The Senate

Standing Committee on Legal and Constitutional Affairs

International Trade Integrity Bill 2007 [Provisions]

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TABLE OF CONTENTS

ABBREVIATIONS

Bill	International Trade Integrity Bill 2007
CEO	Chief Executive Officer
Charter of the United Nations Act	*Charter of the United Nations Act 1945*
Cole Inquiry Report	Commissioner The Hon Terence RH Cole AO RFD QC, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, November 2006
Criminal Code Act	*Criminal Code Act 1995*
Customs	Australian Customs Service
Customs Act	*Customs Act 1901*
Department	Attorney-General's Department
DFAT	Department of Foreign Affairs and Trade
EM	Explanatory Memorandum
Income Tax Assessment Act	*Income Tax Assessment Act 1997*
TIA	Transparency International Australia
UN	United Nations

CHAPTER 1

INTRODUCTION

Background

1.1 On 21 June 2007, the Senate referred the provisions of the International Trade Integrity Bill 2007 (Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 1 August 2007.

1.2 The Bill amends the *Charter of the United Nations Act 1945*, the *Customs Act 1901*, the *Criminal Code Act 1995* and the *Income Tax Assessment Act 1997*. It implements the Australian Government's response to Recommendations 1-3 of the *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme* by Commissioner Terence Cole QC (Cole Inquiry Report).[1]

1.3 The Cole Inquiry Report was tabled in Parliament on 27 November 2006 and presented five principal recommendations to improve Australian law in relation to the Iraq sanctions regime. On 3 May 2007, the Attorney-General tabled the Australian Government's response in Parliament on Recommendations 1-3 of the Cole Inquiry Report (Appendix 1 to this report).[2] The Bill contains the legislative changes arising from these recommendations; however, the Bill goes further than the Cole Inquiry Report which focused on Australian law in the context of an Iraqi sanctions regime. The government considers that the findings and recommendations can be applied more broadly to the administration of all United Nations (UN) Security Council sanctions, regardless of the countries or goods to which they apply.[3]

1.4 The government's response to the Cole Inquiry Report also addressed some recommendations of the Organisation for Economic Co-operation and Development (OECD) Working Group on Foreign Bribery in International Business Transactions

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1 Commissioner The Hon Terence RH Cole AO RFD QC, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, November 2006, at http://www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report (accessed 22 June 2007).

2 'Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme', at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetotheReportoftheInquiryintoCertainAustralianCompaniesinrelationtotheUNOil-for-FoodProgramme (accessed 22 June 2007).

3 *Explanatory Memorandum* (EM), p. 1; The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 14 June 2007, p. 3.

(OECD Working Group) Phase 2 report on Australia[4] which was adopted by the OECD in January 2006. The OECD guidelines allow countries two years to provide a written response to a Phase 2 report.[5]

1.5 The committee understands that the Attorney-General's Department (Department) has recently been advised that the OECD Working Group will not consider Australia's response before January 2008.[6] According to the Department, the recommendations of the OECD Working Group that have been addressed in the Bill are those which the government decided were relevant to its response to the Cole Inquiry Report. However, the Bill does not represent Australia's response to the OECD Working Group; that response is still under consideration by the government.[7]

1.6 The Bill aims to improve Australian laws to strengthen enforcement of all UN sanctions and to combat foreign bribery, and contains information gathering and handling provisions to improve the ability of agencies to administer UN sanctions. The Bill also introduces new offences for individuals or companies which:

- provide false or misleading information in connection with a UN sanctions regime;
- import or export goods prohibited by UN sanctions; or
- otherwise act in contravention of a Commonwealth law that enforces a UN sanction in Australia.

1.7 In his Second Reading Speech, the Attorney-General stated that:

> The government is committed to promoting a culture of ethical dealing in connection with UN sanctions and international trade.
>
> Legislation alone cannot accomplish this and it falls on Australian businesses to maintain their reputation of ethical dealing and integrity. Australia and our trading partners will benefit from seeking to eliminate the cancer of corruption in international trade.[8]

1.8 The amendments to the *Charter of the United Nations Act 1945* and the *Customs Act 1901* will commence on a day to be fixed by Proclamation. However, if

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4 OECD, Directorate for Financial and Enterprise Affairs, *Australia: Phase 2, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006, at http://www.oecd.org/dataoecd/57/42/35937659.pdf (accessed 18 July 2007).

5 Attorney-General's Department, answers to questions on notice, p. 2.

6 Attorney-General's Department, answers to questions on notice, p. 2.

7 Attorney-General's Department, answers to questions on notice, p. 2.

8 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 14 June 2007, p. 4.

they do not commence within six months of the day on which the Bill receives the Royal Assent, they commence on the first day after that six month period. In the period before commencement, the government will conduct consultation with business and industry stakeholders about the amendments and their implementation.[9] In his Second Reading Speech, the Attorney-General stated that the government would 'inform the public of the changes' contained in the Bill, 'focusing particularly on the financial sector and those businesses importing and exporting goods and services'.[10]

1.9 The amendments to the *Criminal Code Act 1995* and the *Income Tax Assessment Act 1997* will commence the day after the Bill receives the Royal Assent.

1.10 The government will provide $4.6 million over four years to address the first three recommendations of the Cole Inquiry Report. According to the EM, this will enable the Department of Foreign Affairs and Trade (DFAT) to coordinate the implementation of UN and bilateral sanction regimes, and contribute to whole-of-government efforts to monitor and ensure compliance with Australian law on sanctions.[11]

Conduct of the inquiry

1.11 The committee advertised the inquiry in *The Australian* newspaper on 27 June 2007 and 11 July 2007, and invited submissions by 11 July 2007. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 40 organisations and individuals.

1.12 The committee received 4 submissions which are listed at Appendix 2. Submissions were placed on the committee's website for ease of access by the public.

1.13 The committee held a public hearing with representatives of the Department, DFAT and the Australian Customs Service in Sydney on 17 July 2007. A list of witnesses who appeared at the hearing is at Appendix 3 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.14 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.15 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the

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9 EM, p. 2; *Committee Hansard*, 17 July 2007, pp 2-3.

10 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 14 June 2007, p. 4.

11 p. 2.

proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter outlines the main provisions of the Bill.

Schedule 1 – Enforcing UN sanctions

2.2 Schedule 1 of the Bill contains amendments to the *Charter of the United Nations Act 1945* (Charter of the United Nations Act) and the *Customs Act 1901* (Customs Act).

Amendments to the Charter of the United Nations Act 1945

2.3 In summary, the proposed amendments to the Charter of the United Nations Act will:

- create new offences for individuals and corporations in relation to conduct that contravenes a UN sanction in force in Australia, with increased penalties for breaches;
- create a provision which invalidates any permission granted under information that is false or misleading in a material particular;
- grant agencies responsible for administering UN sanctions the required information-gathering powers to determine whether UN sanctions are being complied with and improve information-sharing among government agencies; and
- require persons to retain, for five years, documentation in connection with permit applications and compliance with permit conditions.[1]

2.4 The proposed amendments to the Charter of the United Nations Act are explained in greater detail below.

Item 2

2.5 Item 2 of the Bill inserts a definition of 'UN sanction enforcement law' for the purposes of the Charter of the United Nations Act. It provides that the Minister may designate, by legislative instrument, a Commonwealth entity as a 'designated Commonwealth entity', conferring powers on that entity in relation to the administration of UN sanctions. DFAT and the Department of Defence, which have permit-issuing functions, will be specified as 'designated Commonwealth entities'.[2]

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1 EM, p. 1.

2 EM, p. 4.

Item 4

2.6 Item 4 omits 'has made' from paragraph 6(a) and substitutes 'makes'. The EM explains that this will enable the Governor-General to promulgate regulations that apply to decisions by the UN Security Council as these are made. Currently, amendments to regulations may be required to incorporate minor changes to sanctions regimes, should the UN Security Council make a new decision, or should sanctions committees designate individuals or entities as being subject to previous decisions.

Item 5

2.7 Item 5 inserts proposed subsection 6(2) which provides a general regulation-making power to give effect to decisions of the UN Security Council. Item 5 also inserts proposed subsection 6(3) which provides for incorporation by reference to capture UN Security Council decisions as they exist from time-to-time. The EM explains that decisions to be incorporated may be contained in documents such as UN Security Council Resolutions and decisions published by sanctions committees. The documents would be publicly available. The power to make legislative instruments would facilitate the identification of certain matters in cases where it is not possible, or not appropriate, to identify the matter by reference to UN Security Council materials.[3]

Item 6

2.8 Item 6 inserts new subsection 13A which provides that a licence, permission, consent, approval or authorisation granted under the regulations is invalid and taken never to have been granted if it was granted on the basis of an application that was false or misleading.

Item 16

2.9 Item 16 inserts new subsections to section 20 that provide penalties for individuals convicted of an offence under subsection 20(1) (proposed subsections 20(3A) and 20(3B)) and also provide an offence (proposed subsection 20(3C)) and new penalty for bodies corporate (proposed subsection 20(3F)).

2.10 The penalty for an individual is imprisonment for not more than 10 years or a fine, or both. The fine for an individual is 2,500 penalty units or, if the offence relates to transactions the value of which the court can determine, 2,500 penalty units or three times the value of the transactions, whichever is the greater amount. The penalty for a body corporate is 10,000 penalty units or, where the offence relates to transactions the value of which the court can determine, 10,000 penalty units or three times the value of the transactions, whichever is the greater amount.

3 p. 4.

2.11 The EM explains that the penalty accords with Recommendation 2 of the Cole Inquiry Report; that is, penalties for acting in contravention of UN sanctions should be severe and linked to the value of the offending transaction. Strict liability applies to the offence for bodies corporate, also in accordance with Recommendation 2 of the Cole Inquiry Report. Fault elements will be retained for individuals.[4]

Item 22

2.12 Item 22 inserts new subsections that provide a new penalty for individuals convicted under subsection 21(1) of an offence of giving an asset to a proscribed person or entity (proposed subsections 21(2A) and 21(2B)) and that provide a similar offence and new penalty for bodies corporate (proposed subsections 21(2C) and (2F)).

2.13 The penalties for individuals and bodies corporate are the same as those proposed by Item 16. Once again, strict liability will apply to bodies corporate and fault elements will apply for individuals.[5]

Item 24

2.14 Item 24 inserts proposed section 22B, providing that any authorisation issued under section 22 to deal with a freezable asset is taken never to have been issued if the application for the authorisation contained information that was false or misleading, or omitted information, without which the application was false or misleading.

Item 26

2.15 Item 26 inserts several new Parts to the Charter of the United Nations Act.

Part 5

2.16 Proposed section 27 provides an offence for engaging in conduct that contravenes a Commonwealth law which enforces UN sanctions. Proposed section 28 contains an offence for providing false or misleading information, or omitting necessary information, in connection with the administration of a Commonwealth law that enforces a UN sanction.

2.17 The penalties for individuals and bodies corporate under proposed section 27 are the same as those provided for under Item 16. The penalty for an individual under proposed section 28 is 2,500 penalty units; the penalty for a body corporate under proposed section 28 is five times the penalty for an individual, or 12,500 penalty units.

2.18 The offence under proposed section 27 will apply strict liability to bodies corporate but retain fault elements for individuals. The EM explains that the consistent application of strict liability to these offences does not reflect a change in general

4 p. 5.

5 p. 6.

government policy to the framing of offences; rather it reflects the government's acceptance of the recommendations in the Cole Inquiry Report and 'its determination to encourage high ethical standards in the dealings of Australians and Australian companies with (UN) sanction regimes'.[6]

Part 6

2.19 Proposed section 29 provides that the Chief Executive Officer (CEO) of a Commonwealth entity may disclose information to the CEO of a designated Commonwealth entity for a purpose in connection with the administration of a UN sanction enforcement law.

2.20 Proposed section 30 introduces a new power for the heads of agencies that administer UN sanctions to require a person to provide documents, for the purposes of determining whether a UN sanction enforcement law is being complied with.

2.21 Proposed section 31 provides that the CEO of a designated Commonwealth entity may require information to be verified or given on oath or affirmation.

2.22 Proposed section 32 introduces an offence for failing to comply with a notice to produce under proposed section 30.

2.23 Proposed section 33 provides that a person served with a notice under proposed section 30 is not excused from providing the information required on the grounds the information required might tend to incriminate the person. However, the information required is not admissible in evidence against the person in any criminal proceedings, or other proceedings that would expose the person to a penalty, other than for an offence under proposed section 28 or an offence under proposed section 32.

2.24 The EM states that the production power is necessary to ensure the efficacy of sanctions regulatory functions and is consistent with the approach to production orders issued by other Commonwealth bodies such as the Australian Securities and Investments Commission (section 68 of the *Australian Securities and Investments Commission Act 2001*) and the Australian Competition and Consumer Commission (section 155 of the *Trade Practices Act 1974*). Proposed section 33 does not seek to override legal professional privilege.[7]

2.25 Proposed section 37 introduces an obligation for a person who applies for a licence or authorisation under a UN sanction enforcement law to retain any records relating to that application for a period of 5 years. Proposed section 37 also introduces an obligation for a person who is granted a licence or authorisation to retain records relating to the person's compliance with any conditions of that licence or authorisation for a period of five years.

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6 p. 7.

7 p. 7.

Amendments to the Customs Act 1901

2.26 The Bill introduces new criminal offences for:

- importing or exporting goods sanctioned by the UN without valid permission; and
- providing information that is false or misleading in a material particular, or omits a material particular, in an application for a permission to import or export UN-sanctioned goods.

Items 29 and 31

2.27 Item 29 inserts proposed section 52, which deems any licence, permission, consent or approval to *import* UN-sanctioned goods to never have been granted where application for it was made in an approved form and the application is false or misleading in a material particular.

2.28 The EM explains that this means that a person who imports goods under a licence, permission, consent or approval that is taken never to have been granted may be liable under proposed section 233BABAB for importing UN-sanctioned goods without the necessary approval, in addition to any liability for providing false or misleading information under proposed section 233C.[8]

2.29 Item 31 inserts proposed section 112B, which makes equivalent provision in relation to a licence, permission, consent or approval to *export* UN-sanctioned goods.

Item 33

2.30 Item 33 amends paragraph 210(1)(b) to extend the arrest powers exercisable by a Customs officer or police to the new offences of importing and exporting UN-sanctioned goods.

Item 34

2.31 Item 34 inserts new sections 233BABAA, 233BABAB and 233BABAC.

2.32 Proposed section 233BABAA provides that the regulations may prescribe specified goods as UN-sanctioned goods. The regulations must not specify that an item is UN-sanctioned goods unless the item meets certain requirements:

- the importation or exportation of the item must be prohibited by the Customs (Prohibited Imports) Regulations 1956 or the Customs (Prohibited Exports) Regulations 1958; and
- the regulation prohibiting the importation or exportation must give effect to a decision made by the Security Council under Chapter VII of the Charter of the

8 p. 8.

United Nations that Article 25 of the Charter requires Australia to carry out, insofar as that decision requires Australia to apply measures not involving the use of armed force.

2.33 Proposed section 233BABAB contains an offence in relation to the *importation* of UN-sanctioned goods. An individual or a body corporate commits an offence if they import UN-sanctioned goods and importation of the goods was prohibited absolutely, or prohibited unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.

2.34 Proposed section 233BABAC contains an equivalent offence in relation to the *exportation* of UN-sanctioned goods.

2.35 The offences in sections 233BABAB and 233BABAC carry the same penalties as those provided for in Item 16 and outlined above. These offences will be strict liability offences for bodies corporate. The EM explains that the government considers that all offences relating to behaviour in breach of UN sanctions should carry equal penalties. This is to encourage companies and individual directors to ensure high ethical standards in all dealings in relation to UN sanctions.[9]

2.36 The offences under sections 233BABAB and 233BABAC relate only to goods whose importation or exportation is prohibited under the Customs Act either absolutely or on the condition that approval of a particular person be obtained prior to their importation or exportation. Absolute liability attaches to the element that goods were prohibited under the Customs Act to ensure that knowledge of the law is not a prerequisite to the offence (that is, the prosecution does not have to prove that a person had knowledge that the goods were prohibited from import or export). However, strict liability will attach to the element that the approval had not been obtained.[10] The EM explains that this approach is consistent with the existing criminal offences in the Customs Act of importing and exporting Tier 1 and Tier 2 goods.[11]

Item 37

2.37 Item 37 inserts proposed section 233C which contains offences for giving false or misleading information in relation to UN-sanctioned goods.

2.38 An individual commits an offence if they make and sign an application in an approved form, under the Customs (Prohibited Imports) Regulations 1956 or the Customs (Prohibited Exports) Regulations 1958 in relation to the importation or

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9 p. 9.

10 A *strict liability* offence is one which does not require guilty intent for its commission, but for which there is a defence if the wrongful action was based on a reasonable mistake of fact. An *absolute liability* offence is one which does not require a guilty intent, but for which there is no defence of a reasonable mistake of fact.

11 p. 9.

exportation of UN-sanctioned goods, and the application contains information that is false or misleading in a material particular, or omits information, without which the application is misleading in a material particular. Proposed section 233C also establishes an equivalent offence in relation to bodies corporate. Once again, the penalties for these offences are the same as those described in relation to Item 16.

Schedule 2 – Bribery of foreign officials

2.39 Schedule 2 of the Bill contains proposed amendments to the *Criminal Code Act 1995* (Criminal Code Act*)* and the *Income Tax Assessment Act 1997* (Income Tax Assessment Act).

Amendments to the Criminal Code Act 1995

Item 1

2.40 Item 1 inserts subsection 70.2(1A) which clarifies that a charge of bribing a foreign public official does not rely on the outcome of the payment. The EM explains that a benefit paid to a foreign public official may still be a bribe notwithstanding that it failed to secure the business advantage desired.[12]

Item 2

2.41 Item 2 clarifies that, when considering whether a benefit paid to a foreign public official was not legitimately due to that official, the court may disregard the fact that the benefit is, or is perceived to be, customary, necessary or required. The EM states that the government considers that the only circumstance in which a benefit should be paid to a foreign public official is where that benefit is required or permitted by written law.[13]

Item 3

2.42 Item 3 amends subsection 70.3(1) to clarify that the defence in that subsection to a charge of bribing a foreign public official is only available when the benefit paid is expressly required or permitted by the written law of the country or place that governs the behaviour of the foreign public official, regardless of the results of payment or the alleged necessity of payment. The written law of a country or place is limited to the written legislation or regulation of that country or place.[14]

Amendments to the Income Tax Assessment Act 1997

2.43 In summary, the amendments to the Income Tax Assessment Act will:

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12 p. 10.

13 p. 10.

14 EM, pp 2 & 10.

- ensure that payments to foreign public officials are tax deductible only where the benefit paid is expressly required or permitted by written law, regardless of the results of payment or the alleged necessity of payment; and
- align the definition of a facilitation payment ('bribe to a foreign public official') with the definition in the Criminal Code Act.

CHAPTER 3

KEY ISSUES

3.1 The committee received four submissions, only two of which made substantive comment on the Bill. Some of the issues raised in submissions, as well as issues explored by the committee at the public hearing, are discussed below.

Consultation

3.2 The committee questioned representatives from the Attorney-General's Department (Department) and the Department of Foreign Affairs and Trade (DFAT) about the form and extent of consultation with respect to development of the Bill. The representatives informed the committee that consultation has occurred internally within government but that consultation has not taken place with industry stakeholders specifically in relation to the Bill.[1]

3.3 As the representative from DFAT explained:

> We have consulted, primarily, since the tabling of the government's response [to the Cole Inquiry Report], with the financial sector, but we have not consulted with industry on the particular terms of this bill. This is because we had made available on 3 May to the exporting-trading sector the terms of the government's response and the intended content of the bill. Between then and the time that we required to get the bill drafted and before the parliament, in order to get the bill effective in the most expedient time, there was not time to discuss further with industry the terms of the government response to the bill. To accommodate for that fact we have made sure that the bill will not commence until we have been able to negotiate with the various sectors that have an interest in the operation of sanctions in Australia the terms of the implementing regulations on those aspects of the bill that will affect industry. These will be given effect to in the form of the regulations.

3.4 The representative from DFAT advised that specific consultation will take place with industry stakeholders in relation to the drafting of the regulations:

> At present all United Nations sanctions are implemented in part through regulations to the Charter of the United Nations Act. As a consequence of the amendments to that act proposed in this bill, we will be seeking to amend a number of those regulations to reflect, in particular, the increased level of penalty provided for in the act and also to provide for the mechanism by which individual companies may apply for permits and other forms of communication between those companies. That consultation process will begin at the end of this month and carry on until September and October. Once that consultation process is concluded and we have the

1 *Committee Hansard*, 17 July 2007, p. 3.

> necessary regulations drafted following that consultation, at that point we will seek for the terms of this bill to commence, and simultaneously with that we will commence the regulations.[2]

3.5 In broad terms, the representative from DFAT noted that DFAT and Austrade 'remain in regular dialogue with Australian industry and business on the application of UN sanctions generally'.[3] DFAT also retains a database for correspondence with banks and other financial institutions on the operation of particular financial sanctions that might affect them.[4]

Automatic incorporation by regulation

3.6 Dr Ben Saul from the Sydney Centre for International and Global Law at the University of Sydney welcomed the Bill but raised two issues. The first issue relates to the risk, in Dr Saul's view, that automatic incorporation via regulation of persons or entities proscribed by the Security Council in Item 5 of the Bill may give rise to procedural fairness and human rights concerns.[5]

3.7 However, a representative from DFAT explained that it is not possible to accommodate a procedural fairness element in the Bill:

> The automatic incorporation by reference provision would apply to the broad financial sanctions imposed by the Security Council as they relate to the nomination by the Security Council of specific individuals and entities. These are binding obligations imposed by the Security Council which do not allow for the member states to make any kind of allowances in terms of the question of procedural fairness. In other words, we do not have either the opportunity or the right, under the operation of the Charter of the United Nations, to provide for any deferral of the registration, under the Australian law, of individuals named by the Security Council as being individuals to whom sanctions ought to be applied. Bearing this in mind, we are not able to build in a procedural fairness element because that would not be consistent with our obligations under the UN charter.[6]

Responsibilities of the Australian Government

3.8 Dr Ben Saul submitted that the Bill focuses largely on the conduct of individuals or companies rather than on the specific responsibilities of the Australian Government in upholding UN sanctions.[7]

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2 *Committee Hansard*, 17 July 2007, pp 2-3.

3 *Committee Hansard*, 17 July 2007, p. 2.

4 *Committee Hansard*, 17 July 2007, p. 2.

5 *Submission 1*, p. 1.

6 *Committee Hansard*, 17 July 2007, p. 4.

7 *Submission 2*, p. 1.

3.9 Dr Saul noted further that:

> The Cole Inquiry was not empowered, and did not report on, the wider questions of whether Australia breached its *international* obligations in relation to the Iraq sanctions. Specifically, there remain international legal questions as to whether Australia had a duty to ensure (as a matter of strict liability) that its companies were not in breach of sanctions, and whether that duty could – or could not – be discharged by relying on the United Nations vetting of commercial contracts.[8]

3.10 Dr Saul suggested that the Bill should, at a minimum, include a specific provision creating a strict liability offence where any Australian official or Minister (intentionally or recklessly) authorises or permits the export or import of UN-sanctioned goods (additional to the proposed offences in the Bill of actually importing or exporting such goods). In Dr Saul's view, such an offence 'would make it clear to Australian officials that a proper inquiry must be made into whether proposed trade may violate sanctions – and that negligence is not a sufficient defence'.[9]

3.11 The representative from DFAT told the committee that, with respect to overarching responsibility for breaches in international law of Australia's sanctions obligations:

> We respectfully disagree with his position that if an Australian company in breach of Australian law acts inconsistently with UN sanctions, that represents a breach by the Australian government of the sanctions obligation. This is a very well understood principle of public international law and so, from that point of view, so long as the Australian government has in place the necessary measures to implement sanctions and to take action against those who would seek to breach those measures, Australia has met its international obligations.[10]

3.12 The representative from the Department commented on Dr Saul's suggestion to apply a specific offence to Australian officials or Ministers as follows:

> …as a matter of policy, the view has consistently been taken that criminal responsibility should not be imposed on the Crown under Commonwealth law. To create a specific offence as proposed by Dr Saul would be a significant departure from this policy, and this is not under consideration. Regarding officials, depending on the facts of any case, (P)art 2.4 of the Criminal Code, which deals with extensions of criminal responsibility, may apply to some officials for breaches of offences in the bill. This would really depend on the facts, but, for example, an official who aids, abets, counsels or procures the commission of an offence by another person may

8 *Submission 2*, p. 1.

9 *Submission 2*, p. 1.

10 *Committee Hansard*, 17 July 2007, p. 4.

> be open to prosecution. Commonwealth officials are also subject to the disciplinary regime under the Public Service Act.[11]

Penalties

3.13 Transparency International Australia (TIA) expressed general support for the Bill but was of the view that it should go further, particularly in relation to penalties and protection for whistleblowers.[12] In particular, TIA submitted that it 'had hoped that the opportunity would finally be taken…to increase the level of maximum monetary penalties applicable to an offence under Part 70'.[13] TIA's view was that the current level of penalties 'are not "effective, proportionate and dissuasive criminal penalties" as required by the [UN] Convention, even when combined with the possibility of confiscation of benefits or the rather remote risk of jail'.[14] TIA argued further that the maximum fine for corporations upon conviction should be increased to $10 million.[15]

3.14 TIA also considered that special legislative protection should be afforded to whistleblowers in the context of bribery of foreign officials:

> U[nited] S[tates] experience over a long period confirms that the willingness of corporate witnesses to come forward will continue to be an important if not an essential ingredient in successful investigation of bribery cases. The well understood reluctance and risk faced by potential witnesses must be offset as far as possible by legislative protection…[16]

3.15 The committee questioned representatives from the Department and DFAT in relation to whether executives of companies are specifically covered by the offence provisions in the Bill.

3.16 A representative from the Department explained that there are two tiers of offences that are either created or amended by the Bill:

- offences directed at individuals, which in some circumstances could cover the actions of company officials; and
- offences directed at bodies corporate.

3.17 The representative explained further that, where an officer of a company is acting within their ostensible authority, 'clearly corporate liability is going to be the more appropriate course, and obviously the offences apply there'.[17] However, 'if you

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11 *Committee Hansard*, 17 July 2007, p. 4.

12 *Submission 4*, p. 2.

13 *Submission 4*, p. 2.

14 *Submission 4*, p. 2.

15 *Submission 4*, p. 2.

16 *Submission 4*, p. 2.

17 *Committee Hansard*, 17 July 2007, p. 5.

have somebody who is acting outside that kind of realm and for their own personal benefit, there are the individual offences that we would have thought would apply in that instance'.[18]

Offences of strict and absolute liability

3.18 The committee questioned the representatives from the Department and DFAT about the rationale for inclusion of strict and absolute liability offences in the Bill and possible inconsistencies with relevant guidelines in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.[19]

3.19 A representative from the Department explained that the inclusion of strict liability offences for bodies corporate was a specific recommendation from the Cole Inquiry Report. He explained further that:

> Consideration was, of course, given to the normal Commonwealth policy that applies, as articulated in the guide. These offences do not fall strictly within the normal exceptions, although I think it is important to note that one of the key elements we try to avoid in Commonwealth policy is strict liability offences that have imprisonment as a form of punishment, and that does not apply in this case, because we are talking about bodies corporate. For the offences that apply to individuals strict liability is not applied to critical culpability elements.[20]

3.20 The representative from the Department also advised that the inclusion of strict liability offences in such circumstances is consistent with other Commonwealth legislation:

> Certainly for these types of provisions where you are trying to establish whether an element of the offence is compliant with some element of law then, yes, it is very common to apply strict liability in those instances. There is no need to form some kind of belief with regard to it or that the standard fault element that would apply would be recklessness. There is no need for recklessness with regard to whether that statute exists or whether the law had been complied with.[21]

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18 *Committee Hansard*, 17 July 2007, p. 5.

19 Issued by authority of the Minister for Justice and Customs, February 2004. The committee notes that the Senate Scrutiny of Bills Committee, in its Alert Digest No. 7 of 2007 (20 June 2007), commented on several proposed provisions of the Bill. That committee accepted the explanation given in the EM for the imposition of strict liability offences in Items 16, 22 and 26 of Schedule 1 of the Bill, and accepted the abrogation of the privilege against self-incrimination in Item 26 of Schedule 1. However, it sought the Attorney-General's advice in relation to the rationale for inclusion of strict and absolute liability offences in Item 34 of Schedule 1.

20 *Committee Hansard*, 17 July 2007, p. 7.

21 *Committee Hansard*, 17 July 2007, p. 8.

3.21 With respect to the inclusion of absolute liability offences in the Bill, the representative noted that absolute liability applies only to very limited elements in the offences in question:

> It does not apply to the entirety of an offence, so we would not call it strictly an absolute liability offence. It is confined to what is traditionally regarded as the knowledge of law problem. It is confined to whether the particular importation was prohibited under an Act or whether it was prohibited subject to some kind of licensing scheme. It focuses only on those two circumstantial elements of the physical elements and not on the entirety of the offence.[22]

3.22 For example, in proposed section 233BABAB, the first two elements of the offence (namely that the individual intentionally imported goods; and the goods were UN-sanctioned goods and the individual was reckless as to that fact) contain fault elements. As such:

> …it is not an absolute liability offence…The choice to go for absolute liability in this case was consistent with the remainder of the Customs Act. There are very similar offences on which these are ostensibly modelled which is absolute liability in exactly the same instances.[23]

3.23 In its response to a question on notice, the Department stated that the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered when framing the absolute liability offences in the Bill but that 'it is appropriate to depart from the general policy set out in the Guide in these circumstances'.[24]

3.24 The Department reiterated that defences are available for the physical element of the new offences:

> …proposed sections 233BABAB and 233BABAC and existing sections 233BAA and 233BAB provide that strict liability applies to the physical element that an approval had not been obtained at the time of the importation or exportation. This means the defence of honest and reasonable mistake of fact would be available for this element of the new offences.[25]

Committee view

3.25 The committee considers that the Bill will effectively strengthen the capacity to implement and enforce UN sanctions regimes in Australia by significantly improving the relevant legal frameworks.

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22 *Committee Hansard*, 17 July 2007, pp 7-8.

23 *Committee Hansard*, 17 July 2007, p. 8.

24 Answers to questions on notice, p. 1.

25 Answers to questions on notice, p. 1.

3.26 The committee notes advice from the Department and DFAT that it will consult with industry in the development of regulations related to the proposed amendments to the Charter of the United Nations Act. The committee encourages comprehensive consultation in that regard.

Recommendation 1

3.27 The committee recommends that the Bill be passed.

Senator Guy Barnett
Chair

APPENDIX 1

Australian Government response to the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme

Introduction

On 27 November 2006 the Australian Government tabled the Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food programme by Commissioner Terence Cole QC (the Report).

The Australian Government is pleased to respond to the Report. The first three of Commissioner Cole's recommendations have been accepted.

The Government has in fact gone further than Commissioner Cole's recommendations with proposed changes to Australian laws to strengthen enforcement of UN sanctions and fight foreign bribery.

Again, the Australian Government thanks Commissioner Cole and those assisting him for their excellent work on the Report.

In regard to recommendations 4 and 5, public inquiries have already commenced. Recommendation 4 related to the application of legal professional privilege in royal commission proceedings. On 30 November 2006 the Australian Government announced an inquiry by the Australian Law Reform Commission (ALRC) into legal professional privilege as it relates to the activities of Commonwealth investigatory agencies.

The Australian Government accepts that the Cole Inquiry raised important questions in relation to legal professional privilege and its impact on Commonwealth investigations which require further consideration. The ALRC will look at legal professional privilege and its impact on all Commonwealth bodies, including royal commissions, that have coercive information gathering or associated power. The ALRC is to provide its report to Government by December 2007.

Recommendation 5 related to wheat export marketing arrangements. On 12 January 2007, the Australian Government announced the appointment of a Wheat Export Marketing Consultation Committee to undertake extensive consultation with the Australian wheat industry, particularly growers, about their wheat export marketing needs. The Committee reported to the government on 29 March 2007. This report will be used by the government to inform the decision on future wheat export marketing arrangements.

In addition to the five specific recommendations, Commissioner Cole also recommended a Task Force be established to consider possible prosecutions in

consultation with the Commonwealth and Victorian Directors of Public Prosecutions. On 20 December 2006 the Australian Government announced the establishment of the Task Force. The Task Force is led by a senior former Australian Federal Police (AFP) officer Peter Donaldson. Mr Donaldson and a team of AFP officers, Australian Securities and Investments Commission staff and a member of the Victorian Police are working on Commissioner Cole's findings of possible criminal conduct.

Recommendations 1 – 3 in relation to enforcing UN sanctions

Commissioner Cole's first three recommendations are designed to strengthen Australian law and administration of the domestic enforcement of UN sanctions.

In considering the implementation of Commissioner Cole's recommendations, it is important to note that the Report was focussed on the administration of a specific export trading sanctions regime which relied upon the operation of the *Customs (Prohibited Exports) Regulations 1958*. The Report properly did not consider other UN sanctions implemented by regulations made under the *Charter of the United Nations Act 1945* (Charter of the UN Act) such as import trading sanctions, financial services sanctions, freezing of assets and travel restrictions.

The Australian Government has considered these other sanction regimes and has sought to apply Commissioner Cole's recommendations in a way that improves all current and future UN sanctions regimes in Australia. The Government has in fact gone further than Commissioner Cole's recommendations with proposed changes to Australian laws to strengthen enforcement of UN sanctions and fight foreign bribery.

Recommendation one

"I recommend that the *Customs (Prohibited Exports) Regulations 1958* be amended to incorporate a prescribed form that those applying for permission to export would be required to complete. I further recommend that the Regulations be amended so as to:

- make it an offence to knowingly or recklessly provide in an application information that is false or misleading in a material particular
- make it an offence to knowingly or recklessly omit a material particular from an application for a permission to export
- render invalid any permission to export granted on the basis of an application that was false or misleading in a material particular or that omitted a material particular.

The prescribed form should be required to be signed by a senior executive of an exporting company, who should also be personally liable for knowingly or recklessly signing a form that is false or misleading in a material particular or omits a material particular. The penalty for so doing should be imprisonment for 10 years."

Response

The Government accepts Commissioner Cole's recommendation that Australian law should require complete and accurate information in support of any permission to export goods which are subject to UN sanctions and impose significant consequences for any breach of that obligation. The Government will also implement this recommendation for other Australian UN sanction regimes. Accordingly, the Government will introduce legislation to:

- amend the *Customs (Prohibited Exports) Regulations 1958* and the *Customs (Prohibited Imports) Regulations 1956* to require applications for permission to export or import goods subject to a United Nations sanctions regime to be made on an approved application form which requires a declaration and certification by a senior executive of the applicant company as to the accuracy and completeness of the information
- amend the *Customs Act 1901* to deem a permission to export or import UN sanction goods not to have been granted if it was granted on the basis of false and misleading information
- revise and increase financial penalties for importing and exporting goods in breach of UN sanctions
- declare UN sanction goods to be prohibited imports or exports with penalties of 10 years imprisonment for importing or exporting prohibited goods without a valid permit, and
- amend the Customs Act and the Charter of the UN Act to introduce criminal offences for providing false or misleading information in connection with the administration of UN sanction regimes. Penalties of 10 years imprisonment apply with appropriate financial penalties for corporations. Offences can be laid against the company providing the information, any officer who signed any approved application form and any other officer or employee of the company complicit in the provision of the false or misleading information.

Recommendation two

"I recommend that there be inserted in the Commonwealth Criminal Code, perhaps in Chapter 4, offences for acting contrary to UN sanctions that Australia has agreed to uphold. The statute should prohibit direct or indirect unapproved financial or trading transactions designated by the Governor-General. Breach of statute should be an offence of strict liability. The penalty for breach should be severe, equivalent to three times the value of the offending transactions, by way of monetary fine for corporations and up to 10 years' imprisonment for individuals."

Response

The Government accepts recommendation two and will ensure Australian law properly criminalises conduct which breaches UN sanction regimes. Rather than

inserting a new offence in the Criminal Code as recommended by Commissioner Cole, the Government will insert a new offence into the Charter of the UN Act.

The Government will impose strict liability on corporations but not on individuals, as recommended by Commissioner Cole. The Government considers that it is neither fair, nor useful, to subject individuals to 10 years imprisonment for unintended actions or unforeseen consequences unless these resulted from an unjustifiable risk, that is, recklessness. Accordingly, the offence for conduct that breaches a UN sanction will require proof of fault where individuals are concerned.

Recommendation three

"I recommend that there be conferred on an appropriate body a power to obtain evidence and information of any suspected breaches or evasion of sanctions that might constitute the commission of an offence against a law of the Commonwealth."

Response

In his findings Commissioner Cole notes that "no power exists for any Commonwealth entity to obtain evidence and information for the purpose of securing compliance with" UN sanctions. The Australian Government will address this by introducing legislation to give Government agencies responsible for granting permits in relation to UN sanctions appropriate powers to:

- undertake due diligence before any permission is granted
- monitor, effectively, continuing compliance with any conditions or requirements of the permission, and
- identify any possible breaches of the law for referral to relevant law enforcement agencies.

There will also be appropriate penalties for any failure to comply with a requirement to provide required information or documents. Rather than giving these powers to one body, the Government will give these powers to various agencies responsible for granting permits in relation to UN sanctions. Agencies will make appropriate administrative changes to give effect to these new powers.

Further changes relating to foreign bribery and tax deductions

The Government will also be addressing two issues that do not flow directly from Commissioner Cole’s recommendations, but which Commissioner Cole commented on in his report. These relate to foreign bribery and tax deductions. The Government will:

- amend the *Income Tax Assessment Act 1997* (ITAA) to align the definition of facilitation payments to the definition in the Criminal Code to allow deductibility only for minor facilitation payments, and
- amend Division 70 (Foreign Bribery) of the Criminal Code to clarify that the defence in section 70.3 applies only where the law of the foreign country

states that the advantage in question is permitted or required and that the offence can be made out regardless of the results of the payment or the alleged necessity of the payment, and amend the corresponding provision of the ITAA.

APPENDIX 2

SUBMISSIONS RECEIVED

1 Australian Customs Service

2 Sydney Centre for International and Global Law

3 Western Australia Police

4 Transparency International Australia

TABLED DOCUMENT

Document tabled at public hearing

Senator Ludwig

- OECD, Directorate for Financial and Enterprise Affairs, *Australia: Phase 2, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006.

ADDITIONAL INFORMATION RECEIVED

- Answer to Question on Notice received from Australian Customs Service
- Answers to Questions on Notice received from Attorney-General's Department
- Answer to Question on Notice received from Australian Federal Police

APPENDIX 3

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Tuesday 17 July 2007

Attorney-General's Department

Mr Andrew Walter, Acting Assistant Secretary
Criminal Law Branch
Criminal Justice Division

Mr Craig Riviere, Principal Legal Officer
Transnational Crime (Domestic) Policy Section
Criminal Justice Division

Department of Foreign Affairs and Trade

Mr Peter Scott, Director
Sanctions and Transnational Crime Section
International Legal Branch

Australian Customs Service

Ms Sue Pitman,
National Director of Trade Division

Mr Jim Stewart, Director,
Community Protection
Trade Policy and Regulation Branch