Note: the details and outcomes of various legal proceedings relating to Securency International Pty Ltd and Note Printing Australia Ltd have been omitted from this document in accordance with non-publication orders made by the Victorian Courts.

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Introduction

The Organisation for Economic Cooperation and Development (OECD) adopted the Convention on Combating Bribery of Foreign Officials in International Business Transactions (the Convention) on 21 November 1997 in recognition of the widespread phenomenon of bribery in international business transactions. The Convention entered into force on 15 February 1999 and has been ratified by all 34 member countries of the OECD (of which Australia is one) and Argentina, Brazil, Bulgaria and South Africa.1

The Convention is one of the key international instruments on corruption, along with the 2005 United Nations Convention against Corruption (UNCAC), which Australia has also ratified.2 The focus of the Convention is on the ‘supply side’ of bribery – that is, the offer, promise or giving of a bribe, as opposed to the solicitation, acceptance or receipt of a bribe.3

Australia ratified the Convention in 1999 and will undergo its third formal evaluation against the Convention this year. This background note outlines the obligations of Parties to the Convention and how implementation is monitored, before examining how Australia is positioned for its upcoming evaluation.

Obligations of Parties to the Convention

The principal obligation of Parties to the Convention is the criminalisation of bribery of foreign public officials. The Convention requires each Party to make it a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage to a foreign public official so as to influence the official in the performance of his or her official duties, in order to obtain or retain a business or other improper advantage in the conduct of international business.4 Parties are not required to criminalise small ‘facilitation’ payments that are made in some countries to induce public officials to perform routine functions such as issuing licenses or permits (although

the OECD’s more recent position on facilitation payments in a 2009 Recommendation, as outlined below, suggests a shift from this position).  

Parties are also required to establish that complicity in an act of bribery of a foreign official is a criminal offence, and that attempt or conspiracy to bribe a foreign official are offences to the same extent as attempt or conspiracy to bribe a domestic public official.  

The Convention further requires Parties to ensure that the offence of bribery of a foreign public official applies to both legal and natural persons.

The Convention requires Parties to apply effective, proportionate and dissuasive criminal penalties, including, in the case of natural persons, deprivation of liberty sufficient to enable effective mutual legal assistance and extradition. Parties are required to establish jurisdiction over the offence of bribery of a foreign public official where it is committed in whole or in part in their territory, and, if they have jurisdiction to prosecute their nationals for offences committed abroad, where the offence is committed outside its territory by one of its nationals.

Additional obligations of Parties under the Convention include:

• taking measures so that the bribe and the proceeds of the bribe, or property to the value of those proceeds, may be seized and confiscated or that monetary sanctions of comparable effect apply

• considering the imposition of additional civil or administrative sanctions for bribery of foreign public officials

• taking measures to prohibit the establishment of off-the-books-accounts, making of off-the-books or inadequately identified transactions, recording of non-existent expenditures, entry of liabilities with incorrect identification of their object and the use of false documents by companies for the purpose of bribing foreign public officials or concealing such bribery and establishment of effective, proportionate and dissuasive civil, administrative or criminal penalties for such conduct and

• to the extent possible under Parties’ laws, providing prompt and effective legal assistance to other Parties for the purposes of criminal investigations and criminal and non-criminal


6.  Anti-Bribery Convention, art. 1(2).

7.  Ibid., arts. 2 and 3(2).

8.  Ibid., art. 3(1). Parties’ domestic laws may restrict the availability of extradition and mutual legal assistance to offences above a certain penalty threshold. For example, under section 5 of the Extradition Act 1988 (Cth) extradition may only be granted for offences for which the maximum penalty is death or at least 12 months imprisonment or other deprivation of liberty. Therefore, to meet its obligations under the Convention, Australia’s foreign bribery offence must have a maximum penalty of at least 12 months deprivation of liberty.

9.  Ibid., art. 4.
proceedings within the scope of the Convention and facilitating extradition for the purpose of a prosecution for an offence of bribery of a foreign public official.\textsuperscript{10}

In addition to the obligations imposed under the Convention, signatories must accept the \textit{1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions}, which contains non-criminal measures for combating transnational bribery.\textsuperscript{11} The Recommendation asks member countries to disallow tax deductibility of bribes to foreign public officials, implement measures to require companies to maintain transparent accounts, adopt practices to deter corruption in public procurement and ensure independent external auditing requirements are adequate and encourage development of internal company controls.\textsuperscript{12}

Several related Recommendations have been adopted by Parties since the Convention came into force, in particular:

\begin{itemize}
  \item the \textit{2006 Recommendation of the Council on Bribery and Officially Supported Export Credits}
  \item the \textit{2009 Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions}
  \item the \textit{2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions}.\textsuperscript{13}
\end{itemize}

The last of these was adopted on 26 November 2009 following a review of the Convention and related instruments. It builds on the Convention obligations by calling on Parties to, among other things:

\begin{itemize}
  \item periodically review domestic laws established to implement the Convention and their approach to enforcing such laws
  \item periodically review their policies and approach to small facilitation payments and encourage companies to prohibit or discourage them
  \item ensure effective channels are in place for reporting of suspected foreign bribery and adequate protection of those who make such reports and
  \item work towards improved international cooperation to share information and evidence in support of foreign bribery investigations and prosecutions and the seizure and confiscation of the proceeds of foreign bribery.\textsuperscript{13}
\end{itemize}

\textsuperscript{10} Ibid., arts. 3(3), 8, 9 and 10.
\textsuperscript{11} OECD, \textit{Fighting Bribery in International Business Deals}, op. cit., p. 4.
Attached to the Recommendation are guidelines for Parties on good practice in implementing specific articles of the Convention and for companies on internal controls, ethics and compliance.

Monitoring of Parties’ implementation of the Convention

**OECD Working Group on Bribery in International Business Transactions**

The Convention requires Parties to cooperate in undertaking systematic monitoring to promote full implementation of the Convention. 14 The OECD Working Group on Bribery in International Business Transactions, which is made up of representatives from the 38 Parties to the Convention, undertakes this function in accordance with a set of agreed principles. 15 The Working Group prepares a report on each assessment outlining its findings and setting out recommendations to the State Party. The State Party is then required to provide follow-up reports within particular timeframes on its implementation of those recommendations.

Monitoring is conducted by the Working Group in phases. The first phase focused on evaluating the adequacy of the legislation Parties had in place to implement the Convention and the second on whether Parties were applying their legislation effectively. Phase 1 and Phase 2 assessments have been conducted for all Parties. The third phase focuses on enforcement of the Convention, the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions and outstanding recommendations made by the Working Group during the second phase.

Phase 3 is the first assessment to be conducted under a permanent cycle of peer review. Evaluations under Phase 3 began in 2010 and are scheduled to be completed by 2014, with Australia due to be assessed between June and October 2012. 16

**Transparency International**

Transparency International (TI) is an international non-government organisation that works to combat corruption. TI was involved in the drafting of the Convention as well as that of UNCAC and the African Union Convention on Preventing and Combating Corruption. 17 TI publishes a range of regular reports on corruption issues, including a corruption perceptions index and a bribe payers index. Since 2005, TI has prepared annual independent progress reports on enforcement of the Convention. The reports are based on information provided by national experts in each reporting

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15. OECD, ‘Country Monitoring Principles for the OECD Anti-Bribery Convention’, OECD website, viewed 21 December 2011, [http://www.oecd.org/document/45/0,3746,en_2649_34859_44976877_1_1_1_1,00.html](http://www.oecd.org/document/45/0,3746,en_2649_34859_44976877_1_1_1_1,00.html)
country, who take into account the views of government officials and other experts and reports of the OECD Working Group.  

Countries are classified into one of three categories, based on the number and significance of cases and investigations, taking account of the scale of the country’s exports:

**Active Enforcement**: countries with a share of world exports of more than two per cent (the 11 largest exporters) must have at least 10 major cases on a cumulative basis, of which at least three must have been initiated in the last three years and at least three concluded with substantial sanctions. Countries with a share of world exports of less than two per cent must have brought at least three major cases, including at least one concluded with substantial sanctions and at least one pending case, which has been initiated in the last three years.

**Moderate Enforcement**: countries that do not qualify for active enforcement but have at least one major case as well as one active investigation.

**Little or No Enforcement**: countries that do not qualify for the previous two categories. This includes countries that have only brought minor cases, countries that only have investigations and countries that have no cases or investigations.

In its 2011 progress report, seven countries were classified as having active enforcement (Denmark, Germany, Italy, Norway, Switzerland, the United Kingdom and the United States), nine as having moderate enforcement and 21 (including Australia) as having little or no enforcement.

In preparing its reports, TI examines progress and issues country by country as well as overall enforcement and makes findings and recommendations accordingly. While there is no obligation on Parties to implement recommendations made by TI, the annual reports are a useful indicator of both overall progress and the progress of specific Parties’ implementation of the Convention in between the less frequent but more comprehensive assessments conducted by the Working Group.

TI’s 2011 progress report contained three major conclusions, namely that:

- all countries had remained in the same categories as the previous year
- given the lack of progress and the unstable global economy, there is a risk of implementation and enforcement of the Convention losing momentum and
- the primary cause of lagging enforcement is lack of political commitment from government leaders.

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19. Ibid.
20. Ibid., p. 5.
21. Ibid.
Australia’s implementation of the Anti-Bribery Convention

The resulting major recommendations for action at a higher political level do not appear to have been taken up by OECD member countries.

Australia’s implementation of the Convention

Australia moved relatively quickly to ratify the Convention and implement it domestically through legislation, but has lagged behind other countries in its enforcement of the Convention. Some recently initiated reviews and the development of Australia’s first national anti-corruption plan may lead to improvements in Australia’s anti-corruption and foreign bribery framework.

Key components of Australia’s foreign bribery framework

The Criminal Code Amendment (Bribery of Foreign Officials) Act 1999 (Cth) commenced on 17 December 1999 and the Convention came into force in Australia on the same date. The Act inserted a new Division into the Criminal Code Act 1995 (Cth) (Criminal Code) to criminalise the bribery of foreign public officials. Section 70.2 of the Criminal Code provides that it is an offence to provide, offer or promise to provide, or cause a benefit to be provided to another person, with the intention of influencing a foreign public official in the exercise of his or her duties, in order to obtain or retain business, or a business advantage, that is not legitimately due to the recipient or intended recipient. The offence is punishable by up to 10 years imprisonment, a fine of up to 10 000 penalty units (currently $1.1 million) or both for an individual. For a corporation, the maximum penalty is the greater of 100 000 penalty units (currently $11 million) or three times the value of the benefit obtained by the corporation (where it can be ascertained) or ten per cent of the annual turnover of the corporation (where the benefit obtained cannot be determined).

The offence applies where the conduct constituting the offence occurs wholly or partly in Australia or where the conduct constituting the offence occurs wholly outside Australia and at the time of the alleged offence, the person was an Australian citizen or resident or was a body corporate incorporated by or under an Australian law.

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22. This section outlines some of the components of Australia’s foreign bribery framework, with a focus on key obligations under the Convention and measures adopted specifically to comply with the Convention and associated Recommendations. The Convention and associated Recommendations provide a comprehensive framework for combating foreign bribery, and it is not possible to provide a thorough inventory of all the measures Australia has in place that are relevant to meeting those obligations in this paper. For a more detailed (though somewhat dated) summary, see OECD Working Group on Bribery in International Business Transactions, Australia: Phase 2 report on the application of the Convention on Combating Bribery of Foreign Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, OECD, 2006, available at http://www.oecd.org/dataoecd/57/42/35937659.pdf

23. The penalty was increased from up to ten years imprisonment and/or a fine of up to 6000 penalty units for an individual or a fine of up to 30 000 penalty units for a corporation by the Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010 (Cth).

24. Criminal Code Act 1995 (Cth), s. 70.5.
Division 11 of the Criminal Code applies to the offence to provide for ancillary offences including complicity, attempt and conspiracy. A person who attempts, conspires or is complicit in the commission of an offence faces the same penalties that apply to the primary offence.

Sections 70.3 and 70.4 of the Criminal Code provide defences to the offence in section 70.2 in situations where the conduct is lawful in the foreign official’s country (the lawful conduct defence) and where the benefit was of a minor nature, the conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature and an appropriate record was made and retained (the facilitation payment defence). The lawful conduct defence initially applied where it could be established that the conduct would not have constituted an offence against a law in place in the foreign official’s country, but was amended in 2007, following criticism from the OECD Working Group and the findings of an inquiry into the conduct of the Australian Wheat Board (AWB) and other Australian companies involved in the UN Oil-for-Food Programme. The defence now applies only where it can be established that a written law of the foreign official’s country requires or permits the provision of the benefit.

The Criminal Code provisions reflect the key requirements outlined in articles 1, 2 and 4 of the Convention (and go some way to satisfying article 3, which covers offence penalties and other sanctions). Other Commonwealth legislation relevant to implementation of the Convention includes:

- the Proceeds of Crime Act 2002 (Cth) (Proceeds of Crime Act) (Convention article 3(3)—forfeiture of bribes paid and proceeds of foreign bribery; Convention article 7—foreign bribery as a predicate offence for money laundering provisions)
- the Corporations Act 2001 (Cth) (the Corporations Act) (Convention article 3(4)—civil and administrative sanctions; Convention article 8—accounting and auditing requirements and penalties for breaches) and
- the Mutual Assistance in Criminal Matters Act 1987 (Cth) and the Extradition Act 1988 (Cth) (Convention articles 9 and 10 respectively).

The Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions (CDPP) are responsible for the investigation and prosecution of foreign bribery offences respectively.

26. A complete list of relevant legislation as of 9 June 2011 is available in ‘Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’ available at [http://www.oecd.org/dataoecd/15/46/42096019.pdf](http://www.oecd.org/dataoecd/15/46/42096019.pdf). Some of the obligations under the Convention are implemented without the need for legislation, such as articles 11 and 12.
The AFP evaluates matters referred to it in accordance with its *Case Categorisation and Prioritisation Model* (CCPM), including consideration of the incident type, its impact on Australian society, its priority for the AFP and the referrer and the resources required.\(^{27}\) Foreign and domestic bribery are included in the second highest of four categories under the ‘impact’ element and obligations under international treaties in the second highest of four under the ‘priority’ element of the CCPM.\(^{28}\)

The CDPP’s decisions about whether to institute or continue proceedings are made in accordance with the *Prosecution Policy of the Commonwealth*.\(^{29}\) While the policy sets out matters to be considered in such decisions, it does not give higher priority to any particular types of offences.

The *Income Tax Assessment Act 1997* (Cth) was amended in 2000 to disallow tax deductibility of bribes to foreign (and domestic) public officials, in line with the 1997 *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*. The Act contains two exceptions to this general rule along the lines of the defences to the foreign bribery offence in the Criminal Code, detailed above.\(^{30}\)

The Attorney-General’s Department (AGD) is the lead agency for raising awareness of the foreign bribery offence in the public sector. A range of initiatives, led by the Australian Government and the private sector, aim to raise awareness about the foreign bribery offence and associated record keeping and reporting requirements, and encourage the establishment of internal control mechanisms covering corruption such as guidelines and codes of conduct, across the private sector.\(^{31}\)

**Enforcement in Australia**

Australia has conducted few investigations into allegations of foreign bribery, and the first charges were not laid until 2011, over a decade after the foreign bribery offence was enacted. As at 21 May 2010, the AFP had received 20 referrals relating to foreign bribery since the offence was introduced; of those, six were not accepted for investigation following initial evaluation, ten were finalised without charges being laid, three were active investigations and one was under evaluation.\(^{32}\)

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\(^{28}\) Ibid.


\(^{30}\) *Income Tax Assessment Act 1997* (Cth), sections 26–52 and 26–53.


Matters arising from inquiries into the United Nations Oil-for-Food Programme

In 2005, the report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme found that AWB had paid hundreds of thousands of dollars in inland transportation and after-sales-service fees that were funnelled back to the Iraqi Government, an amount corresponding to over 14 per cent of the illicit funds collected by the regime through kickback schemes it managed through the program.33

The subsequent Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme conducted by Terrence RH Cole QC (the Cole Inquiry) considered whether any decision, action, conduct, payment or writing of AWB or a number of other Australian companies might have breached Australian law. If this was found to be the case, it was to be determined whether any matter should be referred to the relevant agency for consideration of proceedings.34

Commissioner Cole considered whether AWB had breached Division 70 of the Criminal Code and determined that, at least in relation to the payment of inland transport and after-sales-service fees, there was no reasonable basis for concluding that it may have committed such an offence. Commissioner Cole found evidence that pointed to the likelihood that if AWB’s conduct had occurred wholly in Iraq, AWB would not have been guilty of an offence against Iraqi law. This could have satisfied the lawful conduct defence as it applied at the time under section 70.3 of the Criminal Code.35

Commissioner Cole did, however, consider that AWB may have breached other Commonwealth and Victorian laws and that a number of AWB’s employees may have breached provisions of the Corporations Act.36

Commissioner Cole recommended the establishment of a task force comprising the AFP, the Australian Securities and Investment Commission (ASIC) and Victoria Police to consider possible prosecutions in consultation with Commonwealth and Victorian prosecution agencies.37 The task force was formed in December 2006, and in July 2007, ASIC also commenced a separate

investigation into possible civil and/or criminal breaches of the Corporations Act.\textsuperscript{38} No criminal prosecutions eventuated, with the AFP and Victoria Police both discontinuing their investigations in 2009 and ASIC dropping criminal charges in 2010.\textsuperscript{39} However, as of July 2011, ASIC was still pursuing civil penalty proceedings against six former senior officers of AWB for breaches of the Corporations Act.\textsuperscript{40}

**Australia’s first prosecution proceedings**

The first Australian prosecutions for foreign bribery were initiated on 1 July 2011, when the AFP laid charges against two Australian companies—Securency International Pty Ltd and Note Printing Australia (NPA) Limited—and six individuals for bribery of foreign officials.\textsuperscript{41} A seventh individual was charged by the AFP on 10 August 2011.\textsuperscript{42} The charges relate to bribes allegedly paid to public officials in Indonesia, Malaysia and Vietnam between 1999 and 2005, the allegations being that senior managers from Securency and NPA used international sales agents to bribe foreign public officials to secure bank note contracts.\textsuperscript{43} Non-publication orders in place in Victoria prohibit the publication of certain details of these proceedings in that state.

The AFP commenced the investigation that led to the current cases (led by a dedicated team of up to 20 officers) in May 2009, following a referral from the Chairman of Securency. The investigation has run concurrently with related investigations being pursued by overseas law enforcement agencies and has involved cooperation with the United Kingdom’s Serious Fraud Office, the Malaysian Anti-Corruption Commission and Attorney General’s Chambers and the Indonesian National Police. Related bribery charges have been laid against two individuals in Malaysia by the Malaysian Attorney General’s Chambers. The AFP advised in July 2011 that the investigation is ongoing, so it is possible that further related charges will be laid.\textsuperscript{44}

**OECD Working Group and TI assessments of Australia**

As noted above, the Phase 1 evaluations conducted by the OECD Working Group focused on the adequacy of Parties’ legislation. In its 1999 Phase 1 report on Australia, the Working Group


\textsuperscript{43} AFP, *Foreign bribery charges laid in Australia*, op. cit.

\textsuperscript{44} AFP, *Foreign bribery charges laid in Australia*, op. cit.
identified two issues for further consideration: the formulation of the lawful conduct defence and the maximum penalties available for the foreign bribery offence. Overall, the Working Group considered that Australia’s legislation conformed to the standards set by the Convention.45

The Working Group’s 2006 Phase 2 report, based on an assessment of how effectively Australia was applying its legislation, outlined a much broader range of issues requiring action. The Working Group made 22 recommendations on how Australia could ensure effective prevention, detection and investigation of foreign bribery and ensure effective prosecution and sanction of foreign bribery and related offences.46 In a follow up report released in 2008, the Working Group deemed Australia to have fully implemented 12 of its 22 recommendations and partially implemented a further eight, and that the remaining two had not yet been implemented.47

The recommendations that had been implemented in full related to:

- further promotion of awareness of foreign bribery within the Commonwealth public service
- reporting and referral processes for foreign bribery cases
- disallowance of tax deductibility of bribe payments to foreign officials
- preventing foreign bribery in the aid context
- reviewing Commonwealth whistleblower provisions
- clarifying the application of the foreign bribery offence
- amending the lawful conduct defence
- compilation of statistics and
- guidelines for the CDPP on discretion to prosecute foreign bribery offences.

Those partially implemented concerned:

- raising private sector awareness of the Convention and the foreign bribery offence (especially among small and medium enterprises)
- amending the AFP’s CCPM to clarify the priority to be given to foreign bribery investigations
- having the AFP undertake evaluations where appropriate of the veracity of allegations from certain sources
- steps to ensure effective transmission of information to the AFP

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Australia’s implementation of the Anti-Bribery Convention

- reporting by external auditors of indications of possible foreign bribery
- updating public guidance material to clarify the operation of the facilitation payment defence and
- measures to prevent companies and individuals convicted of foreign bribery from receiving government business.

The recommendations that the Working Group assessed as not yet implemented were:

- raising awareness of cash dealers of the foreign bribery offence as a predicate offence for money laundering, and providing them with guidance on identifying suspicious transactions [and]

- increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs [multinational enterprises] with headquarters in Australia.  

Australia provided input to the 2008 follow-up report on the steps taken to educate cash dealers about the foreign bribery offence, including education provided by the Australian Transaction Reports and Analysis Centre (AUSTRAC) about anti-money laundering laws, an AUSTRAC information circular and an AGD fact sheet. However, the information provided evidently did not satisfy the Working Group that enough was being done. As noted above under Key components of Australia’s foreign bribery framework, the penalties for the foreign bribery offence were increased in 2010. TI has since recognised the revised penalties as a significant development and assessed them as dissuasive.

Since TI introduced its current three categories of enforcement in 2009, Australia has been classified as having little or no enforcement. While Australia’s legislative framework, complaints procedures and organisation of enforcement have been assessed as generally satisfactory over that period, TI has identified some shortcomings in its reports. These included inadequate penalties for foreign bribery (an issue that was remedied in 2010), inadequate whistleblower protection for the public and private sectors and weaknesses in accounting, auditing and taxation frameworks that provide scope for concealing bribery. In addition to the continued lack of foreign bribery cases, TI’s 2011 report identified criminal liability for corporations (in particular with regard to subsidiaries, agents and other intermediaries), whistleblower protection and specialist investigation skills as areas

48. Recommendations 1(d) and 6(a) respectively, cited in OECD Working Group 2008, op. cit., p. 5, p. 9 and p. 20.
requiring improvement.\textsuperscript{51} TI also noted concerns raised by the AFP about matters to be proved in order to establish an offence of foreign bribery.\textsuperscript{52} TI’s recommendations for Australia were:

- to require companies to adopt adequate procedures to prevent bribery by their agents, subsidiaries and other intermediaries and
- for enforcement agencies to demonstrate that prosecution under the current framework is feasible, and provide reasons where allegations are not pursued or investigations discontinued.\textsuperscript{53}

The next phase: How are things shaping up?

As noted above, the OECD Working Group began Phase 3 evaluations, which focus on enforcement of the Convention, in 2010. Among the countries the Working Group has assessed and reported on so far are Germany, Norway and the United States (which TI assessed in 2011 as having active enforcement), Finland (which TI assessed as having moderate enforcement), and Bulgaria and Canada (which TI assessed as having little or no enforcement).

The United States has investigated and prosecuted more foreign bribery cases than any other Party to the Convention:

> From 1998 to 16 September 2010, 50 individuals and 28 companies have been criminally convicted of foreign bribery, while 69 individuals and companies have been held civilly liable for foreign bribery. In addition, 26 companies have been sanctioned (without being convicted) for foreign bribery under non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). Sanctions have also been imposed for accounting misconduct and money laundering related to foreign bribery.\textsuperscript{54}

The Working Group’s report on the United States was generally positive. It commended the United States Government for its efforts to combat foreign bribery and welcomed significant enforcement efforts, noting that enforcement had increased steadily since the Phase 2 evaluation and resulted in increasingly significant sanctions. The Working Group also considered that all recommendations from Phase 2 had been fully implemented. However, it identified areas in which implementation of the Convention and the 2009 Recommendation could be enhanced. Accordingly, the Working Group made seven recommendations for ensuring effective investigation, prosecution

\textsuperscript{51} F Heimann et al., 2011, op cit., p. 17.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid.
and sanctioning of foreign bribery and three for ensuring effective prevention and detection of foreign bribery.  

Finland has held investigations into six cases of suspected foreign bribery, five of which were ongoing at the time of the Working Group’s Phase 3 report on the country. The Working Group considered Finland’s efforts promising in enforcing the foreign bribery offence since the Phase 2 evaluation had been conducted, and it commended Finland’s proactive approach to international cooperation and asset recovery. However, it had serious concerns about the lack of awareness and understanding of the offence in both the public and private sectors and considered three Phase 2 recommendations remained either partially implemented or not implemented. The Working Group made four recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery (a key recommendation concerned provision of internal guidance and regular training for law enforcement authorities and prosecutors) and 15 for ensuring effective prevention and detection of foreign bribery (including several on raising awareness on Finland’s framework for combating foreign bribery).

At the time the Working Group released its Phase 3 report on the country, Canada had over 20 investigations under its Corruption of Foreign Public Officials Act (S.C. 1998, c. 34) (CFPOA), one conviction and one ongoing prosecution. While the Working Group welcomed Canada’s recent enforcement efforts, including the establishment of the Royal Canadian Mounted Police International Anti-Corruption Unit, it was critical of Canada’s overall progress on enforcement. In particular, it recommended Canada review its law implementing the Convention and its approach to enforcement to determine why, given the size of its economy and its high risk industries, it has had only one conviction.

The Working Group considered Canada’s implementation of the Convention problematic in four key areas: ‘the scope of the foreign bribery offence in the CFPOA, application of sanctions, scope of jurisdiction in the CFPOA, and factors that may be considered in CFPOA prosecution decisions’. The Working Group was unable to assess whether one of the outstanding Phase 2 recommendations had been satisfactorily implemented until there had been further prosecutions and concluded that

59. Ibid.
60. Ibid.
four recommendations remained partially implemented and three remained not implemented. 61 It made nine recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery (directed primarily at enforcement of the CFPOA, including ensuring adequate resources for investigations and prosecutions) and six for ensuring effective prevention and detection of foreign bribery (including raising awareness, addressing facilitation payments, promotion of compliance programs and restrictions on access to public procurement for those convicted under the CFPOA). The Working Group singled out some matters requiring urgent attention, in particular, measures to ensure extraterritorial jurisdiction in line with the Convention and the dedication of resources for anticipated prosecutions. 62

Where does this leave Australia?

As noted above, Australia is scheduled to be assessed as part of the Phase 3 evaluations from June 2012. This will be Australia’s first assessment against the 2009 Revised Recommendation on Combating Bribery in International Business Transactions and the first with a focus on enforcement.

Australia has taken action to remedy one of the implementations assessed as not yet implemented in the 2008 Phase 2 follow-up report by significantly increasing the maximum penalties that apply for the foreign bribery offence. While it will surely be welcomed, this step is unlikely to greatly impress the Working Group in the absence of significant improvements on the enforcement front. The cases brought against Securency and NPA and the related charges laid against individuals will be viewed as a step in the right direction. However, the Working Group will be looking for evidence of a sustained commitment to active enforcement. As legal experts Davids and Schubert have pointed out, the lack of Australian prosecutions is unlikely to be because such offences have not been committed since the foreign bribery offence was enacted over a decade ago. 63 They point to a lack of dedicated resources allocated to investigation and prosecution of the offence compared to jurisdictions such as the US, and technical difficulties associated with investigating cross-border crime, as possible culprits. 64 The issue of adequate resourcing for investigations and prosecutions troubled the Joint Standing Committee on Treaties when it examined the Convention and proposed implementing legislation in 1998:

. . . it would be unfortunate to have the effectiveness of the legislation limited by a shortage of resources for investigation and/or prosecution. It could be seen to reflect on Australia’s commitment to the Convention. For the legislation to be effective, both investigation and prosecution must be adequately resourced.

We doubt that resource issues for the investigation or prosecution of alleged offences against the legislation have been adequately addressed.

61. Ibid.
62. Ibid., pp. 7–9.
64. Ibid.
There would be little purpose in making a recommendation about the resources which might be needed or available to cover these possible needs before enabling legislation has been finalised, or passed. We believe, however, that effective implementation of this legislation will impose additional burdens on investigating and prosecutorial agencies. These organisations will need to keep costs of their activities to implement the legislation under review.

Media reports suggest that while the AFP’s investigation into matters arising from the Cole Inquiry had been under resourced, its current investigation into Securency and NPA has sufficient resources. What is less clear is the level of resources the CDPP will be able to devote to prosecuting the resulting cases. The concurrent increase in the number of people smuggling cases and discontinuation of specific funding for people smuggling prosecutions has apparently placed the CDPP in a difficult financial position. The Director revealed in October 2011 that the CDPP had been authorised to bring forward $900 000 per month from its budget pending Government consideration of a review of the CDPP’s funding arrangements provided to the Attorney-General in August 2011.

TI has identified some other potential reasons for the lack of Australian prosecutions. The organisation has stated that it is not convinced that prosecution is feasible under the current framework. It has also suggested that inadequate whistleblower protection and an apparent lack of the specialist skills required to investigate foreign bribery may be contributing factors.

Australia will also need to satisfy the Working Group that it has taken satisfactory actions to implement the other nine recommendations that remained partially or not implemented at the time of the Phase 2 follow-up report. The most recent publicly available information provided by the Australian Government on the OECD website (current at 9 June 2011) does not indicate that any progress has been made on those recommendations, or recommendations made by TI, since the Phase 2 follow-up report.

Australia has been taking active steps to review its foreign bribery legislation in line with the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

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68. F Heimann et al., 2011, op cit., p. 17.

International Business Transactions. In late 2011, the then Minister for Home Affairs and Justice, Brendan O’Connor, launched a public consultation process on possible amendments to the foreign and domestic bribery offences in the Criminal Code. A public consultation paper was released on 15 November 2011 (submissions were due by 15 December 2011) on:

- the treatment of facilitation payments under Australian law
- the factors that influence whether a benefit is ‘legitimately due’ to the recipient
- the current requirement to identify a particular foreign public official in order to establish an offence, and
- the role of dishonesty in domestic corruption offences.

The consultation paper does not set out the next steps in the process, but presumably legislative amendments may be drafted depending on the results of the consultation process.

The Australian Government also announced the development of a national anti-corruption plan in September 2011. The Government has sought public submissions by 30 March 2012 to inform development of the plan, and will be releasing the first part of the plan shortly. The Government has recognised that the plan is being developed at a time when Australia is being reviewed on its compliance with both the UNCAC and the Convention and has stated that those reviews will be closely considered in the development of the plan.

In addition, on 6 December 2011, the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity initiated an inquiry into the integrity of overseas Commonwealth law enforcement operations. The terms of reference for the inquiry include consideration of trends in the nature and extent of corruption risks facing Commonwealth law enforcement agencies, and the extent to which those agencies are able to prevent and investigate corruption, in international

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Australia's implementation of the Anti-Bribery Convention

operations. The Committee has sought submissions by 29 February 2012 and anticipates holding hearings in March and May 2012.

Based on previous OECD Working Group and TI assessments of Australia’s implementation of the Convention, and the Phase 3 evaluations conducted by the Working Group so far, it appears that despite the recent positive developments outlined above, Australia is likely to face some criticism when it comes time for its Phase 3 evaluation, particularly in relation to enforcement of the foreign bribery offence.
