

Inquiry into the International Trade Integrity Bill 2007

The answers to Senator Ludwig's questions of 17 July 2007 are as follows:

1. Treasury did not assess the amendments to the *Income Tax Assessment Act 1997* (ITAA) made by the International Trade Integrity Bill 2007 (the Bill) for any impact on revenue. As the amendments ensure consistency in the foreign bribery provisions with the *Criminal Code Act 1995* (Criminal Code) and clarify the operation of the income tax law, a formal assessment of the revenue impact was deemed unnecessary.
2. The Senate Standing Committee for the Scrutiny of Bills queried whether the imposition of absolute criminal liability is justified in proposed sections 233BABAB and 233BABAC of the *Customs Act 1901* (the Customs Act), in light of the Committee's views expressed in the *Sixth Report of 2002, Application of Absolute and Strict liability Offences in Commonwealth Legislation*. Proposed sections 233BABAB and 233BABAC impose absolute liability on the element of the offence that importation or exportation of UN-sanctioned goods was prohibited absolutely under the Act.

The Explanatory Memorandum states, at paragraph 64, that the application of absolute liability in these circumstances is consistent with existing provisions in the Customs Act. Existing sections 233BAA and 233BAB create special offences for the importation or exportation of a limited range of goods termed 'Tier 1' and 'Tier 2' goods. Sections 233BAA and 233BAB apply absolute liability to the element of the offences that importation or exportation of goods was prohibited absolutely under the Customs Act.

The offences in proposed sections 233BABAB and 233BABAC relate to a broader range of goods than sections 233BAA and 233BAB but create offences for substantially similar actions. Proposed sections 233BABAB and 233BABAC are also drafted in substantially similar terms to the existing sections and provide identical penalties to those attaching to the importation or exportation of Tier 2 goods.

The application of absolute liability in proposed sections 233BABAB and 233BABAC is justified to ensure consistency across similar offences within the Act. While the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) were considered when framing the offences, it is appropriate to depart from the general policy set out in the Guide in these circumstances.

In addition, 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.

3.

- a. The Government has advised that its response to the Cole Inquiry Report has gone further than Commissioner Cole's recommendations. The Government's response addresses some recommendations of the OECD Working Group on Foreign Bribery in International Business Transactions (OECD Working Group) Phase 2 report on Australia 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 and the Department has recently been advised that the OECD Working Group will not consider Australia's response before January 2008. 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, it is important to stress that the Bill does not represent Australia's response to the OECD Working Group and that response is still under consideration by the Government.
 - b. The OECD Council recommended in 1996 that "member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility." Bribery of public officials in Australia or overseas is a criminal offence and is not tax deductible. The OECD Working Group has not made a recommendation that Australia should deny tax deductibility for facilitation payments. The OECD Working Group's report advises it will follow-up on the application of the tax deduction for facilitation payments once there has been sufficient practice. This means the OECD Working Group will revisit this issue at a later date. Any advice or recommendations made by the OECD Working Group as part of that follow-up would be considered if they arise. Follow-up is not expected to occur until after Australia's Phase 2 response.
 - c. The issues in relation to items (c), (d), (e) and (f) under the heading "Follow-up by the Working Group" are not OECD Working Group recommendations. The OECD Working Group will follow-up on these issues once there has been sufficient practice. Any advice or recommendations made by the OECD Working Group as part of that follow-up would be considered if they arise. Follow-up is not expected to occur until after Australia's Phase 2 response.
4. The recommendations from the Phase 2 report are still under consideration by the Government and the OECD Working Group will not consider Australia's response before January 2008. However, we note that the Government decided that the definition of facilitation payment in the ITAA should be aligned with that in the Criminal Code by amendment in the Bill.
5. The recommendations from the Phase 2 report are still under consideration by the Government and the OECD Working Group will not consider Australia's response before January 2008.. However, we note the Australian Government has continued with its existing awareness raising campaign by:
- developing and maintaining an internet site dedicated to information on foreign bribery www.ag.gov.au/foreignbribery
 - announcing the release of a foreign bribery information and awareness pack on 23 July 2007
 - writing, and enclosing copies of the foreign bribery pamphlet, to:

- the CEOs of Australia's top 100 public companies
- key industry representative groups
- the Minister for Local Government, Territories and Roads and the Chief Minister of Norfolk Island
- 100 legal and accounting firms
- approximately 800 small and medium public enterprises
- providing Australian Government agencies with:
 - information on the offence
 - copies of the foreign bribery awareness brochure
 - draft articles for publication in internal newsletters, and
 - information and PowerPoint presentations to be used in training seminars
- including information on the foreign bribery offence in government publications, distributing leaflets on the offence to relevant Australian Government officials (in Australia and overseas) and developing training and information sessions to brief Australian Government officials about the offence, including pre-departure training for officials posted overseas
- the Public Service Commissioner writing to Department Heads advising of the amendment to the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads*, related to foreign bribery
- producing information for inclusion in the 'Hints for Australian Travellers' brochure issued with new passports
- raising the awareness of cash dealers (ie reporting entities under Australia's anti-money laundering legislation) of the foreign bribery offence as a predicate offence for the offence of money laundering in a number of ways, including:
 - drawing attention of cash dealers to the AGD pamphlet "Bribery of Foreign Public Officials is a Crime" and the AGD webpage on the foreign bribery offence, and
 - issuing an AUSTRAC Information Circular (No. 42) on Bribery of Foreign Public Officials.

These initiatives have been absorbed within existing resources.

6. The recommendations from the Phase 2 report are still under consideration by the Government and the OECD Working Group will not consider Australia's response before January 2008.. However, we note that the Australian Taxation Office (ATO) has recently released a publication providing practical guidance to help businesses manage their tax obligations in the area of bribes and facilitation payments and suggesting initiatives that company boards can put in place to meet their obligations under the law. This publication also provides information relating to the ATO's compliance activities in this area.
7. The recommendations from the Phase 2 report are still under consideration by the Government and the OECD Working Group will not consider Australia's response before January 2008.. However, as noted in the response to question 3(a), 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. In doing so, the Government took the opportunity to toughen the defence under section 70.3 of the Criminal Code in the Bill.