Australia’s implementation of the OECD Anti-Bribery Convention

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Executive summary

• The Organisation for Economic Cooperation and Development (OECD) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 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 44 countries, including Australia. The principal obligation of Parties to the Convention is the criminalisation of bribery of foreign public officials.

• Australia moved relatively quickly to ratify the Convention and implement it domestically through legislation, but for several years lagged behind some other countries in its enforcement of the Convention. The first Australian prosecutions for foreign bribery commenced in 2011, and since then, seven convictions have been obtained across two prosecutions.

• Australia underwent its fourth formal evaluation against the Convention in 2017. The evaluation noted significant improvements in Australia’s enforcement of the Convention since the previous evaluation, completed in 2012.

• Developments over the intervening period included the establishment of a Fraud and Anti-Corruption business area in the Australian Federal Police and the re-opening of several matters in 2013, funding for three dedicated investigation teams in 2016 and legislative amendments that commenced in 2015 and 2016. A Bill introduced in 2017 would have expanded Australia’s foreign bribery offence in several respects and introduced a deferred prosecution agreement scheme for serious corporate crimes, including foreign bribery. However, it lapsed ahead of the 2019 election.

• While the 2017 evaluation recognised positive developments, it also recommended several additional measures, as did a Senate inquiry completed in March 2018. The recommendations in the two reports provide a useful starting point for consideration of measures to further improve Australia’s compliance with the Convention and its broader response to foreign bribery.
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All hyperlinks in this paper are correct as at August 2019.
Introduction

The Organisation for Economic Co-operation and Development (OECD) adopted the *Convention on Combating Bribery of Foreign Public 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 at the date this paper was published, had been ratified by all 36 member countries of the OECD (of which Australia is one) and Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia 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 underwent its fourth formal evaluation against the Convention in 2017. This paper outlines the obligations of Parties to the Convention and how implementation is monitored, before examining Australia’s implementation of the Convention, including progress between the third and fourth evaluations, and the recommendations contained in the latest assessment.

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 domestic 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 licences or permits (though, as outlined below, a 2009 Recommendation requires Parties to encourage companies to prohibit or discourage such payments).⁵

Parties are also required to establish that complicity in an act of bribery of a foreign official is a criminal offence, and that an attempt or conspiracy to bribe a foreign official are offences to the same extent as an attempt or conspiracy to bribe a domestic public official.⁶ The Convention further requires Parties to ensure that the offence of bribery of a foreign public official applies to both legal and natural persons.⁷

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¹ Organisation for Economic Co-operation and Development (OECD), ‘Country reports on the implementation of the OECD Anti-Bribery Convention’, OECD website.
² UNCAC requires parties to implement domestic laws creating offences for a number of specific acts of corruption. UNCAC also encourages parties to pursue methods of prevention, international cooperation and asset recovery on corruption. *United Nations Convention against Corruption* done at New York on 31 October 2003 [2006] ATS 2 (entered into force for Australia 6 January 2006).
⁴ *Anti-Bribery Convention*, art. 1(1).
⁵ Ibid., arts. 2 and 3(2).
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 taking measures to establish 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 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.

In addition to the obligations imposed under the Convention, signatories must accept the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, which contains non-criminal measures for combating transnational bribery. The Recommendation asks parties 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.

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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.

10. Ibid., arts. 3(3), 8, 9 and 10.


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

- the 2006 *OECD Council Recommendation on Bribery and Officially Supported Export Credits*
- the 2009 *Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*
- the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* and

The *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* was adopted following a review of the Convention and related instruments. It builds on the Convention obligations by calling on Parties to, among other things:

- periodically review domestic laws established to implement the Convention and their approach to enforcing such laws
- periodically review their policies and approach to small facilitation payments and encourage companies to prohibit or discourage them
- ensure effective channels are in place for reporting suspected foreign bribery and ensure adequate protection of those who make such reports and
- 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.

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.\(^{15}\) The OECD Working Group on Bribery in International Business Transactions (the OECD Working Group), which comprises representatives from the Parties to the Convention, undertakes this function in accordance with a set of agreed principles.\(^{16}\) 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.

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Monitoring has been 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; the second on whether Parties were applying their legislation effectively; and the third on enforcement and other cross-cutting issues, and progress on implementing earlier recommendations. Phase 1, Phase 2, and Phase 3 assessments have been conducted for most Parties (only those who became Parties more recently are undergoing earlier stages). The fourth phase focuses on enforcement and cross-cutting issues (tailored to specific country needs) and progress on implementing outstanding recommendations from the third phase.17

Phase 3, completed between 2010 and 2014, was the first assessment to be conducted under a permanent cycle of peer review. Evaluations under Phase 4 began in 2016 and are scheduled to be completed by 2024, with a report on Australia released in December 2017.18

**Transparency International**

Transparency International (TI) is an international non-government organisation that works to combat corruption. TI publishes a range of regular reports on corruption issues, including a Corruption Perceptions Index and a Bribe Payers Index.19 From 2005 to 2015 and in 2018, TI published independent progress reports on enforcement of the Convention by state Parties.20 The reports are based on information provided by national experts in each country, who take into account the views of government officials and other experts, and reports of the OECD Working Group.21

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

... A country that is an Active enforcer initiates many investigations into foreign bribery offences, these investigations reach the courts, the authorities press charges and courts convict individuals and/or companies both in ordinary cases and in major cases in which bribers are convicted and receive substantial sanctions.

“Moderate Enforcement” and “Limited Enforcement” indicate stages of progress, but are considered insufficient deterrence. Where there is “Little or No Enforcement”, there is no deterrence ...22

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.

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21. F Heimann, A Földes and S Coles, Exporting corruption: progress report 2015: assessing enforcement of the OECD Convention on Combating Foreign Bribery, TI, 2015, pp. 15–19. The national experts are generally members of TI, but also include lawyers, academics and members of anti-corruption NGOs.
22. Ibid., p. 3. For the calculations used to take account of the scale of a country’s exports, see pp. 15–17.
TI’s 2018 progress report contained the following overarching recommendations:23

- Parties and other major exporters should:
  - ‘scale up’ their foreign bribery enforcement by addressing weaknesses in their legal frameworks and enforcement systems and improving detection of foreign bribery through anti-money laundering systems and, for countries whose performance has deteriorated, reviewing and addressing the underlying causes
  - ensure that ‘settlements in bribery cases meet adequate standards of transparency, accountability and due process’, including by making settlements public and involving affected countries and groups in settlement procedures
  - publish up-to-date data and case information on foreign bribery cases, including annual statistics on investigations and cases opened and concluded and
  - increase efforts to improve mutual legal assistance in foreign bribery cases, including by ensuring adequate resourcing and increasing the use of joint investigation teams.

- The OECD Working Group should:
  - ‘disseminate widely’ an annual list of Parties that have failed to produce meaningful enforcement results in the preceding three to four years, and an annual summary of Working Group recommendations with which Parties have failed to comply
  - publish an annual list of Parties that have taken significant steps to improve enforcement
  - develop guidance on settlements in bribery cases
  - assess the accessibility of data and case information on foreign bribery cases across all Parties, and develop an open database of such information
  - assess all Parties’ performance on mutual legal assistance, and work with other relevant bodies to develop guidance and support sharing of experience and
  - increase its efforts to persuade China, Hong Kong, India and Singapore to accede to the Anti-Bribery Convention (given they each account for two per cent or more of world exports).

Australia’s implementation of the Convention

Australia moved relatively quickly to ratify the Convention and implement it domestically through legislation, but for several years lagged behind some other countries in its enforcement of the Convention. The first Australian prosecutions for foreign bribery commenced in 2011, and since then several convictions have been obtained. The OECD Working Group noted significant improvements in Australia’s enforcement of the Convention between the Phase 3 and Phase 4 reports, and further reforms are currently before Parliament. Some additional measures were recommended in the OECD Working Group’s Phase 4 report and by the Senate Standing Committee on Economics in its 2018 report on its inquiry into foreign bribery.

Key components of Australia’s legislative framework


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 $2.1 million) or both for an individual. For a corporation, the maximum penalty is the greater of 100,000 penalty units (currently $21 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.

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) or

• 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. This 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 provisions outlined above 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 the implementation of the Convention includes:

- Division 490 of the **Criminal Code** (Convention Article 8—false accounting)
- the **Proceeds of Crime Act 2002** (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** (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** and the **Extradition Act 1988** (Convention Articles 9 and 10 respectively).

**Institutional arrangements and key non-legislative measures**

**Investigation and prosecution**

The Australian Federal Police (AFP) is responsible for the investigation of foreign bribery offences. The Australian Securities and Investments Commission (ASIC) is responsible for investigating breaches of the **Corporations Act**, including breaches of directors’, officers’ or auditors’ duties, which may occur alongside foreign bribery. The Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecutions.

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. 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.

The AFP established a Fraud and Anti-Corruption (FAC) business area in February 2013 to improve the agency’s response to serious and complex fraud and corruption, including foreign bribery. The FAC Centre was opened within that business area in July 2014. The Centre is hosted and led by the AFP, but is a multi-agency initiative with representation from several other agencies and departments, including the Australian Taxation Office (ATO), Australian Criminal Intelligence Commission, ASIC, Department of Foreign Affairs and Trade (DFAT), and the Australian Transaction Reports and Analysis Centre. The Attorney-General’s Department (AGD) and CDPP are advisory.
members.\textsuperscript{37} Foreign bribery matters are evaluated by the FAC Centre and if they proceed to investigation, are investigated by one of the specialist foreign bribery teams (based in Sydney, Melbourne and Perth) or other investigators in the FAC business area.\textsuperscript{38}

The CDPP’s decisions about whether to institute or continue proceedings are made in accordance with the \textit{Prosecution Policy of the Commonwealth}.\textsuperscript{39} 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 CDPP moved from a regionally based model to one based on crime types from June 2014, with all foreign bribery referrals now handled by the Commercial Financial and Corruption Practice Group.\textsuperscript{40} The CDPP is not directly involved in investigations. However, it provides advice to investigative agencies throughout the course of investigations ‘to assist in better focussing and improving the quality of those investigations’.\textsuperscript{41}

\section*{Education and awareness}

A range of initiatives led by the Australian Government aim to raise awareness about the foreign bribery offence, as well as 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.\textsuperscript{42}

AGD is the lead agency for raising awareness of the foreign bribery offence, and coordinates outreach and awareness-raising activities across the Australian Government. Other agencies involved in training and raising awareness across the public sector (including state and territory police) and private sectors include DFAT, the AFP, ASIC, the Australian Trade and Investment Commission (Austrade), the ATO, and the Export Finance and Insurance Corporation.\textsuperscript{43}

\section*{International cooperation}

The International Crime Cooperation Central Authority within AGD is the central authority for all formal requests for international criminal cooperation, including mutual legal assistance and extradition.\textsuperscript{44}

The AFP seeks and provides police-to-police assistance on criminal matters, including through its International Liaison Network.\textsuperscript{45} The AFP joined the International Foreign Bribery Taskforce in 2013.\textsuperscript{46} The Taskforce was established in 2011 and formalised through an agreement in 2013.\textsuperscript{47} The other members are the US Federal Bureau of Investigation, City of London Police and the Royal Canadian Mounted Police. The Taskforce aims to improve the law enforcement response to foreign bribery by sharing knowledge, skills, methodologies and case studies. These agencies are

\begin{itemize}
  \item 41. Ibid.
  \item 42. OECD Working Group, \textit{Australia: Inquiry into foreign bribery}, op. cit., p. 12.
  \item 43. Ibid.
  \item 45. Ibid.
  \item 46. AGD, \textit{‘Our work overseas’}, AGD website; OECD Working Group, \textit{Phase 3 report on implementing the OECD Anti-Bribery Convention in Australia}, op. cit., p. 38.
  \item 47. Ibid.
\end{itemize}
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reportedly in contact almost daily to share information, and personnel are often seconded between agencies.\textsuperscript{48}

AGD leads Australia’s engagement with the OECD Working Group, as well as other regional and international anti-corruption forums.\textsuperscript{49}

\textbf{Investigations and prosecutions}

The OECD Working Group’s 2006 Phase 2 report on Australia indicated that the AFP had opened three foreign bribery investigations, one of which had been terminated and two of which were ongoing.\textsuperscript{50}

The OECD Working Group’s 2012 Phase 3 report noted that the AFP had received 28 allegations of foreign bribery involving Australian companies and individuals since the Phase 2 report, and of those, 12 had been evaluated but terminated without an investigation; nine had been investigated but were finalised without charges being laid; and seven cases were ongoing (including one in which charges had been laid).\textsuperscript{51}

On 31 October 2017, the AFP advised that the FAC Centre had received 37 foreign bribery referrals since 1 July 2014.\textsuperscript{52} Including matters that pre-dated the establishment of the FAC but remained current, there were as at 31 October 2017:

- 18 ongoing investigations (13 of which had been publicly declared)
- 14 matters subject to ongoing evaluation (a process of determining whether to open a formal investigation) and
- several matters that had been referred to the CDPP, including one finalised case and one still before the court.\textsuperscript{53}

On the same day, the CDPP advised that seven persons had been convicted of foreign bribery offences and one for a state false accounting offence related to a foreign bribery matter.\textsuperscript{54} These convictions were obtained across two prosecutions, both involving multiple defendants, as outlined below.

\textbf{Securency and Note Printing Australia}

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{55} Additional charges were laid, and a further three individuals were charged with foreign bribery, in August and September 2011 and March 2013.\textsuperscript{56} The charges related to bribes allegedly paid to public officials in Indonesia, Malaysia, Vietnam and Nepal between 1999 and 2005, the allegations being that

\begin{itemize}
\item \textsuperscript{48} B Steinman, ‘It’s time to meet the International Foreign Bribery Taskforce’, The FCPA Blog, 7 December 2016.
\item \textsuperscript{50} OECD Working Group, \textit{Australia: Phase 2 report}, op. cit., p. 4.
\item \textsuperscript{51} OECD Working Group, \textit{Phase 3 report on implementing the OECD Anti-Bribery Convention in Australia}, op. cit., pp. 8–9, 60–63.
\item \textsuperscript{52} Senate Economics References Committee, \textit{Official committee Hansard}, 31 October 2017, p. 17.
\item \textsuperscript{53} Ibid. In an email of 9 May 2017, the AFP advised that as at May 2017, 15 matters pre-dating the FAC remained current: two matters before the courts, three that had been referred to the CDPP and ten ongoing investigations.
\item \textsuperscript{54} Ibid., p. 26.
\item \textsuperscript{55} AFP, \textit{Foreign bribery charges laid in Australia}, media release, 1 July 2011.
\item \textsuperscript{56} AFP, \textit{Further charges laid in foreign bribery investigation}, media release, 10 August 2011; N McKenzie and R Baker, ‘Printing man on bribery charges’, \textit{The Age}, 13 September 2011, p. 3; AFP, \textit{Further charges laid in foreign bribery investigation}, media release, 14 March 2013.
\end{itemize}
senior managers from Securency and NPA used international sales agents to bribe foreign public officials to secure banknote contracts.  

Securency and NPA pleaded guilty to three charges each of conspiracy to bribe foreign public officials in October 2011. Securency was ordered to pay a penalty of $19.8m under the *Proceeds of Crime Act* and fines totalling $480,000. NPA was ordered to pay a penalty of $1.9m under the *Proceeds of Crime Act* and fines totalling $450,000.

Three individuals pleaded guilty to conspiracy to bribe foreign public officials, two of whom were sentenced to two years and six months imprisonment, and the third to two years imprisonment. All three were released on recognizance orders (requiring them to be of good behaviour for a specified period). One of those individuals and two others pleaded guilty to false accounting in relation to payment of commissions to a Malaysian agent. Proceedings against a further four individuals were permanently stayed by the High Court on the basis that continued prosecutions of those individuals ‘would bring the administration of justice into disrepute’, following unlawful compulsory examinations conducted by what is now the Australian Criminal Intelligence Commission.

The AFP commenced the investigation that led to these cases in May 2009, following a referral from the Chairman of Securecy. The investigation ran concurrently with related investigations being pursued by overseas law enforcement agencies and has involved cooperation with the UK’s Serious Fraud Office, the Malaysian Anti-Corruption Commission and Attorney-General’s Chambers and the Indonesian National Police.

**Lifese**

In February 2015 the AFP charged three individuals with conspiracy to bribe a foreign public official. In July 2017 the three men pleaded guilty to the charges, which concerned payment of a US$1 million bribe to a foreign official to secure contracts for their construction company, Lifese, in Iraq. Much of the evidence relied upon in the prosecution was from intercepted telephone conversations, with the first telecommunications interception warrant obtained by the AFP in March 2014. The three men were each sentenced to four years imprisonment, with a non-parole period of two years, commencing from the date of sentencing (27 September 2017). Two of the men, Ibrahim and Mamdouh Elomar, were also fined $250,000 each.

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57. Ibid.; AFP, *Foreign bribery charges laid in Australia*, op. cit.
60. CDPP, *Securency and Note Printing Australia foreign bribery prosecutions finalised*, op. cit.
63. Ibid; RBA, *Guilty pleas made by Note Printing Australia and Securency*, op. cit (quote taken from this source).
64. AFP, *Foreign bribery charges laid in Australia*, op. cit.
68. Ibid.
**OECD Working Group and TI assessments of Australia**

**OECD Working Group Phase 1 evaluation: 1999**

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 identified two issues for further consideration: the formulation of the lawful conduct defence and the maximum penalties available for the foreign bribery offence. However, overall, the Working Group considered that Australia’s legislation conformed to the standards set by the Convention. As outlined elsewhere in this paper, the two issues identified have both since been addressed.

**OECD Working Group Phase 2 evaluation: 2006**

The OECD Working Group’s 2006 Phase 2 report assessed how effectively Australia was applying its legislation, and outlined a much broader range of issues requiring action.

The Working Group considered that Australian authorities demonstrated a strong commitment to combating foreign bribery, and welcomed initiatives to raise awareness of the offences across the public sector and Australia’s commitment to supporting good governance in partner countries. However, it identified several areas for improvement and 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.

The Working Group assessed Australia’s implementation of those recommendations in a follow up report released in 2008 and again as part of the Phase 3 evaluation. It assessed Australia to have fully implemented 15 of the 22 Phase 2 recommendations by the time of the Phase 3 evaluation, with six partially implemented and one not implemented.

The one recommendation that the Working Group still assessed as not having been implemented was raising awareness amongst cash dealers about foreign bribery as a predicate offence for money laundering, and providing dealers with guidance on identifying suspicious transactions (recommendation 1(d)). Two of the partially implemented recommendations also related to awareness-raising, across the private sector generally (including in relation to facilitation payments) and specifically amongst small and medium sized enterprises (recommendations 1(b) and (c)). A further two related to making sure that the AFP receives and evaluates information about foreign bribery from particular sources (recommendations 2(b) and (e)). One related to reporting obligations of external auditors (recommendation 4(a)), and one to consideration of additional sanctions and other measures following a conviction for foreign bribery, such as exclusion from public contracts (recommendation 6(b)).

**OECD Working Group Phase 3 evaluation: 2012**

The OECD Working Group’s 2012 Phase 3 report identified several positive developments since the 2008 follow up report, specifically:

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70. The lawful conduct defence was amended in 2007 (see page 8); the penalty was increased in 2010 (see page 7).
72. Ibid., pp. 57–59.
• that foreign bribery was becoming a priority for the Australian Government
• the announcement of the development and implementation of a whole of government National Anti-Corruption Plan (which was then expected by the end of 2012, but did not eventuate)
• significant increases to the maximum penalty for legal persons (such as bodies corporate) for the foreign bribery offence
• public consultation on the existing facilitation defence to the foreign bribery offence and
• improved sharing of taxation information.  

However, the Working Group had ‘serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low’:

Only one foreign bribery case has led to prosecutions. These prosecutions were commenced in 2011 and are on-going. Out of 28 foreign bribery referrals that have been received by the Australian Federal Police (AFP), 21 have been concluded without charges.

The Working Group made 33 recommendations. In line with the concerns outlined above, its first recommendation was for Australia to review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials. Another was that the AFP:

• takes sufficient steps to ensure foreign bribery allegations are not prematurely closed
• be more proactive in gathering information at the pre-investigative stage
• takes steps to ensure it explores all avenues for exercising jurisdiction over related legal persons (such as corporations) in foreign bribery cases
• continues to systematically consider concurrent or joint investigations with foreign or other domestic law enforcement agencies and
• routinely considers investigations of related charges such as false accounting and money laundering, especially when a substantive charge of foreign bribery cannot be proven.

This prompted the AFP to re-evaluate some of the matters that it previously closed, with an AFP Commander reportedly telling Fairfax Media ‘We could’ve gone a few extra steps. We are re-evaluating. That doesn’t mean we are going to open a whole new investigation. [We are ensuring] there is no stone unturned, that reasonable inquiries have been made’.

Further recommendations included:

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75. Ibid., pp. 5, 10–11, 14–15, 37.
76. Ibid., p. 5; OECD, *OECD seriously concerned by lack of foreign bribery convictions, but encouraged by recent efforts by the Australian Federal Police*, media release, 25 October 2012.
78. Ibid., p. 50 (Recommendation 8(a); a multi-part recommendation).
• increasing the maximum penalty that applies to legal persons for false accounting to a level that is effective, proportionate and dissuasive
• ensuring that the CDPP has sufficient resources to prosecute foreign bribery cases
• improving awareness among state law enforcement officials and the private sector, including targeting companies (particularly small and medium enterprises) that conduct business overseas
• improving foreign bribery reporting requirements across the public service and for officials and employees of independent statutory authorities
• introducing whistleblower protections for public and private sector employees who report suspected foreign bribery to competent authorities in good faith and
• considering concrete steps to encourage companies, ‘in the strongest terms’, to conduct due diligence on agents, including those referred to them by Austrade.80

The Working Group assessed Australia’s implementation of those recommendations in a follow-up report released in 2015 and again as part of the Phase 4 evaluation.81 It assessed Australia to have fully implemented 23 of the 33 Phase 3 recommendations by the time of the Phase 4 evaluation, with four partially implemented and two not implemented.82

The two recommendations that the Working Group assessed as not having been implemented related to:

• ensuring a broad range of mutual legal assistance can be provided to foreign authorities pursuing civil or administrative proceedings against a legal person under a legal system that does not provide for corporate criminal liability (recommendation 11) and
• procuring agencies putting in place transparent policies and guidelines relating to debarment on the grounds of a foreign bribery conviction (recommendation 16(a)).83

Those assessed as partially implemented related to: enhancing corporate liability provisions (recommendation 3); exploring all legal avenues for exercising jurisdiction over related legal persons (recommendation 8(a)(iii)); providing a clear framework on plea bargaining and self-reporting (recommendation 9); and raising awareness of foreign bribery as a predicate offence to money laundering (recommendation 13).84

**OECD Working Group Phase 4 evaluation: 2017**

Overall, the Phase 4 report was more positive than the previous assessment about Australia’s implementation and enforcement of the Convention. It identified several positive developments since the Phase 3 report, including ‘substantial institutional changes’ to enhance the investigation and prosecution of foreign bribery, improved protections for public sector whistleblowers, amendments to the foreign bribery offence and introduction of new false accounting offences in

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80. Ibid., pp. 50–52.
82. OECD Working Group, *Implementing the OECD Anti-Bribery Convention: Phase 4 report: Australia*, op. cit. Of the remaining four recommendations, three were converted to follow-up issues; the report did not state whether the Working Group considered recommendation 15d to be fully implemented (it was assessed as partially implemented in the 2015 follow-up report). Recommendation 8a is counted here as partially implemented overall; the Working Group assessed four of its five parts to have been fully implemented and one as partially implemented.
83. Ibid., pp. 46–49.
84. Ibid., pp. 17–21, 49–51.
2015, and extensive awareness-raising relating to facilitation payments. The Working Group also identified ‘two important initiatives’ that it believed constitute good practice: establishment of the Fintel Alliance (launched in 2017) and the engagement of AFP’s overseas liaison officers in foreign bribery investigations.

The Working Group commended Australia for increasing enforcement of the foreign bribery offence and securing its first convictions, but considered that ‘in view of the level of exports and outward investment by Australian companies in jurisdictions and sectors at high risk for corruption, Australia must continue to increase its level of enforcement’. It made 13 recommendations. The Working Group recommended that Australia:

- continues to resource the AFP and CDPP effectively so that the AFP can continue its enforcement efforts and the CDPP can prosecute foreign bribery cases at the rate they are expected to be generated (recommendations 2(a) and (b))
- legislates clear, comprehensive protections for private sector whistleblowers and ensures employees in all sectors are fully apprised of those protections (recommendation 1(b))
- raises awareness of foreign bribery as a predicate offence for money laundering, particularly in the real estate sector, and addresses the risk that proceeds of foreign bribery could be laundered through the real estate sector (recommendation 1(a))
- pursues confiscation of bribe payments and their proceeds where appropriate (recommendation 4(a))
- has procuring agencies put in place transparent policies and guidelines relating to debarment on the grounds of a foreign bribery conviction (recommendation 4(b))
- proactively pursues criminal charges against legal persons for foreign bribery and related offences (recommendation 5(a))
- finalises, publishes and raises awareness of guidance on self-reporting of foreign bribery and related offences by corporations, and provides clear information in the public domain on where a company should go in order to self-report foreign bribery (recommendations 5(b) and (c))
- finds additional ways to encourage companies, particularly small and medium-sized enterprises, to develop and adopt adequate prevention and detection mechanisms, and in the event that Australia enacts an offence of failing to prevent foreign bribery, closely engages with the private sector on related guidance on compliance measures (recommendations 6(a) and (b))
- clarifies guidance to tax auditors to minimise the risk of tipping off taxpayers about current or potential foreign bribery investigations (recommendation 1(c)) and
- ensures to the fullest extent possible under the Australian legal system, that mutual legal assistance is provided to parties to the Convention that apply civil or administrative liability to legal persons for foreign bribery (recommendation 3).

The Working Group invited Australia to submit a written report in December 2019 on its implementation of these recommendations.

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85. Ibid., p. 57. On the legislative amendments, see further the ‘Recent developments’ section of this paper.
86. Ibid. On the Fintel Alliance, see further the ‘Recent developments’ section of this paper.
87. Ibid., p. 56.
88. Ibid., pp. 57–59.
TI assessments

In its 2018 progress report, which was based on enforcement for the period 2014–17, TI classified seven countries as having active enforcement (Germany, Israel, Italy, Norway, Switzerland, the UK and the US), four as having moderate enforcement (Australia, Brazil, Portugal and Sweden), eleven as having limited enforcement and twenty-two as having little or no enforcement.90

TI has classified Australia as demonstrating moderate enforcement since TI introduced its current four categories of enforcement in 2012 (active, moderate, limited, and little or none).91 It had previously included Australia in the lowest of three categories (active, moderate, and little or none) in its 2009 to 2011 reports.92 The change in 2012 reflected the initiation of Australia’s first prosecution proceedings in 2011 and the eight investigations underway at the time of the report.93 TI’s 2013 report noted several continuing criminal matters and the outcomes of civil sanctions against former directors and officers of the Australian Wheat Board for breaches of the Corporations Act.94 It also noted inadequacies in the legal framework and enforcement system, some of which have since been addressed, and the establishment of the Fraud and Anti-Corruption business area in the AFP.95

TI’s 2014 and 2015 progress reports did not include the individual country analysis provided in earlier reports, but contained some remarks on Australia in the general commentary. In its 2014 progress report, TI noted legislative reforms, the commencement of several new investigations, and the signing of interagency agreements between the AFP and regulatory agencies as positive developments in Australia.96 The 2015 progress report highlighted significant inadequacies in protections for whistleblowers in the majority of signatories, including for private sector whistleblowers in Australia.97

TI’s 2018 report, which did include individual country analysis, noted the two cases outlined earlier in this paper and several ongoing investigations, and the progress outlined below under ‘Recent developments’. It also identified several deficiencies. The report recommended that Parliament pass reforms included in a 2017 Bill that has since lapsed; introduce a deferred prosecution scheme that requires a formal admission of criminal liability; introduce a debarment scheme; expand anti-money laundering regulation to include real estate agents, lawyers and accountants; repeal the facilitation payments defence; expand mutual legal assistance to include civil and administrative proceedings; continue to adequately resource the AFP and CDPP; and develop a database of bribery enforcement actions.98

89. Ibid., p. 56.
95. Ibid., pp. 14–16.
Recent developments

Investigations and investigative capacity

Following on from the OECD Working Group’s Phase 3 report in 2012, significant effort has gone into improving enforcement of the foreign bribery offence in Australia. As noted above, the report prompted the AFP to re-evaluate some of the matters it had previously closed, and the FAC business area and FAC Centre were established in 2013 and 2014, respectively. The FAC Centre’s functions include evaluating all foreign bribery referrals in consultation with the Foreign Bribery Panel of Experts to determine whether they proceed to investigation, conducting quality assurance reviews of key ongoing investigations, and collecting, analysing, and disseminating data and findings arising from referrals. The FAC business area has ongoing funding for around 140 investigators working across a range of fraud, corruption and bribery matters. This was supplemented in April 2016 with funding of $14.7 million over three years (to the end of 2018–19) for three foreign bribery investigative teams based in Sydney, Melbourne and Perth.

In October 2013, the AFP and ASIC entered into a memorandum of understanding (MOU) on collaborative working arrangements. The MOU provides a general framework for cooperation between the agencies on law enforcement issues and the exchange of information and intelligence, and includes an annex specific to foreign bribery. The annex, amongst other things, requires each of the agencies to notify each other of any foreign bribery referrals where it can be reasonably expected that the jurisdiction of both might be engaged (the AFP in relation to the Criminal Code and ASIC in relation to the Corporations Act). In such circumstances, experts from each agency must work together to consider whether an independent investigation by the AFP or ASIC, a joint investigation or alternative regulatory or compliance action is most appropriate. The annex also provides that where there is sufficient evidence to meet the criminal threshold, Criminal Code offences will take precedence.

Recent and proposed legislative reforms to foreign bribery laws

In March 2015, the Government introduced an amendment to the foreign bribery offence to clarify that it is not necessary for the defendant to have intended to influence a particular foreign public official for the offence to apply. The amendment was passed by Parliament and commenced in November 2015. This implemented a recommendation of the OECD Working Group’s Phase 3 report on Australia.

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101. M Turnbull (Prime Minister), G Brandis (Attorney-General) and M Keenan (Minister for Justice), Boosting efforts to tackle foreign bribery, media release, 23 April 2016; Australian Government, Budget measures: budget paper no. 2: 2016-17, p. 66.

102. AFP and ASIC, Memorandum of understanding between the Australian Federal Police and Australian Securities and Investments Commission on collaborative working arrangements, October 2013.


105. OECD Working Group, Phase 3 report on implementing the OECD Anti-Bribery Convention in Australia, op. cit., pp. 11–12, 49 (Recommendation 2(b)).
In November 2015, the Government introduced amendments to the *Criminal Code* to create new false accounting offences.\(^{106}\) Under these amendments, which commenced in March 2016, a person commits an offence when:

- the person makes, alters, destroys or conceals an accounting document, or fails to make or alter an accounting document the person is under a legal duty to make or alter and
- the person intended (under section 490.1) or was reckless as to whether (under section 490.2) the making, alteration, destruction or concealment (or failure to make or alter a document) would facilitate, conceal or disguise the occurrence of:
  - the person or someone else receiving a benefit not legitimately due to him or her
  - the person or someone else giving a benefit not legitimately due to the recipient or intended recipient and/or
  - loss to another person that is not legitimately incurred and
- one of the circumstances in subsection 490.1(2) applies.\(^{107}\)

Subsection 490.1(2) lists circumstances that bring the relevant conduct within the Commonwealth’s constitutional powers. These include characteristics of the person (for example, where the person is a constitutional corporation), the location or context of the act or omission (for example, outside Australia or in concealing a Commonwealth offence) and characteristics of the document (for example, it is kept for the purposes of a Commonwealth law).

The maximum penalties for individuals and corporations are the same as for foreign bribery if intent is proven, and half that amount where recklessness is proven. While the offences implement a recommendation of the OECD Working Group’s Phase 3 report on Australia, they are not restricted to false accounting for the purpose of committing or concealing a foreign bribery offence.

The Government introduced the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 on 6 December 2017, following public consultations on proposed reforms earlier that year.\(^{108}\) The Bill, which lapsed ahead of the 2019 federal election, would have:

- created a new corporate offence of failing to prevent foreign bribery (similar to section 7 of the UK’s *Bribery Act 2010*\(^{109}\))
- expanded the definition of foreign public official to include candidates for office
- clarified that the offence is about ‘improperly influencing’ a foreign public official (instead of the current language which refers to a benefit being ‘not legitimately due’)
- removed the requirement for a bribe to be provided, promised or offered so as to influence the foreign public official in the exercise of his or her official duties

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expanded the offence to also apply where a personal (as opposed to business) advantage is sought

clarified that the advantage sought may be for someone other than the person providing, promising or offering a bribe and

clarified that the accused does not need to have specific business or a specific advantage in mind.\[^{110}\]

**Proposed deferred prosecution agreement scheme**

The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 would also have introduced a deferred prosecution agreement (DPA) scheme in Australia for serious corporate crime. DPAs and non-prosecution agreements (NPAs) have been used in the US for some time, and the UK’s DPA scheme commenced in 2014.\[^{111}\] While they are used for a range of crimes, DPAs and NPAs have become a key means of enforcing the US *Foreign Corrupt Practices Act* (FCPA), so are of particular interest in the context of foreign bribery.\[^{112}\]

Under a DPA, prosecution for an offence is deferred if a defendant agrees to comply with specified conditions:

A DPA is a voluntary, negotiated settlement between a prosecutor and defendant. Under a DPA scheme, where a company has engaged in a serious corporate crime and the crime has either been self-reported by the company or identified by investigators, prosecutors would have the option to invite the company to negotiate an agreement to allow it to avoid a conviction (ie, defer the prosecution). The terms of a DPA typically require the company to comply with conditions, cooperate with any investigation, and pay a financial penalty. A breach of the terms would result in the prosecution resuming with the possibility of additional penalties. This decision to enter into DPA negotiation is at the discretion of the prosecuting agency.\[^{113}\]

The Government released an initial discussion paper in March 2016, and a further consultation paper on a proposed model in March 2017, informed by earlier submissions and discussions with federal agencies.\[^{114}\]

The model proposed in the Bill would have allowed DPAs to be used only for legal persons (not individuals) and for specific Commonwealth offences considered to be serious corporate crimes. DPAs would have been negotiated by prosecutors in accordance with publicly available guidelines, and required approval from a former judicial officer appointed as an approving officer. They would have been published in full unless the CDPP considered it inappropriate to do so in the interests of


justice (in which case a DPA may be either not published, or published with some details removed).115

**Senate Standing Committee on Economics inquiry**

On 24 June 2015, the Senate referred an inquiry into foreign bribery to the Economics References Committee. The inquiry, which lapsed at the dissolution of Parliament in May 2016, was reinstated in October 2016 and the Committee reported on 28 March 2018.116 The Committee made 22 recommendations. Seven recommendations would be implemented by the foreign bribery amendments in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, or concerned the development of guidance related to the ‘failure to prevent’ offence.117 Four related to the introduction of a DPA scheme (which that Bill would establish) and the development of an accompanying Code of Practice.118 Two reiterated recommendations of the OECD Working Group’s Phase 4 report (relating to debarment and information on voluntary reporting), and another was that the Government prioritise the consideration and implementation of the Phase 4 recommendations.119 The remaining recommendations were that:

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115. For further information, see Barker and Biddington, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, op. cit.; Senate Standing Committee on Legal and Constitutional Affairs, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, op. cit.


117. The Bill would implement recommendations 5, 6, 7 and 10; recommendations 8, 9 and 17 related to the content of, and process for developing, guidelines for corporations on steps that they should take to implement adequate procedures to prevent foreign bribery: Barker and Biddington, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, op. cit., pp. 8–9.

118. Recommendations 11, 12, 13 and 14.

119. Recommendations 1, 20 and 22.
the AFP’s annual reports include certain information about the FAC Centre, including the number of referrals received and the resources allocated to the Centre

consideration be given to developing a mechanism to make contingency funding available to relevant agencies for large and complex foreign bribery investigations

the Government have regard to how any changes coming out of a review of ASIC’s enforcement regime could help improve enforcement of penalties for breaches relating to foreign bribery

outstanding recommendations from the Parliamentary Joint Committee on Corporations and Financial Services’ 2017 report on whistleblower protections be implemented expeditiously, and that the Expert Advisory Panel on Whistleblower Protections be asked to consider whether the Australian framework provides adequate protections for people making disclosures relating to foreign bribery

the facilitation payment defence be abolished over a transition period

ASIC maintains a central register on beneficial ownership that requires companies, trusts and other corporate structures to disclose relevant information and

the Government provides practical guidance to companies and increases awareness of the high-risk sectors and regions in which Australian businesses commonly operate.

The Government had not responded to the Committee’s report as at the date of publication of this paper.

Conclusion

Australia moved relatively quickly to ratify the Convention and implement it domestically through legislation, but its enforcement of the Convention was low for many years, with the first prosecutions not commenced until 2011. Since then, several convictions have been obtained and Australia has made a concerted effort to strengthen its response to foreign bribery, including through legislative amendments and a greater focus on and resourcing of investigations. Foreign bribery investigations can be lengthy, complex and resource-intensive, so it will take time and sustained effort and resources for the benefits of recent measures to be fully realised. The recommendations of the Phase 4 report and the recent Senate inquiry provide a useful starting point for the consideration of measures to further improve Australia’s compliance with the Convention and its broader response to foreign bribery.


