been determined in relevant legislation. Otherwise, such thresholds or standards can lack the legitimacy required for social permission to be granted making it difficult for business to proceed with planned operations and activities.[11] Clearly then, companies cannot exert anything like complete control over 'social licence' but they can nevertheless manage 'issues such as transparency, accountability, clarity about benefits, remedies and adequate due diligence'.[12] Again, these are the conditions that have to be satisfied before social consent or permission is granted in the first place.

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[8] B Tricker, *Corporate Governance: Principles, Policies and Practices* (2nd ed), Oxford University Press, 2012, p 70.
[9] Christine A Mallin, *Corporate Governance* (4th ed), Oxford University Press, 2013, p 20.
[10] Tricker, above n 9, at 74.
[11] John Morrison, 'Business and Society: Defining the "Social Licence"', *The Guardian* (2014) 29 September <http://www.theguardian.com/sustainable-business/2014/sep/29/social-licence-operate-shell-bp-business-leaders>. See also Jason Prno, D Scott Slocombe, 'Exploring the origins of "social license to operate" in the mining sector: Perspectives from governance and sustainability theories', *Resources Policy* (2012) 37 346.
[12] Morrison, above n 12.

As Cadbury asserted long ago, disclosure is a founding principle of corporate governance because this is the basis of public confidence in business and, he might have added, in government as well. Disclosure is closely aligned with, and is complementary to, the principles of transparency, accountability, fairness and responsibility. Thus, these ancillary principles too not only apply to the governance of corporations and the 'corporate system' more generally, they are just as applicable to the governance of government and of the public sector including the various departments, agencies and authorities comprising it. This leaves a very large question over the meaning of governance for an agency like ASIO for which disclosure is in many respects an anathema. But, if secrecy *is* essential to ASIO's performance in protecting the security of the country and its people then it arguably would make little sense to judge its governance, even if this were possible, by the same standards of disclosure, transparency and the like as are used in judging corporations' and 'regular' public sector agencies' governance. Accordingly, in the following sections ASIO corporate governance will be investigated beginning with an examination of its mission, values and functions, and powers with a view to determining how important secrecy is to the performance of its mission. It will also consider the critical assessment of Edward Snowden's disclosures included in the ASIO Report to Parliament 2013-2014 and in recent speeches and addresses by ASIO officials. This is important because ASIO's critique of Snowden clearly reveals its attitude to secrecy and disclosure which has significant implications for how well it serves the interests of its key stakeholders. An examination of ASIO's oversight and accountability framework is then undertaken assessing how secrecy affects the framework's effectiveness. Finally, an overall evaluation is provided of ASIO's performance in serving the interests of its stakeholders, in particular, the Australian public.

ASIO corporate governance: security and secrecy

First, it is important to understand the meaning of security that it is ASIO's role to protect. This is contained in Section 4 of the ASIO Act 1979 where security is defined as meaning the protection of Australia and Australians from espionage, sabotage, politically motivated violence and the promotion of communal violence, attacks on the country's 'defence system, foreign interference, whether these are 'directed from, or committed within, Australia or not' and, serious threats to the integrity of Australia's borders and territory. This is broadened considerably by the inclusion in the definition of security of 'the carrying out of Australia's responsibilities to any foreign country' in relation to any of these matters.[13] This expansive view of security and ASIO's role in protecting it is important background for understanding the organisation's vision, mission, objectives and so on.

The ASIO Strategic Plan 2013-16 provides a brief and relatively accessible introduction to ASIO's vision and mission, objectives and values (there is not the scope here to consider ASIO's goals which in any event support its mission[14]). ASIO's vision, 'The Intelligence Edge for a Secure Australia', is so vacuous as to warrant no further attention. Its mission is 'To identify and investigate threats to security and provide advice to protect Australia, its people and its interests'. In other words, ASIO's mission is the protection of Australia's national security by collecting and assessing security intelligence and providing appropriate advice to government. ASIO's values are unexceptionable if not also a little vacuous: Excellence, producing useful and timely advice, showing solid leadership and being professional, being innovative and improving through learning; Integrity, being ethical and unbiased, maintaining confidentiality and secrecy, respecting diversity; Accountability, being responsible in conducting operations and for outcomes, and being accountable to the Australian public through the government and parliament; Cooperation, developing a common purpose and mutual support; using appropriate communications in all relationships; having productive partnerships.[15] More important than ASIO's vision, mission and values for an understanding of ASIO's governance arrangements are its objectives.

[13] ASIO Act 1979, Section 4. The recent addition of border and territorial integrity to the list of threats to national security reflects the current Government's obsession with asylum seekers and the punishment of them. <www.comlaw.gov.au/Details/C2013C00437> .

[14] ASIO Strategic Plan 2013-16, above, n 4, at 3.

[15] ASIO Strategic Plan 2013-16, above n 4, at 4. Some of the Strategic Plan's text regarding ASIO's values has been paraphrased and slightly abridged. Oddly, the Strategic Plan does not include 'Respect, We show respect in our dealings with others', as one of ASIO's values unlike the Report to Parliament 2013-2014 which does so. This could have been the result of a formatting issue and, after all, they're only words.

Under the 'Our Work' heading, the Strategic Plan makes it relatively clear, and not surprisingly, that ASIO's objectives complement and support the Government's national security strategy. There are four broad objectives of the strategy: ensuring the safety and resilience of the population as a whole; protecting and strengthening Australia's sovereignty including independence of its decision making and authority over its territory and resources; securing Australia's assets, infrastructure and institutions, e.g. supply chains, intellectual property, information technologies and communications networks, natural wealth; and, promoting a favourable international environment through influencing and shaping the country's regional and global environment so that it is conducive to Australia's interests and values.[16]

ASIO's objectives (and goals) are largely reflected in the Outcomes and Deliverables that are outlined in Part 2 Program Performance of the Annual Report 2013-2014. Part 2 is based on publicly-available information. There is one outcome, Outcome 1, which is 'To protect Australia, its people and its interests from threats to security through intelligence collection, assessment and advice to government.' The Annual Report lists four program deliverables: 1. security intelligence analysis and advice such as strategic and counter-espionage threat assessment and advice, border security, engaging with and advising industry groups, supporting prosecutions and litigation involving security intelligence; 2. protective security advice which includes counter-terrorism checking, personnel and physical security, and contributions to policy development; 3. security intelligence investigations and capabilities which involves maintaining and enhancing collection of 'all-source' security intelligence, analysis of complex tactical and technical data, technical R&D; counter-terrorism response, liaising with national and international partners and stakeholders, and policy development; 4 collecting foreign intelligence in Australia when requested by the Ministers of Foreign Affairs and Defence or 'incidentally' as a result of existing security intelligence capabilities or liaising with foreign partners.[17] Part 2 of the Annual Report also contains a self-assessment of ASIO's performance against its two key performance indicators and in terms of each deliverable. The first of the KPIs deals with how in the reporting period ASIO's action and advice contributed to the management and reduction of risk to people and property, public, private and national infrastructure and any special events of national or international significance during the reporting period. The second deals with the security of ASIO'S activities. Clearly, then, ASIO performance against the second of its KPIs depends heavily on secrecy and the protection of secrecy. The importance of secrecy for ASIO performance against Outcome 1, and the two KPIs and each of the deliverables, is demonstrated in the Annual Report Part 3 Outcomes and highlights. This is 'a detailed report of ASIO performance and operations' against Outcome 1. Unfortunately for transparency and disclosure, and public confidence, 'This part contains a national security classification of Top Secret and is excised by the Attorney-General in its entirety…as unauthorised disclosure could reasonably be expected to cause exceptionally grave damage to the security of the Australian Government.'[18] At the beginning of Part 3 it is made clear that excising Part 3 (Exclusion) was done after the Attorney-General obtained advice from the Director-General of Security that it 'is necessary in order to avoid prejudice to security.'[19] No mention is made here of 'exceptionally grave damage'.

The Report's revealing critique of Snowden's revelations is contained in Part 1 The Security Environment and Outlook under the unsettling heading Espionage and clandestine foreign interference. It begins: 'Self-motivated individuals who exploit their privileged access to government information to make unauthorised disclosures of classified or other privileged information have always been a potential source of harm to Australia's interests.'[20] The harm that such individuals can cause has been, according to the Report, 'greatly increased by modern information technology, which allows large amounts of information to be aggregated and copied' and further 'amplified' by the internet with its capacity for easy distribution of the information to a large audience that is ready to 'consume' it. Overlooked here, and cynically inverted, was what the Snowden disclosures actually revealed: the significant harm to

[16] ASIO, Strategic Plan 2013-16, above n 4, at 4. The objectives, deliverables and KPIs have all been paraphrased and slightly abbreviated.
[17] ASIO Report to Parliament 2013-2014, pp 12-13 <www.asio.gov.au/Publications/Report-to-Parliament/Report-to-Parliament html >.
[18] ASIO Report to Parliament 2013-2014, above n 18, p xiv.
[19] ASIO Report to Parliament 2013-2014, above n 18, p 37.
[20] ASIO Report to Parliament 2013-2014,above n 18, p 7.

human rights and democratic freedoms increased by modern information technology allowing the bulk collection and aggregation (storage and retention) of large amounts of information that has been amplified by the internet making it even easier for agencies like the US NSA, UK GCHQ and Australian ASD to collect, aggregate and cross-reference vast amounts of information about the private communications (metadata and content) of innocent individuals. In any event, for ASIO Snowden was a 'malicious insider' who caused 'wide-scale and indiscriminate' harm that will be 'felt for many years' to come because his actions have the 'very real potential' to 'inspire and influence people who wrongly regard him as a whistleblower'.[21] In substantiating its claim that it is incorrect to regard Edward Snowden as a real whistleblower, the Report quotes at length from Attorney-General George Brandis' speech to the Centre for Strategic and International Studies in Washington DC delivered in April 2014. In this speech, Brandis cited *The Snowden Operation* by Edward Lucas (Lucas is *The Economist's* Senior Editor), who in turn had cited Princeton University academic Rahul Sagur's *Secrets and Leaks*. Based on these sources, Brandis was able to assert that there are three principal criteria that have to be satisfied for a person to qualify as a whistleblower: the person must have unambiguous and compelling evidence of abuse, misconduct or corruption; disclosing the information must not disproportionately threaten public safety; and, to the extent possible, the scope and scale of the information 'leaked' must be limited. According to Brandis citing Lucas, Snowden failed the whistleblower test on all three counts.[22]

The Snowden exposures, disclosures or 'leaks" have ensured that the issue of what is, and what is not, whistleblowing and who should be, and who should not be, regarded as a whistleblower, is now a thorny and vexed one for ASIO. Snowden's actions have also reinforced for ASIO the need for greater secrecy and the strict protection of secrecy. In his Review which precedes the ASIO Report proper, then Director-General of Security David Irvine acknowledges that effective disclosure (whistleblowing) laws ensure that (undefined) 'improper conduct' within government including its intelligence agencies 'is investigated and dealt with'. Thus, ASIO, and its Director-General, welcomed the enactment of the Public Interest Disclosure Act 2013 which commenced in 2014. However, it did so not because this Act provides for adequate protections for genuine whistleblowers who expose misconduct, abuse of powers or corruption but because the Act contains measures for the 'appropriate protection against the unauthorised disclosure of intelligence information' by people like Snowden who are 'self-motivated malicious insiders' frequently acting out of a personal grievance or misguided agenda.[23] In other words, Irvine and ASIO welcomed the introduction of the Public Interest Disclosure Act precisely because the Act protects the secrecy of the organisation, its operatives and its operations from unwanted exposure by even genuine whistleblowers and journalists who act in the public interest. In any event, investigating the actions of people like Snowden is 'complex, resource-intensive and highly sensitive' requiring ASIO and similar organisations to be 'appropriate and proportionate' in their response balancing 'individual privacy considerations' against the potential harm these individuals can inflict by their actions.[24]

Some of the same themes were taken up by one of the two (anonymous) Deputy Directors-General of Security who addressed the Security in Government Conference in September 2014.[25] In keeping with the Conference theme, the Deputy Director General's address was titled 'The espionage threat from trusted insiders'.[26] According to the Deputy Director-General, it is not only malicious insiders recruited

[21] ASIO, Report to Parliament 2013-2014, above n 18, at 7.
[22] ASIO Report to Parliament 2013-2014, above n 18, at 7. It is telling that Brandis did not here quote the meaning of 'public interest disclosure', and provisions for protection of disclosers, contained in the Public Interest Disclosure Act 2013 Subdivision A and Subdivision C, of Division 2 Part 2.
[23] Director General's Review in ASIO Report to Parliament 2013-2014, above n 18, at ix.
[24] ASIO Report to Parliament 2013-2014, above n 18, at 7.
[25] According to the Attorney-General's Department website, the Conference is hosted by the Department's National Security Resilience Policy Division, has been a regular event since 1987 and enables 'security agency advisers [to focus] on protective security issues.' The 2014 Conference theme was 'Mitigating the trusted insider threat'. ASIO provided a separate briefing to the conference on the Australian security environment and trends in protective security countermeasures. However this 'was open to Australian Government employees only with a current security clearance at the Negative Vetting Level 1 (SECRET level) or above.' <www.ag.gov.au/NationalSecurity/SecurityGovernmentConference/Pages/Security-in-Government-Conference-2014.aspx> .
[26] Deputy Director-General of Security, 'The Espionage Threat from Trusted Insiders'. Address to the Security in Government Conference 2014, 2 September < www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-

by foreign intelligence services who pose a significant risk to national security and potentially cause 'catastrophic harm' to Australia and its interests. Just as harmful are 'self-motivated malicious insiders' motivated by 'disgruntlement, revenge, ego, a sense of the misguided greater good or loyalties, or financial gain' who 'betray the trust of their employer'. Like his boss David Irvine, the Deputy Director-General had Edward Snowden squarely in his sights. She/he quoted the Attorney-General to reject the claim that Snowden is a whistleblower but also to label him a 'traitor': 'He is a traitor because, by a cold-blooded and calculated act, he attacked your country [the US] by significantly damaging its capacity to defend itself from its enemies, and in doing so, he put your citizen's [*sic*] lives at risk. And, in the course of doing so, he also compromised the national security of America's closest allies, including Australia's.'[27]

In the end, according to the Deputy Director-General, the Government and public servants have a 'fundamental duty' to uphold and defend the country's interests including 'holding secrets' and to protect such confidential (that is, classified) information 'in many instances for life'.[28] His then boss, David Irvine, had had a similar message when in August 2014 he addressed the National Press Club (an extremely rare event for a Director-General) and delivered a speech titled 'Diligence in the shadows—ASIO'S responsibility'. Spruiking ASIO's role and work, Irvine pointed out that the former is identifying and assessing threats to national security and to the lives and safety of Australians while the latter, which is 'predictive and advisory', is essentially an exercise in risk management which enables the Government to take preventative measures. As well as being different from the law enforcement work of police services, another 'defining characteristic' of ASIO's work is the 'need for a security intelligence service to operate in secrecy.'[29] In explaining why secrecy is necessary, and in another cynical allusion, Irvine noted that 'As any journalist will understand, we need to protect our sources' (community contacts or covert human sources) from being put in 'real personal danger'.[30] In addition, not only did secrecy protect ASIO's 'operational techniques' from becoming known to 'our adversaries' who if they had this knowledge would be better placed to disguise their 'malicious activities', it also protected from exposure any intelligence provided by 'our friends and allies'. Irvine's final apologia for secrecy is that bizarrely it is 'to the benefit of individuals whom ASIO may be investigating' because '[t]he reputations, livelihoods and future prospects of such people, *many of whom may turn out not to be of security concern after all*, may be damaged if our work is not conducted discreetly, out of the public gaze.'[31]

The all-encompassing definition of security contained in the ASIO Act is matched by the all-encompassing secrecy surrounding ASIO, its operatives and operations. The ASIO Act, the National Security Information (Criminal and Civil Proceedings) Act 2004 and, ironically, the Public Interest Disclosure Act 2013 all work in concert having 'the effect of creating a sort of three-sided hall of mirrors in which each Act's restrictions on the disclosure, and availability, of information are tightened as one Act reinforces the others in providing fewer and narrower avenues for access to and release of information in the conduct of terrorism investigations and any subsequent trials.'[32] The Acts' severe restrictions on disclosure of and access to information about ASIO and its activities have been further tightened and reinforced by provisions contained in the National Security Legislation Amendment Act (No. 1) 2014. This Act creates an offence with a prison sentence of up to five years and an aggravated offence (where a discloser intentionally or recklessly endangers the health and safety of a person or adversely affects the conduct of an SIO) with a maximum penalty of 10 years imprisonment for the unauthorised disclosure of information about ASIO special intelligence operations (SIOs). An SIO is

Statements/DDG-Speech-02-September-2014 html>. It is a moot point whether the Deputy Director-General's speech was in fact ASIO's 'separate briefing' to the conference.

[27] George Brandis cited in Deputy Director-General of Security, above n 27.

[28] ASIO Report to Parliament 2013-2014, above n 18, at 7.

[29] Director-General's Speech to the National Press Club, 27 August 2014. In support of ASIO secrecy, Irvine cited the Royal Commission on Intelligence and Security [Hope Royal Commission], Fourth Report, Volume 1 [ASIO], published in 1977/78: 'Intelligence agencies simply cannot operate in full public view if they are to be effective.' <www.asio.gov.au/publications/speeches-and-statements/speeches-and-statements/dgs-speech-27-august-2014 html >.

[30] Director-General's Speech, above n 30.

[31] Director-General's Speech, above n 30 (emphasis added).

[32] Rix, above n 3, at 245.

defined as an ASIO operation that is relevant to its performing a 'special intelligence function' which includes collection and analysis of intelligence related to security. No allowance is made for public interest disclosures and whistleblowing by ASIO employees or of disclosures by journalists. The offences therefore seriously encroach on free speech and expression and on media freedom.[33] In addition to these restrictions, the National Security Legislation Amendment Act enhances ASIO's surveillance powers by strengthening its powers to collect and retain metadata.[34] These enhancements are complemented by the additional powers handed to ASIO in the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 which enables ASIO to collect and retain metadata and to obtain access to computers even when these have nothing to do with the protection of national security.

ASIO corporate governance: oversight and accountability?

According to the Strategic Plan 2013-16, 'Our [ASIO's] corporate governance arrangements support the management and evaluation of performance across a range of ASIO's functions.'[35] The Strategic Plan itself is an important component of these governance arrangements reflecting ASIO's responsibility not only for meeting Australia's current security needs but also for 'ensuring that Australia's national security capability is maintained' to enable it to meet the country's future security challenges.[36] The Plan underpins ASIO's strategic and operational planning and sets the organisation's overall direction in business plans, the priorities of its corporate committees, and 'executive focus'. It also ensures that ASIO's investments in capability development are aligned with the goals in the Strategic Plan and that its performance is measured and reported in accordance with the Plan. The Strategic Plan also briefly outlines ASIO's oversight and accountability framework. This framework is explained in a little more detail in the Director-General's speech to the National Press Club and more detail is provided in the Report to Parliament and other ASIO documents.

In his speech, the Director-General pointed out that

> ASIO is accountable directly to the Parliament. The Organisation provides an annual report to the Parliament of its activities, has its activities scrutinised at Senate Estimates [Committee], it briefs the Opposition, appears before the bipartisan Parliamentary Joint Committee on Intelligence and Security, and provides as required public and private briefings to various Senate committees. It is audited by the ANAO [Australian National Audit Office].[37]

In addition to these arrangements, ASIO's oversight and accountability framework contains a number of other important components. ASIO reports yearly to the National Security Committee of the Cabinet and submits a classified annual report to Parliament. The Attorney-General has oversight of all ASIO operations and issues each warrant for the use of ASIO's 'intrusive powers.' The ASIO Act requires the organisation to comply with the Attorney-General's Guidelines for performing its functions of collecting, correlating, analysing and communicating intelligence related to security and in relation to politically motivated violence.[38] ASIO's security assessments can be reviewed by the Administrative

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[33] M Biddington 'National Security Legislation Amendment Bill (No. 1)' (2014) *Bills Digest*, 19 1 at 29 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F3361366%22> .; Australian Human Rights Commission Inquiry into the National Security Legislation Amendment Bill (No. 1). Submission to the Parliamentary Joint Committee on Intelligence and Security (2014) at 14 <www humanrights.gov.au/submissions/submission-inquiry-national-security-legislation-amendment-bill-no-1-2014.>

[34] Australian Human Rights Commission, above n 34, at 10; Biddington, above n 34, at 13.

[35] ASIO Strategic Plan 2013-16, above n 4, at 4.

[36] ASIO Report to Parliament 2013-2014, above n 18, at 60. Part 5 Corporate Management describes the role of ASIO's various governance committees and has sections dealing with its 'Outreach' initiatives, 'People', Property, and Financial services.

[37] Director-General's Speech to the National Press Club, above n 30. It should be noted that the PJCIS does not have oversight of ASIO's operations and does not have the power to initiate its own inquiries. For more on the oversight and accountability framework see ASIO Report to Parliament 2013-2014 Part 4 ASIO and Accountability, above n 18. Also, ee Senator John Faulkner's recommendations for, amongst other things, bolstering the investigative powers of the PJCIS: J Faulkner, 'Surveillance, Intelligence and Accountability', 24 October 2014 <www.senatorjohnfaulkner.com.au/file.php?file=/news/TGRUOSECRG/index html>.

[38] Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence) <www.asio.gov.au/About-ASIO/Oversight-and-Accountability/Attorney-General-Guidelines html>.

Appeals Tribunal, the Independent Reviewer of Adverse Security Assessments and the courts. The Independent National Security Legislation Monitor reviews the legislative framework within which ASIO carries out its counter-terrorism work and can recommend changes to legislation. The legality, propriety and proportionality of ASIO's work are subject to independent oversight by the Inspector-General of Security and Intelligence, the peak oversight and accountability for Australia's various intelligence services. The role of the IGIS is to ensure that the intelligence services, including ASIO, act legally and with propriety and in accordance with ministerial guidelines and directives, and with respect for human rights. The IGIS has wide-ranging powers including those of a Royal Commission. Among the IGIS's specific powers are conducting inquiries into the activities of the intelligence agencies from the IGIS's own motion or in response to a reference or complaint from the responsible Minister, requiring witnesses to attend inquiries conducted by the Inspector-General, and taking sworn evidence and copying and retaining documents. Inspector-General staff are also able to enter security agency premises when conducting an inquiry and act on complaints from ASIO and ASIS employees about certain matters relating to the conditions of their employment.[39]

The Director-General regards this oversight and accountability framework as 'robust and effective'. However, his view is not a universally shared one. In mid-October 2014, for example, the Office of the Inspector-General of Intelligence and Security began recruitment of five more staff to add to the existing 12 in order to enable the office to monitor ASIO's exercise of the enhanced powers it was granted by the two amendment bills that were considered above.[40] A number of commentators were concerned about the extent to which five additional staff would actually strengthen the Office's capabilities to provide thorough oversight of ASIO, as well as of the other intelligence agencies such as the Australian Secret Intelligence Service (ASIS, Australia's overseas secret intelligence collection agency). Professor George Williams of the Gilbert + Tobin Centre of Public Law at UNSW pointed out that 'it has been regarded for some time that IGIS is underfunded and has not kept up with the enormous increase of personnel within the intelligence community and the significant expansion of their powers.' Matthew Rimmer, of the ANU College of Law, agreed with Williams calling the IGIS 'a bit of a paper tiger' that provides only 'weak oversight'.[41] Independent Senator Nick Xenophon also expressed criticism of the Inspector-General. Commenting on the Inspector-General's inquiry into a case involving an Australian soldier who allegedly pulled a gun on an ASIS agent, Senator Xenophon noted that she seemed to have a 'very cosy and collegial relationship' with ASIS and the other intelligence agencies 'which is not appropriate'. He also believed that in investigating the incident, the Inspector-General had been 'either misled or lied to'.[42] Under the existing legislative framework, lying to the Inspector-General by an intelligence service carries no penalty.

Conclusion: Public confidence and social licence by default?

In spite of the Director-General's assurances, ASIO lacks a comprehensive and robust oversight and accountability framework. The oversight bodies are hamstrung by legislation protecting the secrecy shrouding the organisation and its operations including by imposing limits on the powers of the oversight bodies themselves. And, because when it is claimed that national security is at stake the oversight bodies seem reluctant to exercise to the extent possible the limited powers that they already have. The relevant legislation, including the misnamed Public Interest Disclosure Act 2013, also severely penalises genuine whistleblowers and journalists from making disclosures about ASIO and its operations even if these disclosures are in the public interest. These tight restrictions on the availability of and access to information about ASIO have been reinforced and further tightened in the National Security Legislation Amendment Act (No. 1) 2014. If as Cadbury asserted, disclosure is the foundation of corporate governance because without disclosure the public cannot have confidence organisations are being run

[39] Roles and Functions of the Inspector-General <http://www.igis.gov.au/about/index.cfm> .
[40] H Belot, 'Inspector-General of Intelligence and Security launches recruitment drive to monitor ASIO', *The Sydney Morning Herald*, 13 October 2014. The current Inspector-General is Dr Vivien Thom.
[41] Williams and Rimmer cited in H Belot, 'Intelligence watchdog's oversight called "weak" as new powers granted to spy agencies', *The Sydney Morning Herald*, 14 October 2014.
[42] Chris Uhlmann, 'Nick Xenophon criticises ASIS handling of incident', ABC News, 21 October 2014 <www.abc.net.au/new/2014-10-21/nick-xenophon-criticises-asis-handling-of-incident/5289014>.

effectively and in the interests of genuine stakeholders then there are few grounds for the Australian public to have much confidence that ASIO is serving their interests or for giving it a carte blanche social licence. On this score at least, ASIO's corporate governance *is* an oxymoron. In the end, however, this dilemma is an unresolvable one for it cannot be concluded with any certainty that national security is only able to be protected with tight secrecy. Tight secrecy, and a lack of transparency and accountability accompanying it, comes with considerable risk of misuse and abuse of power and limits on the Australian people's ability to enjoy their fundamental rights and freedoms.

Whistleblowing and the Indonesian Tax Department: A Framework For Analysis

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Abstract

This chapter discusses opportunities for whistleblowing of bribery practices in the Indonesian Directorate General of Taxation. Building on earlier studies which reveal that written regulations and policies providing whistleblowers protection programs and threatening punishment for those who retaliate against whistleblowers, are not effective, this study investigates social and cultural variables, such as attitude toward whistleblowing, group pressure, and perceived behavioural control that may influence individuals to report wrongdoing. The chapter suggests that unless bribery is understood within an organization, the relevant regulations, policies, and system may not be used at all or they may not be used properly to combat bribery. Three main research questions are discussed: first, to what extent do identified variables influence individuals to report bribery; second, to what extent do identified variables influence individuals in selecting reporting channels; and third, what are the main variables that influence the intention of individuals to report bribery? Answers to these questions will be useful when designing whistleblowing regulations and policies to combat bribery in the high context culture of Indonesia.

Key words

whistleblowing, business ethics, codes of conduct, corruption, ethical decision-making, ethics, values and management futures, organisational culture, trust management

Introduction

In this chapter, which focuses on bribery and whistleblowing in the Indonesian Directorate General of Taxation (DGT), bribery is constituted as giving or promising to a tax department employee in order to make him or her reduce tax obligations and/or accelerate services (Azam, Gauthier & Goyette 2009; Rizal, Y 2011). The majority of whistleblowing studies are in a Western cultural context. This chapter uses Planned Behavior Theory (PBT) developed by Park and Blenkinsopp (2009) to investigate the relationship between attention, subjective norms and perceived behavioral control, and the intention to whistleblow, as well as the preferred reporting channels in a high context culture such as Indonesia. Adapting the earlier work by Park and Blenkinsopp (2009), this study utilizes Schein's six mechanisms of leadership style (Fallon & Cooper 2015; Schein 2010) that help identify an organization's shared "underlying assumptions and the process by which they come into being" (Dellaportas, Cooper & Braica 2007, p. 1445). This study expands on previous research to include the perceived ease/difficulty of finding other occupation(s) and of having sufficient evidence (MSPB 2011) as variables that can influence an individual's propensity to whistle blow (Miceli & Near 1985b; Near & Miceli 1986). The conceptual model (see Figure 1) shows how whistleblowing intentions would be predicted by PBT. The model also includes analysis of the preferred channel of reporting, as well as the intention to 'not' report. Although, prominent whistleblowing research scholars, such as Miceli, Near, and Dworkin (2013) argue that whistleblowing studies lack fundamental theories, this study applies the

"Universal Dignity Theory of Whistleblowing" (UDTW) proposed by Hoffman and McNulty (2011) as basic theory. As Hoffman and McNulty (2011, p. 51) argues, the fundamental principle of UDTW is that "whistleblowing is both permissible and a duty to the extent that doing so constitutes the most effective means of supporting the dignity of all relevant stakeholders". The principle of UDTW leads to the following conditions for ethical whistleblowing as follows: first, compelling evidence of nontrivial illegal or unethical actions done by an organization, or its employees that are considered to violate the dignity of one or more of its stakeholders; and second, a lack of knowledge of the wrongdoing or failure by the organization to take corrective actions (Hoffman & McNulty 2011).

However, it would also be unreasonable to expect an individual to disclose misconduct in his or her organization if one has credible grounds for believing that by reporting wrongdoing one would be putting oneself or their loved ones at risk of retaliation (Hoffman & McNulty 2011). There are key principles in this basic theory that satisfy this investigation since it focuses on investigating the feeling of having evidence, nontrivial illegal action (bribery), perceived of the organization seriousness to investigate the report seriously, and retaliation as fundamental consideration to whistleblow. Hoffman and McNulty (2011) also note that although their ethical whistleblowing theory is grounded in conditions in the United States, the theory is intended to be applicable in other countries and cultures.
In addition, as literature would also suggest, humans often have other motives such as intrinsic or extrinsic motives, not merely self-sacrifice when they do a good deed for the broader community (Dozier & Miceli 1985). For instance, individuals may be motivated to disclose wrongdoing given the opportunity to obtain financial and other personal benefits (Bowden 2014). This concept, earlier called prosocial behavior, has been developed as pro-organisational behaviour (POB) in an organization context (Brief & Motowidlo 1986). POB is defined as behaviour that is "(a) performed by a member of an organization; (b) directed toward an individual, group, or organization with whom he or she interacts while carrying out his or her organizational role; and (c) performed with the intention of promoting the welfare of the individual, group or organization toward which it is directed" (Brief & Motowidlo 1986, p. 711).

The main different between prosocial behaviour and altruism is the latter required the actors' purely unselfishness motives in performing a particular behaviour (Dozier & Miceli 1985). Borrowing this idea, in the context of whistleblowing theory, many prominent whistleblowing scholars have considered whistleblowing as POB (Brown 2008; Miceli & Near 2013). Thus, we believe that if an organization is keen to encourage their employees to report misconduct, they need to facilitate employees working in an ethical environment, supportive culture and values, as well as appropriate regulations, policies, procedures and other intrinsic and extrinsic ingredients. The reasons are very clear, because whistleblowing has an embedded risk of retaliation, thus asking one to sacrifice their career and in some cases their very life, without providing adequate protection from adverse consequences and providing stimulus that could encourage them to speak up is unreasonable. Equally, enforcing others to sacrifice themselves is no sacrifice at all when the one giving direction does not suffer any adverse costs (Bouville 2008). In fact, as Bouville (2008) noted, offering and giving rewards to potential or existing whistleblowers does not breach morality. People are not expected to be saints who act with pure motives and the notion that 'rejection of rewards as tainting motives is incompatible with the basic assumptions of morality' (Bouville 2008, p. 11). Moreover, utilizing cost and benefit analysis, the potential to whistle-blow and stop wrongdoing has seen financial rewards become more prevalent. Consistent with this line, some scholars (Bowden 2014; Brink, Lowe & Victoravich 2013; Dworkin & Near 1997; Miceli & Near 1985a) suggest that adequate financial incentives should be included as extrinsic motivational factors to encourage employees to report misbehavior (such as bribery).

Study context

Commonly referred to as the 'Gayus' case, this most notorious bribery case at the Indonesian Directorate General of Taxation (DGT) attracted great public interest and provides the backstory to this study. A DGT official, Gayus Halomoan Tambunan, a relatively low-ranking staff who "fixed" tax issues by assisting both domestic and foreign companies to illegally avoid or reduce their tax liabilities, collected a small fortune of Rp74 billion ($8.5 million) (Newman 2011/2012). Although the official was sentenced to ten years in prison, he declared himself as a minnow compared to other much larger wrongdoers in the DGT. Corroborating his assertion, related analysis indicated that a significant "tax mafia" operates within the organisation (Newman 2011/2012). Moreover, as a survey conducted by the Welfare Initiative for Better Societies, a non-government organisation cited in Pramudatama (2012) indicated, Indonesia stood to lose approximately 50 percent or around of Rp521 trillion (US$55.9 billion) of its tax revenues as a result of the massive corruption committed by wrongdoers in the department (DGT) in collaboration with taxpayers and unofficial tax officials who were exploiting irregularities in tax regulations.

Officially, the DGT argues that the internal whistleblowing system (WISE) has helped the organization detect and reveal cases of bribery within the Department (Rizal, J 2013). However, noting Gayus' suggestion of a "tax mafia" (Newman 2011/2012) and the reported existence of a culture of corruption as noted by Rizal (2011), the cases identified so far might be perceived as just the top of the iceberg, and that bribery continues to exist and remains largely unaffected (or undeterred).

Another issue that compounds the concern with bribery and related wrongdoing by DGT officials is that the existing Indonesian whistleblowing laws have weaknesses both in the adequacy of principles and provisions, and in their implementation. For example, compared to accepted international principles, the Indonesian whistleblowing laws show some limitations. External reporting channels to third parties, anonymity, confidentiality, internal disclosure procedures, remedies, and transparency are still indicated as absent (Wolfe et al. 2014). Moreover, the Witness and Victim Protection Agency (WVPA) is reported as underfunded, ineffective, limited in geographic coverage, lacking in supporting technology and human resources skills, and its appointees are not independent from political involvement (Hendradi 2011). Additionally, as this study noted, the different perspectives by law enforcement officials regarding witness and victim protection results in a lack of coordination and can lead to conflict among related parties. Finally, Hoffman and McNulty (2011) notes that it is unreasonable to expect an individual to disclose misconduct if by doing so it would put the individual or their loved ones in harm's way and without sufficient legal protection.

Those issues suggest that while regulations are necessary, alone they may not be sufficient and it is necessary to understand **(**and adjust governance practices to enable) predictors that may influence individuals' intention to report bribery. In sum, good governance is a key factor for long-term stability, and it cannot be imposed from outside. Rather, it is best developed organically, supported by strong roots within society.

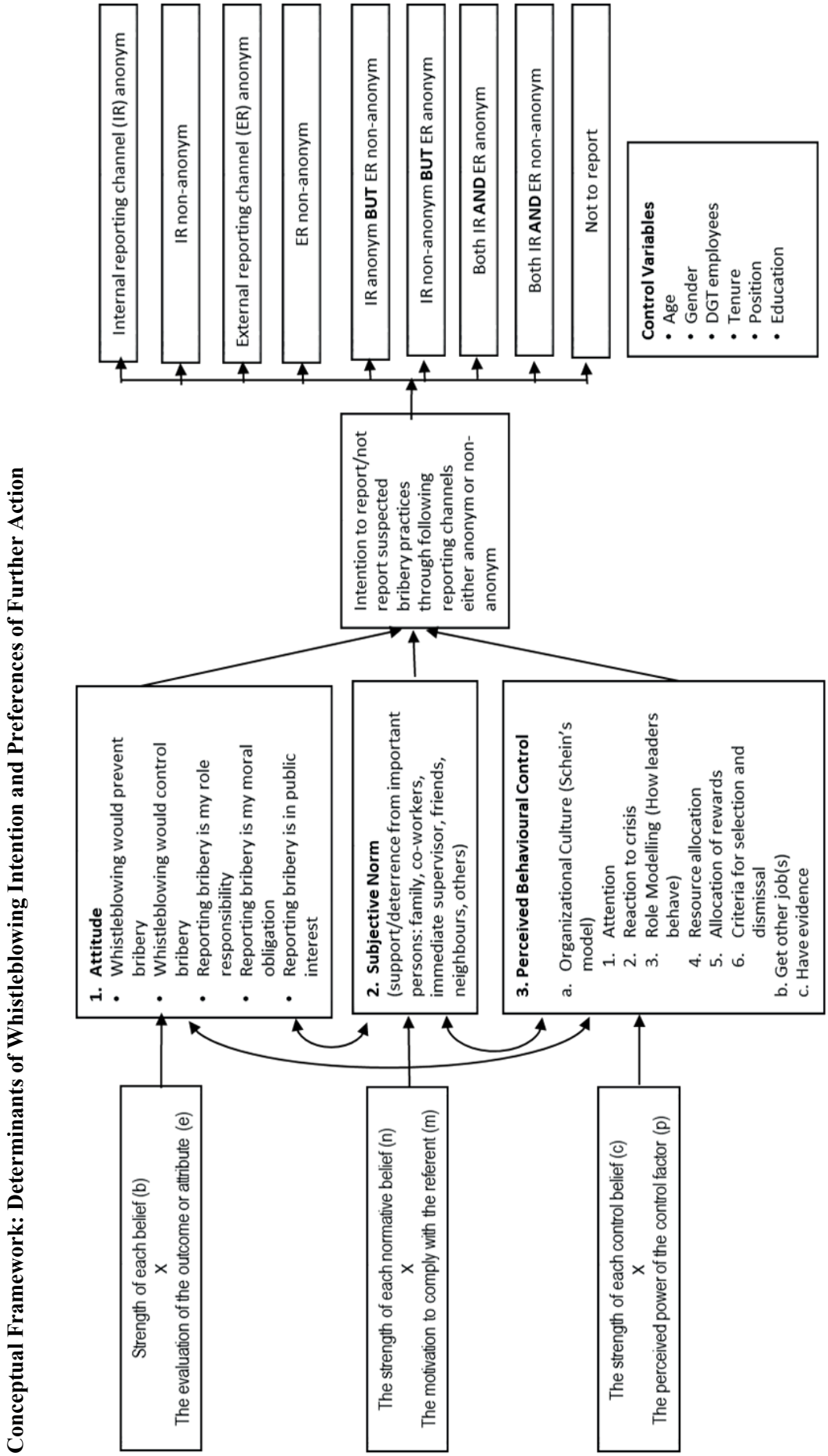

Figure 1: Intention to Report Bribery Cases adapted from Park and Blenkinsopp (2009)

Conceptual framework

To better understand the predictors of whistleblowing intention, research has theoretically and empirically demonstrated the pivotal importance of pro-social organizational behaviour (POB) (Brown 2008; Miceli & Near 2013). In whistleblowing theory, an individual considers that they should report wrongdoing if he or she believes that reporting is worthy (Lowry et al. 2012), to stop misconduct (Brown 2008; Cassematis & Wortley 2013) and whether one believes that whistleblowing is his or her personal responsibility (Lowry et al. 2012). However, it does not mean that whistleblowing is an act of altruism (Dozier & Miceli 1985). Rather, it is clear that individuals may be motivated by financial and other personal benefits (Bowden 2014). This proposed study utilizes Planned Behaviour Theory (PBT) developed by Ajzen's (2005).

The reason to utilize PBT is because several studies across countries such as in Malaysia (Ab Ghani 2013), South Korea (Park & Blenkinsopp 2009), South Africa (Fatoki 2013), and Indonesia (Bagustianto 2015; Banda & Mahfud Sholihin 2012; Kreshastuti & Prastiwi 2014; Sulistomo & Prastiwi 2011) show that the theory has widely tested validity as a model of a general theory that accounts for whistleblowing.

Importantly, it is very difficult, even impossible, to directly access an actual whistleblowing event because it is considered a sensitive issue (Chiu 2003; Patel 2003) and a hidden activity (Patel 2003). As well, confidentiality required by organisations restrict access to the whistleblowers (Sims & Keenan 1998). The net effect of these factors makes the topic difficult to research (Patel 2003). Consequently, this study will investigate the intention of the DGT employees to engage in whistleblowing rather than their actual behaviour.

Given these compelling gaps in whistleblowing literature, this study attempts to extend the theory to explicitly account for attitude, subjective norm, and perceived behavioural control (organizational culture, availability of other work and evidence held) in relation to bribery practices in the Indonesian DGT organization. Arguably, the biggest limitation of existing whistleblowing literature is that it has focused mainly on Western culture, thus as various scholars note, there is a need to extend the studies to other regions and cultures (Lowry et al. 2012; Miceli, Near & Dworkin 2013).

PBT accommodates three determinants namely attitude, subjective norm and perceived behavioural control (Ajzen 2005). PBT is based on the assumption that individuals' intention to perform a specific behaviour depends on their beliefs and available information (Ajzen 2005). Moreover, for a sensitive issue such as intention to use cannabis, PBT successfully provided good predictions of both intentions and behaviours (Conner & McMillan 1999). Thus, the concept is arguably also useful in predicting with some accuracy other high risk behaviours, such as whistleblowing (i.e. Ab Ghani 2013; Fatoki 2013; Park & Blenkinsopp 2009). As well, if an individual believes that he or she possesses the appropriate opportunities or resources (e.g. money, time, skills, cooperation and support from others) to deal with particular behaviours, they are more likely to perform the behavior in question (Ajzen & Madden 1986).

The first determinant of intention is an attitude, which means an individual's judgement of how much he or she favours or rejects a particular behaviour, derived from salient beliefs about the consequences of the behaviour and the subjective evaluation of those consequences (Park & Blenkinsopp 2009). It is intriguing that positive attitude towards whistleblowing (individuals think it is morally right and necessary) does not necessarily means all will disclose wrongdoing when the time comes to do so. In fact, only a few actually take action (Park & Blenkinsopp 2009).

The second determinant of intention is subjective norms, referred to as "the perceived social pressure to perform or not to perform the behaviour" (Ajzen 1991, p. 188). This reflects an individual's normative beliefs about approval or disapproval by important referent individuals or group in relation to a given behaviour (Ajzen 1991). A significant number of researchers also argue that the presence of super-ordinates or co-workers support has a positive relationship to reporting (i.e. Brown 2008; Dozier

& Miceli 1985; Ellis & Arieli 1999; Lavena 2014; Mesmer-Magnus & Viswesvaran 2005; Miceli & Near 1988, 1989; Miceli, Near & Dworkin 2009; Miceli et al. 2012; Near & Miceli 1995; Park & Blenkinsopp 2009; Proost et al. 2013; Trongmateerut & Sweeney 2013). Inconsistency in results related to this variable can be found in a single study at Indonesian DGT, which revealed that supervisor support does not influence employees' intention to report wrongdoing (Budiriyanto & Gugup Kismono 2013).

A third determinant of intention is perceived behavioural control. This is defined as the perceived ease or difficulty of performing the behaviour, which depends on an individual's self-efficacy and perceived wider environmental factors that promote or hamper performance (Foy et al. 2007). It is also argued that the perceived difficulty may overlap substantially with affective attitude (Kraft et al. 2005). However, this finding mainly refers to Park and Blenkinsopp (2009) and Fallon and Cooper (2015) studies in fitting the variables with PBT.

The first sub-determinant of perceived behavioural control in this study is organizational culture. Although culture is an abstraction, the forces that culture creates in social and organizational situations are powerful (Schein 2006). It is commonly understood that culture and leadership are two sides of the same coins (Schein 2006). On the one side, cultural norms will define leadership, while on the other side, the ultimate act of leadership is arguably to internalize useful culture or to mitigate culture when it is considered as dysfunctional (Schein 2006).

More generally, whistleblowing must also be viewed in terms of the national Indonesian culture, which is characterized as high power distance, more collectivist than individualistic, with moderate feminism and moderate in uncertainty of avoidance (Hofstede & Hofstede 2005). The effect of national culture on the workplace is evident in the following noticeable characteristics (1) inequality is acceptable; (2) more powerful individuals have more privileges, even, sometimes over the clear written rules and regulations; (3) whoever holds power is often seen as the source of rightness and goodness; (4) individuals tend to avoid conflict, preserve others' 'face', maintain harmony, and seek compromise; and (5) a relationship often prevails over task (Hofstede & Hofstede 2005). All studies seem to weight leaders as key players whose responsibility is to shape the organisational culture (Fallon & Cooper 2015; Hofstede & Hofstede 2005; Schein 2006).

The organisational cultures of leadership styles based on Schein's study are attention, reaction to crisis, resource to allocation, role modelling (how leaders behave), allocation of reward, and criteria for selection and dismissal (Fallon & Cooper 2015; Schein 2006, 2010).

a. Attention
   Attention is a leaders' commitment to focus, assess, and manage issues that can be perceived by employees as important or not important in value within an organisation (Fallon & Cooper 2015). If a high ranking official is inconsistent with messages conveyed, then subordinates can get confused about the view or opinion of their superiors (Fallon & Cooper 2015). For instance, in case of whistleblowing, regardless of how frequently the organisation encourages the employees to report misconduct, if senior leaders fail to follow up reports seriously, it can discourage employees' intention to disclose misconduct (i.e. Bowden 2014; Brown 2008; Cassematis & Wortley 2013). Worse, lack of leader's attention can help create a corrupt culture within the organisation (Fallon & Cooper 2015).

b. Reaction to Crisis
   Schein's second mechanism relates to an organisation's reaction to a crisis (Fallon & Cooper 2015). Leaders' reaction to a crisis clearly depicts their values to employees (Dellaportas, Cooper & Braica 2007). For instances, how a leaders' reacts to a bribery case, whether they blame others for the fraud occurring or they admit to a weaknesses in the system and apologise for the problems, can demonstrate the leaders' ethical values (Fallon & Cooper 2015). If the leaders are seen to blame others or react in a defensive manner to unethical behaviours within the organisation, employees are reported as likely to prefer to disclose misconduct through external reporting channels or even by going public (Driscoll 1999; Tavakolian 1994).

c. Resource Allocation
This mechanism indicates that employees' behaviour, attitudes and their personal goals are influenced by leaders' decisions on budget allocation and its expenditure (Dellaportas, Cooper & Braica 2007). Simply, a leaders' priorities can be clearly illustrated by budget allocation (Schein 2010). For example, if the organisation spends much of the budget on entertainment and services to business partners, rather on than the quality and/or ethical value of products offered, the perception by employees can be of a climate that endorses loose accountability, which in turn can lead to corrupt work environment (Fallon & Cooper 2015).

Based on a review in the United States on the activities of the Office of the Special Counsel (OSC) created by the whistleblowers provisions of the Civil Service Reform Act of 1978, findings reveal that the low percentage of noted complaints in the organization is because the office was understaffed and resources were inadequate (Vaughn 2013 cited in Bowden 2014). Other studies in different organizations also support the findings (i.e.Dellaportas, Cooper & Braica 2007; Fallon & Cooper 2015).

d. Role Modelling
Schein's fourth mechanism, role modelling, is regarded as one of the most important responsibilities of leaders in organizations' (Fallon & Cooper 2015). Positive role modelling shown by the senior leaders will strengthen the ethical way to conduct business; however, negative behaviour examples given by the high rank officials are able to erode ethical standards (Fallon & Cooper 2015). As they also note, how the leaders behave can be seen in two ways (a positive or negative role) (Fallon & Cooper 2015). Positive role modelling will promote ethical behaviour to conduct business, while negative role modelling will erode ethical standards (Fallon & Cooper 2015).

e. Allocation of Rewards
Merit based performance rewards by leaders are indicators of the prevailing organisational culture (Fallon & Cooper 2015). However, if unethical behaviour by individuals within an organisation are rewarded, these informal messages send strong messages about the real corporate culture, which is perceived as promoting unethical business practices (Fallon & Cooper 2015). In the case of the Australian Wheat Board (AWB), empirical studies show that during the kickback scandals AWB executives received higher salaries and bonuses even while they showed unethical behaviour in the conduct of business (Cole 2006 and Overington 2007 cited in Fallon & Cooper 2015). Where corporate culture is ethical, disreputable behaviour should be unacceptable and even punished. However, in the AWB case, the ends (goal to maximize profit) appeared to justify the means, which included conducting business unethically (Fallon & Cooper 2015). The message was quite clear that that 'being unethical was 'good' and being ethical is not if it potentially jeopardised future sales' (Fallon & Cooper 2015, p. 80).

f. Criteria for Selection and Dismissal
Criteria for selection and dismissal - the internal selection process for employees joining and/or leaving the organisation - can ensure the corporate culture remains intact and to the benefits of the leaders (Fallon & Cooper 2015). Employees who are deemed 'suitable' to the culture will remain in work or will be newly recruited, while those who oppose the culture may resign or be terminated (Fallon & Cooper 2015). In the case of AWB, the whistleblower who challenged the payment of kickbacks was ultimately pushed out of the organization due to his 'questioning' (Fallon & Cooper 2015). As a result of selection and dismissal criteria, employees can be discouraged from reporting wrongdoing.

Conversely, the effect of perceived retaliation is inconsistent. For instance, Brown (2008), Cassematis and Wortley (2013), and Bowden (2014) reveal that one of predominant reasons for not reporting wrongdoing in organisations is because of a fear of retaliation. This finding is consistent with several cross-cultural studies (i.e. Fatoki 2013; Hwang et al. 2014; Keenan 2000, 2002, 2007; Lowry et al. 2012; MacNab et al. 2007; Park & Blenkinsopp 2009; Park et al. 2008; Sims & Keenan 1999; Tavakoli, Keenan & Cranjak-Karanovic 2003). Yet, contrary to common beliefs, a different

result is reported by some studies in Indonesia that reveal that personal cost does not significantly influence individuals to report on misconduct (Bagustianto 2015; Septiyanti, Sholihin & Acc 2013).

The second proposed sub-determinant of perceived behavioural control is the perceived ease or difficulty for the DGT employees to obtain other positions (alternate employment). Based on the theory of power dependence relations, an employee's decision to perform a particular action is highly influenced by his or her degree of dependence on the organisation and the availability of other resources (Emerson 1962 cited in Ab Ghani 2013). If an employee believe that he or she can get other work (employment) easily, one may not be fearful of retaliation and so may tend towards disclosing misconduct (Miceli & Near 1985b; Near & Miceli 1986).
In addition, this study investigates third sub-determinant namely the effect of a perception of having evidence. As indicated by a previous study by the U.S. Merit Systems Protection Board, a high rate of reporting, particularly for serious types of wrongdoing, is highly related to the quality of evidence held by whistleblowers (MSPB 2011). These studies indicate that whistleblowers need accuracy about facts surrounding the misconduct before making a decision to report or not report (Near & Miceli 1996). Since this study determines bribery, as a main type of wrongdoing which may be considered as a serious type of misconduct, it seems that a perception of having evidence must inevitably be included.

Contribution to knowledge

Even though, the conceptual framework of this study is mainly adapted from Park and Blenkinsopp (2009) study, the authors have attempted to design a more comprehensive model by adding some other important variables identified in the literature. Arguably, the combination of selected variables in our conceptual framework would be the first to address the most important influences on an individuals' intention to report misconduct. This study will thus fill some gaps in, as well as extend literature. For instance, perceived organisational culture based on Schein's six mechanisms of leadership styles has not, to date, been fully examined in the whistleblowing literature in Indonesia. So, too, other variables, such as the perceived ease or difficulty to find other work, as well as the perception of having sufficient evidence especially in relation to serious misconduct such as bribery. In addition, the framework supports an investigation of employee preferences when reporting, using either internal or external channels, by anonymous or non-anonymous means, or by not reporting a case of misconduct. A combination of preferences on reporting channels, and anonymity, as well as intention not to report have all not been investigated in the Indonesian (and DGT) context.

Last but not least, this is the first study that sets out to examine selected variables and intention to report bribery at a government institution (DGT) in Indonesia. Most previous studies identified in the literature search appear focused on sexual harassment scenarios (i.e. Alagappar & Marican 2014; Bowes-Sperry & O'Leary-Kelly 2005; Miceli, Near & Dworkin 2013; Sinha 2013). It is important to investigate a particular type of wrongdoing, not only because whistleblowing studies are still very scarce, and the issue requires more investigation (Miceli, Near & Dworkin 2013), but also because researchers need to investigate a specific wrongdoing that matches with an organisation's characteristics and interests. An organisation's characteristics may lead to different treatments for different wrongdoings. For instance, strongly profit-oriented organisations may be less open to legal violations, rather than embezzlement. The latter is seen as reducing profit (Victor and Cullen 1988, Wimbush and Shepard 1994 cited in Near & Miceli 1995). Based on these reasons, there is a need to focus on bribery in this study as this aligns with the tax organisation's main problem (Rizal, Y 2011).

The proposed research questions are as follows:

(1) To what extent do selected predictors influence the intention of the DGT employees to report bribery?
(2) What are the main factors that influence the intention of DGT employees to report bribery?
(3) To what extent do selected variables influence the DGT employees to report or not report bribery? What are the preferred reporting channels – e.g. internal or external? Anonymous or non-anonymous?

Methodology

The study will test the conceptual framework using mixed methods, but it mainly relies on a quantitative method by utilizing a web-based survey (close-ended questions). To obtain more insights, respondents will be asked to respond to open-ended questions (qualitative approach). Based on their answers, the findings will be analysed to test the link between attitude, subjective norm, and perceived behavioural control, and the DGT employee intention to report bribery either through internal or external reporting channel by anonymous or non-anonymous, or not to report.
To measure attitude, this study utilizes and adapts the positive consequences of whistleblowing based on the aims of the whistle-blower protection laws (Callahan and Dworkin 2000 cited in Park & Blenkinsopp 2009).

To measure subjective norm, this study will refer to and adapt from Park's and Blenkinsopp's (2009) study, which investigates the importance of individuals or group for a whistle-blower in relation to report bribery.

To investigate the third variable, perceived behavioural control, this study will adapt perceived organizational culture based on Schein's six mechanisms referring to Schein (2010) and Fallon and Cooper (2015) studies, perceived of easiness/difficulties to get other occupation(s), and perceived of having evidence. In these sections, most variables are new compared to those of from Park and Blenkinsopp (2009) study.

Last but not least, the study identifies employee preference in their choice of options to report through either an internal or external channel, anonymous or non-anonymous, or not to report, this study expands on work by Park and Blenkinsopp (2009). While the previous study focused only on two options of reporting channels (internal or external), this study expands to eight reporting channel preferences, as well as the possibility to not report.

The data for this study was collected from the Indonesian DGT employees between January and March 2016. A web-based survey (Qualtric) will be used to gather the main information. To design the survey, this study refers to guidance with some modifications from Ajzen (2006), Francis' et al. (2004), Park and Blenkinsopp (2009), and Fallon and Cooper (2015) studies. In this method, respondents are asked to determine their agreement or disagreement with a particular statement, using a five-point Likert scale of responses (Veal 2005).

The web-based survey link will be emailed to participants. According to Veal (2005), the use of the method fits with some characteristics of this study, such as the sensitive issue of whistleblowing, which needs a relatively higher degree of respondents' anonymity, and the characteristics of being widely scattered geographically, making face-to-face interviews impossibly expensive. Given a population of around 32,000 DGT employees, the target is 600. Veal (2005) argues that for population below 50,000, the minimum representative sample is 384 for a confident interval level of ±5%. To choose respondents, a stratified random sampling is used in order to satisfy representatives of each office, based on region, demographic clusters, and to mitigate bias (Reiter 2000; Veal 2005).

The data will be analysed using Analysis of Moment Structures (AMOS) statistical program for the qualitative questions because it is able to take confirmatory (i.e. hypothesis-testing) on multiple variables or multivariate relationships or estimating points and/or interval indirect effects (Byrne 2013). While for the quantitative questions, we will utilize NVivo.

Conclusion

Possible preliminary findings based on a pilot of the questionnaire are discussed briefly. It is predicted that all determinants (attitude, subjective norm, and perceived behavioural control) have positive relationships to the DGT employee intention to report bribery. As well, it is predicted that employees will prefer to utilize external reporting channel anonymously if they perceive the retaliation is high and their report will not be followed seriously by the organisation. Finally, it is predicted that perceived behavioural control, especially in relation to organisational culture is the most influential determinant for the DGT employees to report or not report bribery within the organisation. Thus, it may also be recommended that DGT and the Indonesian Ministry of Finance (MoF) need to increase openness and transparency in their actions by building and developing information and communication technologies, such as e-reporting. For instance, the taxpayers have to report their wealth online to DGT. The information has to be able to be accessed by not only the tax officials who directly deal with the payers but also by limited layers of the team members and their superordinate's. All tax analysis and reviews as well as whom has accessed the system and changed to the data have to be recorded in the system for audit trails. Moreover, the system has to be audited by internal and independent auditors regularly. This would reduce the potential of collusions between taxpayers and tax officials. Another approach is by conducting regular ethics training, workshops, and discussions at local and national levels. Helping cultivate a strong civil society is important and it will require a long-term view. These efforts have the potential to create a substantive social change in attitudes toward transparency and foster an ethical culture in the workplace.

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Research into Whistleblowing: Protection Against Victimisation

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Abstract

'Blowing the whistle' is fraught with risk and this is increasingly recognised by the widespread adoption of whistle-blower legislation to protect the whistle-blower. This paper reviews current legislation, the literature on victimisation of whistle-blowers and reports the results of a study of whistleblowers. Interviews conducted with whistleblowers showed that their experience is usually negative. They become 'victims' of a range of harms, including loss of employment, bullying and harassment and emotional distress. The results have implications for the successful operation of the new disclosure laws introduced by the Australian and State governments.

Key Words

Whistleblowing. Public sector, Private sector, legislation, Protection

Introduction

In democratic societies, governments, public sector organisations and others who spend the public 'purse' it is generally accepted that they should be accountable to the wider public. Accountability occurs through institutions including Parliament, the courts, integrity bodies such as the Ombudsman and related accountability mechanisms, and through associated governance regulations and guidelines. However, calling people to account can only happen if there is information and evidence. Research (Armstrong 2014) suggests that those who know most about wrongdoing[1] are often those closest to the action. These people have been termed 'whistle-blowers' if they decide to report the wrongdoing. 'Blowing the whistle' however, is fraught with risks and this is increasingly recognised by the widespread adoption of whistle-blower legislation to protect the whistle-blower. Many questions are raised by whistleblowing (Dussuyer, Mumford and Sullivan 2011). What does it mean to 'blow the whistle'? What kinds of whistle-blowers are there? What motivates a person to 'blow the whistle'? Do different kinds of whistleblowing require different responses? What are the difficulties experienced by whistle-blowers? For those who receive their reports, what are their responsibilities? To whom should organisations be accountable for how they handle whistle-blower allegations? What are the experiences of whistle-blowers after reporting wrongdoing and what is the impact on the organisation? It is these last questions that are the focus of the present study.

[1] 'Wrongdoing' is the term preferred in this paper to cover misconduct, corrupt conduct, illegal behaviour and other forms of non-compliance.

Background

A frequently used definition of whistleblowing in the research literature is:

The disclosure by organisational members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action. Micali, Near and Dworkin (2008).

Increasingly however, the term 'whistle-blower'[2] according to some (Armstrong & Francis 2014) has pejorative connotations, and is replaced by terms such as ' complainant', 'respondent',' reporter of public interest', ' discloser', or 'person making allegations or raising concerns'. Thus in the Victorian *Public Interest Disclosure Act 2013* (PID Act) what was 'whistleblowing' in the previous Act is now a 'public interest disclosure' defined as a disclosure of information, by a public official, that is:

- a disclosure within the government, to an authorised internal recipient or a supervisor, concerning suspected or probable illegal conduct or other wrongdoing (referred to as "disclosable conduct");
- a disclosure to anybody, if an internal disclosure of the information has not been adequately dealt with, and if wider disclosure satisfies public interest requirements; or
- a disclosure to anybody if there is substantial and imminent danger to health or safety; or
- a disclosure to an Australian legal practitioner for purposes connected with the above matters.

The act of blowing the whistle and the person who does this, arouses a number of conflicting views and responses (Francis 2015; Dussuyer et al 2011). Whistle-blowers have often taken action only after a lot of 'soul searching' and a desire for change but their colleagues may feel threatened, guilty or shamed and management of an organisation may focus more on the whistle-blower than on the alleged perpetrator of the wrongdoing. It has been widely reported that in many cases it is the whistle-blower who ends up being victimised and subject to mistreatment and retaliation[3]. The media also regularly reports on instances where whistle-blowers have been treated poorly as a result of reporting on wrongdoings.

The purpose of this paper is to describe a study of a self-selected sample of whistle-blowers after they reported wrongdoing in their workplace, from the point of view of what they experienced through qualitative interviews, and also of those who handle and manage whistle blower reports, the 'disclosure coordinators', through an on-line survey. The focus of the present study is to identify:

- What is the nature and extent of victimisation experiences of whistle-blowers who report wrongdoing in the work place
- What elements are protective against victimisation when blowing the whistle, and
- What are effective measures to protect whistle-blowers from victimisation?

Protecting the whistle-blower through legislation

Whistle-blowers in the public and private sectors are afforded protection by legislation. Most legislation in Australia specific to protecting the whistle-blower is designed to protect the members of the public sector (Bowden, 2014, Brown 2013, Armstrong & Francis 2013). Protection for whistle-blowers has been introduced in Public Disclosures (PD) Acts by all Australian States and at the national level since the 1990s (Armstrong and Francis 2014). Most recently legislation was introduced in Victoria in 2012 when the *Whistle-blower Protection Act* 2001*,* previously under the jurisdiction of the Ombudsman, was repealed and replaced by the *Independent Broad-Based Anti-Corruption Commission Act* 2011 and

[2] Translations of 'whistle-blower' into French – 'lanceur d'alerte' and Dutch – klokke luier' evoke colourful images as does the English term.

[3] Various terms have been used to describe the negative outcomes experienced by whistle-blowers after reporting wrongdoings – retaliation, victimisation, detrimental action and mistreatment. In this study the term 'victimisation' is preferred.

the *Protected Disclosure Act* 2012 No. 85 of 2012 (Government of Victoria). The Victorian Independent Broad-Based Anti-Corruption Commission (IBAC[4]) was established in 2013 with its principal function to identify, investigate and expose serious corrupt conduct, and police personnel misconduct; and also with responsibility for whistleblowing and the investigation of public interest disclosures which covers such activities as poor oversight of funds, improper use of equipment and property, misappropriation of assets, improper use of authority and position. The IBAC legislation goes further than mismanagement of public resources to also include conduct that poses risk to public health or safety or the environment. Protection for whistle-blowers by IBAC involves both having appropriate procedures in place to manage the whistle-blower process and specific initiatives to protect the whistle-blower. Thus in 2013 IBAC published *Guidelines for Protected Disclosure Welfare Management* and *Guidelines for Making and Handling Protected Disclosures* which together provide the framework and rules for compliance with the *Protected Disclosures Act* and procedures for the protection of whistle-blowers against liability for breaches of statutory confidentiality of information and breaches of confidence. IBAC also holds regular forums of 'disclosure coordinators' who handle whistle-blower reports in the public sector organisations.

Legislation to protect whistle-blowers in the private sector is more diffuse; the *Corporations Act* includes some legislation; Standards Australia has issued a Standard for whistle-blower protection, and the Australian Securities Exchange listing rules requires voluntary compliance. Less specific is protection afforded by other Acts. Whistle-blowers in the private sector in Australia are protected by provisions in the *Australian Corporations and Securities Act (Australian Government,* 2001, Part 9.4AAAA) that is administered by the Australian Securities and Investment Commission (ASIC). The Act requires a disclosure to be made to ASIC, a member of the company's audit team, a director, secretary or senior manager of the company or a person authorised by the company to receive the disclosure.

To be protected by the *Corporations Act* a whistle-blower must be an officer (usually that means a director or secretary) of the company; an employee of the company; or a contractor (or employee of a contractor) who has a current contract to supply goods or services to the company. Protection provides that the persons making disclosures cannot be subjected to civil and criminal liability, termination of employment, reduction in employment conditions, the enforcement of contractual remedies and /or liability for defamation as a result of the disclosure. Victimisation or threat of victimisation is prohibited and, should it occur, the organisation or person issuing the threat can be liable to compensate the victim for damages. Bowden (2014) notes that further issues need to be addressed: managing vexatious whistle-blowers, types of wrongdoings need to be expanded, and that ASIC appears to be an inappropriate agency to deal with protection and support for whistle-blowers.
The *Corporate Governance Standards* issued by Standards Australian International (2003) includes the Standard AS8004-2003 Whistle-blower Protection Programs for Entities. The Standard recommends that a whistle-blower be given a guarantee of anonymity, although under the *Corporations Act* whistle-blowers must identify themselves, and persons making anonymous reports are not protected under the *Act*. While the *Act* affords whistle-blowers some protection, the officers to whom a report is made are not protected if they fail to respond adequately to a whistle-blower's report. Bowden (2014) reported that the ASX provisions are not mandatory and found that by 2000 only 54 per cent of the ASX companies had a formal detailed whistle-blower program. Whistleblower protection is also offered to the business sector through the *Australian Competition and Consumer Commission (ACCC)* and the *Australian Securities and Investment Commission* (ASIC) legislation. Some of the problems identified with legislative protection of whistle-blowers (Armstrong & Francis 2014; Brown & Roberts 2011) are that it places limitations on whistle-blowers going to the public media (most organisations want to keep bad news 'in house') and whistle-blowers are advised to keep their allegations 'confidential'. Whistle-blower legislation also often requires that reporting of wrongdoing must first be made internally within

[4] IBAC is constituted as a body independent of the Crown with its employees covered by the *Public Sector Act* 1994. A further Act, the *Victorian Inspectorate Act* 2011, created the Victorian Inspectorate, whose purpose is to monitor IBAC's compliance with relevant laws, access IBAC's policies and procedures and investigate and assess complaints against IBAC.

the whistle-blower's organisation, and only as a last resort, going to an external higher authority. In many cases whistle-blowers who desire to remain anonymous risk having their identity known as the origin of information can be readily traced back to the source.

Understanding why whistle-blowers are victimised

Research has identified factors which are associated with the whistle-blower decision to take action when wrongdoing is observed. These include their perception of how the wrongdoing is viewed by peers/managers and by the organisation, their ethical values, the perceived seriousness or significance of the wrongdoing and the expectations of what will happen if they disclose the wrongdoing. Research shows that people who blow the whistle can be motivated by a desire to 'do the right thing' and correct a 'wrong', and many whistle-blowers report wanting to live in a transparent, ethical and trusting work place. A recent example (reported in Armstrong and Francis, 2014) compared and contrasted the good intentions and the practical consequences of deciding to blow the whistle. The whistle-blower's personal account of his experience after reporting wrongdoing indicated that he was committed to his organisation and was distressed by the way he was treated, that is, sidelined, ignored and finally having no choice but to leave the organisation. Bowden (2014, p.11) captures the essence of the problem the whistle-blower faces: *'If we are to assess by the extent of the ethics of an action, then we must rank loyalty to the wider community or the ethical precepts of society, at a higher level than loyalty to an employer. The whistle-blower is making a judgement of the harm he or she may be inflicting on the organisation by exposing a wrong, balanced against the alternative of keeping quiet'.*
Further research shows that employees who have blown the whistle are often loyal to an organisation and would rather have a wrongdoing corrected by raising the issue within their organisation [5] (Tsahuridu and Vandekerkhove, 2008). Others report that the workplace culture (Francis 2015), and the characteristics of the discloser and the wrongdoer are highly relevant (Ethics Research Centre, 2013).

In an important UK report about how whistle-blowers were mistreated in the National Health Service (NHS), Francis (2015) found that 'dubious motives' can be attributed to the whistle-blower, such as not acting to address poor performance, or that the disclosure was allegedly motivated by revenge, 'mental problems' or other ulterior motives, and these may have been used as an excuse for avoiding addressing public interest concerns by the organisation. Many whistleblowers have good intentions and do not anticipate the unintended consequences of their disclosure that may come from work colleagues or managers, such as viewing them as "snitches" or not part of the team. Within organisations, whistle-blowers maybe perceived as threatening the status quo, and not only by the people involved in misconduct but also by their colleagues and managers who may feel threatened by the disclosures. It becomes difficult to know who to trust and creates feelings of insecurity, especially if people who raise concerns do not feel valued for doing so, or worse, are 'punished' (Francis 2015).

That whistle-blowers suffer mistreatment and harm after speaking out about wrongdoing has been widely reported (Francis 2015). Examples of victimisation experienced by persons reporting wrongdoing within organisations, included poor performance appraisal, failure to promote, denial opportunities for training, intimidation, bullying, harassment, assignment to less important duties, transfer to lesser roles, marginalisation, isolation at work, blackmail, buying them off, declared mentally unfit for work, setting impossible work assignments and non- renewal of contract. Brown et al (2008) in a major study of whistleblowing in the Australian public sector, found mistreatment was often by management. These authors also noted that mistreated whistle-blowers were not more likely to be trouble makers, disgruntled employees or persons predisposed to conflict that those treated well or the same. Brown et al (2008) collected and analysed survey data from 7,663 public agencies. It was found that '*contrary to some stereotypes it is not inevitable that a whistle-blower will suffer mistreatment from co-workers or management as a result of reporting wrongdoing, even if reporting is frequently a difficult and stressful experience*' (xxvii). These authors further reported that 78 per cent of whistle-blowers said they were treated well or the same as a result of reporting, while 22 per cent said they were treated badly (although it was noted that whistle-blower mistreatment varied greatly between agencies).

However, an estimated 62 per cent of all whistle-blowers had suffered increased stress as a result of reporting, with 43 per cent reporting extreme stress.

The frequency of victimisation against whistle-blowers has reportedly ranged from a high of about 90 per cent down to 22 per cent (Bowden 2014). Bowden notes that victimisation may be reducing over time as the higher rates are from older studies. As policies and legislation are now in place to protect whistle-blowers from such behaviour; and the use of internal whistleblowing systems has developed, whistleblowing may be perceived as an important element in improving organisational governance.

While the workplace and ethical culture of an organisation is important if whistle-blowers are to feel confident in speaking up, these factors may also be relevant in determining whether a whistle-blower will be victimised. If the workplace culture does not support an ethical behaviour, transparency and integrity, and the perception is that no action will be taken, people will not risk speaking out. In the recent UK report (Francis 2015) it was found that there is a general perception that speaking up can lead to victimisation or lack of action. A reluctance to raise concerns was often associated with workplace culture of bullying or harassment behaviour. In many cases reported in the media, the immediate response of organisations to a whistleblower appears to be one of covering up the wrongdoing in order to safeguard the reputation of the organisation.[6]

Research into risk factors for victimisation of whistle-blowers (Near & Miceli 1996) has identified four categories – the personal characteristics of the whistle-blower (such as gender, socio-demographic differences), organisational variables (such as size of the work group, structure), characteristics of the wrongdoing (seriousness, systematic) and the power and status of the wrongdoer (seniority, tenure). As noted by Brown et al (2008), the range of risk factors confirms the complexity of whistleblowing cases and makes it difficult to help identify where preventive efforts should be focused.

By obtaining from the whistle-blowers themselves descriptions of what they have experienced, and from disclosure coordinators who receive and manage whistle-blower reports in organisations, the present study can highlight aspects which could assist improving the outcomes for people who speak up about wrongdoings in the workplace when others remain silent.

Study approach to investigating victimisation of whistle-blowers

It was expected that obtaining the participation of whistle-blowers would be a difficult task and it was considered that being able to obtain between 20-30 qualitative interviews would provide a reasonable sample under the circumstances. Following a number of discussions with and advice from the Victorian Ombudsman's office, IBAC and other organisations who are in contact with whistle-blowers, and having obtained the approval of the Research Ethics Committee, it was decided to approach STOP line, an independent 'hotline' which provides an external service for reporting and management of disclosures of workplace crime, corruption or misconduct for private and public sector organisations. Whistle-blowers are assured by STOP line that they can maintain their anonymity by contacting STOP line, and the disclosure co-ordinators from client organisations work with STOP Line to formulate appropriate responses. While much research in Australia on whistleblowing has been focused on the public sector, it was possible through the STOP line database to include whistle-blowers from the private sector.

STOP line agreed to assist and collaborate with the researchers. It sent an email invitation to participate in the research to all whistle-blowers on its database of some 500 persons who had contacted them over

[6] This has been found by Australian Committees of Inquiry into child abuse where executives of institutions did not report sex abuse allegations to the legal authorities. For example, the Church institution has been accused of misleading victims by deliberately relocating priests accused of abuse instead of removing them from their positions. Whistle-blower policeman Peter Fox says he was told to stop investigating alleged abuse by priests (Reid, 2013).

the last 4 years to report wrongdoing[7]. The invitation explained the aims of the study, what was involved, how confidentiality was to be protected and how to contact the researchers directly. STOP line found in the course of sending the invitation that many emails on its database were no longer active, so that a valid set of 200 emails was obtained. From these, some 20 expressions of interest were received by the researchers, with 12 interviews conducted (as at February 2015). The process of making contact and arranging a time for interview with the whistle-blowers was slow and protracted, often requiring several emails or telephone calls with further explanation of the research aims, reassurance about confidentiality and what the research was to be used for.

Qualitative interviews with whistle-blowers were mostly conducted by telephone, as a majority were based outside Melbourne. The procedure for the interview was to email the ethics approved Informed Consent Form and the Participants Information Sheet, followed by arranging a suitable time for the interview. Care was taken to assure whistle-blowers of the confidentiality of the interview and the need to ensure that the conversation was conducted in private. Qualitative interview questions focused on the experience of the whistle-blower and covered general background of the workplace/organisation and of the whistle-blower, their role; details of the actual wrongdoing incident(s), followed by what steps were taken to report the matter and then what happened subsequently. The interview attempted to follow the sequence of events, like 'beads on a string', in order to understand the whistle-blowers' experiences and the reactions to the reporting of wrongdoing.

Methodological limitations

- Whistle-blowers interviewed for the study are self-selected, and given the focus of the research it was highly likely that any whistle-blowers agreeing to participate would have had negative experiences following their reporting of wrongdoing; there was no information from whistle-blowers who had been well treated (See Brown et al 2008). Hence the sample interviewed are biased towards having been victimised.
- There was a low response rate (around 10 per cent to date) to the invitation to participate in the research, which limits the conclusions that can be drawn from the study. This may be partly due to many whistle-blowers not using their original emails with which they had contacted STOP line; it could also be that length of time (up to 4 years ago) since the whistleblowing had occurred made participation in the research less salient to many.
- It was found that many whistle-blowers lived outside Melbourne, hence interviews were conducted by telephone and which limited the nature of the qualitative interview and did not always enable fuller comments to be provided by the whistle-blowers.
- Would the whistle-blowers interviewed meet the IBAC criteria for protected disclosures? It is unlikely that any of the interviewees to date would meet the serious misconduct threshold. While whistle-blowers reported a wide range of wrongdoings, none would appear to meet the stringent requirements for a formal investigation by IBAC to be initiated as it can only investigate serious indictable offences. Thus the IBAC requirement for disclosures to possess prima facie evidence of serious corrupt conduct is a high threshold to start an independent investigation. This means that in the case of the whistle-blowers interviewed in this study and who have experienced mistreatment, they would not be able to be protected by the legislation, even though they have reported suffering victimisation and they experienced significant negative consequences as a result of having reported wrongdoing in their workplace. It would appear that formal protection through the whistle-blower legislation is not available to them.

Preliminary findings[8]

[7] STOP line (www.stopline.com.au) is an independent, confidential toll free hotline service for the receipt of disclosures relating to corruption, criminal activity, serious misconduct or improper behaviour in the workplace. It was founded by former Victoria Police officers based in Victoria but has client organisations across Australia. It also provides investigative service to the private and public sectors.

[8] Based on 12 completed interviews to date.

The whistle-blowers interviewed came from a wide range of employment sectors – these included public and private organisations, some large, Australia-wide, including some based in remote locations, while others were middle range in size. A number of whistle-blowers interviewed were on contract or employed as casual workers with no permanent employment status. More females (9/12) than males were among those interviewed. Their ages ranged from an estimated 30-60 years. In terms of their job role in the organisations, most were professionally qualified or skilled tradespersons, and generally from middle management levels.

The wrongdoing reported by the whistle-blowers ranged from deception, fraud, such as in falsifying timesheets and leave records, to bullying and harassment, non-compliance with safety regulations placing workers at risk, sexual discrimination and improper recruitment and promotion procedures.

Reporting of the wrongdoing was made internally in the first instance, most often to their immediate supervisor or to the human resource manager; when that often led according to the whistle-blowers to no action or …'sweeping under the carpet'… of the matter, some of those interviewed also went to the unions, which were in some cases perceived to be not independent. Several others after a number of futile attempts for action went to lawyers or to the Fair Work commissions.

The nature of the victimisation experienced was generally what previous research has found – marginalisation, isolation in the workplace, setting boring or impossible tasks, poor performance reports, being singled out and abused in front of others.

The outcome for the whistle-blowers after reporting the wrongdoing was in generally negative.

The one exception was the whistle-blower who decided to take early retirement and…according to her …'that was the best decision she had made work-wise'…several of the interviewees received compensation through the courts or through workplace payouts… 'better than nothing'… as one said. For others, the outcome was non-renewal of their contracts or dismissal and unemployment. In all cases none of the interviewees at the time of interview was still working in the same organisation.

Negative emotional impacts for individuals were reported by all of those interviewed – with many taking sick leave, need for stress and anxiety medication, and visits to GPs and with continuing lingering emotional impact about what had happened to them. Most of those interviewed however said, if they were faced again with the situation, they would not change what they had done. As one person interviewed said…'once I had done it [reported the wrongdoing] it was hugely liberating'…even after the mistreatment she received subsequently.

Next steps in the research

1. Locate more whistle-blowers through STOP line and through IBAC to achieve 20–30 completed interviews
2. Complete piloting of the disclosure coordinator survey and then send it out to private and public sector organisations from the STOP line and IBAC databases
3. Analyse data and draft report of findings by December 2015.

Concluding remarks

The experiences of the whistle-blowers interviewed so far reveal that when wrongdoings are reported, managers or supervisors are perceived to respond less by thanking the employee for bringing it to their attention; that they will look into it and report back to them, but more to ignore what is reported or worse to make the whistle-blower a scapegoat for bringing it to their attention (as in 'shoot the messenger'). As a result, the social psychological processes in organisations when reported wrongdoings are mishandled can produce forms of psychological martyrdom and organisational trauma. It can be detrimental to the organisation or workplace and lead to an absence of psychological safety,

creating high stress, insecurity and a non-productive work culture which in the long term can be associated with absenteeism, sick leave and high employee turnover and produce what has been termed a 'survivor syndrome' as occurs after organisational restructuring or redundancies (Wilde 2014).

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The Kangaroo and the Dragon: Party Ideology and its Impacts on Australia's Methods of International Governance with China as a Case Study

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Abstract

Australia's two main political groupings – the ALP and Coalition – represent two different methods of governance, based on their political ideologies. These differences extend to the external sphere. It is the overarching aim of states to gain power to pursue what they deem is in their national interests, though the definition and method of governance changes according to the party in power. Broadly, the Coalition prefers to focus on bilateral relationships in achieving its national interest, whereas the ALP focuses on achieving its national interest through multilateral settings. When in government, both sides puts the powers and resources of the state towards achieving their preferred method of governance, and neglecting the other. This paper will look at a history of post WWII Australian Prime Minister's methods of governance and then finish by engaging in a discussion of Australia's current issues with governance concerning its economic relationship with China.

Key Words
Governance, Foreign policy, Australian Labour Party, China

ARTICLE

States use their power to achieve their own interests. Therefore, states that can direct more national resources are more powerful and have foreign policies that have more impact than weaker states. However, it is acknowledged in neoclassical realist approaches that foreign policy choices are made by a select few political leaders and elites. As they have the authority to utilise the national resources. It is their perceptions that matter and determine responses. Their view of a nation's power maybe different to the realities, and they are restrained from using a nation's full power by both internal and external factors[1]. To understand the way states respond to their external environment, the variables caused by internal pressures must be analysed. These variables include different political systems and structures, cultures and national identities and may restrict easy access to a state's total material power resources.[2] Because of these domestic pressures on the perception and use of power, neoclassical realism also examines different state structures and understanding the links between power and policy. Neoclassical realism argues that it is the aim of states to gain power to pursue what they deem is in their national interests. It breaks down the state's efforts in that respect into two spheres, the internal and the external. The external sphere is similar to other theories of realism, states competing against each other in an anarchical international order. The internal sphere is further broken into three domestic actants that effectively define the internal composition of the state itself: the elites, the political class and the public. It argues that it is the perceptions of power and the interests that the three actants have that

[1] Gideon Rose, "Neoclassical Realism and Theories of Foreign Policy", 1998, *World Politics*, Vol. 51, No 1, Oct., http://www.jstor.org/stable/25054068, p147
[2] Ibid p161

matter in the method of governance of the state's international relations. Perceptions are shaped by experiences, culture history and ideology. Perceptions influence decisions, reactions and methods of governance at all levels and in Australia, our two main political groupings – the ALP and Coalition – represent two different methods of governance, based on their perceptions. The Coalition prefers to focus on bilateral relationships, whereas the ALP focuses on achieving its national interest through multilateral institutions. Both sides aim to accomplish the same goal – the national interest, though, despite sharing some common ground, each has their own unique interpretations of what constitutes the national interest. Despite foreign policy in Australia being formed by a small number of people, the top two with ultimate responsibility, the Prime Minister and foreign minister, are heavily influenced by their party position and preferred method of governance. The rise of China has led to challenges to Australia's national interest, and both the ALP and Coalition argue that their method of governance is best suited to meet these challenges.

A political "party is a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed"[3] The overarching foreign policy aim for both the ALP and Coalition is serving Australia's national interest. "National interest is a term used to denote the objectives pursued by a state"[4] The term 'interest' is usually related to the realist view of international politics. Hans Morgenthau, one of the intellectual founding fathers of realism stated "The main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power"[5] and "The statesman must think in terms of the national interest, conceived as power among other powers."[6] 'National interest' is commonly used in association with foreign policy, the equivalent terms regarding domestic policy are 'public interest' or 'common good'. The ALP's and Coalition's definition of the national interest have four common goals: maintaining the territorial integrity of Australia, including the safety and security of its society and economy; ensuring regional stability and preserving the existing regional balance of power; the sea lanes that make up the arteries of international trade remain open; and responding to new security threats.[7] Included in the last goal are terrorism, international crime, unregulated population movement, and quarantine.

To understand Australia's national interest objectives, we must comprehend Australia's sense of isolation and subliminal fear of invasion. Australians comprise less than one-third of one per cent of the world's population. This tiny fraction of humanity lives on an island continent, comprising just over 5 per cent of the earth's land surface. This continent contains unique flora and fauna, not found anywhere else in the world and is abundant in primary resources. It does not have a land border with any other country. Its east and west coasts face nothing but ocean, to the south are the frozen expanses of the Antarctic. To the north are cultures and civilisations with that seem alien and exotic and to most Australians. Australia's geostrategic environment is the South Pacific and South East Asia. "Its major ally is in North America, 12,000km away. Its major trading partners lie in North East Asia, 8000km away. The historical and cultural roots of the majority of its population lie in Europe, on the other side of the world."[8] Throughout its history, Australia has looked towards bigger powers to protect it from the outside world.

Due to the enormous and complex nature of foreign policy and the multiple, competing demands on their time, the most authoritative figures – the Prime Minister, the Minister of Foreign Affairs and senior advisors and secretaries, while wielding great influence, cannot attend to all policy matters, and their

[3] Edmund Burke, 1886, *Thoughts on the cause of the present discontents*, http://www.unilibrary.com/ebooks/Burke,%20Edmund%20-%20Thoughts%20on%20Present%20Discontents.pdf
[4] Derek McDougall, 1997, *Studies in International Relations: The Asia-Pacific, The Nuclear Age, Australia,* Second Edition, Hodder Education, Rydalmere p23
[5] Hans Morgenthau, 1967, *Politics Among Nations: The Struggle for Power and Peace*, Alfred A. Knopf, New York, p5
[6] Ibid p165
[7] Nick Bisley, 2012, "Never having to choose: China's rise and Australian Security" in *Australia and China at 40*, University of New South Wales, Sydney, p67-68
[8] Allan Gyngell & Michael Wesley, 2003, *Making Australian Foreign Policy,* Cambridge University Press, Port Melbourne, p10

fields of expertise does not extend to all fields, so can only exert their influence on certain matters. The Prime Minister sets the tone and direction of foreign policy due to the virtue of their position, which, despite, or because of the Constitution not mentioning the Prime Minister or their powers, in the Australian 'Washminster' system of government, enjoys unfettered authority in most areas of policy. When the Prime Minister makes a statement it is automatically viewed as policy and remains so unless retracted or it is overtaken by unforseen events. Despite only being elected by one electorate, The Prime Minister is perceived to speak for the entire nation and because of this acts as the key link between the internal and external spheres of governance. Because Australia's Head of State resides in the United Kingdom, and when abroad, mainly represents the interests of that country, the Prime Minister of Australia has the added responsibility of a de facto Head of State, as well as Head of Government. As mentioned previously, the Prime Minister cannot insert themselves into aspect of every foreign policy, so the policies they do pick and choose are inevitably given a high profile and priority, with relevant funding attached. The main difference between the Prime Minister and the Minister for Foreign Affairs is "…the Prime Minister can chose when to intervene, the Minister (for Foreign Affairs) cannot."[9] Most of the day-to- day decision making at operational level and most of the responsibility for the general direction of policy is left to the Foreign Affairs Minister. They share DFAT with the Minister for Trade, though takes overall administrative responsibility for the department.

The Coalition takes a pragmatic view to foreign policy, having a history of compartmentalising politics and trade. Australia was trading with the PRC under Menzies, at a time before it granted diplomatic recognition, and even while Australian troops fought and died in Vietnam - which was justified as an attempt to stop Chinese aggression - Australia was selling wheat, wool and steel to the PRC[10]. Promoting the bilateral method of governance allows for closer relationships to develop between nations, as elites establish rapport and friendship with each other. This reduces the possibility of instability and conflict developing by addressing problems before they can be exacerbated. Coalition governments also have a history of publicly appealing to 'Australian values', i.e., western values we have adopted from the English and share with the Americans. The flipside of this is that this often exacerbates xenophobic and racist undertones in Australian society against other cultures. Australia has free trade agreements (FTAs) with six different nations. They are in order: New Zealand (1965 & 1983), United States (2004), Chile (2008), South Korea (2014), Japan (2014) and China (2014). Negotiations or ratifications for all six FTAs have occurred under Coalition governments, as the Coalition places high priority on bilateral relations so dedicates more of their ministers time on pursuing this method of governance. Historically, the Coalition has been more willing to send Australian troops to serve on overseas operations.

Trade and economics take a central role in the Liberal version of the national interest. As the major partner in the Coalition, it is the Liberal's ideology that is dominant. The Liberal Party's manifesto *The Federal Platform* outlines the party's ideologies, including its foreign policy aims:

> further develop the capacity of an internationally competitive Australian economy to benefit from the globalisation of trade and investment flows;
> maintain a strong national defence capability, with an appropriate mix of bilateral, regional and multilateral security alliances;
> strengthen our international relationships and alliances, especially with the United States;
> maximise the economic and strategic opportunities offered by closer engagement with the countries of the Asia-Pacific region;[11]

Therefore, as the major party in the Coalition the Liberal's governance when in power strives to achieve the aims stated in the manifesto.

The ALP's method of foreign policy governance has a history of using multilateral engagement as its tool of governance to meet its national interest aims. Whenever the ALP is in power Australia has

[9] Ibid p97
[10] James Curran, 2012, "The world changes: Australia's China policy in the wake of empire" in *Australia and China at 40*, University of New South Wales, Sydney, p28
[11] Brian Loughnane (auth), 2002, *The Federal Platform of the Liberal Party of Australia*, Liberal Party of Australia, http://lpaweb-static.s3.amazonaws.com/FederalPlatform.pdf

stressed the importance of going through multilateral organisations, such as the United Nations, G20, or APEC when engaging in dialogue with a great power, especially on regional issues. This is because it believes all nations are equal in a multilateral environment. This equality ensures the influence of middle powers such as Australia is magnified, and the influence of greater powers is diluted. Greater powers are forced to constrain their ambitions, acknowledge the interests of multiple stakeholders and are placed under pressure to conform with majority opinion. In addition to this, Australia is a highly trade-dependent economy without the military throw-weight of a great power, and the ALP believes that without strong international rules and institutions would make the world a 'dog eat dog' place and disastrous to not only the national interest but the nation's survival. An example of the ALP's dedication to multilateral institutions is the UN Security Council. Australia has been a member of the UN Security Council on five occasions – 1946-74, 1956-57, 1973-74, 1985-86 and 2013-14. On all but one occasion (1956-57) it was ALP that campaigned to win the seat while in power.

The ALP tends to define Australia's national interest to include more idealistic, humanitarian aims. The ALP's manifesto *The National Platform* outlines the party's ideologies, including its foreign policy aims:

> 19 Labor defends Australia's national security, promotes our national interest and protects human rights. For more than a century, Labor has played a significant role in defending our national security, fighting against oppression and injustice and supporting international efforts for peace and development. While the challenges change, our resolve to protect Australia does not. As a nation, we can give no greater respect than to those who take up military service in the defence of Australia and of our values in the world. We honour and cherish our military veterans for their proud contribution to our nation and their willingness to sacrifice themselves for our common good.
>
> 20 Labor believes Australia's interests are best protected and advanced by promoting peace and cooperation, including through our historic alliance with the United States, international forums like the United Nations, engaging with Asia, through public diplomacy and overseas aid and development.
>
> 22 Labor is a party of human rights. Labor believes in a just and tolerant society that fully protects the rights and freedoms of all people in Australia. Labor supports the Universal Declaration of Human Rights and the international treaties to which we are a signatory.[12]

Therefore the ALP's governance when in power strives to achieve the aims stated in the manifesto.

Prior to World War II, Australia's preferred method of governance in foreign affairs by the main party's was toeing London's line. Menzies summed it up as "saying useful things at the right time to the government of the United Kingdom"[13] Australia was content to see itself as an outpost of the British Empire and its citizens as British citizens. Australia refused to ratify the 1931 Statute of Westminster which gave autonomy to the whiter parts of the British Empire, with Menzies telling parliament "I know that quite a number of responsible people are troubled about the proposal to adopt the Statute of Westminster for the reason that they feel it may give some support to the idea of separatism from Great Britain."[14] Menzies further portrayed Australia's Britishness following the outbreak of World War II. He broke the news of hostilities by announcing "My fellow Australians...in consequence of the persistence by Germany in her invasion of Poland, Great Britain has declared war upon her, and that, as a result, Australia is also at war"[15] Australia did not appoint an ambassador until 1940, following twelve months of negotiations, when Menzies reluctantly sent one to Washington, and even then it was only because of World War II.[16] This imperial view was set to be shaken up, as World War II progressed, helped along by the election victory of John Curtin over Menzies in 1941. It was only during Chifley's government in 1948 that Australian citizenship was established.

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[12] George Wright (auth), 2011, *Australian Labor Party National Platform*, Australian Labor Party, http://d3n8a8pro7vhmx.cloudfront net/australianlaborparty/pages/121/attachments/original/1365135867/Labor_National_Platform.pdf?1365135867

[13] Robert Menzies, quoted in Peter Hartcher, 2014, *The Adolescent Country*, The Lowy Institute, Penguin, Melbourne, p78

[14] Robert Menzies, quoted in Paul Keating, *Embargoed against delivery, Asia in the New Order: Australia's Diminishing Sphere of Influence,* The Keith Murdoch Oration State Library of Victoria
14 November 2012

[15] Robert Menzies, *Wartime Broadcast*, 3 September 1939, https://www.awm.gov.au/encyclopedia/prime_ministers/menzies/

[16] Hartcher, *The Adolescent Country*, p78

Curtin's entire period as Prime Minister was taken up by World War II. It was during this period that Australia began to fall under America's sphere of influence, with Curtin saying that "Australia looks to America, free of any pangs as to our traditional links or kinship with the United Kingdom."[17] Singapore fell to the Japanese in February 1942, destroying Britain's ability to project power in the Pacific. in late 1942, under Curtin and his Minister for External Affairs Dr. H.V Evatt, the Australian Parliament passed the Statute of Westminster Adoption Act 1942. With this Act, Australia became legally autonomous from the United Kingdom, and with this new found autonomy, the ability to create its own foreign policy. Britain's war strategy had most Australian troops fighting the Axis in the Middle East. Following the outbreak of war in the, Curtin requested Australia's troops be returned. Churchill refused. Curtin ignored him and had two divisions brought back to defend Australia. However, as the tide of the war turned in favour of the allies, Curtin reverted back to type, calling Australia "the bastion of British institutions, the British way of life and the system of democratic government in the Southern World"[18] while visiting London.

Ben Chifley's Prime Ministership dealt with the aftermath of World War II. He was a strong proponent of national self determination. He expressed the view that the "labour movement had a great objective – the light on the hill – which we aim to reach by working for the betterment of mankind...Labor would 'bring something better to the people, better standards of living, greater happiness to the mass of the people"[19] This speech has resonated through the decades, as it encapsulates the ALP's guiding philosophy. In foreign affairs he strongly resisted Dutch efforts to retake the Dutch East Indies. He also refused to send forces to help the British fight the insurgency in their colony of Malaya. These foreign policy decisions are consistent with the values explained by Chifley's 'light on the hill' speech.

Dr H.V Evatt is the ideological forefather of the ALP's multilateral method of governance. He helped establish the United Nations, contributing to the drafting of the Universal Declaration of Human Rights, served as the third President of the UN General Assembly, and the first Chairman of the UN Atomic Energy Commission. Though Evatt never had the opportunity to become Prime Minister, he was very influential in the Curtin-Chiefly ALP governments during World War II, serving variously and sometimes concurrently as Deputy Prime Minister, Attorney General and Minister for External Affairs, and later served as Opposition Leader during the Menzies government.

Robert Menzies became Prime Minister for the second time the Cold War was settling into the international landscape. Australia's traditional fear of the 'yellow peril' of being swamped by Asians was now exacerbated by the 'red peril' of communist invasion, forming the 'orange peril', which though vague, was at various times taken to mean Communist China, North Korea, Indo-China, Malaysia and Indonesia. Menzies committed Australian forces to the Korean War (1950-1953), the Malayan Emergency (1950-1960), Konfrontasi (1963-1966) and Vietnam (1962-1973) with the overarching aim To prevent the domino theory and stop the orange peril reaching Australia, and cement the bilateral relationship with the United States. Following the 1950 communist victory in China, Australian foreign policy was in two camps, due to Australia's transition period between British and American spheres of influence: those wishing to follow the British lead and extend recognition on the basis of "The People's Republic was in effective control of China irrespective of whether one liked that government or not";[20] and those wishing to follow the American argument that the communists "…had to show that it had the support of the Chinese people and was an acceptable member of the international community"[21] The American argument won.

The US was keen to normalise relations with Japan so it could focus its energies on fighting the Korean War, but Australia was apprehensive of what could happen if the US rearmed Japan in its fight against communism, given that World War II was still fresh. In 1952 Australia signed the ANZUS Treaty with

[17] John Curtin, *The Task Ahead*, The Herald, 27 December 1941
[18] John Curtin, *the postscript to the news bulletin*, *Times,* 7 May 1944
[19] Ben Chifley, speech to the *NSW Labor Party Annual Conference*, 12th June 1949, http://www.chifley.org.au/the-light-on-the-hill/
[20] Robert Menzies in Derek McDougall, *Studies in International Relations*, p403
[21] Ibid

the United States and New Zealand as a security guarantee compromise over these fears. Despite this, in 1957 Australia became the first nation to open its trading doors to Japan following World War II [22]and Japan steadily grew to be Australia's major trading partner. When announcing that Australia was sending troops to South Vietnam, Menzies said "The take-over of South Vietnam would be a direct military threat to Australia…it must be seen as a thrust by Communist China between the Indian and Pacific Oceans."[23] Conscription was controversially introduced to meet the manpower requirements for these overseas wars.

Australia's first large scale trade with the PRC occurred in 1960, when it started trading wheat[24], later expanding to other primary produce such as wool, despite not recognising the PRC as the legitimate government of China. Australian troops had fought the Chinese during the 1950-1953 Korean War and only a couple of years after the establishment of the wheat trade between the two, Australia got involved in the Vietnam War, where the PRC sent military advisors. There was some controversy about Australia still selling wheat to the PRC while in Vietnam with accusations of 'we are feeding the enemy'. In 1962-1964, exports to PRC was 6% of Australia's total[25]. In 1963-1964, one third of Australian wheat went to the PRC, worth $128.2 million.[26] Menzies argued that it was possible to compartmentalise trade and politics. The other partner in the Coalition, the Country Party also needed to placate its core rural constituency. Country Party leader, and Deputy Prime Minister John McEwen justified the position by saying "I know of no incident in history where peace and goodwill have been fostered by a government setting out to deny the people of another country ordinary foodstuffs."[27] Menzies set the foreign policy tone for his next three successors as Prime Minister (not including the caretaker period of McEwen), who were all Liberals, with the exception of starting to draw down from the Vietnam War, and even then only in the face of massive domestic resistance.

Harold Holt was in office for just under two years before disappearing while swimming off Cheviot Beach. He responded to the withdrawal of British Empire from Asia by going 'all the way with LBJ', increasing Australia's commitment to the Vietnam War to boost ties with the United States.

John Gorton became Prime Minister after Holt's disappearance. He was viewed as a larrikin, and maverick by many Coalition elites. He viewed himself as 'Australian to the boot heels'[28], and as such, sought to guide an independent foreign policy, while juggling the interests of Britain and the United States in the Cold War. He further distanced Australia from Britain and began the withdrawal of troops from Vietnam in November 1970, as the war was becoming more and more unpopular. Gorton "declared he was not of, or in, the Establishment"[29] and "Any future (ideological) changes were unlikely' to be in a conservative direction"[30] This sort of governance style did not endear Gorton to his colleagues and he was deposed in a leadership ballot, where with the votes tied 33-33, Gorton seeing he did not have the party's support, cast his own vote to depart the leadership.

In direct contrast to Gorton, William McMahon described himself as a 'Liberal Party man' as it was the "organ by which the national will and conscience will be put into effect"[31] His major foreign policy legacy is denouncing the July 1971 Gough Whitlam led delegation to the People's Republic of China

[22] Annabelle Quince & Kerry Phillips, *Trading with the enemy: the Australia-Japan Agreement on Commerce*, ABC, 25 February 2007, http://www.abc net.au/radionational/programs/rearvision/trading-with-the-enemy-the-australia-japan/3393730 accessed 6 March 2015
[23] Robert Menzies in Derek McDougall, *Studies in International Relations,* p404
[24] Peg White & Peter Young, 1988, *Australia's Relations with Asia*, McGraw-Hill Book Company, Sydney p121
[25] ESK Fung and C Mackerras, 1985, *From Fear to Friendship; Australia's Policies towards the Peoples Republic of China, 1966-1982*, University of Queensland Press, Brisbane, p84
[26] Ibid, p83
[27] John McEwen in Derek McDougall, *Studies in International Relations,* p405
[28] *John Gorton, Australia's Prime Ministers*, National Archives of Australia, http://primeministers naa.gov.au/primeministers/gorton/in-office.aspx
[29] Ian Hancock, 2002 *John Gorton: He Did It His Way*, Hodder, Sydney p248
[30] Ibid
[31] William McMahon, *New Prime Minister's Press Conference*, 10 March 1971, http://pmtranscripts.dpmc.gov.au/transcripts/00002381.pdf

as proof that Whitlam was "a pawn of a Communist power and a spokesman for the enemy being fought in Vietnam"[32] Only weeks later, McMahon faced widespread public humiliation when US President Richard Nixon announced he would be visiting the PRC. Also in July 1971 the Coalition cabinet agreed on withdrawing Australian forces from Vietnam, anticipating a US scale down in the face of the new Sino-US détente. By the end of McMahon's term, the majority of Australia's troops had been withdrawn from Vietnam.

Despite the exception of its most notable foreign policy achievement in being the first developed economy to recognise the People's Republic of China, the Whitlam government revived Evatt's multilateral method of governance in the external sphere. Whitlam spent almost a year as foreign minister as well as Prime Minister. Prior to Whitlam's term, the only multilateral organisation Australia's leaders participated in was the Commonwealth Heads of Government Meeting (CHOGM). Whitlam expanded this and Australia joined the Council for Namibia, the Ad Hoc Committee on the Indian Ocean and the Committee of Twenty-four on decolonisation, with Whitlam speaking at many Third World conferences. He created an international aid agency separate from DFAT and raised the proportion of aide given through multilateral channels by 5% [33] Under Whitlam Australia initiated a dialogue partnership with the Association of South East Asian Nations (ASEAN), pledging financial assistance to its aid development program. Some multilateral trade treaties adopted by the Whitlam government include the *Arrangement regarding International Trade in Textiles*, *International Sugar Agreement*, *Agreement establishing the International Bauxite Association* and ratifying nine International Labour Organisation (ILO) conventions. In regards to the PRC trade increased fivefold following diplomatic recognition.[34] Whitlam believed "that international law – and by that I include…the formal and informal institutions – provides the only alternative to tension, chaos and destruction"[35] Australia (and New Zealand) took France to the International Court over its nuclear testing in the Pacific, ratified Nuclear Non-proliferation Treaty and promoted the region as 'a zone of peace'. Whitlam also renewed focus on the UN, which, as mentioned, his predecessor Evatt had helped establish, and had been lower down the list of priorities by Menzies. Whitlam stated "it is through the United Nations that Australia best asserts its national independence and international identity"[36] He backed up these words with actions, Australia contributed funds to assist educational development in Africa.

Unlike Whitlam, Malcolm Fraser was "not out to change the world"[37] though he did play an important role in establishing an independent Zimbabwe and was a vocal critic of South Africa's apartheid. He was very worried about the threats of 'Soviet Imperialism' to the Australian national interest and promoted a boycott of the 1980 Moscow Olympics. In 1976 Fraser visited the PRC to promote trade relations, turning Whitlam's recognition of Beijing into a bipartisan one. He also concluded a friendship treaty with Japan, giving Japanese businesses favourable treatment. Fraser merged Whitlam's aid agency into DFAT, because the Coalition believes that aid is a tool that can be used to achieve the national interest.

In 1989 Bob Hawke proposed the creation of the Asia-Pacific Economic Cooperation group (APEC) as an informal multilateral method of economic governance. Bob Hawke's major foreign policy challenge came about in 1990 when Iraq invaded Kuwait. Australia fully participated in the UN sanctions placed on Iraq following the invasion and sent a contingent of over 1800 ADF personnel to the Gulf War, and

[32] *William McMahon, Australia's Prime Ministers*, National Archives of Australia, http://primeministers naa.gov.au/primeministers/mcmahon/in-office.aspx
[33] T.B Millar, *From Whitlam to Fraser*, Foreign Affairs, July 1977, http://www foreignaffairs.com/articles/27902/tb-millar/from-whitlam-to-fraser
[34] Jim Cairns, in interview with Robin Hughes, May 25, 1998, http://www.australianbiography.gov.au/subjects/cairns/interview7 html, accessed 14 Jan 2013
[35] Gough Whitlam, *Australia and International Law* – Address by the Prime Minister to the Seminar on Public International Law, Canberra, 26 July 1975, Whitlam Institute E-Collection at 2, http://cem.uws.edu.au/R/F6TBHIGNYUKUV33HDQBGXS19MQKA6S2D429T1M6H6QA9KDNV6Y-00203?func=results-jump-full&set_entry=000001&set_number=000003&base=GEN01-EGW01
[36] Gough Whitlam, 1997, *Abiding Interests,* University of Queensland Press, St Lucia, QLD, p171
[37] T.B Millar, *From Whitlam to Fraser*

to provide humanitarian aid to Kurds in northern Iraq.[38] Under Hawke, various high ranking Chinese officials visited Australia. In the 1980s, China's two largest foreign investments, worth a combined $310 million were both in the Australian resources sector[39]. In 1984-1985, Australian exports exceeded $1billion[40], with wheat still accounting for 51% of exports.[41] However, relations between the two nations soured following the Tiananmen Square massacre in June 1989, with the Hawke government, guided by its idealistic and humanitarian ideologies imposing sanctions on the PRC.

After deposing Hawke in December 1991, Paul Keating began pushing for a paradigm shift in Australian identity, moving from a nation bound by our ties to the UK towards one that identified as being part of the Asia-Pacific. The key to this change was APEC. He believed that regionalism had been stifled due to the bipolarity of the Cold War, but following the collapse of the Soviet Union it was now a possible method of governance.[42] All previous Prime Ministers only attended two international gatherings - the Commonwealth Heads of Government Meeting and the South Pacific Forum. Keating wanted to change APEC from an informal meeting to the key multilateral institution in the region, responsible for the governance of developing free trade and economic cooperation between nations. He believed that a strong regional trade group was essential to Australia's economic stability. Keating spent his first 12 months as Prime Minister intensely lobbying fellow world leaders on his APEC dream, as he explains:

> To succeed I first had to secure the support of the Japanese Prime Minister, then Kiichi Miyazawa. Miyazawa I had known well from my Treasury years but, in those days the Japanese would not do anything other than that countenanced by the United States. Miyazawa told me that he would only come with me if I was able to get Soeharto – not simply the President of Indonesia, but a leading figure in the Non-Aligned Movement: a big call. I made a huge effort with Soeharto; discussion after discussion, but once I had him, I was able to approach Li Peng, the Chinese Premier, to encourage China to come in too. Li Peng was exceptionally suspicious of it, particularly as APEC, the economic body, already had Taiwan and Hong Kong in its membership. But eventually I did get the support of Premier Li Peng for a head of government level, Pacific-wide body, but only after his wife had upbraided me at a dinner for putting unreasonable pressure on him. After I had added South Korea and Canada to the stock of states in support of the idea, I was able to approach President Bill Clinton for his support for what was virtually a custom made group.[43]

The first APEC Leaders' Meeting held in Seattle in November 1992.

Gareth Evans, became foreign minister in 1989, and as such served in both the Hawke and Keating governments, also succeeded in a number of multilateral initiatives, the most important being the ASEAN Regional Forum, the defence and security dialogue operating within the aegis of ASEAN. His most important legacy is the key role he played in the Cambodian peace process. The main obstacle to peace in Cambodia had been each of the internal warring parties wanting a disproportionate say in a power sharing agreement during a transitional administration. Three of the four parties wanted a power sharing agreement, though with more power for themselves than the others, and the other party rejected power sharing outright. To get around this impasse Evans publically announced that he supported "building a transitional administration directly around the authority of the United Nations… to decide the country's destiny pending free and fair elections organised by the UN and held under international supervision."[44] This suggestion was taken up all parties involved, and the result was in 1992-93 the biggest and most far reaching UN peacekeeping operation ever mounted, the UN Transitional Authority

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[38] *1980s, 90s and Gulf War*, Royal Australian Air Force, http://web.archive.org/web/20070704204923/http://www.defence.gov.au/Raaf/history/airforce_history/gulfwar htm accessed 27th February 2015

[39] Ross Garnaut, Ross, 1990, *Australia and the Northeast Asian Ascendancy: Report to the Prime Minister and the Minister for Foreign Affairs and Trade*, Second Edition, Australian Government Publishing Service, Canberra, pg. 98

[40] FA Mediansky & AC Palfreeman, eds., *In Pursuit of National Interests: Australian Foreign Policy in the 1990s*, Pergamon Press, Sydney, 1988

[41] White & Young, 1988, *Australia's Relations with Asia*, pg. 123

[42] Paul Keating, *Embargoed against delivery, Asia in the New Order: Australia's Diminishing Sphere of Influence,* 14 November 2012, The Keith Murdoch Oration State Library of Victoria

[43] Ibid

[44] Gareth Evans, *Outline of the Cambodian Peace Plan*, Extract from Australian Senate Hansard, 24 November 1989, http://www.gevans.org/speeches/old/1989/241189_fm_outlinecambodia.pdf

in Cambodia (UNTAC). Australia, in recognition of the key role Evans played assumed leadership of UNTAC. Evans explained why he was interested in Cambodia:

> …we have, as a nation which aspires to be a good international citizen, an uncomplicated humanitarian obligation to help resolve the tragedy that has engulfed Cambodia. The people of Cambodia have been caught up in an external war not of their making; in a period of unimaginable internal horror; and in an external invasion that has brought with it further years of fighting, hunger and suffering. All the countries of the world owe the Cambodian people peace: to rebuild their country, their own lives and some kind of decent future for their children.[45]

After resigning from Australian politics in 1999 Evans has continued his high profile career in public life, joining several influential international think tanks dedicated to protecting world peace and human rights. Evans contributed to the creation of the concept 'Responsibility to Protect' (R2P), which argues that a state loses its right to sovereignty if it fails to protect its citizens from atrocities. Evans explains "It was to create a new norm of international behaviour which states would feel ashamed to violate, compelled to observe, or at least embarrassed to ignore. It was to stimulate the creation of new institutional mechanisms, national and international, that would help translate that sense of moral and political obligation to protect into effective action."[46]

The Howard Government made a conscious effort to shift Australian foreign policy governance away from the multilateralism of the Hawke-Keating government and focus on Australia's relations with individual nations. He took significant steps were taken to increase the Prime Minister's role in foreign policy making to a more US Presidential model. During his government's tenure, all appointments of Ambassadors and High Commissioners had to be vetted by Howard and Cabinet, replacing the previous system of the foreign minister making these decisions. He had a big influence on the appointment of all department heads. A Cabinet subcommittee, the National Security Committee was formed and its members were not confined to Cabinet members, with senior bureaucrats regularly participating. Because Howard chaired this committee he was able to increase his influence in foreign and strategic policy. Under Howard, the Australian Wheat Board was embroiled in scandal for bribing officials of Saddam Hussein's regime at a time of UN sanctions. By using the compartmentalising method of governance Howard was able to juggle the interests of many stakeholders. Howard's Minister for Foreign Affairs, Alexander Downer belittled the ALP's ideology by arguing that " Australian foreign policy must be based not on dreamy idealism, but on a clear-headed understanding of the power structures of the Asia-Pacific region. It is insufficient for Australian foreign policy makers simply to assert our priority lies in our own region. We need to understand the weight of various regional powers and how the interrelationships between those powers affect the underlying security of the region."[47]

Australia was one of the key members in the Global War on Terror (GWOT) deploying resources in Afghanistan and Iraq following 9/11. Howard and Bush had a close personal relationship, with Bush giving Howard the nickname 'man of steel' in May, 2003[48] and a 'sheriff'[49] (following years of jibes by Howard's detractors that he was America's deputy sheriff[50]) because of Howard's staunch support for Bush's foreign policy. The Howard government established a free trade agreement with the US and despite a rocky start, was able to deepen Australia's relationship with China. Howard's balancing of Australia's bilateral relationships with the US and with China is the defining feature of his foreign

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[45] Gareth Evans, *Australia, Indo-China and the Cambodian Peace Initiative*, Address to the Sydney Institute, Sydney, 13 March 1990, http://www.gevans.org/speeches/old/1990/130390_fm_ausindochinecambodia.pdf

[46] Gareth Evans, *The Responsibility to Protect at 10: Progress, Challenges and Opportunities in the Asia Pacific*, Address to APR2P/ GCR2P/ Stanley Foundation/ ICRtoP Conference, Phnom Penh, Cambodia, 26 February 2015, http://www.gevans.org/speeches/speech568 html

[47] Alexander Downer, *Neither Isolated nor Isolationist: The Legacy of Australia's Close Engagement with Asia*, 9 August 2000, speech to the Murdoch University Asia Research Centre, http://www foreignminister.gov.au/speeches/2000/000809_isolate html

[48] *Bush lauds Howard as 'man of steel'*, Sydney Morning Herald, 4 May 2003, http://www.smh.com.au/articles/2003/05/04/1051987592763 html

[49] James Grubel, *Bush's 'sheriff' comment causes a stir*, The Age, 17 October 2003, http://www.theage.com.au/articles/2003/10/16/1065917555365.html

[50] *Australia as regional police doctrine puts Howard in damage control*, ABC, 27 September 1999, http://www.abc net.au/7.30/stories/s55116 htm

policy legacy, and the most successful example of the Coalition's preferred method of governance. This is symbolised by the consecutive days in October 2003 when President George W Bush and President Hu Jintao addressed joint sittings of both houses of the Australian Parliament. By the end of the Howard government in 2007, China had become Australia's major trading partner.

Kevin Rudd was Prime Minister between 2007-10 and 2013. Inbetween these two bookends he was Foreign Minister During this six year period, he was the most influential person in Parliament regarding foreign affairs. His successor as Prime Minister, Julia Gillard told the ABC "Foreign policy is not my passion. It's not what I've spent my life doing… if I had a choice I'd probably more be in a school watching kids learn to read in Australia than here in Brussels at international meetings."[51] During the depths of the Global Financial Crisis Rudd pushed for the G20 (of which Australia is a member) to be upgraded from a forum for financial ministers to a leadership summit and for it to be the primary international economic governance decision making body, instead of the G8 (of which Australia is not a member). Rudd believed in the G20 so much that in the months leading to the inaugural 2008 Washington leadership summit he spent a third of his time dedicated to the project[52] The 2009 London G20 leadership summit has been hailed as the reason for stopping the collapse of the world economy and "in coming years, the London G20 summit will be seen as the most successful summit in history"[53] Following its success Rudd unsuccessfully campaigned to have the G20 replace the UN as the primary international multilateral body.[54] Rudd focused his energies on other multilateral bodies, including the East Asia Summit, where he was "hugely influential"[55] in getting the US and Russia invited as members.

In his first term, Rudd characterised Australia's relationship with China as 'Zhengyou' (a true friend who can criticise). Rudd said that as a Zhengyou "The best way to prosecute our relationship with China is to be broad-based about it and not to pretend problems do not exist when they do… At the same time, [we should] not regard those problems as impeding the development of the rest of the relationship."[56] The Rudd government used its Zhengyou status (real or imaginary) to raise several issues with China, something his predecessor never did. He mentioned human rights abuses in the 2008 speech in Beijing; in 2009, Chinalco was blocked from buying Rio Tinto; the Defence White Paper named China as a threat and Rebiya Kadeer, the exiled Uyghur leader was allowed to attend the 2009 Melbourne International Film Festival. All of these instances are examples of the ALP's ideology including human rights in its method of governance.

Tony Abbott has a history of being an anglophile, stating on several occasions that Australia is firmly part of the Anglosphere, most notably in his autobiographical book *Battlelines.*[57] When making a speech at the Heritage Foundation in Washington DC he said "few Australians would regard America as a foreign country"[58] Tony Abbott hinted at the Coalition's China polic. In the same speech he mentions "Australia's foreign policy should be driven as much by our values as our interests."[59] Abbott has also stated he will tighten foreign investment laws, stating that no Chinese State-owned Enterprise would be allowed to invest in Australia under an Abbott government, appealing to Australian, western values.[60]

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[51] Julia Gillard, *The 7:30 Report*, ABC, 5 October 2010, http://www.abc net.au/7.30/content/2010/s3030288 htm
[52] Hartcher, *The Adolescent Country*, p4
[53] Colin Bradford & Johannes Linn, 'The April 2009 London G-20 Summit in Retrospect', *The Brookings Institution*, 5 April 2010, www.brookings.edu/research/opinions/2010/04/05-g20-summit-linn
[54] Kevin Rudd in Dennis Shanahan, *Kevin Rudd spruiks merits of G20 to the UN*, The Australian, 25 September 2009, http://www.theaustralian.com.au/news/world/kevin-rudd-spruiks-merits-of-g20-to-the-un/story-e6frg6so-1225779334335
[55] Hartcher, *The Adolescent Country*, p66
[56] Kevin Rudd in Phillip Coorey, *How zhengyou Kevin is keeping everyone happy*, 11April 2008, Sydney Morning Herald, http://www.smh.com.au/news/world/how-zhengyou-kevin-is-keeping-everyone-happy/2008/04/10/1207420587841.html
[57] Peter Hartcher, *On the road to China, no Damascus conversion*, 15 May 2012, Sydney Morning Herald, http://www.smh.com.au/federal-politics/political-opinion/on-the-road-to-china-no-damascus-conversion-20120514-1ymw4 html#ixzz2Ye9GXp00, accessed 20 July 2013
[58] Tony Abbott, 2012, *Address to the Heritage Foundation*, Washington D.C., http://www.tonyabbott.com.au/LatestNews/Speeches/tabid/88/ArticleType/ArticleView/ArticleID/8816/Default.aspx
[59] Ibid
[60] Tony Abbott, 2012, *Address to AustCham Beijing*, China, http://www.tonyabbott.com.au/News/tabid/94/articleType/ArticleView/articleId/8818/Address-to-AustCham-Beijing-China.aspx

However, on winning government, Abbott has been just as pragmatic as his Coalition predecessors when it comes to trade, maintaining the jingoistic rhetoric for his domestic audience. On taking power the Abbott Government continued the Coalition tradition of bilateral relations. The first priority of the new government was securing free trade agreements with South Korea, Japan and China. Within its first 12 months of government it has achieved these agreements, reflecting the enormous amount of resources, time, energy and political capital spent on accomplishing this priority. Australia was the first nation to back the US campaign against ISIS, deploying 400 airmen and 200 Special Forces personnel to the fight.

What is China's national interest? China's over riding aim is stability and legitimacy of Communist Party rule. Due to the lack of democracy, the Party does not rule by direct mandate of the people, but as a continuation of the ancient 'mandate of heaven', enjoyed by Chinese Emperors. The main key to keeping this mandate is through providing economic prosperity for the people.[61] This has, in turn provided for the economic prosperity of almost every other nation in the world, including Australia. The other method of governance utilised in creating stability is the promotion of Chinese nationalism. China is in the unique position of having (in one form or another) existed for 5,000 years. For most of this time China has seen itself as the 'Middle Kingdom', the centre of gravity for the whole world and its people as innately superior. Other entities around its periphery acknowledged this by paying tribute. This belief was destroyed with the 'Century of Humiliation', in which China was subjugated to foreign powers, which, according to the Party, only ended with the communist victory in the civil war in 1949. The Party has set about recreating the previous mentality as the basis of China's social cohesion. Like other forms of nationalism, modern Chinese nationalism has led to xenophobic undertones, and belief that China needs to be more aggressive and influential in foreign affairs, as its power rises.[62]

Xi Jinping was elected Secretary General[63] of the Chinese Communist Party in November 2012 for a ten year term. His political slogan 'The Chinese Dream' is, like all political slogans, more style than substance. However, it ties in with the Party's goals, envisioning "…a mighty nation reclaiming its rightful place in the world, not just economically but politically and culturally too."[64] He has taken a hawkish stance on most foreign policy issues, notably with Japan over the Diaoyu/Senkaku islets and with Vietnam, Malaysia, Brunei and the Philippines over the South China Sea. This hawkish stance is making other nations in the region uneasy, and pushes them closer to the US. Xi predicts that China will become the chief military power in the region by 2049[65], a sign of how advanced the US military is compared to every other nation on earth. Like the Emperors of old, the Secretary General wields enormous power and influence on the direction of the country, however he does so within Party limits. Likewise, in Australia, the Prime Minister is the most powerful actor in the making of foreign policy, but is not the only actor.

How is this likely to affect Australia? For Australia, the 21st Century is the 'Asian Century'. With the advent of the 'Asian Century' there has been a conscious paradigm shift focusing on Asia in every facet of Australian life. Government, business and education are all being pushed and pulled into influencing all three domestic actants to perceive their culture and identity as an 'Asia Pacific' nation, as opposed to Australia's traditional European background. Simultaneously, the 'tyranny of distance' is being replaced with the 'advantage of proximity' as the global centres of political and economic power shift closer to Australia's region. The People's Republic of China, more than any other Asian nation exemplifies the opportunities and pitfalls available in the Asian Century. While not part of China's periphery states, Australia is in a unique halfway point in regards to China. To put China's importance to Australia's economic health into perspective in 2005 "…a ship load of iron ore was worth about the same as about 2,200 flat screen television sets. Today (2010) it is worth about 22,000 flat-screen TV

[61] Rowan Callick, *Party Time: Who Runs China and How*, Black Inc, Collingwood, p13
[62] Martin Jacques, *When China Rules the World*, 2nd Edition, Penguin, London, p533
[63] For a description of the different titles and powers office bearers in Chinese politics have see Susan V. Lawrence and Michael F. Martin's *Understanding China's Political System*, Congressional Research Service Report for (US) Congress
[64] Beech, *How China Sees the World*, p21
[65] Ibid p20

sets – partly due to TV prices falling but more due to the price of iron ore rising by a factor of six"[66] Almost 30% of Australia's exports go to China.[67] This economic dependence on China ensures that Australia will be affected by how China acts in its relations with other states in the region, seven of which are in Australia's top eight economic partners.[68] From a Chinese perspective, Australia is viewed as a western, European nation in their region, and as such, Australia provides a window to the Chinese on how other western nations think, as our European culture has influenced our perceptions and reactions. Because of Australia's close relationship with the US, China also uses Australia as an intermediary to send diplomatic messages to the US.

"Australia is strikingly different from any country in Asia. But we are not uniquely different: no more different from China is Indonesia; no more different from Japan than is Malaysia; no more different from the Republic of Korea than is India."[69] India, Singapore, South Korea and Taiwan are all part of China's geographical periphery. All have the United States as their major security partner and the PRC as their major economic one and they manage to juggle the two. Indeed, the latter two states owe their existence to American military support against the Chinese. Australia has even traded with China in a time of war, though it is hard to see that happening again. As China becomes the regional hegemon, it is well within its realpolitikal rights to exercise both its hard and soft power[70] in influencing other states, including Australia. It will be up to the Australian Government on how to respond.

Australia's foreign policy methods of governance towards China following the 2013 election should be a continuation of Australia's foreign policy towards China in the 5 years preceding the 2013 election. To achieve its geopolitical national interest objectives, Australia needs to persuade other nations in the Asia-Pacific to encourage China to participate in regional forums, by convincing the Chinese it is worthwhile to do so, as China is easily powerful enough to ignore multilateral organisations. Because other nations in the region are facing a similar conundrum regarding China, Australia's middle power status will be enhanced if it presents a united front with these nations, when negotiating with China. The peer pressure advantages within the ALP's preferred multilateral method of governance is, by nature, unavailable to be replicated in the bilateral method preferred by the Coalition. However, the Coalition's bilateral method allows for more specific issues to be raised, and allows for closer relationships between nations, reducing the possibility of instability and conflict, by addressing problems before they are able to fester. Because of these advantages, Australia needs to continue its annual bilateral talks with China. The Howard government made great use of its bilateral relations with China, which have been strengthened under Gillard-Rudd. These talks should be used to raise issues that affect the relationship by both sides in more confidential and relaxed settings, with more time dedicated to the meetings than are afforded in a multilateral setting. As a leader's time is a finite resource, there needs to be a balance between the two, with the Prime Minister attending multilateral meetings and having other key players such as the foreign and trade ministers attend bilateral meetings with their counterparts. The ALP's national interest concerns involving human rights can be brought up in a bilateral setting, without embarrassing the other nation or compromising the relationship.

One thing both sides of politics need to agree on is that Australia is on the wrong end of the mining boom, though exports are still strong[71], and will remain so for fifteen years[72]. It is predicted that China's urban population will increase by 326 million people[73], a number greater than the entire population of the United States. This urbanisation will still require Australian commodities to meet energy needs and

[66] Stevens, *The Challenge of Prosperity,*
[67] Beech, *How China Sees the World*, p23
[68] *Australia's trade in goods and services by top ten partners*, 2013, DFAT, <http://dfat.gov.au/publications/tgs/index html> accessed 08 August 2014
[69] Ross Garnaut, *Australia and the Northeast Asian Ascendancy* p319
[70] See Zachary Keck's *The Hard Side of Soft Power,* The Diplomat, 24 July 2013, http://thediplomat.com/the-editor/2013/07/24/the-hard-side-of-soft-power/
[71] Kevin Rudd quoted in Martin Parry, *Australia at cross roads as China boom ends*, Fox News, 11 July 2013, http://www foxnews.com/world/2013/07/11/australia-at-crossroads-as-china-boom-ends-pm/
[72] Wayne Swan in *Australian (sic) 'well placed' for transition*, Sky News, 17 July 2013, http://www.skynews.com.au/topstories/article.aspx?id=888757
[73] Jacques *When China Rules the World*, p539

to construct "28,000km of commuter rail and erect 20,000-50,000 skyscrapers."[74] Yet as a nation we must find ways to diversify our economy.[75] To do so, we need to attract Chinese investment in non-commodity sectors, as well develop industries and services to meet the wants of China's growing middle class. The Asian Century will offer golden opportunities for the Australian economy. Australia's tourism industry, for example, should refocus its energies and target the Chinese to visit Australia. Australia's education sector, despite the dip in revenue in 2009-2010 due to publicised violence against Indians has enormous potential to attract students from wealthy Chinese families, and train Australians in in-demand skills. The manufacturing sector in Australia cannot compete with labour intensive, low priced goods from China and need to find niche markets, as Chinese technology is still playing catch up in several areas. The manufacturing sectors of China's south east Asian neighbours have responded to this challenge by becoming "…manufacturers of component parts assembled in China"[76] Turning Northern Australia into 'Asia's food bowl' has been mooted by the Coalition, and while unfeasible with current technology,[77] it displays that the parties are thinking of ideas to diversify.

Australian states should increase their own relations with China. Though section 51 of the Constitution grants the Federal Government exclusivity in foreign relations, nothing is stopping the states from setting up permanent trade missions in key Chinese cities, and sending regular delegations to visit stakeholders. These relations would be purely economical, in line with the Coalition governance method of compartmentalising relations. Whatever the eventual economic method of governance plan is, it should be used as a blueprint in the near future regarding Australia's economic relations with India and Indonesia, which are both on track to enter the top half dozen economies by 2050, thanks to their massive populations.

China has the right to pursue its own national interest, and as it is vastly more powerful, the rise of China does present some challenges to Australian foreign policy. They are not unique, however, and with opportunities that will emerge in the Asian Century, Australia is well positioned to continue its economic prosperity. Though a leader's time is a finite resource, each party in Australian politics has developed their own methods of governance to best utilise this resource in advancing the national interest and that diversity brings strength of imagination. The multilateral method of governance allows Australia to magnify its middle power status while the bilateral method of governance allows Australia to develop closer relations with other nations. Compartmentalising different aspects of the national interest such as trade and security has been able to serve many competing stakeholders. China needs Australia almost as much as Australia needs China, and it would be foolish for them to deliver some sort of ultimatum to the Australians to separate from the Americans - that would severely impact on the economy of both nations, and shatter the illusion of China's 'peaceful rise'. If the United States and China do for some unforseen reason go to war in the future, Australia, and every other country in the region, will have a lot more to worry about than flat screen TVs.

[74] Ibid p541
[75] Chris Bowen quoted in *Bowen says China boom end a challenge*, Sky News, 18 July 2013, http://www.skynews.com.au/topstories/article.aspx?id=888971
[76] Michael Wesley, 2012, *Australia and the China boom* in *Australia and China at 40*, University of New South Wales, Sydney, p200
[77] See Rob Law, *The only way is up? The northern Australian food bowl fantasy*, The Conversation, 18 March 2013, http://theconversation.com/the-only-way-is-up-the-northern-australian-food-bowl-fantasy-12573 and Bill Bellotti, *Can Australia really feed Asia?* The Conversation, 21 April 2013, http://theconversation.com/can-australia-really-feed-asia-13626

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Enhancing Trade Governance Through Benchmarking Transparency Standards in Asia-Pacific Regional Trade Agreements

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Abstract

Transparency, as a fundamental principle of international trade, could reduce the cost caused by information asymmetries and promote market predictability as well as non-discriminatory treatments. This paper examines transparency provisions in both World Trade Organization (WTO) rules at the multilateral level and Asia-Pacific regional trade agreements (RTAs) at the regional as well as bilateral level. Comparing with WTO provisions, the evolving practice in Asia-Pacific RTAs successfully reinforces and deepens current multilateral transparency obligations. Besides, the importance of transparency of the preferential trade treatments is also investigated in the WTO Transparency Mechanism for Preferential Trade Arrangements. The authors argued that the homogenous content of the examined Asia-Pacific RTAs transparency development provides a governance initiative that could well offer lessons for the WTO.

Keywords

Transparency, Trade Governance, World Trade Organization, Free Trade Agreements, Regional Trade Agreements, Trade Facilitation, Preferential Trade Arrangements, APEC, Australia, China

Introduction

Transparency has been recognized as a fundamental element of good governance. In the field of international trade, it plays an important role to reduce traders' time and cost in seeking information. It also reduces information gaps that may lead to discriminatory treatments and thereby prevents potential trade disputes.

Unlike in a multilateral context, concerns of lack of transparency may not surface frequently in Regional Trade Agreements (RTAs) due to their preferential nature and mutual trust among the parties. However, this paper argues that the need for transparency in RTAs is no less significant than in the case of multilateral trade regimes. The significance of transparency in RTAs could be two fold namely its role towards fellow RTA members, and the members of the WTO. Firstly, in the context of a RTA, strong transparency standards are critical to safeguard the mutual trust among members, which is the fundamental basis of the very existence of any preferential regime. Secondly, in a multilateral context like the WTO, a clear commitment to transparency in RTAs will enhance the much-needed legitimacy any preferential treatments rendered under the auspices of the RTAs. As transparency measures play a critical role, both within and outside of any RTA, the present paper argues for the need to construct and gauge transparency obligations in RTAs. In this process, it is important to ensure that the standards of transparency in RTAs are not perceived to be less than international standards. Therefore, transparency standards in RTAs have to be clearly benchmarked to enhance trade governance both at regional and multilateral level. At the multilateral level, World Trade Organization (WTO) has established a

range of transparency standards across different agreements and mechanisms, which could potentially act as benchmarks for regional trade agreements (RTAs).

Transparency standards in WTO mechanism are found at different layers. The basic obligation on transparency as enshrined in the General Agreement on Tariffs and Trade (GATT) has inspired various transparency provisions across different WTO agreements and mechanisms. Transparency provisions governing multilateral trade obligations are spread across various agreements. Interestingly, two separate mechanisms on transparency have been created governing RTAs and non-reciprocal Preferential Trade Arrangements (non-reciprocal PTAs). The two transparency mechanisms evidence the interest of WTO members in seeking transparency in reciprocal and non-reciprocal free trade agreements. In the context of multilateral trade, the GATT Article X prescribes the fundamental transparency obligation that requires members to disclose trading information properly to enhance regulation and administration transparency. As tariff barriers go down globally, transparency and relevant procedural issues have a greater significance in behind-border measures to facilitate trade like market access, export and import administrations, standard recognition etc. Article X has further expanded in other WTO agreements and mandated to the 2013 agreed WTO Trade Facilitation Agreement (TFA).[1] In the TFA, transparency measures require member countries to undertake a more comprehensive reform in trade governance than those prescribed in the GATT.

On the other hand, a large number of RTAs[2] have been adopted in recent years to make bolder and faster strides. Particularly, Asia-Pacific[3] marks a very active geographical area in RTAs. Among current binding RTAs, nearly one out of three involves an Asia-Pacific country.[4] Meanwhile, trading powers such as Australia, China as well as regional institutions like Asia-Pacific Economic Cooperation (APEC), are located in this area. This paper investigates current transparency mechanisms in WTO multilateral regulations and regional trade agreements adopted in Asia-Pacific area, and particularly those signed by trading powers in this region, like Australia and China. The terms RTAs and free trade agreements (FTAs) refer to regional or bilateral trade agreements that are differentiated from WTO agreements at the multilateral level, and the two terms are used interchangeably in this paper. Similarly, the regional or bilateral trade agreements are sometimes referred as preferential trade agreements (PTAs), which need to be distinguished from non-reciprocal preferential trade arrangements (non-reciprocal PTAs) as recognized under the WTO mechanism. The non-reciprocal PTAs are mainly special trade arrangements targeting developing and least developed countries, like those arising out of the General System of Preferences (GSP) recognized under the GATT/WTO mechanism.

The second part of the paper reviews the literature on transparency and trade governance, and the third part examines and analyzes multilateral trading transparency mechanisms in the WTO context. Part IV mainly investigates transparent provisions in RTAs adopted by Australia, China and APEC Model Chapter on Transparency; and also compares them with the WTO transparency provisions. Part V illustrates the significance of transparency in the context of non-reciprocal PTAs reflected in the WTO Transparency Mechanism for non-reciprocal PTAs. The conclusion discusses how far the transparency standards in Asia-Pacific RTAs match relevant benchmarks and what can be improved in the future for better regional trade governance.

[1] The three mandates of Trade Facilitation Agreement are GATT Art. V on freedom of transit, Art.VIII on fees and formalities connected to importation and exportation and Art.X on publication and administration of trade regulations.
[2] The term "preferential trade agreement" in this paper is interchangeable with free trade agreement (FTA) or regional trade agreement (RTA).
[3] This paper adopts a general definition of Asia-Pacific referring to East Asia, South Asia, Southeast Asia and Oceania.
[4] According to the statistics from WTO RTA database, there are 74 out of 273 RTAs in force involving Asia-Pacific countries. See WTO Regional Trade Agreements Information System: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx

Transparency and Trade Agreements

As the tariffs drastically decrease on a global scale, the focus of trade liberalization has switched to non-tariff barriers, which cover a wide arrange of trade measures, such as market entry procedures, standard recognition, import bans and labelling requirements. The non-tariff barriers could take complex forms and they tend to directly or indirectly undermine free trade objectives. A non-transparent trading environment can worsen this situation and increase the information asymmetries or make the trade more costly and time-consuming. In the OECD estimation, the low transparency results in the same economic cost caused by protectionism and lower the competition.[5] For economic operators, transparency in trade policy can largely reduce their cost in collecting information. In the empirical research conducted by Freund and Weinhold, they found that companies with better access to information can export more, and the use of Internet on cross-border trading could reduce the exporter's cost in collecting information about overseas markets.[6]

The positive effect of transparency is also seen on trade growth. To investigate the influence of transparency upon trade, Helble etc empirically examined the improvement of transparency on trade flows among APEC members. The study found that such enhancement can yield substantial gains, similar to or even higher than trade liberalization in other disciplines.[7] The researchers concluded that trade policy reforms should not be limited to the concerns of protectionism, but it is equally important to focus on transparency in trade measures.

Besides, institutional governance among different countries could be a unique comparative advantage, since transparency not only affects trade flow in quantity, but also in quality. Nunn illustrates that countries with more efficient and transparent institutional enforcement mechanism have more diverse goods, as the highly differentiated goods rely more upon predictable enforcement mechanisms.[8]

From the trade relations perspective, transparency is one variable in facilitating trade cooperation among governments. In the examination of the trading partners of European Union (EU) FTAs, it is revealed that countries with greater political and economic transparency tend to have a smoother negotiation process and more flexible trading arrangements in FTAs with EU.[9] Moreover, less transparent trade governance has higher incidence of involvement in trade disputes. In the research on WTO disputes alleging the violation of transparency obligations, Ala'i demonstrates that WTO complaints have invoked the defendant's non-compliance with publication or due process commitments.[10] In the dispute settlement interpretations on transparency, the author observed the development of transparency from a "subsidiary" to "substantive" issue. Thus, improving trade transparency is also important to avoid potential trade disputes.

Transparency has been widely recognized in trade regulations and present literature. But the definition term is often vague and subjected to diverse interpretations. It refers to different components, such as "*right to know*",[11] "*good governance*"[12] and the definitions of Transparency in the WTO mechanism

[5] L Patrick and R Lattimore, 'Protectionism? Tariffs and Other Barriers to Trade' in International Trade: Free, Fair and Open?, OECD, 2009,p 56.
[6] C Freund and D Winhold, 'The Effect of the Internet on International Trade', (2004) 62 *Journal of International Economics*, p 171-89.
[7] M Helble, B Shepherd and S Wilson, 'Transparency and Trade Facilitation in the Asia Pacific: Estimating the Gains from the Reform', in Mimeo (Eds), World Bank Development Research Group, 2008,p 40.
[8] N Nunn, 'Relationship-Specificity, Incomplete Contracts, and the Pattern of Trade', *Quarterly Journal of Economics* 2007,122 (2),p 569-600
[9] L Baccini, 'Cheap Talk: Transaction Costs, Quality of Institutions, and Trade Agreements' (2014) 20 *European Journal of International Relations*, p 113
[10] P Ala'I, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance' (2008) 11 *Journal of International Economic Law*, p 779-802.
[11] Joseph E. Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life" (1999) Oxford Amnesty Lecture, p 27.
[12] Friedl Weiss, "Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison"(2007) 30 *Fordham International Law Journal*, p1545-86.

are quite diverse. In the WTO's glossary, the term is defined in the context of information disclosure, as "*the degree which trade policies and practices, and the process by which they are established, are open and predictable*."[13] The WTO Analytical Index further refers it as the obligation to notify.[14] While Committee on Trade and Environment connects it directly with trade governance, saying "*support the proper functioning of the multilateral trading system, by helping to prevent unnecessary trade restriction and distortion from occurring, by providing information about market opportunities and by helping to avoid trade disputes form arising*."[15] Within WTO framework, transparency has several dimensions and it is further categorized into internal and external transparency by Friedl Weiss. The former refers to equal access to WTO negotiations and decision process, while the external dimension means public access to information on trading rules, procedures and decisions.[16]

The above different definitions reveal the dynamic nature of the components of trade-related transparency. Therefore, in order to understand the scope of transparency in trade, it is necessary to investigate the specific commitments and obligations prescribed in different contexts. The specific commitments to achieve transparency in the trade have been evolving in both multilateral trade agreements and RTAs. Particularly, how transparency obligations are manifested in multilateral trade agreement and how RTAs in Asia-Pacific have reinforced these aspects, will be discussed in the following two sections.

Transparency in the World Trade Organization

This part mainly analyzes GATT Article X and its further developments under other WTO agreements. Distinct transparency provisions in range of WTO agreements like General Agreement on Trade in Services (GATS), Trade Related Intellectual Property Rights (TRIPS) Agreement, Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Agreement on Technical Barriers to Trade (TBT), Agreement on Subsides and Countervailing Measures (SCM), and Trade Facilitation Agreement (TFA) are examined. The role and significance of WTO transparency mechanisms for PTAs is addressed subsequently in Part V.

1. The Publication and Availability of Information

Article X of GATT is the key provision governing the publication of trade regulation. It mainly contains two publication-related requirements. The obligations are (1) to publish promptly laws, regulations, judicial decisions and administrative rulings as well as all preferential trade arrangements; (2) new or more restrictive measures should be published before its enforcement.[17] The Appellate Body in the *US-Underwear* specified the transparency obligation under Article X, should be considered as a principle in the disclosure of governmental trade acts.[18] Furthermore, the scope of disclosed trade policies is not limited to the legislated sources, but also includes instruments that are issued by authoritative bodies and binding force under domestic law is not a necessary element.[19] The way to implement this article

[13] Glossary, World Trade Organization, available at http://www.wto.org/english/thewto_e/glossary_e/glossary_e htm.
[14] Legal Affairs Division of World Trade Organization, WTO Analytical Index: Guide to WTO Law and Practice, Vol1, Cambridge, 2012, p 300.
[15] This report points out the significance of transparency of domestic environmental regulations to avoid trade restrictions. See World Trade Organization, Trade and Environment at the WTO 44 (2004), available at http://www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf
[16] Friedl Weiss, "Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison"(2007) 30 *Fordham International Law Journal*, p1545-86 at 72.
[17] General Agreement on Taffies and Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, 1867 U.N.T.S. 187, at Art. X.
[18] *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Appellate Body Report (1997) Dispute DS24, at Para. 21.
[19] *European Communities and its Member States — Tariff Treatment of Certain Information Technology Products*, WTO Panel Report(2011) Dispute DS375, at Para. 7.1029–30.

should enable governments and traders to be "acquainted"[20] without "undue delay"[21]. This could be also interpreted as obligation to notify. This obligation is further developed as obligation to establish enquiry points to enhance an easier information access in TBT and GATS.[22] Besides, the GATS and TRIPS enforce the protection of confidential information and legitimate interests of public and private parties in the information disclosing process.[23]

In the TFA, to reduce barriers produced by inefficient trade governance in the cross-border trading process,[24] publication of trade regulation is developed in a more detailed way. (TFA is mandated under three GATT provisions, and Article X was one of the three legal basses.[25]) In addition to incorporating the above-mentioned Article X requirements, Article 1 in TFA first specifies the scope of regulations to be published. Second, it obliges members to use the Internet to publish.[26] The application of information and technologies greatly facilitate a low-cost and easy access to the information. In the second paragraph of Article 1, TFA recognizes this importance in requiring members to use the Internet to publish and update the listed trade measures. This is a step forward since Article X of GATT, the predecessor as well as counterparts in other WTO agreements, does not detail the means to publish the information. Third, to better facilitate the information delivery, TFA requests governments to establish enquiry points to respond to enquiries on the published information. Fourth, the TFA strengthens its monitoring by requiring members to notify how the publication and use of the Internet are implemented.

2. Participation in Rule Making

Beyond the access to the rules, enabling interested parties to participate into the rule-making process is another important development to enhance the transparency in trade. Involving interested parties into the rule-making process will reflect the practical needs and keep a positive information sharing between the administration and interested parties, but more importantly, it will also increase the transparency of the rule-making process and enhance the confidence in administration among traders, so as to promote the implementation.

In GATT, no obligation is specified relating to the public participation in rule making. Even Article XXII is on the consultation; the content is limited to consultations between contracting members under the circumstances of trade disputes. But under TBT and Agreement on Subsides and Countervailing Measures (SCM), commenting opportunity is provided to members or interested parties before imposing provisional measures. [27] Similarly, Article 2 of TFA requires governments to provide stakeholders the opportunity and reasonable period to comment and consult in the rule-making process. The governments should regularly inform stakeholders of their plans of new measures or the proposed amendments and invite them to give comments and response on these measures.

3. Predictability: Appeal or Review, Advance Rulings

The predictability of rules is the third aspect of transparency in trade governance. Several WTO agreements contain recourse in implementation, like the right to review, the establishment of independent review institutions. Specifically, in Article X (3) of GATT, due process is emphasized in

[20] *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes,* WTO Panel Report (2005) Dispute DS302, at Para. 7.414. Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, WTO Panel Report (2013) Dispute DS371, at Para. 7.773.
[21] Above n 19, at Para. 7.1074.
[22] Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, 1868 U.N.T.S. 120, at Art.10.3; General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, 1869 U.N.T.S. 183 at Art. III(4).
[23] Above n22 at GATS Art. *IIIbis*; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, 1869 U.N.T.S. 299, at Art.63.
[24] P.Sourdin and R Pomfret, Trade Facilitation: Defining, Measuring, Explaining and Reducing the Cost of International Trade, Camberley, Edward Elgar Publishing, 2012, p3.
[25] Above n17, at Art.V, VIII and X.
[26] Trade Facilitation Agreement, World Trade Organization, at Art.1 Para.2.
[27] Above n22 TBT at Art.2.10; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, 1869 U.N.T.S. 14, at Art. 17.

the obligation to apply the regulations in a uniform, impartial and reasonable manner. It also requires members to provide review and correct mechanisms, such as judicial, arbitral or administrative procedures or tribunals. As trade regulations could affect or potentially affect stakeholders, the uniform, impartial and reasonable implementation manner is required;[28] and alternative mechanisms to adjust should also be made available for involved parties.[29] This implies that transparency has the dimension of the due process requirements. The TRIPS Agreement not only recognizes the right to review but also requires the parties to provide judicial or quasi-judicial authority as the final administrative decision on all agreement covered issues.[30] TFA incorporates the above due process obligations and requires members to establish administrative or judicial review and appeal institutions for the administrative decisions in Article 4.[31]

In addition, TFA also contains a provision on advance rulings, which has not been addressed in GATT. Advance rulings are about how the customs administrations have to implement laws and regulations, such as tariff, value assessment of goods, and to treat imported goods. Such rulings are formal decisions with binding force issued by customs administrations at the request of traders, such as exporters or importers. Advanced ruling is a predictability and transparency enhancement mechanism to inform traders of the law enforcement information before the transactions, reduce unnecessary release and clearance delay at the border, and to ensure the predictability and consistence in the trade governance. In Article 3 of TFA, the form and time-bound issuing of the advance rulings are covered, combining with the right to review and appeal, this provision also encourages administrations to contain unsolicited information to requesters.[32] Hence, TFA provisions are aimed at ensuring that the traders have access to related information and there by enhance predictability in law enforcement.

Trade Related Transparency Standards in Asia-Pacific

The proliferation of RTAs has marked Asia-Pacific an essential feature in trade governance. By 2014, a total of 119 RTAs in this region has entered into force, and 69 in negotiation.[33] The aim of this part is to identify to what extent RTAs have deepened and expanded the above-mentioned three fields of multilateral transparency standards. This section examines the transparency related measures as reflected in Asia-Pacific RTAs although mainly focusing on the in Asia-Pacific Economic Cooperation (APEC) and trade agreements involving Australia and/or China.

1. APEC Model Chapter on Transparency

In a pursuit to enhance transparency standards in the Asia-Pacific RTAs, the APEC introduced a Model Chapter (MC) on transparency at the APEC Ministerial Meeting held at Vladivostok, Russia in September 2012. The MC is not just a model law setting transparency standards for future FTAs in Asia-Pacific but is inspired by such standards already existing in the current FTAs in the region. The Transparency MC, albeit being a non-binding instrument, gains significance due to its unique characteristics. Firstly, in spite of being a model law, the MC is not a set of goals just built upon desirable best practices but is based upon actual practices of the APEC members under their FTAs. [34] Secondly, the MC recognizes that the WTO rules on transparency are just the minimum standards and seeks to advocate further standards based on the FTAs of APEC members. Thirdly, the MC aims to use those additional transparency standards as a benchmark in order to promote a coherent and consistent approach across other FTAs.

[28] The three elements were interpreted as obligations by the Panel in Argentina-Hides and Leather. See *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Panel Report (2001) Dispute DS155, at Para. 11.86.
[29] Above n18 at Appellate Body Report, at Para. 21.
[30] Above n23 TRIPS at Art. 62.5.
[31] Above n26, at Art.4.
[32] Above n26, at Art.3.
[33] Asia Development Bank, Asian Regional Integration Centre: http://aric.adb.org/fta-trends-by-status.
[34] It also draws its inspiration from the relevant transparency provisions of GATT and GATS under Article X and III respectively.

A close examination of the MC reveals a whole array of recommended general transparency standards, which are however subjected to specific standards that may be prescribed in specialized areas of cooperation like SPS or TBT.[35] In seeking higher standards of transparency the MC intends to promote due process in policy-making and facilitate the administration and exchange of information between FTA members.[36] Eight concrete sets of transparency standards are prescribed by the MC and interestingly specific mention is made when a particular standard is intended to reflect the WTO transparency standard. For example, the first standard prescribed by the MC namely, 'the publication of measures of general application', is explicitly identified as a reflection of the relevant WTO standard.[37] Besides, the MC requires recommends a prompt publication no later than when the measure in question becomes effective[38] and suggests the provision for time in between those two acts, where practicable. Similarly, the MC also requires the publication of the 'purpose and rationale' of the adopted measures.

The next MC recommendation requiring 'public consultation' demonstrates its attempt to establish transparency standards beyond WTO. With an aim to provide opportunity for input from the other party to a FTA and its interested persons, the MC requires 'prior publication of draft measures'[39] (along with an explanation of its purpose and rationale) by the parties to FTA except in specific emergency situations[40]. A consultation period of not less than 30 days is prescribed. Although, there is no obligation to conform the draft measures in accordance with the input received from the consultation, the MC mandates the relevant authority to consider the comments. The MC not only creates the obligations to publish but also prescribes various modes of publication and distribution in order to discharge those obligations. While the publications could be carried out through a physical or online version of the official journal, their distribution has to be encouraged using additional means including an official website.

Another MC standard on 'disclosure of confidential information' is just a reflection of relevant WTO provisions[41] limiting the obligation in circumstances affecting law enforcement or public interest or legitimate commercial interest of specific enterprises[42]. The next MC standard requires each party to a FTA to establish and provide information about 'contact points' to render assistance in finding and obtaining the published measures of general application. The parties are also required to ensure that the contact points so established are able to mutually coordinate and facilitate responses relating to the subject matters covered under the FTA. The MC standard on 'notification and provision of information' warrants a party to a FTA to respond to written enquiries of the other party on matters pertaining to the implementation of the FTA within a reasonable period of time[43]. Unlike some other obligations under the MC, this standard only covers the enquiries by a party to the FTA and not the enquiries made by its interested persons.

[35] The MC recognizes the need to prevent conflict between the general and specific transparency standards (for example, sector specific transparency standards). The MC clearly indicates that the specific transparency provisions would prevail in the event of such a conflict. The scope of application of the MC is also limited to 'measures of general application', which are defined in lines with relevant provisions of the WTO Agreements like Article X of GATT and Articles III and XXVIII of GATS and includes laws, regulations, decision, judicial decisions and administrative rulings of general application pertaining to or affecting the matters covered by an FTA. See, Article 10 and Article 1 respectively of APEC Model Chapter on Transparency for RTAs/FTAs 2012 (the MC).

[36] Especially by requiring parties to FTAs to designate contact points to improve communication on FTA related matters. See the General considerations relevant to this Chapter and Article 6 of MC.

[37] Moreover, any relevant WTO obligations in this regard are not to be detracted by the prescribed publication standard under the MC.

[38] Enforcement of the measure before publication is prohibited except in situations of emergency. See Article 2(2) of the MC.

[39] Draft judicial decisions are exempted from the standard requiring public consultation, when such consultation will contravene the law.

[40] Above n35 at Article 3 (4). Unlike the general emergency exception recognized in Article 2(2) the emergency recognized here is limited to specific circumstances involving internal security of the economy, monetary and fiscal policy, public interest, public health, commercial interest of particular enterprises, and law enforcement.

[41] The specific provisions are Article X of GATT and Article III bis of GATS.

[42] Above n35 at Article 5.

[43] Under normal circumstances, this is period prescribed as 30 days calculated from the date of the receipt of the written request. See Article 7(2) of the MC.

The MC prescribes standards about 'administrative proceedings' in order to ensure that parties to a FTA administer their measures of general application in a consistent, impartial and reasonable manner. The administrative proceedings standard incorporates a range of specific obligations. Firstly, each party to a FTA is obliged to give a reasonable notice with a prescribed set of information about any proceedings to persons of other party directly affected by such proceedings. Secondly, the above mentioned persons of the other party have to be given a reasonable opportunity to be heard before any final administrative action is taken[44]. Finally, the parties are obliged to ensure that the procedures followed in such administrative proceedings are consistent with their domestic law.

The next major transparency standard recommended under the MC namely 'review and appeal' is also reflective of relevant WTO standards[45]. Each party is obliged to create and maintain independent and impartial judicial, arbitral or administrative tribunals or procedures[46] to enable prompt review and correction of administrative actions regarding matters covered by the FTA. The MC mandates that the parties to the proceedings are provided with a reasonable opportunity of hearing and the ultimate decisions of the proceedings are reached based on the evidence adduced. Finally, the MC recognizes the need to implement such decisions, after possible appeal or review, in order to ensure that any resulting administrative action is indeed governed by those decisions.

2. Transparency Measures in in Asia-Pacific RTAs

At the regional level, the transparency standards discussed above have been examined in the context of 19 FTAs adopted by Australia and China. One common feature could be observed is that transparency requirement has been recognized as a principle like the principle of non-discrimination in the preambles. Generally, transparency measures have been established in a separate chapter governing all disciplines in the trade arrangement or in specified requirements under different trading fields, spreading out the transparency measures into obligations governing trade in goods, customs administrations or trade in services.

Information Publication

In addition to incorporating the GATT Article X obligations, RTAs also reinforced the Article X-related measures found in other WTO Agreements as general transparency principle applicable to all areas covered under the RTAs. For the scope of information, China-New Zealand FTA clearly refers to information relating to "*laws, regulations, procedures, and administrative rulings of general application*". The "*administrative rulings of general application*" is specified as an administrative ruling or interpretation that applies to all persons and facts (general application),[47] and it excludes any such administrative or quasi-judicial decision that only applies to some particular person or circumstances (specific application).[48] In addition to the scope defined in the China-New Zealand FTA, the China-Switzerland FTA requires relevant judicial decisions to be published.[49]

In the WTO agreements, protecting confidential information measures are mainly contained in GATS and TRIPS. But in FTAs examined in this paper, Australia-US FTA for instance, the similar measures protecting confidential information target all covered areas instead of being limited to trade in services and intellectual property trade.[50] Meanwhile, it further specifies the application procedure, like submitting the written request and informing the other party, and requires receiving party institutions

[44] However, this obligation arises only when the time, the nature of the proceedings and the public interests permit such an opportunity for hearing. See Article 8 (1) (b) of the MC.
[45] See Article X of GATT and Article VI of GATS.
[46] In case if the procedures lack independence, the parties are obliged to ensure that such procedures are capable of at least providing an objective and impartial review. See Article 9 (1) of the MC.
[47] Free Trade Agreement Between The Government of the People's Republic of China And The Government of New Zealand,7 April 2008, at Art.168.
[48] Above n47, at Art.167.
[49] Free Trade Agreement between the People's Republic of China and the Swiss Confederation, 1 July 2014, at Art.1.5.
[50] Australia-United States Free Trade Agreement, 1 January 2005, at Art.22.4.

to disclose only for justified purposes. This practice could also be found in ASEAN-Australia-New Zealand FTA[51] and China-Switzerland FTA[52] .

To reduce the information gap between administrations, Australia-Malaysia FTA contains an information exchange mechanism, in the form of contact points, which is established in the field to facilitate the transparency in the implementation of sanitary and phytosaintray measure. The two governments are required to provide the contact points, the list of responsible authorities and significant changes in administration.[53] The similar provisions are also included in Australia-Japan FTA on cooperation in information sharing.[54]

Participation in Rule Making

To enhance the transparency of the rule-making process, RTAs adopt a more open attitude to encourage affected parties as well as the public to participate in rulemaking in all sectors under the agreements.[55] National treatment, the fundamental principle of international trade law, is further reflected in RTAs to request governments to ensure a fair treatment of stakeholders and opportunity to comment in the rule-making process. This could be observed in Australia-Chile FTA[56] and Australia-Japan FTA.[57]

Predictability

Transparency trade governance not only requires accessible regulations and the open rule-making process, a predictable enforcement of regulations is also indispensable. In addition to right to invoke dispute settlement mechanisms provided by the trade agreement, the right to review or appeal the administrative decision is also available to adjust and correct the administrative actions in FTAs.
Following the compulsory involvement of judicial or quasi-judicial in the review under Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade [58] and TRIPS[59],, Australia-US FTA clearly reproduces the same as at least one level of review is needed, and judicial review shall be the final level of the administrative review.[60] This could also be observed in Australian FTAs with Chile,[61] Malaysia,[62] Japan,[63] and China-New Zealand FTA[64].

In the case of advanced rulings, the trade facilitation tools in customs administration, it is arguable that the TFA is the one that follows the practice of RTAs in the filed. TFA was concluded at the ninth WTO Bali Ministerial Conference in 2013, while some of the RTAs examined in this paper, such as the RTAs containing advance rulings like the Australia-US FTA or China-New Zealand FTA were signed in 2005 and2008 respectively. Australia-US FTA also has detailed procedures than the TFA, which was signed subsequently, such as the elements to be included,[65] and the time to issue the advance ruling after obtaining all the needed information..[66]When advance rulings are amended or revoked, the justification should be submitted. More importantly, contrasting with the TFA, the FTA extends the application to potential exporters or producers.[67]

[51] ASEAN-Australia-New Zealand Free Trade Agreement, 26 August 2014, at Charpter11, Art.13, para.8.
[52] Above n49, at Art.1.6.
[53] Malaysia-Australia Free Trade Agreement, 1 January 2013, atArt.5.5.
[54] Agreement between Australia and Japan for an Economic Partnership, 15 January 2015, atArt.4.7.
[55] Above n54, at Art.1.4.
[56] Australia–Chile Free Trade Agreement, 1 January 2009, atArt.7.9.1.
[57] Above n 54, at Art.6.7.
[58] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1868 U.N.T.S. 201, at Art. 1.3.
[59] Above n 23TRIPS at Art. 41.4.
[60] Above n 50 at Art.6.4.
[61] Above n 56 at Art.119.
[62] Above n53 at Art.9.4.
[63] Above n54 at Art.4.8.
[64] Above n47 at Art.170.
[65] Such as tariff classification, country of origin, and qualification for the originating good, see Above n 50 at Art.6.3.
[66] Above n26 at Art.3.1.
[67] Above n 50 at Art.6.3.

3. Emerging Transparency Area in Asia-Pacific RTAs

One essential contribution made by the RTAs to the international trade governance is to add new components, such as the anti-corruption. This issue has been addressed by different international rules under different subjects. In the relevance of corruption to trade, much empirical research has showed its distortion effect upon trade flows.[68] In other words, corruption is like an invisible levy increasing the cost of the trade. Anti-corruption objective could motivate domestic reforms and promote greater transparency among trading partners' economies. It might be questionable to pursue non-trade objectives in trade, such as trade sanctions against Iran or Myanmar. However, the forum of RTAs signifies the potential to promote not only trade flows, but also measures that deter elements that affect free trade.

Historically, trade agreements have not addressed the corruption issues, and it has not been included in the WTO framework so far. Integrating the anti-corruption into transparency first originated from a United Sates FTA signed with Morocco in 2004,[69] and US government extends this practice to its subsequent FTAs with other trading partners. In the RTAs examined in this paper, the Australia-US FTA reflects this feature as well.[70]

However, in 19 examined RTAs, we only observe Australia-US FTA includes one provision on regional cooperation in combating corruption and enhancing trade.[71] And the provision simply encourages two parties to cooperate in eliminating corruption so as to promote trade transparency, and does not contain further substantive arrangements and procedures. Although, they may as such be weak to fight corruption in trade governance, it serves as an emerging example to illustrate that RTAs could be a viable platform to address corruption related barriers to trade.

The Need for Transparency in Preferential Trade

The need for transparency in bilateral or regional free trade agreements is a concern not only to the parties or beneficiaries to those agreements but also non-members. Free trade agreements, being exceptions to multilateral obligations under the WTO, need to effectively embrace transparency in order to gain legitimacy among non-members and to establish its compatibility with relevant rules of exception under the WTO. The role and significance of transparency obligations may differ depending on the nature of the trade agreement in question. The role of transparency obligations under the multilateral trade agreements is to ensure that the vigor of the free trade rules is not diluted and their ultimate object or goals are not indirectly defeated due to want of transparency in the actions of member states.

The transparency obligations play a significant role in building confidence among large and diverse member states in a multilateral trade regime, where trade liberalization of individual members may mainly be driven by the binding force of the underlying free trade rules. However, in the context of bilateral or regional FTAs, the trade liberalization of individual members could be motivated by various other factors like strategic goals, bilateral cooperation, regional interests, etc. Under such circumstances, the role and significance of transparency obligations for the members of such agreements would arguably be different in comparison with the context of multilateral trade agreements. It is equally arguable that the role of transparency requirements under non-preferential PTAs would be distinct *viz a viz* its role in FTAs or multilateral trade agreements.

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[68] J G Lambsdorff, 'Corruption in Comparative Perception' (1998) 65 Economics of Corruption: Recent Economic Thought Series 81. E BnBarbier, R Damania & D Léonard 'Corruption, trade and resource conversion' (2005) 50 *Journal of Environmental Economics and Management* 276. W Sandholtz & W Koetzle, 'Accounting for Corruption: Economic Structure, Democracy, and Trade' (2000) 44 International Studies Quarterly 31. S Andersson & P M Heywood, 'The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption' (2009) *Political Studies* 57, 746.

[69] United States-Morocco Free Trade Agreement, January 1, 2006, at Art.18.5.

[70] Above n 50 at Art. 22.5.

[71] Above n50 at Art.22.5.

As mentioned earlier, PTAs could be either reciprocal or non-reciprocal in nature. Non-reciprocal preferential treatments are generally referred as preferential trade "Arrangements" instead of "Agreements" in the WTO regime. The foregoing analysis in this section is mainly focused on non-reciprocal PTAs distinct from the reciprocal PTAs[72]. In case of non-reciprocal PTAs, the concerns of lack of transparency among its members are expected to be less in comparison with reciprocal PTAs or FTAs or multilateral trade agreements. However, the need for transparency even in the cases of non-reciprocal PTAs cannot be under estimated. Firstly, countries not involved in a non-reciprocal PTA would still be interested in the transparency of such arrangements. As non-reciprocal PTAs tend to involve large concessions that are unilateral in nature and justified under various grounds of assistance or aid, non-participants would be interested in ensuring that any act or consequences in furtherance of non-reciprocal PTAs are indeed compatible with relevant rules like the WTO Enabling Clause[73] and the generalized system of preferences (GSP)[74] or waiver provisions[75].

Secondly, the beneficiaries of a non-reciprocal PTA would equally be interested in seeking transparency in order to ensure that the state granting a preferential treatment is indeed treating all the beneficiaries equally. Although, the state granting the preferential treatment may be allowed to impose some restrictions upon specific beneficiaries[76], the WTO Appellate Body held that the state has to administer the preferential treatment in a non-discriminatory manner among similarly placed beneficiaries. In a dispute with the European Communities (EC), India contended that the term 'non-discriminatory' under footnote 3 of the Enabling Clause prohibits EC from providing any differential treatment among developing countries under its GSP Scheme. The EC, on the other hand, defended its action on the ground that differential treatment of GSP beneficiaries are not prohibited as such and reasonable distinction among GSP benefeciaries could be made based on justifiable grounds like, for example, differing developmental needs among intended benefeciaries[77].

The WTO Dispute Settlement Panel initially rejected the EC position[78] and upheld India's contention that 'non-discriminatory' obligation under the Enabling Clause mandated identical tariff preferences under GSP schemes to all developing countries beneficiaries without differentiation except when

[72] For example the reciprocal agreement that is aimed at creating a Free Trade Area between Mercosur and the Republic of India in 2004 is referred as the Preferential Trade Agreement between MERCOSUR and the Republic of India 2004.
[73] Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT 1979.
[74] Under the legal authority granted by the Enabling Clause, developed countries create GSP schemes, where by preferential treatment is offered to trade originating from developing or least developed countries on a non-reciprocal basis. The Enabling Clause has also paved way for developing countries to create the Global System of Trade Preferences (GSTP), where by trade concessions are exchanged between developing countries. See UNCTAD, "Conclusion of the Sao Paulo Round of the GSTP: A Historical Achievement for South-South Economic Cooperation and Integration" Briefing Notes, UNCTAD Committee on Economic Cooperation and Integration among Developing Countries, No. 1, January 2011, pp.6.
[75] Apart from the GSP, preferential treatment for Least Developed Countries (LDCs) has been sought using waiver provisions under the WTO Agreement. For example, in the past the WTO General Council has granted waiver in order for the developing country members to provide preferential tariff treatment for LDCs. See WTO, Preferential Tariff Treatment for Least-Developed Countries, Decision on Waiver Adopted on 15 June 1999, WT/L/304, 17 June 1999, pp.2. See for the details of a similar waiver relating to services trade from LDCs C M Carpio and J C Mir, 'The Least-Developed Countries Services Waiver: Any Alternative Under the GATS?' (2014) 6 *Goettingen Journal of International Law*, 115.
[76] Under certain a priori conditions contemplated and recognized in the respective GSP Scheme.
[77] In this case, the EC argued that the needs of 12 beneficiary countries were different other developing countries including India and therefore deserved a special preference. However, the EC was found to have no established criteria of distinguishing the 12 beneficiary countries from the rest of the developing countries. See *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Panel, WT/DS246/R, 1 December 2003, at Para 4.290.
[78] Interestingly, the EC attempted to distinguish that the special treatment it bestowed under its Drug Arrangement Program was intended to address drug related problems faced by the 12 beneficiaries, distinct from other developing countries and India that did not face such problems. However, India counter argued that the increased market access opportunities under the Drug Arrangement Program has the potential to help resolve a large variety of development needs, which are commonly faced by India and other developing countries along with the 12 beneficiaries. See n 77. at Para 4.290.

implementing certain a priori limitations[79] recognized in a GSP Scheme[80]. However, the Appellate Body subsequently reversed this conclusion reached by the Panel and held that the Enabling Clause did not preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries[81]. It held that a preference granting country is not prohibited from limiting the benefits to specific sub-categories of GSP beneficiaries categorized under objective criteria. However, the Appellate Body categorically pronounced that the non-discriminatory obligation under the Enabling Class prohibited any discrimination among the beneficiaries that fall within a specific sub-category.

The Appellate Body held that identical treatment should be granted to all similarly situated GSP beneficiaries within a specific sub-category[82]. Thus, the obligation of non-discrimination in offering preferential treatment was also upheld by the Appellate body albeit in a more limited context than the one recognized by the Panel. This recognition of non-discriminatory obligation, therefore, warrants the need to promote high degree of transparency in non-reciprocal PTAs in order to enable eligible beneficiaries detect any denial of equal benefits.

The recognition of FTAs and non-reciprocal PTAs as exceptions to the multilateral obligations under the WTO regime naturally motivates the WTO members to seek transparency in the administration of those exceptions. Such motivations have resulted in the creation of two distinct framework of transparency under the auspices of the WTO that are primarily targeted at promoting transparency related to RTAs and non-reciprocal PTAs. In as much as the two frameworks seem to be primarily targeted at satisfying the WTO members regarding the legitimacy of RTAs and non-reciprocal PTAs, they are equally capable of enhancing transparency for the benefit of the respective countries involved. A closer examination of the features of WTO Transparency Mechanism for Preferential Trade Arrangements (TMPTA) introduced in 2010 and how the same has promoted transparency relating to Asia-Pacific non-reciprocal PTAs would indicate the importance and utility of WTO TMPTA.

The proposal for the TMPTA in the WTO was initially made by three developing nations namely Brazil, China and India along with the United States. [83] It was finally adopted in 2010 to govern preferential trade of all forms[84] and explicitly extend to all non-reciprocal preferential treatments under WTO agreements.[85] Under this mechanism, the donor member shall notify WTO Secretariat and Committee on Trade and Development and provide required information about the covered instruments, like the full list of preferential tariffs. The notification obligation is further strengthened by the Secretariat's factual presentation.[86] Besides, the TMPTA encourages all members to publish information that should be submitted.[87]

Conclusion

WTO and Asia-Pacific RTAs adopt different approaches to address transparency in trade. It is an increasing trend in RTAs to clearly state transparency as its core objective. Contrastingly, GATT keeps silent on this term in its preamble, so as in Agreement on Technical Barriers to Trade (TBT) and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), while the GATS

[79] For example, the preference giving countries may recognize in their GSP Schemes certain a priori limitations (also referred as graduation provisions or mechanism) like setting up import ceilings to exclude imports from individual developing countries when their products concerned reach a certain competitive level in the market of the preference-giving country. See above n77. at Para 7.108.
[80] Above n77. at Para 7.140.
[81] *European Communities – Conditions for the Granting Of Tariff Preferences to Developing Countries*, Report of the Appellate Body, WT/DS246/AB/R, 7 April 2004, at Para 174.
[82] Above n77 at Para 173.
[83] The joint proposal of these four states ultimately materialized in the creation of the WTO TMPTA Agreement in 2010.
[84] Comparing to 2006 Transparency Mechanism for Regional Trade Agreements, which deals with reciprocal trade agreements.
[85] Transparency Mechanism For Preferential Trade Arrangements, General Council Decision of 14 December 2010,WT/L/806,at Para 1. (c)
[86] Above n 85 at Para 7.(c).
[87] Above n 85 at Para 23.

replicates the GATT Article X and renames it as transparency.[88] In GATT, transparency has been addressed in Article X as a means to enforce trade rules disclosure. Transparency in the WTO context is implemented in different specific circumstances than to proclaim it as an overarching objective. In RTAs, transparency is not just a provision to implement commitments between treaty parties, but more importantly an icon of a healthy environment to facilitate business. From this perspective, RTA transparency measures are connected more closely to good governance in trade.

In the RTAs we examined, one prevailing approach is to create a separate chapter on transparency, which is applicable to all measures under the RTA. These chapters are later implemented by sector-specific transparency commitments in each sector-oriented chapters, like in arbitral proceeding, financial services, or sanitary and phytosanitary measures. Such approach facilitates interested parties to collect the needed information and at the same time enables the administrations to manage the transparency implementation well. On the other hand, the WTO way does not include a single provision or chapter to host transparency rules for all areas, but most of WTO transparency-related requirements are scattered in separate agreements, like GATT, TFA, SPS, TBT, GATS etc. But this method has advantages in addressing special needs of each trade area.

The motivation behind these RTA transparency measures is good governance, which implies that this kind of public good could also benefit non-party members, although they come from preferential arrangements between limited signatories. This further suggests that once the country implements their RTA transparency commitments, it would lower the cost of trade in general and may benefit non-members and future trading partners. Besides, the RTA provisions we examined have highly homogenous content, which could facilitate a large scale of convergence with other regimes. In turn, this process could enhance the consistency of RTAs with WTO rules, and avoid spaghetti bowel effect caused by different RTAs' overlapping rules on the same subject.

Meanwhile, as exceptions to multilateral trade arrangements under WTO regime, RTA should also contain transparent rulemaking and implementation process, which is important to build confidence among both the signatories and non-party traders. We particularly investigated the example of non-reciprocal PTAs under WTO monitoring mechanism to illustrate the transparency concerns on preferential trade treatments. RTAs examined in this paper have reinforced the relevance of multilateral

AIST Superannuation Governance: Paper Examining International and Australian Governance Trends

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Abstract

The Australian Government is seeking to introduce major changes to the governance of superannuation funds. Industry superannuation funds in Australia often have an executive board of directors in which the composition of the boards is based on equal representation of the number of directors elected by the Members and by the employer organisation. One of the major tenets of governance is the appointment of independent directors. The Government has issued a discussion paper in which it was suggested that this should be adopted by the superannuation funds. This paper argues on behalf of the Australian Institute of Superannuation Trustees (AIST) why this change is not necessary and how under the current model the funds are compliant with the governance standards of the Australian Prudential Regulation Authority (APRA) and the Australian Securities Exchange (ASX).

Key Words
Governance, Superannuation funds, Independent directors, Australian Institute of Superannuation

Purpose of this Paper

The Australian Institute of Superannuation Trustees (AIST) mission includes championing strong governance of the superannuation industry. AIST is committed to advancing the good governance practices and culture of not-for-profit superannuation funds. AIST believes that representative trustees offer the best governance model for Australian superannuation funds through their independence from profit-making financial institutions, their diversity and investor representation, and a unique culture of commitment and innovation. The governance model of not-for-profit funds is based on equal representation whereby an equal number of the fund's employer and employee-sponsored directors are nominated or elected to the fund's board with the overarching protection of a two-thirds majority vote on board decisions.

In November 2013, the Government issued its *Better Regulation and Governance, Enhanced Transparency and Improved Competition in Superannuation* Discussion Paper[1] ("the Government's Discussion Paper"). The Government's Discussion Paper sought feedback on several issues, including the most appropriate definition and proportion of independent directors on superannuation boards. The Government's Discussion Paper includes an unproven underlying assumption that independent directors would improve current governance outcomes. The Financial System Inquiry

[1] Australian Government, (2013) *Better Regulation and Governance, Enhanced Transparency and Improved Competition in Superannuation*, Discussion. Australian Government. Available at: http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2013/Better%20regulation%20and%20governance/Key%20Documents/PDF/Discussion_Paper.ashx

Final Report[2] has recommended the mandating of a majority of independent directors on the board of corporate trustees of public offer superannuation funds, including an independent chair; align the director penalty regime with managed investment schemes; and strengthen the conflict of interest requirements. In its submission in response to the Financial System Inquiry Final Report[3], AIST has strongly contested the proposition that there are shortcomings that need attention, or that the Final Report recommendations will lead to better outcomes for members of not-for-profit funds. AIST believes that any such should not be taken lightly and should be considered in the context of international experience.

Following the Global Financial Crisis ("GFC"), a review of corporate governance practices was high on the agenda overseas. The microscope was placed on financial institutions (including pension funds) both in Europe and the USA.

This Paper was initially prepared for internal AIST use to inform its response to the Government's Discussion Paper, as this Paper examines post-GFC international reviews of corporate governance trends. This Paper now summarises:

- AIST's response to the Government's Discussion Paper – so far as governance matters are concerned. Our response to this as well as to the Financial Services Inquiry Final Report was informed by this Paper;
- International corporate governance trends, with particular focus on post-GFC reviews; and
- How not-for-profit superannuation funds meet ASX principles and banking and insurance company prudential standards.

Australia's superannuation funds are underpinned by and acting in the best interest of members' test, which is enshrined in legislation as well as trust law. Overseas commentators believe that 'best interest' tests should also be legislatively imposed on European banks – so that bank depositors' interests may be protected against banks only acting in the interests of shareholders. Australian not-for-profit superannuation funds exist only to benefit members.

Our research also found that overseas commentators such as the OECD strongly believed independence of thought and mind were more important than meeting a strict definition of being an 'independent director'. We also found that there is no evidence that 'independent directors' add value; and that members of superannuation funds should be suitably represented on superannuation fund boards (as already occurs through the equal representation model of Australia's not-for-profit superannuation funds).

AIST's position on superannuation governance matters

The superannuation industry is currently implementing a wide raft of changes, particularly in the area of fund governance. Following an extensive consultation period, with significant industry input, new Prudential Standards and guidance were introduced and a new suite of legal obligations in the Superannuation Industry (Supervision) Act 1993 ("SIS Act") has taken effect to strengthen superannuation fund governance and the duties and obligations of trustee directors. While the industry should always strive towards best possible governance practices, now is a time for consolidation to allow the heightened standards to impact governance practices in the industry.

AIST supports a light-touch regulatory approach where appropriate, while acknowledging the importance of the superannuation industry to Australia's economy, the retirement savings of working

[2] *Financial System Inquiry Final Report*, (2014). [online] Commonwealth of Australia. Available at: http://tinyurl.com/nx768z8 [Accessed 7 Apr. 2015].
[3] Australian Institute of Superannuation Trustees, (2014). *Response to the Financial System Inquiry Final Report 31 March 2015*. [online] Australian Institute of Superannuation Trustees. Available at: http://tinyurl.com/lj5gh2ul [Accessed 6 April. 2015].

Australians and the compulsory nature of the system. However, any further reforms to the system should not only be considered in light of regulatory efficiency and cost, but also through a risk management lens. The ultimate benefit to members, in a system where that priority is paramount for trustees, should also be a key consideration for Government.

Notwithstanding these relatively recent developments, the Government is currently reviewing the board structures of super funds. The Government's Discussion Paper sought feedback on several key governance issues, including the most appropriate definition and proportion of independent directors on superannuation boards. The Financial System Inquiry Final Report has recently recommended the mandating of a majority of independent directors on the board of corporate trustees of public offer superannuation funds, including an independent chair; align the director penalty regime with managed investment schemes; and strengthen the conflict of interest requirements.

AIST believes the representative trustee system delivers superior results for members and does not support the mandating of independent directors –either as a majority or a 'one third' requirement. Rather, we support flexibility around the equal representation system with the SIS Act being amended to allow boards to appoint up to one third non-representative directors. AIST believes there is no evidence to suggest that mandating a majority of independent directors will benefit members of not-for-profit funds.

For equal representation boards the SIS Act limits the number of independent directors that such a board can appoint. AIST supports greater flexibility at law around this restriction and recommends that the legislation be amended to allow equal representation boards to appoint up to a third of their number from outside of the representative pool. AIST supports the equal representation model however, and believes that up to one-third independent directors preserves the nature of that system, while offering boards greater flexibility.

AIST points to the significant complexities that underlie an attempt to align the superannuation industry with other APRA-regulated industries and listed companies. Superannuation funds are set up as trusts, a structure that has significantly different foundations and obligations, and that is not easily merged with other operating structures. This trust structure has unique properties, which AIST believes are essential to the continued success of our system. It does however mean that alignment with other sectors may not be entirely possible in every respect. The governance models within the superannuation industry itself require different treatment for equal representation boards to those with a different structure. While we support the ASX Corporate Governance Principles and their definition of independence as it applies in the corporate arena, the straight adoption across into superannuation is unworkable due to the unique nature of the superannuation governance and operating models.

AIST believes that legal entities such as superannuation funds should not be subject to regulatory overlay when it to comes to choosing who governs and leads the business. The new Prudential Standards and the SIS Act very clearly articulate the roles and responsibilities of trustee entities and their boards and APRA's expectations as a regulator have also been clarified through the recent Stronger Super reforms. AIST submits that the regulator has sufficient powers to direct funds to make appropriate changes where it has concerns regarding governance or other risks, and that funds, operating within the law, should be able to choose directors and a Chair of the fund that is appropriate for the needs of the fund, and is ultimately in the best interests of members.

Australia's superannuation system has been independently reviewed, and was found in 2014, following the introduction of APRA's Prudential Standards, to be ranked amongst the world leaders (ranking of 3 out of 25 countries) on pension fund governance and integrity.[4]

[4] Australian Centre for Financial Studies and Mercer, (2014) *Melbourne Mercer Global Pension Index*, Melbourne Available at: http://tinyurl.com/omuvjxo

If there is any change to the independent director requirements for superannuation funds, the definition of 'independent director' is crucial. It means different things in different contexts. The Financial Services Inquiry Final Report recommends that an arm's length definition should be adopted. Section 10(1) of the SIS Act adequately characterises non-representative directors for an equal representation board structure. The definition excludes employer sponsors and representatives of member and employer representative organisations. AIST in its submission noted that this exclusion is unnecessary as membership does not engender a material conflict that impacts on the director's ability to act with independence of mind and judgment.

AIST believes the current legal requirements set out in the SIS Act, APRA Prudential Standards and trust law, with regulatory oversight from APRA provide a sound framework for the management of conflicts of interest. SPS 521 and the new SIS Act amendments should be allowed time to impact fund governance arrangements.

Research Section

Summary of Research Findings

Key findings

- International commentators all note that good governance is important. Among other things, good governance is associated with good performance.
- Most countries favour a principles-based – as opposed to a prescriptive - approach to pension fund governance. In Australia, the ASX Corporate Governance Principles and the APRA Prudential Standards adopt a principles-based approach.
- Different models of pension fund governance are valuable. Of 22 OECD countries, the majority have equal representation boards (representatives of both members and employers), while another six have member representation.
- Prescribing independent directors is not the answer. Many international commentators, such as the OECD, strongly believe independence of thought and mind is more important than meeting a strict definition of being an 'independent director'. However, evidence regarding the value of that independent directors bring is not definitive, both here and overseas.
- Trust law underpins the strong governance of super funds and best protects beneficiary interests.

Good governance is multi-dimensional

The ongoing debate about superannuation/pension fund governance is complex and nuanced and all too often over-simplified by media commentators. The focus of government reviews tends to be centred around board composition, the prescription of independent directors and the legal foundation of super fund governance – trust law. Good governance, however, is achieved through the efficient interaction of many organisational features. Good governance should permeate the fund's entire operations and at all levels within the fund's management structure, such as clearly delineating the roles of the trustee board and management, accountability arrangements within administration and finance systems, and robust risk management systems. This includes the appropriate management of conflicts of interests. Any valid attempt to improve superannuation governance should therefore be multi-dimensional and informed by international pension fund governance best practice trends and guidelines.

Most countries favour a principles-based approach

The OECD and European Commission[5] (among others) found that a principles-based approach to governance rather than a prescriptive approach leads to greater transparency and accountability. Principles-based corporate governance codes in the UK and Europe use a 'comply or explain' model to strengthen accountability and transparency. Boards then actively engage with the principles to explain their reasoning to shareholders (in the case of companies) or beneficiaries for the decisions they make. In Australia, the ASX Corporate Governance Principles and the APRA Prudential Standards also adopt a principles- based approach.

Skills plus independence of thought and judgment is critical

The OECD and the EU have concluded that the objective for good governance should include having boards that:

- Are capable of objective and independent judgment; and
- Have the right mix of skills and experience.

Prescribing independent directors on a board is not the answer

The OECD has concluded that promoting competence on boards is more critical than a focus just on independence[6]. While the OECD states there is not an inherent conflict between independence and competence, it goes on to say that sometimes formal independence may be necessary while independence per se is never a sufficient condition for board membership. The OECD suggests that the question of independent directors may have been pushed too far in favour of negative lists (qualities a director should not have rather than what they should) and this may have led to qualifications (as an example of positive board attributes) or suitability being of secondary importance.

In the United States, the stock exchange rules for listed companies are prescriptive – and independent directors are mandatory. Many believe US independent director requirements are easily avoided by selecting directors who are 'legally' but not actually independent. [7]

Different models of corporate governance are valuable

As noted by the OECD, a principles-based corporate governance model enables different governance structures to be implemented – and caters even for governance models that don't yet exist. A 2008 OECD Working Paper on Pension Fund Governance [8] concluded that employee or member representation could ensure a better alignment of the interests of the board with the fund beneficiaries. The OECD Paper notes this needs to be balanced against the need for experience and knowledge. AIST notes that APRA's fit and proper standards deal with these requirements. Of the 22 countries reviewed

[5] Organisation for Economic Co-operation and Development, (2010). *Guidelines for Pension Fund Governance.* Organisation for Economic Co-operation and Development; Organisation for Economic Co-operation and Development, (2010), *Corporate Governance and the Financial Crisis: Conclusions and Emerging Good Practices to Enhance Implementation of the Principles* Organisation for Economic Co-operation and Development; European Commission, (2010). *Green Paper 2010 Calling for ways to improve corporate governance in financial institutions*, Brussels. European Commission.

[6] Organisation for Economic Co-operation and Development, (2010), *Corporate Governance and the Financial Crisis: Conclusions and Emerging Good Practices to Enhance Implementation of the Principles* Organisation for Economic Co-operation and Development. Available at: http://tinyurl.com/lsg8qet

[7] Scott, H. and Dallas, G. (2006). *Mandating Corporate Behaviour: Can One Set of Rules Fit All? Available at:* http://www.law.harvard.edu/programs/about/pifs/research/publications/s&p6.05monograph.pdf

[8] *,Stewart, F. and Yermo, Y. (*2008). *Working Paper on Pension Fund Governance, Challenges and Potential Solutions*, Organisation for Economic Co-operation and Development. Available at: http://www.oecd.org/finance/private-pensions/41013956.pdf

by the OECD, 13 have equal representation and a further six require some form of member representation on the board.

Regarding 'best interests tests', the EU[9] has called for legislation governing listed companies to have a legal 'duty of care to non-shareholders such as bank depositors' imposed on board directors. Australian superannuation boards are already required to act in the best interests of beneficiaries.

International commentators all note that good governance is important. Among other things, good governance is associated with good performance.[10]

Whether independent directors add value to performance is unclear. The jury is out on this issue both here and overseas. But there is widespread consensus that skills, experience, and independence of thought and judgment are critical. These key factors should be the focus of any moves to improve the governance of superannuation (indeed, they are a key focus of APRA's new standards on superannuation governance), rather than requiring certain 'types' of directors, such as independent directors.

Part One – Corporate governance and why it matters

1.1 Why good governance matters

Good governance of an organisation is associated with good performance[11]. The governance of the Australian superannuation system is strong. Australia's superannuation system has been independently reviewed, and was found in 2014, following the introduction of APRA's Prudential Standards, to be ranked amongst the world leaders (ranking of 3 out of 25 countries) on pension fund governance and integrity.[12] APRA statistics show not-for-profit funds using the equal representation model have outperformed for profit funds.[13] Not-for-profit superannuation funds have a very clear focus – they exist only to benefit members. Their focus is not swayed by shareholders or other parts of large financial conglomerates. Strong trustee governance practices reduce the potential risks faced by a superannuation fund with flow-on effects for the fund's enduring stability and sustainability. Good performance and the enduring stability and sustainability of a fund are fundamental to a member's retirement benefit.

1.2 What is corporate governance?

The UK Cadbury Committee on the Financial Aspects of Corporate Governance 1992 produced a much-quoted definition of corporate governance.

'Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and

[9] European Commission, (2010). *Green Paper 2010 Calling for ways to improve corporate governance in financial institutions*, Brussels. European Commission.
Available at: http://ec.europa.eu/internal_market/company/modern/corporate_governance_in_financial_institutions_en.htm
[10] Johnson, K. and de Graaf, F. (2009). *Modernising Pension Fund Legal Standards for the 21st Century*, Organisation for Economic Co-operation and Development. Available at:
http://www.oecd.org/corporate/ca/corporategovernanceprinciples/42670725.pdf Feb 2009
[11] Johnson, K. and de Graaf, F. (2009). *Modernising Pension Fund Legal Standards for the 21st Century*, Organisation for Economic Co-operation and Development. Available at:
http://www.oecd.org/corporate/ca/corporategovernanceprinciples/42670725.pdf Feb 2009
[12] Australian Centre for Financial Studies and Mercer, (2014) *Melbourne Mercer Global Pension Index*, Melbourne
Available at: http://tinyurl.com/omuvjxo
[13] Medianet, (2014). , *APRA Statistics show not-for-profit funds outperform*. (online) Available at:
http://medianet.com.au/releases/release-details?id=792894

reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting.'

While the above definition is clearly appropriate in a corporate setting where shareholders are key stakeholders, it does not however deal with the unique nature of organisations that exist in a trust structure without shareholders. As AIST and IFF's *A Fund Governance Framework for Not-for-Profit Superannuation Funds*[14] notes, "high standards of trustee governance amount to more than mere compliance with legislative and regulatory requirements and prudent fiscal management. An effective governance framework begins with clearly defined powers and roles of trustees, chief executive officers and superannuation fund management. It includes articulated systems and relationships that underpin supervision, responsibility and accountability arrangements within the fund's administration and operation. It also incorporates robust risk management systems that identify, monitor and mitigate potential risks. Good governance policies and practices should permeate the fund's entire operations and all levels within the fund's management structure, forming an essential part of the fund's culture. It should also be specific to the fund, taking into account size, scale, membership, and unique qualities of the fund as set out in their trust deed and governing documents."

Part Two – Overview of Corporate Governance Trends

2.1 Introduction

This section examines corporate governance trends both overseas and within Australia. A spotlight was focussed on European and US corporate governance practices within financial institutions following the GFC. In summary:

- A principles-based – rather than using prescriptive definitions – is the preferred approach.
- Promoting competence on boards is more important than a focus on 'independent directors'.
- It is highly contentious whether 'independent directors' add value given corporate governance is multi-dimensional.
- Member representation on boards can ensure a better alignment of the board with superannuation fund members.

2.2 OECD, EU and Australia

2.2.1 A principles based approach is adopted

The OECD, EU Commission and Australia use a principles-based approach to corporate governance. Any model (now or future) could be tested against the principles. Such principles-based corporate governance codes in UK and Europe use a 'comply or explain' model. This model heightens the levels of accountability and transparency, more so than a prescriptive approach, as boards have to actively engage with the principles to explain their reasoning to shareholders or beneficiaries. Even post the GFC, international commentators believe that a principles-based governance approach to financial institution corporate governance is preferable to a prescriptive approach:

- OECD *Guidelines for Pension Fund Governance June 2009*[15]notes that the governing body should be accountable and have final responsibility, and recognises that different models may be used to achieve this.
- OECD *Corporate Governance and the Financial Crisis: Conclusions and Emerging Good Practices to Enhance Implementation of the Principles*[16] reinforces the OECD principles.

[14] Australian Institute of Superannuation Trustees and Industry Funds Forum, (2014). *A Fund Governance Framework for Not-for-Profit Superannuation Funds*, Third edition. Available at: http://www.aist.asn.au/media/12822/2014_FundGov_Framework_V3.pdf

[15] Organisation for Economic Co-operation and Development, (2009). *OECD Guidelines for Pension Fund Governance*, Organisation for Economic Development and Co-operation. Available at: http://tinyurl.com/odoyat9

[16] Organisation for Economic Co-operation and Development, (2010). *Corporate Governance and the Financial Crisis: Conclusions and emerging good practices to enhance implementation of the Principles*, Organisation for Economic

- European Commission Green Paper 2010 *Calling for ways to improve corporate governance in financial institutions*[17](which includes banks, insurance companies and pension funds) supports the OECD principles-based approach.
- European Banking Federation's response[18] to the European Commission Green Paper 2010 says that corporate governance should be principles-based, balanced and adequately flexible to reflect different national structures and business models
  (ie. recognising different EU models).

In Australia, the ASX Corporate Governance Principles and APRA's prudential supervisory model have similarly adopted a principles-based approach.

2.2.2 OECD and EU on 'independents'

- *OECD Guidelines for Pension Fund Governance June 2009*[19] state that the governing body should be suitable through having a mix of skills, including fit and proper criteria.
- *OECD Corporate Governance and the Financial Crisis: Conclusions and Emerging Good Practices to Enhance Implementation of the Principles*[20] reinforces OECD principles and identifies weaknesses in board practices. They state the objective should be to create boards capable of objective and independent judgment. They further noted that while there is not an inherent conflict between independence and competence, sometimes formal independence may be necessary but never a sufficient condition for board membership. When using a principles-based approach, the OECD argues that the principle should be that the board is capable of exercising independent and objective judgment, alongside skills, fitness and propriety. The OECD goes on to state that:
  - Promoting competence on boards is more critical than a focus merely on independence;
  - The question of independent directors may have been pushed too far in favour of negative lists and this may have led to qualifications (eg. positive list of board attributes) or suitability being of secondary importance in considering new board recruits; and
  - Independence of thought and judgment is important.

- *European Commission Green Paper 2010 calling for ways to improve corporate governance in financial institutions*[21] recommends widening of the fit and proper test to include the evaluation of expertise and individual qualities of candidates – and balance between independence and skills. Interestingly, the EU notes that for the for-profits (eg. banks) there should be a strengthening of legal liability for directors through a 'duty of care' to take into account interests of (bank) depositors. In superannuation in Australia this requirement is already in place in the Superannuation Industry (Supervision) Act 1993.

Development and Co-operation. Available at:
http://www.oecd.org/corporate/ca/corporategovernanceprinciples/44679170.pdf

[17] European Commission. (2010). *Green Paper: Corporate governance in financial institutions and remuneration policies*, Brussels, European Commission. Available at:
http://ec.europa.eu/internal_market/company/docs/modern/com2010_284_en.pdf

[18] European Banking Federation (2010). *EBF Response to the European Commission's Green Paper on Corporate Governance in financial institutions*, Brussels, European Banking Federation. Available at: http://www.ebf-fbe.eu/uploads/documents/positions/CorpGov/6-%20September%202010-D1313D-2010-EBF%20response%20Corporate%20Governance%20GP%20-%20final%20version%20-%20clean.pdf

[19] Organisation for Economic Co-operation and Development, (2009). *OECD Guidelines for Pension Fund Governance*, Organisation for Economic Development and Co-operation. Available at: http://tinyurl.com/odoyat9

[20] Organisation for Economic Co-operation and Development, (2010). *Corporate Governance and the Financial Crisis: Conclusions and emerging good practices to enhance implementation of the Principles*, Organisation for Economic Development and Co-operation. Available at:
http://www.oecd.org/corporate/ca/corporategovernanceprinciples/44679170.pdf

[21] European Commission, (2010). *Green Paper 2010 Calling for ways to improve corporate governance in financial institutions*, Brussels. European Commission.
Available at: http://ec.europa.eu/internal_market/company/modern/corporate_governance_in_financial_institutions_en htm

- *European Banking Federation's response to the European Commission Green Paper 2010* supports diversity of board member profiles with a focus on professional skills, with the furthering of a board's overall efficiency being a primary focus when considering the composition of the board.

2.2.3 Composition of superannuation boards – OECD countries

A 2008 OECD Working Paper on Pension Fund Governance[22] suggests that employee or member representation can ensure a better alignment of the interests of the board with the fund beneficiaries. The Paper goes on to comment that this needs to be balanced against the need for experience and knowledge. In Australia, the fit and proper requirements deal with this matter. The OECD Paper provides the following summary of representation on superannuation boards across various countries:

Australia	**Non-public offer funds (company and industry-wide funds) must have an equal number of employer representatives and member representatives on the board of directors of the corporate trustee or in the board of trustees.**
Austria	The board of supervisors of the pension fund may have two seats fewer for employee representatives than for the sponsoring employer or other shareholders of the pension fund.
Belgium	The board of directors of a pension fund must have equal representation of employers and employees.
Brazil	At least one third of the supervisory board and the audit committee must be composed of worker representatives.
Canada	There are no requirements for single employer plans. Multi-employer plans established pursuant to a collective agreement are governed by a board of trustees composed in accordance with the plan or collective agreement (typically equal representation).
Germany	Supervisory Board: employee representation depends on the number of employees in the pension fund, with a maximum of equal representation.
Hungary	Mandatory pension funds must have member representatives in their board of directors.
Iceland	The board of the pension fund must have equal representation of employers and employees
Ireland	No requirement for employee representation.
Israel	No requirement for employee representation.
Italy	The general assembly and the board of directors must each have equal representation of employers and employees.
Japan	The Board of Representatives of Employee Pension Funds must have equal representation of employers and employees.
Mexico	No requirement.
Netherlands	The board of the pension fund must have equal representation of employers and employees.
Norway	The board of the pension fund must have at least as many employee as employer representatives.
Poland	Not less than half of the members of the supervisory board of the occupational pension society should be nominated by the members of the fund.
Spain	The majority of the control commission must be selected by plan members and beneficiaries. No requirement for member representation in the board of pension fund management companies.
South Africa	At least half of trustees must be elected by plan members.
Sweden	The board of the foundation must have equal representation of employers and employees.
Switzerland	The supreme council of a pension fund must have equal representation of employers and employees.
United Kingdom	At least one third of trustees must be member-nominated.
United States	No requirements for single-employer funds. Multi-employer (Taft-Hartley) funds must have equal representation of employers and employees.

[22] *Stewart, F. and Yermo, Y. (*2008). *Working Paper on Pension Fund Governance, Challenges and Potential Solutions*, Organisation for Economic Co-operation and Development. Available at: http://www.oecd.org/finance/private-pensions/41013956.pdf

2.3 USA

2.3.1 Companies - prescriptive approach applied

The experience in the US is different to that of the UK, OECD and European Commission, with various stock exchanges (eg. NYSE) having a prescriptive based approach. However, US commentators have mentioned that US rules will need to become more flexible. A good summary can be found in a 2013 Harvard Law School paper[23]where the highly prescriptive nature of US corporate regulation is reviewed. This review states that the US appears to believe that its predominance as an international capital market permitted it to impose its own regulatory rules without fear of losing market share. This situation has changed due to the ability to mobilise large amounts of capital and increased trading on foreign markets. If this is true, then US rules will have to become more flexible and we may see a move from the present model to one of comply or explain.

2.3.2 USA companies and 'independents'

The US models of corporate governance require independent directors. As noted earlier in this Paper, many believe US independent director requirements are easily avoided by selecting directors who are 'legally' but not actually independent.

The New York Stock Exchange defines independent as "no director qualifies as independent unless the board of directors affirmatively determines that the director has no material relationship with the listed company, either directly or as a partner, shareholder or officer of an organisation that has a relationship with the company."[24]

In the US, criticism of the need to appoint independents questions whether the directors are independent of judgment. This is because the majority shareholders accept the nomination of the board. So, in the end, the so-called 'independent' knows who appointed them, and this may give rise to a potential conflict. An interesting article from the Kellogg School of Management analyses whether having independent directors adds to performance.[25] In summary, the report finds that there is a relatively small difference in returns earned by executives and independent directors but that they do earn higher returns than the market this has not however been the case in Australian superannuation sector – see for example research undertaken by the University of Melbourne.[26]

In the US, the main areas of debate around 'independents' centres around who appointed them (are they beholden to the board and majority shareholders?), whether independents are as good as company executives who are also directors, and how remuneration practices might sway decisions.

2.3.3 USA pension schemes – a non-prescriptive approach

Most US employee benefit plans (including pension plans) are governed by the *Employee Retirement Income Security Act* 1974 ('ERISA'). The main features of ERISA so far as corporate governance is concerned are:

- Those exercising control have fiduciary responsibilities.
- There is to be at least one named fiduciary with the authority to control and manage the plan.

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[23] Scott, H. (2005). *A Global Perspective on Corporate Governance*, Credit Week. Available at: http://www.law.harvard.edu/programs/about/pifs/research/publications/5scott.pdf

[24] New York Stock Exchange, (2014). *New York Stock Exchange Listed Company Manual*. Section 303A.02. Available at: http://nysemanual nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp_1_4_3&manual=%2Flcm%2Fsections%2Flcm-sections%2F

[25] Ravina, E. and Sapienza, P. (2009). *What do Independent Directors Know? Evidence from their trading*, Kellogg School of Management. Available at: http://www kellogg.northwestern.edu/faculty/sapienza/htm/ravina_sapienza.pdf

[26] Lawrence, J. and Stapledon,G. (1999). *Do Independent Directors Add Value?* The University of Melbourne. Available at: http://www.law.unimelb.edu.au/files/dmfile/IndependentDirectorsReport2.pdf

- There are no member representation requirements for single employer funds, but there must be member representation on multi-employer funds.
- Fiduciaries are to run the plan solely for the interests of the participants and beneficiaries.
- Plans are to be run with well-documented decision-making processes, comply with laws and disclosure requirements, monitor vendor fees for reasonableness and service quality, and regularly assess plan performance.

While US listed companies have prescriptive listing requirements, most US employee pension plans are provided with "significant latitude in how plan sponsors design and conduct plan governance, eg. the creation and composition of specific benefit plan committees, their responsibilities, and the types of governance related documents they use. However, this does not imply that governance can be ad hoc or unplanned. Rather, the complexities of ERISA's many requirements, and the potential liability to fiduciaries if they breach their duties and to employers for compliance failure, create a pressing need for a thoughtfully constructed plan governance system."[27]

In December 2011, Towers Watson published *The New Governance Landscape, Implications from the 2011 Towers Watson US Retirement Plan Governance Survey.* Key findings include:

- Processes of decision making vary widely.
- Respondents saw top governance challenges as retirement benefit costs and regulatory complexity.
- Less than half regularly assess the plan decisions against specific metrics.

2.3.4 USA pension schemes – no requirement to have 'independents'

In the case of public pension plans, representatives of the sponsoring organisation, current employees, beneficiaries and independents of US public pension plans comprise the boards.[28] While there is no single code of governance practice in the US, individual funds such as CalPERs have developed their own codes of practice, which mention the topic of independence. CalPERS sees independence as the cornerstone and that boards should be comprised of at least a majority of 'independent directors'. CalPERS notes that the definition approach alone may be insufficient and boards must embrace independence. CalPERS has a prescriptive definition of independence.[29] It includes that an independent is not affiliated with a not-for-profit entity that receives contributions from the company that exceed the greater of $200,000 or 2% of consolidated gross revenue. CalPERS adopts the International Corporate Governance Network (ICGN) Principles.

2.4 Have 'independents' added value?

2.4.1 Good governance delivers results - Australia's not for profit superannuation funds outperform

Good governance of an organisation is associated with good performance. In the case of the Australian superannuation system:

[27] Towers Watson U.S. Retirement Plan Governance Survey, (2011). *The New Governance Landscape, Implications from the 2011*.
Towers Watson USA. Available at: file:///Users/Karen/Downloads/Towers-Watson-US-Pension-Governance-Survey-2011-Implications%20(1).pdf
[28] Harper, J.T. (2008). *Board of Trustee Composition and Investment Performance of US Public Pension Plans*. Oklahoma State University, Available at:
http://www rijpm.com/admin/article_files/Joel_Harper_Board_of_Trustee_Composition_and_Investment_Performance_of_US_Public_Pension_Plans_February_2008.pdf
[29] CalPERS definition of 'independent' is included at page 54 of http://www.calpers-governance.org/docs-sof/principles/2011-11-14-global-principles-of-accountable-corp-gov.pdf

- Australia ranks second out of 25 countries[30].
- Not-for-profit superannuation funds have outperformed for profit funds[31].

2.4.2 Jury is out on whether 'independent' directors add value

Corporate governance is multi-dimensional
In its 2008 report Governance and Performance in Corporate Britain, [32] the Association of British Insurers (ABI) examined whether good governance delivers performance. The ABI operates the Institutional Voting Information Service which analyses UK listed companies in relation to levels of compliance with corporate governance best practice. The Report covers the boom period before the GFC, yet still finds (as did the Harvard study) that investors in listed companies put a premium on good governance. The Report notes the following:

- Corporate governance involves the interaction of many organisational features in complex ways. Assessment of corporate governance should therefore be equally multi-dimensional.
- One size of governance does not fit all.
- 'Independent directors' is raised in the context of whether there are sufficient non-executive directors to balance the number of executives on the board.
- Other factors include the appropriateness of performance targets, remuneration practices, composition of audit committees, and shareholding packages in excess of 40%.

As a comment, the ABI Report highlights the principle that the appointment of independent directors as a single factor does not equate to good corporate governance.

Contentious issue as to whether independent directors add value

Australia
There are many studies on this topic – most concluding that there is no empirical evidence either way. Here is a summary of one Australian study.

A 2013 research study conducted by the Australian School of Business - *Shareholders suffer from independent directors*[33] - suggests that independent directors increased the pay of CEOs (not taking into account how well they performed) – and this has diminished shareholders' wealth. Professor Swan believes that this is because independent directors do not have knowledge of the industry or the company. It should be noted that Professor Swan is comparing results with pre-2003, when listed companies were not required under ASX listing rules to have a majority of 'independent' directors.

Commentators divided even in USA, where Stock Exchanges have prescribed independents
Professor Donald C Clarke in his article, *Three Concepts of Independent Director*, [34] notes that "despite the surprisingly shaky support in empirical research for the value of independent directors, their desirability seems to be taken for granted in policy-making circles. … Independent directors have long been viewed as a solution to many corporate governance problems. Well before the Enron and WorldCom scandals, the New York Stock Exchange already required the presence of independent directors on audit committees, and in the

[30] Australian Centre for Financial Studies and Mercer, (2014) *Melbourne Mercer Global Pension Index*, Melbourne Available at: http://tinyurl.com/omuvjxo
[31] Industry Super Australia, (2015). Industry super fund outperformance reinforces undivided loyalty model | Industry Super Australia. [online] Available at http://tinyurl.com/jwcc3qe [Accessed 13 March 2015].
[32] Selvaggi, M. and Upton, J. (2008). *Governance and Performance in Corporate Britain*, Association of British Insurers. Available at: http://www.gmiratings.com/noteworthy/ABI_Feb_2008.pdf
[33] Professor Swan, P. (2013). *Shareholders suffer from independent directors*. University of New South Wales, Australian School of Business. Available at: http://www.asb.unsw.edu.au/newsevents/mediaroom/media/2013/august/Pages/shareholders-suffer-from-independent-directors.aspx
[34] Clarke, D. (2007). *Three Concepts of the Independent Director*. George Washington University Law School. Available at: http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1045&context=faculty_publications

United States, insider-dominated boards have been rare for years. …Some studies have even found a negative correlation between board independence and corporate performance."

The article goes on to comment that there is significant disagreement as to how 'independence' is defined. For example, those who see the independent director primarily as a defender of shareholder interests against management will naturally see more shares being held as beneficial. Those who see the independent director as someone untainted by any financial interest in the company are suspicious of share ownership. Professor Clarke concludes by saying that we do not even know what we mean when we talk about the independent director and that therefore, any jurisdiction planning to include independents should think carefully about the purposes and objectives for including independents.

2.4.3 Independents and the need for diversity and specific sector training

As noted by the EU[35], diversity on boards (especially of non-executive board members) is one of the key issues of corporate governance: 'Empirical evidence highlights the benefits of diversity for corporate governance both in terms of efficiency and better monitoring. Diversity, not just of gender but also of race and social background, and the presence of employee representatives, broadens the debate within boards and helps, as some say to avoid the danger of narrow group think.'

In examining the causes of the GFC, the EU goes on to say that one of the interviews in their case studies said that it is 'difficult for supervisory board members without a background in banking to understand the range of different complex products; and further that Lord Myners in a review of the banking sector by the House of Commons Treasury Committee 2009 said that banks were not focussing on the need to recruit non-executives with specific technical expertise and experience in the banking sector.

This perhaps points to the need for directors to have specific training and expertise in the superannuation sector, as well as meeting the fit and proper requirements. Recently, similar conclusions have been drawn in the retailing sector. In an article by Sue Mitchell in The Age[36], exposing a lack of retailer board knowledge of the retail sector, one commentator concluded that 'the role of the board is to OK the broad path they expect a company to follow; to be able to do that they must have a good understanding of the retail market and how it functions and what trends are important. … If they are not alert to it, … mistakes can be made.'

[35] European Commission, (2010). *COMMISSION STAFF WORKING DOCUMENT Corporate Governance in Financial Institutions: Lessons to be drawn from the current financial crisis, best practices Accompanying document to the GREEN PAPER Corporate governance in financial institutions and remuneration policies*. [online] Brussels: European Commission. Available at: http://tinyurl.com/awmq2xn

[36] Sue Mitchell, *Retailer boards short of hands-on retail experience*, The Age 30 May 2015 Available at: http://tinyurl.com/psn2gy2

2.4.3 Reasons cited in various research papers for using independent directors –do they apply to superannuation funds?

Reasons cited for independent directors	Application to Australian NFP* superannuation funds	How NFP* superannuation funds governance models exceed reasons cited for independent directors
Helps manage the divergence between the interests of shareholders and management	No	SIS and Trust law require board to act in members' best interest. No shareholders and exist only to benefit members.
Encourages active performance managing of organisational performance particularly in environments where there are executives on the board	Yes	APRA monitoring of performance, regular reporting to APRA, demonstration of scale and efficiency as part of MySuper.
Role in take-over defences and acquisitions as removed from management	No	Best interests of all members. Due diligence processes require board to examine 'equivalency' of benefits.
Good monitor of executive pay	Yes	Remuneration committees and no executives on boards
Helps access to international capital markets	Yes	
Some argue improves performance	NFP* out-perform[37]	

* Not for profit superannuation funds

Part Three – How Not for Profit Superannuation Fund Governance Meets ASX and Australian Bank/Insurance Standards

As mentioned in the Overview within this paper, the Government has issued a *Better Regulation and Governance, Enhanced Transparency and Improved Competition in Superannuation* Discussion Paper. The Government's Discussion Paper states that it intends to align the governance structures in the superannuation system more closely with corporate governance principles and cites the ASX principles and the principles APRA applies to banking and insurance.

Accordingly, this section of the paper compares the corporate governance practices and requirements of ASX listed companies, banks and insurers with not-for-profit superannuation boards. The conclusion may be drawn that not-for-profit superannuation fund boards not only meet the vast majority of these requirements but – because of the overarching requirement that they must act in the best interests of members (based in trust law and legislation) – have higher corporate governance responsibilities.

[37] Industry Super Australia, (2015). Industry super fund outperformance reinforces undivided loyalty model | Industry Super Australia. [online] Available at http://tinyurl.com/jwcc3qe [Accessed 13 March 2015].

3.1 ASX Principles

The table below compares APRA regulated super funds with the ASX

ASX principle	Compliance	Representative model
Lay solid foundations for management and oversight: A listed entity should establish and disclose the respective roles and responsibilities of its board and management and how their performance is measured and monitored.	√	Governance Standard SPS 510 requires that the board has a formal charter setting out the roles and responsibilities, that any delegation be clearly documented, and that there be a process for performance assessment.
Structure the board to add value: A listed entity should have a board of appropriate size, composition, skills and commitment to enable it to discharge its duties effectively.	√	Fit and Proper Standard SPS 520 requires this.
Act ethically and responsibly: A listed entity should act ethically and responsibly.	√	SIS covenants sections 52 and 52A. AND additional common law trustee duties
Safeguard integrity in corporate reporting: A listed entity should have formal and rigorous processes that independently verify and safeguard the integrity of its corporate reporting.	√	**Funds are required to have internal audit, external audit and in many cases actuarial oversight with an audit committee being required under SPS 510**
Make timely and balanced disclosure: A listed entity should make timely and balanced disclosure of all matters concerning it that a reasonable person would expect to have a material effect on the price or value of its securities.	√	SIS Act requires annual reports, significant event notices, PDSs. Section 29QB SIS Act requires additional disclosures.
Respect the rights of security holders: A listed entity should respect the rights of its security holders by providing them with appropriate information and facilities to allow them to exercise those rights effectively.	N/a	Arguably a higher test: SIS requires best interest test for all members and beneficiaries. Additional trustee common law overlay.
Recognise and manage risk: A listed entity should establish a sound risk management framework and periodically review the effectiveness of that framework.	√	Risk Management Standard SPS 220 requires this.
Remunerate fairly and responsibly: A listed entity should pay director remuneration sufficient to attract and retain high quality directors and design its executive remuneration to attract, retain and motivate high quality senior executives and to align their interests with the creation of value for security holders.	√	SPS 510 requires super funds to have remuneration policy and remuneration committee. S29QB of SIS Act (via Regs) requires extensive remuneration disclosure. Arguably a higher test of acting for beneficiaries: SIS requires best interest test for all members and beneficiaries.

3.2 ASX listing rules

The table below examines how APRA regulated superannuation funds compare with meeting the *recommended* ways for meeting the ASX principles as well as the 2013 recommendations.

Where not-for-profit superannuation boards would meet recommended methods

ASX	Representative model
Charter setting out roles, responsibilities of board, chair, senior management	SPS 510
Checks of candidates	SPS 520
Board terms, written agreements with directors, senior executives	SPS 510 board terms
Gender diversity policy and disclosure of meeting targets	AIST recommendation. WGEA applies where entity >100 employees
Board evaluation and disclosure	SPS 510 requires annual review
Senior executive review	Occurs in practice
Disclose details of directors, interests, length of service	New SIS regulations pursuant to s29QB SIS Act
Chair and CEO not to be same person	Occurs in practice
Entity should have statement of mix of skills	S29QB SIS requires skills disclosure on web and mix of skills required pursuant to SPS 510 and SPS 520
Board should have audit committee	Requirement under SPS 510
Board should receive statement from CEO and CFO that accounts properly maintained	Occurs
Board to require management to design and report on risk management and review at least annually and major risks identified and reported	A requirement under SPS 220
Board should establish remuneration committee with majority of independents and claw back policy of performance based remuneration and disclose this policy as well as equity based remuneration schemes	Remuneration committee required SPS 510 and claw back policy of performance based remuneration and disclose this policy and equity based schemes

Grey area

Majority to be independent directors. ASX defines independent as "a non-executive director who is not a member of management and who is free of any business or other relationship that could materially interfere with or could reasonably be perceived to materially interfere with the independent exercise of their judgment".	AIST member fund trustees are non-executive and appointed by external entities. Additionally, SIS Act and common law trustee duties of care impose best interests of member tests. Research demonstrates term trustee imposes seriousness of role with fewer breaches than corporate directors (see 2006 PJC on Corporations and Financial Services Inquiry into Structure and Op of Superannuation Industry).

Where not-for-profit superannuation boards would not meet recommended method

Chair to be independent	Not required, though many have elected to appoint an independent Chair
Board should establish nomination committee	Not required BUT super funds required to have board renewal policy SPS 510
Code of conduct for board, senior executives and employees	Not a requirement, but AIST supports this and is common practice. AIST introduced Code of Conduct and Ethics for its members in 2014
Audit committee should include at least 3 non-executive directors and majority are independent and Chair is independent and not Chair of board	At least 3 members, all non-executive. Chair of committee not to be Chair of the Board – SPS 510.
Communications policy for effective communication with shareholders and participation at gen'l meetings	Not a requirement but SIS Act covers major member communications.

3.3 Comparing Prudential Standards for banks and insurance with not-for-profit superannuation funds

As previously noted, the Government's Discussion Paper states that it intends to align the governance structures in the superannuation system with the principles APRA applies to banking and insurance.

Prudential Standard CPS 510 Governance sets out minimum foundations for good governance of Approved Deposit-taking Institutions, general and life insurers:

- Competent (or similar) board which can make reasonable and impartial business judgments in the best interests of the institution and which duly considers the impact of its decisions on depositors or policy holders. The governance of these institutions builds on these foundations in risk that sponsoring organisations dictate ways that take account of the institutions size, complexity and risk profile.
- 'Independent director' is a non-executive director who is free from any business or other association – including those arising out of a substantial shareholding, involvement in past management or as a supplier, customer or adviser – that could materially interfere with the exercise of their independent judgment. The circumstances that will not meet this test of independence include, but are not limited to, those set out in Attachment A below:
  (Attachment A) A director is **not** independent if the director:

    1. is a substantial shareholder of the regulated institution or an officer of, or otherwise associated directly with, a substantial shareholder of the regulated institution;
    2. is employed, or has previously been employed, in an executive capacity by the regulated institution or another group member, and there has not been a period of at least three years between ceasing such employment and serving on the Board;
    3. has within the last three years been a principal of a material professional adviser or material consultant to the regulated institution or another group member, or an employee materially associated with the service provided;
    4. is a material supplier or customer of the regulated institution or another group member, or an officer f or otherwise associated directly or indirectly with a material supplier or customer; or
    5. has a material contractual relationship with the regulated institution or another group member other than as a director.

A non-executive director is interpreted as meaning reference to a director who is not a member of the regulated institution's management. Non-executive directors may include Board members, senior managers of parent company of locally incorporated regulated institution or of parent company's subsidiaries, but not executives of the regulated institution or its subsidiaries.

Comparing CPS 510 requirements with superannuation funds:

CPS 510 requirement	Superannuation fund requirements
APRA key requirements:	
Specific requirements of board size and composition which include: - full range of skills - collective knowledge of directors - minimum 5 directors - majority of independent directors - Chair must be independent - Majority of directors present and eligible to vote at all board meetings must be non-executive directors Board representation must be consistent with locally incorporated regulated institutions shareholding. CPS gives examples eg. if shareholding is no more than 15% of voting shares, not be more than 1 board member who is an associate of shareholder.	Requirements under APRA Prudential Standards include: - same requirement SPS 520 fit and proper - same requirement SPS 520 fit and proper - not a requirement - not a requirement but no executive directors - not a requirement but no executive directors - not a requirement but no executive directors on trustee boards Board represents best interests of all members so not a requirement.
Chair must be independent director	Not a requirement although some of AIST member funds have independent directors as chairs
Board Audit Committee must be established	Same requirement as SPS 510 Governance
Board must have policy on Board renewal and procedures for assessing Board performance	Same requirement as SPS 510 Governance
Board Remuneration Committee must be established	Same requirement as SPS 510 Governance
Other APRA requirements	
Institution must have a Remuneration Policy aligning remuneration and risk management	Same requirement as SPS 510 Governance
Institution must have dedicated internal audit function	Same requirement as SPS 510 Governance

4. International reflections on the value of the trust structure

In its Interim Report, the Financial System Inquiry sought views on the appropriateness and cost efficiency of the trust structure for the superannuation industry. The Inquiry has generally expressed interest in seeking comments on international comparisons with the Australian financial system. This section therefore examines – and confirms – the international view that trust structures best protect members and their beneficiaries.

The legal framework that trustee directors operate in is based on trust law. This sets the limits of a trustee's discretionary powers and assigns duties and obligations to protect the interests of beneficiaries. Many commentators believe the trust structure is fundamental to a retirement savings system that ensures the highest standards of governance. A recent report by the Law Commission[38] in the UK examined the nature of trust law around fiduciary duties. The report considered these duties in the context of the UK pension fund system, and the difference in duties of fiduciaries, and the protection of beneficiaries, across pension funds based in trust law, and those created in a contractual relationship. The report quotes Lord Justice Millett's summary of a fiduciary relationship in Bristol and West Building Society v Mothew: "The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary." "The distinguishing duty of a fiduciary is "the duty to loyalty". However this duty of loyalty sits alongside the other statutory, equitable and common law duties which a fiduciary might owe."

[38] Law Commission UK (July 2014) Fiduciary Duties of Investment Intermediaries available at: http://tinyurl.com/kaeor5a

In the UK there are two separate and very different legal foundations underpinning pension funds – those based in trust law and those based in contract. An individual can purchase a pension product from an insurer in the UK, and that is a product based in contract law. Reviewing the two systems, however, the Law Commission report noted: "There are serious problems with the law relating to contract-based pensions. The contract model assumes that savers are fully informed autonomous parties, able to make good judgements in the market place. Yet the evidence is that savers fail to engage with pensions. This has now become institutionalised by auto-enrolment, where people are placed in pension schemes by default, without any conscious agreement to the charges or contract terms." The report states that a distinguishing duty of fiduciary is their duty to loyalty to the beneficiaries of the trust. That duty of loyalty however sits alongside the other statutory, equitable and common law duties which a fiduciary might owe. In contract, the duty of loyalty, and the obligation to protect the best interests of the pension fund member are absent. In a pension scheme context trustees are asked to "make the decisions that members would have made for themselves, if they had the time, expertise and motivation to do so." The protection that trust law offers to the beneficiaries as vulnerable and disengaged members of pensions schemes is far higher and more appropriate in the circumstances than a relationship based in contract law

Conclusion

The Australian superannuation system is envied internationally. Australia's superannuation system now covers over 94% of the Australian workforce, [39] has over $1.75 trillion under management, and is equal to Australia's GDP. [40] The majority of Australians rely on trustees to prudently manage their retirement savings. Australia's superannuation industry comprises several types of superannuation models, each with different governance and ownership structures. Some superannuation funds are owned by banks, some are owned by individuals (Self Managed Superannuation Funds), while the not-for-profit superannuation funds exist purely to manage money for the members and other beneficiaries.

While there are these different models, pooled superannuation funds (those funds not operated by individuals for their own retirement) have stringent governance requirements, via a combination of Commonwealth legislation and trust law. The application of trust law to Australian superannuation funds replicates other Anglo-Saxon jurisdictions. As Keith L Johnson and Frank Jan de Graaf note in an OECD paper[41], *"*trustees have generally been held to a higher standard of conduct than is required of corporate directors or parties to a contract."

The research of international corporate governance trends featured in this paper was undertaken as input to AIST's response to the Government's Discussion Paper. A review of papers from the OECD, the EU Commission, and various academic papers was undertaken and there was a very clear focus on corporate governance issues following the GFC. The findings are clear:

- Members of superannuation funds need representation on boards so that their interests are aligned.
- No case for having prescriptive requirements for independent directors has been made.
- The focus should be on outcomes.
- It is important that board members be suitably qualified and experienced (the APRA Prudential Standards in Australia cover this issue).

[39] Australian Bureau of Statistics, (2009). *Trends in Superannuation Coverage*. Available at: http://www.abs.gov.au/AUSSTATS/abs@ nsf/Lookup/4102.0Main+Features70March%202009

[40] The Hon B Shorten (2013). Address at the Conference of Major Superannuation Funds. Brisbane. Available at: http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2013/002 htm&pageID=005&min= brs&Year=&DocType=

[41] Johnson, K. and de Graaf, F. (2009). *Modernising Pension Fund Legal Standards for the 21st Century*, Organisation for Economic Co-operation and Development. Available at: http://www.oecd.org/corporate/ca/corporategovernanceprinciples/42670725.pdf Feb 2009

The overriding requirement is that the board of trustees of superannuation funds must act in the best interests of members (and the beneficiaries of members). These stringent requirements have resulted in the Australian superannuation system receiving the second highest score out of 25 countries in the Mercer Global Pension Index. Within this environment, Australia's not-for-profit superannuation funds have outperformed[42].

[42] Industry Super Australia, (2015). Industry super fund outperformance reinforces undivided loyalty model | Industry Super Australia. [online] Available at http://tinyurl.com/jwcc3qe [Accessed 13 March 2015].

The Influence of Budget Transparency on Quality of Governance

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Abstract

The public budget is the engine that drives any economy; thus, budget transparency contributes to shaping the political process and government performance. The current study examines the relationship between budget transparency (measured by an Open Budget Index (OBI)) and governance quality (measured by Worldwide Governance Indicators (WGI)). The study covers four years – 2006, 2008, 2010, and 2012 – where OBI data are available. Furthermore, the role of the human development level of nations in shaping this relationship is tested.

While the result of the analysis shows a significant relationship between budget transparency and governance quality, which is inconsistent with the literature, the findings indicate minimal influence of the human development level of nations on this relationship. This result confirms the influence of budget transparency in the adoption of good governance practices by governments and increased quality of governance. Future research can examine the relationship between human development and quality of governance in the process of understanding factors that contribute in enhancing the governing process.

Keywords: budget transparency, governance quality, human development

Introduction

Aaron Wildavsky (1961), in his masterpiece *Political Implications of Budgetary Reform*, stated "[T]he budget is the life-blood of the government, the financial reflection of what the government does or intends to do" (p. 184). The budgetary system and the public budget process have impacts on the way government operates. Thus, the cornerstone of developing financial systems in countries starts with the development of the public budget. Also, the public budget contributes to human development, economic growth, and governing. Therefore, international organizations, donors, and civil society organizations advocate budget transparency and accountability toward better governance.

Conversely, good governance has been introduced as a tool to work toward better service for citizens, political stability, and government effectiveness. Furthermore, good governance is connected to fighting corruption and holding bureaucrats and politicians accountable for their actions. Consequently, good governance practices by governments are a prerequisite of financial and nonfinancial aids from donors to countries in need of assistance.

The main theme of the current article is to study the influence of budget transparency on good governance. The open budget index (OBI) as a measure of budget transparency, as well as the worldwide governance indicators (WGI) (Voice and Accountability (VA), Political Stability and Absence of Violence (PS), Government Effectiveness (GE), Regulatory Quality (RQ), Rule of Law (RL), and Control of Corruption (CC)) as a measure of good governance, have been used in studying the relationship between budget transparency and good governance. The study covers 2006, 2008, 2010, and

2012, where OBI data are available. In addition, the current study will explore the influence of human development in shaping the relationship between good governance and budget transparency. The human development index (HDI), which will be used in the current study as a measure of human development, classifies countries into four groups (very high development, high development, medium development, and low development). The three dimensions used in constructing HDI are health, education, and living standards.

Where most prior studies on this subject have concentrated on one aspect of governance, the current article is exploring the influence of budget transparency on all six indicators of good governance, which will enhance the knowledge regarding the relationship between budget transparency and quality of governance. Also, studying the relationship between budget transparency and governance on a global scale (compared to the regional or country level) allows for studying the relationship in a variety of political and governmental systems. In addition, the current study will explore the influence of human development on the relationship between good governance and budget transparency, thus filling the research gap in exploring this issue.

While the result of the analysis shows a significant relationship between budget transparency and quality of governance, the analysis concludes that the human development level of nations has a minimal influence in shaping the relationship. This result confirms the influence of budget transparency on governments' adoption of good governance practices and increasing quality of governance. In contrast, although human development significantly moderates the relationship between budget transparency and regulatory quality and between budget transparency and government effectiveness, it did not moderate any other relationships.

Budget Transparency

The theme of transparency has been addressed through numerous studies in many fields (e.g., political, economic, and social sciences). Kosack and Fung (2014) argue that the notion of transparency has been adopted by governments and international organizations based on the promise that "disclosure of information about government institutions, policies, and programs empowers citizens to hold officials responsible for their spending and performance, thereby reducing corruption and mismanagement of public resources and leading, eventually, to more accountable, responsive, and effective governance" (p. 65). Thus, transparency is argued to be an important tool for better governing.

Public budget, on the other hand, is the engine that drives the economy and government's work. The structure of the budget, the budget process, and the way it is executed play a significant role in economic growth and sustainable development (Acosta, 2013; Ellis & Fender, 2006), political stability and political turnout (Benito & Bastida, 2009; Zucolotto & Teixeira, 2014), controlling corruption (Kosack & Fung, 2014; Santiso, 2006), and human development (Carlitz, Renzio, Krafchik & Ramkumar, 2009; de Renzio, Gomez & Sheppard, 2005). In addition, the impact of public budget goes beyond the public sector to influence private sectors' performance and financial market (Hameed, 2011).

Distinguishing between budgets and budgetary systems is a critical point that many previous researchers have mentioned. Whereas the budget refers only to the documents within which financial proposals are contained, the budget system refers to the relationship between the stages to be followed in order to compile the budget documents (Lee, 2012; Shah, 2007). In addition, the public budget generally reflects the policy of the government with regard to economic policies.

Over the years, many definitions of budget transparency have been introduced. Premchand (1993) defines budget transparency as "the availability of information to the public on the transactions of the government and the transparency of decision-making processes" (p. 17). The Organization for Economic Co-operation and Development (OECD) defines budget transparency as "the full disclosure of all relevant fiscal information in a timely and systematic manner" (OECD 2002, p. 1). The definition of open budget initiative that will be utilized in the current paper explicates details in defining budget

transparency: "transparency means all of a country's people can access information on how much is allocated to different types of spending, what revenues are collected, and how international donor assistance and other public resources are used" (IBP, 2010, par. 4).

Accordingly, budget transparency movements are motivated by the assumption that "enhancing transparency and accountability in the budget process will lead to improved democratic and developmental outcomes" (Carlitz, 2013, p.s53). In contrast, the length and complexity of the public budget makes it difficult for the average citizen to understand; thus, it has been argued that too much budget transparency can do more harm than good (Persson, Rothstein & Teorell, 2010; Kolstad & Wiig, 2009). On the contrary, Carlitz (2013) stated that "access to budget information and budget processes clearly has the potential to empower citizens and make their governments respond in ways that may improve their lives" (p. s63).

Good Governance

Evaluating public sector performance and people's participation in political and governmental decision-making processes are subjects that have dominated research in many fields (e.g., public administration and political science) (Birkland, 2006; Rhodes, 2007). In addition, many theories and models have been introduced, such as new institutionalism theory (North, 1990; DiMaggio & Powell, 1991) and public choice theory (Tullock, Seldon, & Brady, 2002), which study how governments perform their work and how politicians and bureaucrats behave in the policy process.

The governance model is characterized by a change in the role of government from the only player to one of many players. Governance is marked by a change in government's role in society, where nongovernmental actors (e.g., citizens and nonprofit organizations) participate in the decision-making process and where democratic principles are applied by giving the majority of people the right to participate in the governing process (Denhardt & Denhardt, 2007; de Ferranti, Jacinto, Ody, & Ramshaw, 2009). According to Neumayer (2003), governance is defined as "the way in which policy makers are empowered to make decisions, the way in which policy decisions are formulated and implemented and the extent to which governmental intervention is allowed to encroach into the rights of citizens" (p. 8).

Accordingly, good governance is the standard used to determine the quality of governing by countries and international institutions providing political, administrative, and financial support and advice to other countries. Also, international financial institutions (e.g., the IMF and the World Bank) and donor countries (e.g., the United States and the United Kingdom), use good governance as a standard to evaluate countries' affairs and systems. This evaluation contributes, in part, to the decision of whether or not to provide aid to those countries (Mimicopoulos, Kyj, and Sormani, 2007; Santiso, 2001).

Good governance is defined as "the ability of government to develop an efficient, effective and accountable public management process that is open to citizen participation and that strengthens rather than weakens a democratic system of government" (Riddell, 2007, p. 374). In addition, international organizations deem that good governance is a condition for economic development and efforts to fight corruption. The United Nations has introduced eight major characteristics of good governance that define and articulate good governance practices by governments: "[good governance is] participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and follows the rule of law" (UNESCAP, 2009, p. 1). In addition, good governance is characterized by respecting human rights and adopting democratic principles by governments (e.g., citizen participation and transparency) in decision-making processes (Denhardt & Denhardt, 2007; Kosack & Fung, 2014).

Therefore, indices have been developed by organizations to measure quality of governance, and each index is structured and calculated differently (Arndt & Oman, 2006; Mimicopoulos et al., 2007; Thomas, 2008). While some are regionally based (e.g., measuring quality of governance among African

nations), other indices have expanded annually by covering more countries. Other measures of quality of governance concentrate on one or two aspects of the governing process, such as the corruption perceptions index (CPI), which measures nations' corruption levels. Arndt and Oman (2006) argue that, although "the perfect governance indicator will undoubtedly never exist" (p. 11), some indicators have more validity and credibility than others. The number of sources used to structure an index, the comprehensiveness with which the governing process is covered, and the accuracy of the results are all factors that make one index more credible than others among users (Arndt & Oman, 2006; Mimicopoulos et al., 2007).

The worldwide governance indicators (WGI) project defines good governance as "the traditions and institutions by which authority in a country is exercised," including:

> (a) the process by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies; and (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them (Kaufmann, Kraay, & Mastruzzi, 2009b, p. 1).

Because they cover the most important aspects of the governing process (Arndt & Oman, 2006; Mimicopoulos et al., 2007), the worldwide governance indicators (WGI) will be adopted as a measure of good governance, in the current study. Unlike other indices, the WGIs contain an indicator for each aspect of the governing process, affording researchers and policy-makers a better understanding of the political process (de Ferranti et al., 2009; Kaufmann, Kraay, & Mastruzzi, 2009a; Thomas, 2008). Thus, the design of the WGI, coupled with the fact that it covers all member nations of the UN, helps to provide a clear understanding of the relationship between quality of governance and budget transparency.

Transparency and Good Governance: Previous Studies

Many studies have been conducted to examine the relationships between budget transparency and government's performance and activities; budget transparency and countries' development (Alt & Lassen, 2005; Gaventa & McGee 2013); budget transparency, fiscal performance, and political turnout (Benito & Bastida, 2009; Stiglitz, 2002); and transparency and good governance (Acosta, 2013; Kolstad & Wiig, 2009). The positive influence of government work's transparency on a country's development and quality of governance is a common finding among most of these studies.

Benito and Bastida (2007) study the relationship between budget transparency on one side and economic development and fighting corruption on the other. Even though every country has a different culture and political system, which might affect the way each country applies public budget transparency standards, the authors find a strong relationship among budget transparency, economic development, and efforts to fight corruption in all countries included in the research. Additionally, the study concludes that budget transparency increases a government's accountability and improves the decision-making process. In addition, Benito and Bastida (2009) study the relationship between budget transparency based on the availability of information from governments and citizen participation in the political process. After admitting the difficulty of measuring political participation by using one only aspect of it (voting), the study nonetheless finds a positive relationship among budget transparency, fiscal performance, and political turnout.

Renzio, Gomez, and Sheppard (2009) study the relationship between budget transparency and human development in resource-dependent countries – that is, countries that depend on natural resources (e.g., oil or minerals) as their main source of income. Using open budget initiative data collected in 2006, they compare these scores with the UN Human Development Index (HDI) for each country. While they find that resource-dependent countries suffer from a lack of budget transparency, Renzio et al. (2009) find no clear relationship between budget transparency and a country's level of development.

In contrast, Zucolotto and Teixeira (2014) study the influence of budget transparency on corruption, accountability, quality of legislature institutions, and democracy in countries. The study concludes that "countries that are more transparent have more and better accountability mechanisms and, consequently, a greater level of democracy and less corruption, all of which points to the importance of transparency in the process of democratic consolidation" (Zucolotto & Teixeira, 2014, p. 96).

Although the literature has reached mixed conclusions in connecting transparency and budget transparency to good governance, there has been increasing interest in the potential of transparency to improve quality of governance (Relly & Sabharwal 2009; Schmidt-Hebbel, 2012). According to Masud (2011), "budget transparency has emerged as a key component in governance reform, particularly since citizens around the world frequently lack at least some of the most basic information about government decisions and actions at every stage of the budget process" (p. 43).

In summary, while budget transparency has been connected to good governance practices by governments, information access by the public has not played the role of an end in itself but rather a tool toward better governance. Thus, to have an effective and efficient system and to benefit from budget transparency, the public (e.g., citizens and nonprofit organizations) must have the capability to monitor authorities and hold them accountable for their actions. In their study of the effect of budget transparency on the performance of resource-rich countries, Kolstad and Wiig (2009) argue that budget transparency in and of itself cannot be the only solution to reduce corruption and maintain sustainable development unless combined with improved quality of institutions and policies (financial and otherwise), citizen empowerment, and human development level. Similarly, Lindstedt and Naurin (2010) stated, "Reforms focusing on increasing transparency should be accompanied by measures for strengthening citizens' capacity to act upon the available information if we are to see positive effects on corruption" (p. 301).

Human Development

Human development has been associated with quality of governance (Grindle, 2007; Sagar & Najam, 1998), economic growth (Adams & Mengistu, 2008; Smith, 2007), and sustainable development (Alkire, 2010; Ndulu & O'Connell, 1999). In addition, human development shares some principals with good governance practices by governments, such as supporting free speech, upholding human rights, and improving public services' quality (Grindle, 2007; Sagar & Najam, 1998). Therefore, Pradhan and Sanyal (2011) argue that good governance practices (e.g., rule of law and transparency) are conditions for high levels of education and health systems; thus, high quality of governance results in more efficient and effective government work that leads to high levels of human and economic development.

Similarly, Alkire (2010) thinks that human development (e.g., high-quality education and health systems) supports the productivity of an economy by providing healthy and highly trained individuals. To this end, human development requires both economic growth and good governance practices by governments. According to The United Nations Development Program (UNDP) (2000), "resources generated by economic growth have financed human development and created employment while human development has contributed to economic growth" (p. 7).

Consequently, governments need to adopt balanced development of the governance process, economic and human development in order to enhance the well-being of citizens and increase the effectiveness of the government's work. The current paper will test whether the state's level of development influences the relationship between quality of governance and budget transparency. In addition, having four groups of human development as human development index (HDI) constructed (very high development, high development, medium development, and low development) will help in enhancing our understanding of the influence of nations' human development levels on the relationship between budget transparency and quality of governance.

Theoretical Framework: New Institutionalism Theory

The new institutionalism framework has shaped studies in many fields, including public policy and public administration. According to Lane and Ersson (1999), new institutionalism focuses on non-policy factors, such as economic and social factors, that affect the composition and functioning of institutions. New institutionalism theory argues that the quality of institutions is related to their governance quality (North, 2009; Powell, 2007). In addition, new institutionalists stress the important role of institutions in shaping individuals, political processes, and economic outcomes (March & Olsen, 1984; Weaver & Rockman, 1993), while individuals and society likewise influence institutions (Hall & Taylor, 1996; Scott, 2003). According to Powell (2007), "organizations are deeply embedded in social and political environments [suggesting] that organizational practices and structures are often either reflections of or responses to rules, beliefs, and conventions built into the wider environment" (p. 1).

Thus, there is a two-way relationship between governance and the structure and design of institutions (North, 2007; Stoker, 1998). Governance is a means of including all social and political actors in the decision-making process, while institutions can be seen as the rules of the game, controlling how the governance process takes place (Stocker, 2010; Williamson, 1998). According to Bell (2011), "institutions are important, because, as entities, they form such a large part of the political landscape, and because modern governance largely occurs in and through institutions" (p. 1). In addition, Hall and Taylor (1996) argue that the quality of political outcomes and governance depends on improving human development factors (e.g., socioeconomic factors, education levels, and standard of living). Therefore, new institutionalism theory contributes to the debate over the role that individuals play in influencing an institution's outcomes.

Additionally, both governance and new institutionalism assert the importance of both formal and informal arrangements (Lane & Nyen, 1992; North, 2009). According to North (1991), "institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)" (p. 97). Thus, since public budget is "the life-blood of the government" (Wildavsky, 1961, p.184), we could argue that public budget transparency plays an important role in enhancing the quality of governance, government performance, and human development (DiMaggio & Powell, 1991; Ndulu & O'Connell, 1999). Accordingly, the current paper examines whether the public budget transparency levels of nations affect governance (i.e., quality of institutions).

Methodology and Data Sources

Although many studies have addressed governance throughout history, little has been said regarding the relationship between budget transparency and governance. The current paper attempts to fill this gap by studying the relationship between budget transparencies from 2006 to 2012. Thus, the first research question is: Is there a relationship between budget transparency (independent variable) and quality of governance (dependent variable)? Furthermore, the current study will explore whether the relationships between budget transparency and each governance indicator vary based on a country's level of development. Thus, the second research question is: Does the relationship between budget transparency and quality of governance vary from country to country based on each country's level of development?

Measuring Budget Transparency

Many indices and guidelines have been introduced in an effort to measure and evaluate the application of budget transparency by governments (e.g., open budget index (OBI), best practices for budget transparency by the Organization for Economic Co-operation and Development (OECD), and guidelines for public expenditure management by the International Monetary Fund (IMF)). Although it is based on data collected through surveys sent to institutions and civil society organizations – which

raises some concerns regarding the accuracy of the results, since most of the data collection is based on the subjectivity of the participants rather than fact-based analysis (de Renzio et al., 2005; Hameed, 2011) – the open budget index (OBI) is nonetheless considered by many scientists and organizations to be the most reliable and credible tool available for measuring the application of budget transparency by governments (Carlitz, 2013; Santiso, 2006; Wehner & de Renzio, 2013). OBI "assesses whether governments provide their citizens with timely, comprehensive, and useful budget information; whether oversight institutions, including the legislature and external auditors, are effectively performing their role; and whether the public has opportunities to participate in the budget process" (Masud, p. 43).

OBI is a product of the open budget initiative, which is part of the International Budget Partnership's (IBP) program, which is founded by the Center on Budget and Policy Priorities. The first index of OBI was issued 2006, and it has been issued every two years since. OBI collected data from 100 countries in 2012 (International Budget Partnership, 2012). In the current paper, the open budget index is used as a measure of budget transparency. According to International Budget Partnership (2012):

> The Open Budget Index (OBI) assigns each country a score from 0 to 100 based on the simple average of the numerical value of each of the responses to the 95 questions in the questionnaire that assess the public availability of budget information. A country's OBI score reflects the timeliness and comprehensiveness of publicly available budget information in the eight key budget documents (p. 45).

Measuring Governance

While there are many governance indices, most specialize in measuring certain aspects of the governing process, while few attempt to comprehensively cover all aspects of governance. The World Bank Group's set of worldwide governance indicators (WGI) is considered by many scholars to be "the most comprehensive publicly available set of governance indicators" (Arndt & Oman, 2006, p. 28). The current paper will use the worldwide governance indicators (WGIs) as a measure of the quality of governance for several reasons. The WGI includes six indicators, each of which measures one aspect of the governing process. Unlike other indices, the WGI contains an indicator for each aspect of the governing process, affording researchers and policy-makers a better understanding of the political process (de Ferranti et al., 2009; Langbein & Knack, 2010). Accordingly, in the current research, each indicator will be used as a separate, unique variable in order to reach a better understanding of the relationship between each aspect of the governance process and budget transparency.

In addition, 31 sources of data were used to construct the WGI indicators, thus enriching their quality (Kaufmann et al., 2010, 2009a). The WGI, which used more than 441 variables in formulating and measuring the six indicators of governance, covers more than 213 countries and territories, making this the only set of indicators to cover all member states of the United Nations (Arndt & Oman, 2006). The WGI has been an annual indicator since 2004; however, it was biannual from 1996-2003. Accordingly, a scale of low to high quality of governance (-2.5 to +2.5), will be adopted in the current paper. Six dimensions are used in measuring the level and quality of governance as part of the Worldwide Governance Indicators (WGI): 1) Voice and Accountability (VA), 2) Political Stability and Absence of Violence (PS), 3) Government Effectiveness (GE), 4) Regulatory Quality (RQ), 5) Rule of Law (RL), and 6) Control of Corruption (CC) (Kaufmann et al., 2009a).

Measuring Human Development

Many studies have found a strong correlation between governance on the one hand and economic growth and human development on the other (Kaufmann & Kraay, 2002; Ranis, Stewart, & Samman, 2006; Smith, 2007). Thus, a nation's human development level is used in this study to analyze the relationship between governance and budget transparency. Many indices and reports have been issued for measuring and evaluating countries' human development level, including the human development index (HDI), human rights index (HRI), and human development reports (HDRs) (McGillivray, 1991; Ranis et al., 2006; Streeten, 1994). HDI has been adopted in the current study because it has been

recognized as a well-designed index that captures and measures the majority of human development aspects in a credible and valid way (Haq, 1995; Noorbakhsh, 1998; Ranis et al., 2006). HDI is a product of the United Nations Development Program (UNDP) and has been published annually since 1990. HDI is an index that ranks countries based on their human development level relative to other countries. Three dimensions – adult literacy, life expectancy at birth, and standard of living – are used in calculating HDI (UNDP, 2010). According to UNDP (2010), gross national income (GNI) is used to measure the standard of living, life expectancy at birth is used to measure level of life expectancy at birth, and mean years of schooling and expected years of schooling are used to measure level of adult literacy. For every human development component, there is a mathematical formula, and there is an aggregate formula that includes all three formulas to construct HDI (UNDP, 2010). HDI can range from 1.0-0.0, where scores of the final formula divides countries as follows: 1.0-0.79 (very high development), 0.78-0.698 (high development), 0.69-0.52 (medium development), and 0.51-0.28 (low development) (UNDP, 2010). For the current paper, the 2006, 2008, 2010, and 2012 issues of HDI will be used.

The Relationship between Budget Transparency and Good Governance

The first research question sought to determine whether there was a relationship between budget transparency (as measured by the open budget index) and good governance (as measured by Voice and Accountability, Political Stability, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption). Since all the variables were measured using an interval scale, correlation procedures were conducted. As most of the variables were highly skewed and not distributed normally, non-parametric Kendall-Tau correlation tests were utilized.

Budget Transparency and Good Governance in 2006

The findings in Table 1 reveal that the Open Budget Index (OBI) was positively associated with the six indicators of good governance in 2006. Therefore, increased levels of budget transparency were significantly associated with increased levels of Voice and Accountability (VA), Political Stability (PS), Government Effectiveness (GE), Regulatory Quality (RQ), Rule of Law (RL), and Control of Corruption (CC).

Table 1: *Kendall Tau Correlations between Budget Transparency and Good Governance in 2006 (N = 98)*

Variables	1	2	3	4	5	6
Open budget index						
Control of corruption	.44***					
Government effectiveness	.47***	.71***				
Political stability	.23***	.48***	.41***			
Rule of law	.42***	.77***	.75***	.49***		
Regulatory quality	.51***	.69***	.77***	.41***	.70***	
Voice and accountability	.56***	.56***	.51***	.46***	.53***	.55***

* $p < .05$. ** $p < .01$. *** $p < .001$.

Budget Transparency and Good Governance in 2008

The findings in Table 2 show that the OBI was positively associated with the six indicators of good governance in 2008. Therefore, increased levels of budget transparency were significantly associated with increased levels of VA, PS, GE, RQ, RL, and CC.

Table 2*: Kendall Tau Correlations between Budget Transparency and Good Governance in 2008 (N = 91)*

Variables	1	2	3	4	5	6
Open budget index						
Control of corruption	.42***					
Government effectiveness	.41***	.58***				
Political stability	.26***	.33***	.29***			
Rule of law	.37***	.59***	.54***	.37***		
Regulatory quality	.49***	.58***	.54***	.37***	.57***	
Voice and accountability	.51***	.40***	.34***	.28***	.38***	.39***

* $p < .05$. ** $p < .01$. *** $p < .001$.

Budget Transparency and Good Governance in 2010

As shown in Table 3, the OBI was positively associated with five of the indicators of good governance in 2010. Increased levels of budget transparency were significantly associated with increased levels of VA, GE, RQ, RL, and CC but not PS.

Table 3: *Kendall Tau Correlations between Budget Transparency and Good Governance in 2010 (N = 82)*

Variables	1	2	3	4	5	6
Open budget index						
Control of corruption	.32***					
Government effectiveness	.35***	.51***				
Political stability	.14	.30***	.27***			
Rule of law	.30***	.59***	.60***	.35***		
Regulatory quality	.39***	.45***	.59***	.34***	.56***	
Voice and accountability	.46***	.36***	.37***	.31***	.35***	.42***

* $p < .05$. ** $p < .01$. *** $p < .001$.

Budget Transparency and Good Governance in 2012

As shown in Table 4, the OBI was positively associated with five of the indicators of good governance in 2012. Once again, increased levels of budget transparency were significantly associated with increased levels of VA, GE, RQ, RL, and CC but not PS.

Table 4: *Kendall Tau Correlations between Budget Transparency and Good Governance in 2012 (N = 57)*

Variables	1	2	3	4	5	6
Open budget index						
Control of corruption	.30***					
Government effectiveness	.46***	.48***				
Political stability	.14	.25***	.25***			
Rule of law	.40***	.63***	.58***	.32***		
Regulatory quality	.48***	.45***	.53***	.32***	.55***	
Voice and accountability	.43***	.34***	.41***	.27***	.41***	.42***

* $p < .05$. ** $p < .01$. *** $p < .001$.

The Moderating Effect of Human Development on the Relationship between Budget Transparency and Good Governance

The second research question sought to determine whether the relationship between budget transparency (as measured by the OBI) and good governance (as measured by VA, PS, GE, RQ, RL, and CC) varied across nations' levels of human development. The independent variable, budget transparency, was transformed into a binary variable, with the top 50 countries categorized into the highly transparent group and the bottom 50 countries assigned to the less transparent group. The moderator, human development, was transformed from a four-category variable into a two-category variable with the Very High and High categories collapsed into a single group and the Medium and Low categories collapsed into another group. Because the indicators of good governance were highly skewed (and transformations did not correct for skewness), the six indicators were coded into binary variables based on their medians. Since the dependent variables were binary, logistic regression procedures were conducted. The product of the independent and moderator variables, the interaction term, was evaluated at an alpha of .05.

Results for 2006

Control of corruption. The findings in Table 5 indicate that human development did not moderate the relationship between budget transparency and CC scores in 2006, B = .07, p = .949. Rather, human development had a main effect on CC scores, B = -2.16, p = .001. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher CC scores dropped by .12.

Table 5: *Logistic Regression Results for Good Governance in 2006 (N = 89)*

Variables	B	*SE*	*OR*
Control of corruption			
High vs. low human development (HD)	-2.16 ***	0.54	0.12
High vs. low budget transparency (BT)	-0.78	0.54	0.46
HD x BT	0.07	1.08	1.07
Government effectiveness			
High vs. low human development (HD)	-2.90 ***	0.67	0.06
High vs. low budget transparency (BT)	-0.12	0.67	0.89
HD x BT	-1.78	1.35	0.17
Political stability			
High vs. low human development (HD)	-0.85	0.50	0.43
High vs. low budget transparency (BT)	-0.06	0.50	0.95
HD x BT	-0.64	0.99	0.53
Rule of law			
High vs. low human development (HD)	-1.58 ***	0.52	0.21
High vs. low budget transparency (BT)	-0.60	0.52	0.55
HD x BT	-0.63	1.03	0.53
Regulatory quality			
High vs. low human development (HD)	-2.99 ***	0.71	0.05
High vs. low budget transparency (BT)	-0.81	0.71	0.44
HD x BT	-3.16 *	1.43	0.04
Voice and accountability			
High vs. low human development (HD)	-0.50	0.55	0.61
High vs. low budget transparency (BT)	-1.85 ***	0.55	0.16
HD x BT	1.09	1.10	2.98

* p < .05. ** p < .01. *** p < .001.

Government effectiveness. Likewise, human development did not moderate the relationship between budget transparency and GE scores, B = -1.78, p = .187, but it did have a main effect on GE scores, B = -2.90, p = .001. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher GE scores dropped by .06.

Political stability. Human development did not moderate the relationship between budget transparency and PS scores, B = -.64, *p* = .520, nor did it have a main effect on PS scores, B = -.85, *p* = .088.

Rule of law. Human development did not moderate the relationship between budget transparency and RL scores, B = -.63, *p* = .542, but it did have a main effect on RL scores, B = -1.58, *p* = .002. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher PS scores dropped by .21.

Regulatory quality. Human development significantly moderated the relationship between budget transparency and RQ scores, B = -3.16, *p* = .027. Post-hoc procedures reveal that within countries scoring high on human development, there was no relationship between budget transparency and RQ scores, B = .77, *p* = .502; however, within countries scoring lower on human development, there was a relationship between budget transparency and RQ scores, B = -2.39, *p* = .003. In particular, in comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher RQ scores dropped by .09.

Voice and accountability. Human development did not moderate the relationship between budget transparency and VA scores, B = 1.09, *p* = .322, nor did it have a main effect on VA scores, B = -.50, *p* = .367.

Results for 2008

Control of corruption. As shown in Table 6, human development did not moderate the relationship between budget transparency and CC scores in 2008, B = 1.00, *p* = .340. Rather, human development had a main effect on CC scores, B = -.25, *p* = .017. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher CC scores dropped by .29.

Government effectiveness. Similarly, human development did not moderate the relationship between budget transparency and GE scores, B = -.05, *p* = .963, but it did have a main effect on GE scores, B = -1.77, *p* = .001. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher GE scores dropped by .17.

Political stability. Human development also did not moderate the relationship between budget transparency and PS scores, B = 1.46, *p* = .141, nor did it have a main effect on PS scores, B = -.57, *p* = .253.

Table 6: *Logistic Regression Results for Good Governance in 2008 (N = 82)*

Variables	B		*SE*	*OR*
Control of corruption				
High vs. low human development (HD)	-1.25	*	0.52	0.29
High vs. low budget transparency (BT)	-1.29	*	0.52	0.27
HD x BT	1.00		1.04	2.71
Government effectiveness				
High vs. low human development (HD)	-1.77	***	0.53	0.17
High vs. low budget transparency (BT)	-1.01		0.53	0.37
HD x BT	-0.05		1.06	0.95
Political stability				
High vs. low human development (HD)	-0.57		0.50	0.57
High vs. low budget transparency (BT)	-0.37		0.50	0.69
HD x BT	1.46		0.99	4.32
Rule of law				
High vs. low human development (HD)	-0.89		0.50	0.41
High vs. low budget transparency (BT)	-0.53		0.50	0.59
HD x BT	0.63		0.99	1.88
Regulatory quality				

High vs. low human development (HD)	-2.40	***	0.58	0.09
High vs. low budget transparency (BT)	-1.20	*	0.58	0.30
HD x BT	-0.87		1.16	0.42
Voice and accountability				
High vs. low human development (HD)	-0.29		0.56	0.75
High vs. low budget transparency (BT)	-2.04	***	0.56	0.13
HD x BT	1.47		1.13	4.36

* $p < .05$. ** $p < .01$. *** $p < .001$.

Rule of law. Human development did not moderate the relationship between budget transparency and RL scores, B = .63, $p = .524$, nor did it have a main effect on RL scores, B = -.89, $p = .072$.

Regulatory quality. Human development did not moderate the relationship between budget transparency and RQ scores, B = -.87, $p = .450$, but it did have a main effect on RQ scores, B = -2.04, $p = .001$. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher RQ scores dropped by .09.

Voice and accountability. Human development did not moderate the relationship between budget transparency and VA scores, B = 1.47, $p = .192$, nor did it have a main effect on VA scores, B = -.29, $p = .603$.

Results for 2010

Control of corruption. The findings in Table 7 indicate that human development did not moderate the relationship between budget transparency and CC scores in 2010, B = .87, $p = .425$. Rather, human development had a main effect on CC scores, B = -1.53, $p = .005$. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher CC scores dropped by .22.

Government effectiveness. Likewise, human development did not moderate the relationship between budget transparency and GE scores, B = -.82, $p = .501$, but it did have a main effect on GE scores, B = -2.37, $p = .001$. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher GE scores dropped by .09.

Political stability. Human development also did not moderate the relationship between budget transparency and PS scores, B = 1.44, $p = .144$, nor did it have a main effect on PS scores, B = -.72, $p = .144$.

Table 7: *Logistic Regression Results for Good Governance in 2010 (N = 73)*

Variables	B		*SE*	*OR*
Control of corruption				
High vs. low human development (HD)	-1.53	**	0.54	0.22
High vs. low budget transparency (BT)	-1.41	**	0.54	0.24
HD x BT	0.87		1.08	2.38
Government effectiveness				
High vs. low human development (HD)	-2.37	***	0.61	0.09
High vs. low budget transparency (BT)	-1.67	**	0.61	0.19
HD x BT	-0.82		1.22	0.44
Political stability				
High vs. low human development (HD)	-0.72		0.49	0.49
High vs. low budget transparency (BT)	0.16		0.49	1.17
HD x BT	1.44		0.98	4.20
Rule of law				
High vs. low human development (HD)	-1.09	*	0.50	0.34
High vs. low budget transparency (BT)	-0.74		0.50	0.48
HD x BT	0.49		1.00	1.63
Regulatory quality				
High vs. low human development (HD)	-2.05	***	0.59	0.13
High vs. low budget transparency (BT)	-1.64	**	0.59	0.19
HD x BT	0.75		1.18	2.11
Voice and accountability				
High vs. low human development (HD)	-1.99	**	0.74	0.14
High vs. low budget transparency (BT)	-3.26	***	0.74	0.04
HD x BT	-0.08		1.48	0.92

* $p < .05$. ** $p < .01$. *** $p < .001$.

Rule of law. Human development did not moderate the relationship between budget transparency and RL scores, B = .49, p = .623, but it did have a main effect on RL scores, B = -1.09, p = .029. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher RL scores dropped by .34.

Regulatory quality. Human development did not moderate the relationship between budget transparency and RQ scores, B = .75, p = .527, but it did have a main effect on RQ scores, B = -2.05, p = .001. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher RQ scores dropped by .13.

Voice and accountability. Human development did not moderate the relationship between budget transparency and VA scores, B = -.08, p = .956, but it did have a main effect on VA scores, B = -1.99, p = .007. In comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher VA scores dropped by .14.

Results for 2012

Control of corruption. As shown in Table 8, human development did not moderate the relationship between budget transparency and CC scores, B = 1.87, p = .178, nor did it have a main effect on CC scores, B = -1.12, p = .108.

Government effectiveness. Human development significantly moderated the relationship between budget transparency and GE scores, B = 3.47, p = .048. Post-hoc procedures reveal that within countries scoring highly on human development, there was a relationship between budget transparency and GE scores, B = -4.09, p = .008; in particular, in comparison to countries that were highly transparent, the likelihood that countries that were not as transparent would have higher GE scores dropped by .02. However, within countries scoring lower on human development, there was no relationship between budget transparency and GE scores.

Political stability. Despite increasing the number of iterations to 50, a final solution could not be found. Cross-tabulations revealed that there were no countries that could be categorized as high on human development with minimal budget transparency and high PS scores. It is thus possible that the result is an indication of failure of estimation.

Rule of law. Human development did not moderate the relationship between budget transparency and RL scores, B = 1.82, p = .222. Human development also did not have a main effect on RL scores, B = -.37, p = .619.

Table 8: *Logistic Regression Results for Good Governance in 2012 (N = 53)*

Variables	B	*SE*	*OR*
Control of corruption			
High vs. low human development (HD)	-1.12	0.70	0.33
High vs. low budget transparency (BT)	-0.51	0.70	0.60
HD x BT	1.87	1.39	6.49
Government effectiveness			
High vs. low human development (HD)	-1.62	0.88	0.20
High vs. low budget transparency (BT)	-2.36 **	0.88	0.09
HD x BT	3.47 *	1.76	32.14
Rule of law			
High vs. low human development (HD)	-0.37	0.75	0.69
High vs. low budget transparency (BT)	-1.35	.750	0.26
HD x BT	1.82	1.49	6.17
Regulatory quality			
High vs. low human development (HD)	-1.27	0.83	0.28
High vs. low budget transparency (BT)	-2.49 **	0.83	0.08
HD x BT	1.73	1.65	5.63
Voice and accountability			
High vs. low human development (HD)	-1.32	0.88	.270
High vs. low budget transparency (BT)	-2.78 **	0.88	0.60
HD x BT	0.23	1.75	1.26

* p < .05. ** p < .01. *** p < .001.

Regulatory quality. Human development did not moderate the relationship between budget transparency and RQ scores, B = 1.73, p = .296, nor did it have a main effect on RQ scores, B = -1.27, p = .125.

Voice and accountability. Human development did not moderate the relationship between budget transparency and VA scores, B = .23, p = .895, nor did it have a main effect on VA scores, B = -1.32, p = .132.

Discussion

In regard to the research question of whether there was a relationship between budget transparency and good governance, the answer found in this study is yes. Budget transparency was positively associated with increased levels of governance indicators in 2006 and 2008. In 2010 and 2012, OBI was related to all indicators except political stability. This result confirms the influence of budget transparency in the adoption of good governance practices by governments and increased quality of governance.

Conversely, while the result of the analysis shows the importance of budget transparency in improving quality of governance, the analysis concludes that, while the human development level of nations has an influence in shaping the relationship between budget transparency and quality of governance, this influence is not entirely significant. Thus, regarding the second research question of whether the relationship between budget transparency and good governance varies across levels of human development of nations, the answer varies across variables and years. While human development significantly moderated the relationship between budget transparency and regularity quality in 2006

and the relationship between budget transparency and government effectiveness in 2012, it did not moderate relationships in any other years.

To conclude, while the result emphasizes the importance of budget transparency in improving institutional quality, human development has minimal influence on the relationship between budget transparency and good governance. The length and complexity of the public budget makes it difficult for the average citizen to understand, and this could be a reason for the minimal influence of human development on the relationship. Also, the result confirms a significant influence of human development on the relationship between budget transparency on one hand and regulatory quality and government effectiveness on the other, which can be interpreted in terms of people devoting more attention to those factors that have a direct influence on their daily lives (e.g., regulatory quality and government effectiveness) than to the rest of the factors.

Furthermore, other factors that might maximize the influence of public budget transparency on institutional quality (e.g., political and social factors) have not been included in the analysis. Also, the current study covers only four years, whereas including more years in the analysis might give us better understanding of the effect of the human development level of nations on the relationship between budget transparency and quality of governance.

Conclusion

Public budget is the engine that drives any economy; thus, budget transparency has an influence in shaping the political process and government performance. The result of the analysis shows a significant relationship between budget transparency and quality of governance, which is inconsistent with the literature. Thus, budget transparency contributes to reducing corruption, improving government performance, and holding bureaucrats and politicians accountable for their actions. Hence, the budgetary system and the public budget process have impacts on the way government operates.

Conversely, while the human development level of nations significantly moderated the relationships between budget transparency and regularity quality and between budget transparency and government effectiveness, it did not moderate any other relationships. Future research should examine the relationship between human development and quality of governance in the process of understanding factors that contribute to enhancing the governing process.

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